Union Citizenship:

Development, Impact and Challenges

The XXVI FIDE Congress in Copenhagen, 2014
Congress Publications Vol. 2

Editors: Ulla Neergaard,
Catherine Jacqueson & Nina Holst-Christensen

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Unionsbürgerschaft:

Entwicklung, Auswirkungen und Herausforderungen

La citoyenneté de l'Union :

Développement, impact et défis

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Union Citizenship: Development, Impact, and Challenges

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Copenhagen 2014 was hosted by the Danish Association for European Law
in cooperation with the Faculty of Law, University of Copenhagen.
One of the social events took place in the main building pictured on the cover.

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Nina Holst-Christensen,
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From 1978 to 2014

From 28-31 May 2014 the XXVIth FIDE Congress will take place in Copenhagen. Thus, it will be the second time that Copenhagen has the pleasure to host a FIDE Congress. 36 years earlier, in 1978, one took place for the first time in Copenhagen.[2] The president of FIDE at that time, Professor Ole Lando, said the following in his opening speech:

'When you get gr[e]y hairs you tend to look back to your childhood and early youth more often than you did earlier. You often remind yourself of how you looked upon the world then. You also remember how the grown-ups of that time looked upon it. Forty years ago those who had grey hairs and compared Europe with the Europe of their youth were generally very gloomy in their outlook. Whereas in 1898 Europe had seemed set on a course of peaceful progress, in 1938 many people prophesied war, tyranny and poverty, and they were right. In 1939 we had war. During the war most of us experienced tyranny, and when the war ended in 1945 we lived in misery and poverty. Yet, only ten years after the war six European countries, two of which had been at war with the other four, created an Economic Community. Their aim was to establish a closer union among the European people, to further economic and social progress, to improve living conditions, and to maintain and strengthen freedom and peace. When in 1955 it was thus proposed to establish a Common Market, the people of Europe still remembered the war, and were willing to accept

1. Professor, Dr. Ulla Neergaard, University of Copenhagen, President of the Danish Association for European Law, President for FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, University of Copenhagen, Secretary General for FIDE 2013-14; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Professor, Dr.jur., Dr. Jens Hartig Danielsen, University of Aarhus; and Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard and Catherine Jacqueson have had the overall responsibility for all three volumes, whereas Jens Hartig Danielsen has been primarily involved in Volume 1; Nina Holst-Christensen in Volume 2; and Grith Skovgaard Ølykke in Volume 3.
2. The topics then dealt with were: 1. 'Equal Treatment of Public and Private Enterprise'; and 2. 'Due Process in the Administrative Procedure'.

measures which could guarantee peace and freedom. Peace and freedom were in the minds both of those who had visions of a brotherhood of European nations and of those who wanted to secure prosperity by creating a wider market for trade and industry. During the years which have passed since then, the fears of tyranny and war have faded. The organization known as the European Communities is no longer seen as a preserver of peace and liberty. The prosperity which so many had hoped for has come and has gone away again. Today the former enthusiasm for a united Europe has evaporated.'[3]

Again, almost four decades have passed by, and one can again look back anew in the same manner as Professor Ole Lando did. As we all know, so much has happened. The European Union of today has experienced many successes such as the profound enlargement; the enactment of the Charter of Fundamental Rights; the broadening of democracy and important values; the strengthening of free trade; the relative prosperity; the establishment of Union citizenship; and the improved degree of security and peace. However, one could still say that the enthusiasm for a united Europe has to some extent evaporated, and that crisis and challenges at several different levels are deeply felt. The FIDE Congress of 2014 will explore many layers thereof with outset taken in the selection of significant and important themes, which to some degree become clear from reading the present volume and its 'sisters'.

FIDE – an Unusual European Organisation

FIDE (*i.e. Fédération Internationale pour le Droit Européen/International Federation of European Law*) focuses on research and analysis of European Union law and EU institutions, as well as their interaction with the legal systems for the Member States. It unites the national associations for European law of most of the EU Member States and candidate countries, as well as Norway and Switzerland. At present, there are 29 member associations – each situated in different countries – who all work voluntarily for the spreading of knowledge of the EU.

FIDE was established already in 1961, and is by many seen as having been a very important actor in the original establishment of EU law as a legal discipline.[4] Even today, despite the establishment of many other channels for

3. See Ole Lando: 'Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978', in 'FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979', p. 6.
4. See for discussions Morten Rasmussen *e.g.*: 'Establishing a Constitutional Practice: The Role of the European Law Associations', in Wolfram Kaiser and Jan-Henrik Meyer (Eds): '*Societal Actors in European Integration. Polity-Building and Policy-*

dealing with EU law, FIDE's most important activity consists in the organisation of the biennial FIDE Congresses and the related publications are viewed by many as still having an extraordinary design, significance and influence.[5]

The XXVI FIDE Congress and Its Main Themes

The main topics of the XXVI FIDE Congress have been selected a couple of years in advance after several 'hearings' of relevant actors all over Europe and are the following:

- General Topic 1 – The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU;[6]
- General Topic 2 – Union Citizenship: Development, Impact and Challenges;[7]
- General Topic 3 – Public Procurement Law: Limitations, Opportunities and Paradoxes;[8] and
- Saturday's General Topic – In the Era of Legal Pluralism: The Relationship between the EU, National and International Courts, and the Interplay of the Multiple Sources of Law.[9]

Making, 1958-1992', Palgrave Macmillan, 2013, pp. 173-197; and Alexandre Bernier: 'Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970', in 'Contemporary European History', 2012, pp. 399-415.

5. See further Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181.
6. Appointed as 'General Rapporteur' is: Professor Fabian Amtenbrink; and as 'Institutional Rapporteur': Jean-Paul Keppenne, Legal Service, European Commission.
7. Appointed as 'Joint General Rapporteurs' are: Professor Niamh Nic Shibhne & Professor Jo Shaw; and as 'Institutional Rapporteur': Michal Meduna, DG Justice, European Commission.
8. Appointed as 'General Rapporteur' is: Professor Roberto Caranta; and as 'Institutional Rapporteur': Adrián Tokár, Legal Service, European Commission.
9. The treatment of this topic has not followed the 'system' of 'questionnaires', 'General Rapporteurs', 'Institutional Rapporteurs', and 'National Rapporteurs'. Instead a panel discussion of leading court presidents and judges from both the international and the national courts, as well as academics has been organised. Although the 'Saturday's General Topic' thus is not the direct focus of the present publications, it may for the sake of completeness be mentioned that this topic might on the surface seem a bit theoretical, but in actual fact it is of great and also concrete importance in the daily

The selected topics all have in common that they are very central and important for the understanding of the challenges facing Europe these years, and for the development of European law. With the selection it is ensured that both constitutional and institutional elements are dealt with. It is also made certain that one of the most significant founding stones of the EU, namely the internal market, is touched upon. In addition, the importance of the EU to the individuals, namely the Union citizens themselves, is given heavy weight. We therefore hope that both practitioners, officials, academics, civil society, and so on, will all find a huge interest in the topics selected.

Everyone is likely to agree that the first topic on economic governance constitutes a very natural and unavoidable choice. Indeed, the Economic and Monetary Union was created more than twenty years ago and is heavily challenged in this tumultuous time of financial and economic crisis. Although improvements of the economic situation in Europe have recently occurred, nothing is yet completely stabilised, and in any event there is real need for a legal analysis of the developments which have taken place. It is thus time to assess the legal status of EU economic governance, and the issue of constitutional asymmetry in respect of economic and monetary issues. Other issues to be dealt with are: what are the legal consequences of possible divergences from EU law; what is the role of the Court of Justice of the European Union; what are the prospects for the future; is an ever closer Fiscal Union a question of balancing national sovereignty and the Euro's fundamental governance structures; is there a need for Treaty changes in order to introduce Eurobonds; and to what extent may tax law be harmonised.

Union citizenship is equally topical and challenging. What is the reality of Union citizenship in the Member States more than two decades after the insertion of Union citizenship in the Treaty? The intention is to enhance the understanding of how the rights attached to Union citizenship have been implemented and respected by the national authorities. It is also to address the interesting issue for the citizens of whether Union citizenship might backfire and negatively affect the 'acquired' rights of the workers. Union citizenship

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legal work of many lawyers, and others. It focuses more specifically on how EU law has to operate in a multi-level legal order and thereby on the interrelationship of courts and the phenomenon of a plurality of sources of law. According to the conception of legal pluralism, hierarchies no longer exist in the same manner as in the traditional nation state. Also, it is part of this conception that one has to accept that the present state of affairs to some degree contains elements of complexity and unpredictability, and that there is a need for compromises. As part of the search for compromise, some may prefer to leave forever open the issue of supremacy.

is also interesting from the perspective of the Union's legitimacy and it is worth considering how far-reaching the sense of solidarity of the Member States and their citizens is towards other Member States and their citizens. In addition, delicate issues such as family reunification, expulsion, and the particular case of third country nationals might be of relevance.

The third general topic, which concerns public procurement law, touches upon an area of law which has a huge practical importance in most Member States. It is linked to public spending and thus to some degree to the financial and economic crisis. Public procurement regulation is increasingly relevant for many lawyers, undertakings, and public authorities. Very timely, the public procurement directives have been under revision for the last couple of years, and the FIDE Congress offers the possibility of discussing in which direction the proposed changes go and analyse their implications. The same is true in respect of the remedies directive. In times of economic crisis the issue of public-private partnerships and the financing of services of general economic interest is crucial and at times a rather controversial issue. This may also be true in respect to the environmental and social protection, which increasingly figures as considerations in this area.

Altogether, the XXVIth FIDE Congress and this volume, together with its two 'sisters', propose to take the temperature of EU law at both the level of the EU and at the national level with the outset taken in three topical and essential legal areas. Thereby, they hopefully constitute a goldmine for comparative and EU lawyers.

A Collaboration of Great Minds of EUropean Law[10]

In order to lift discussions and analysis even further, in conformity with the traditions of FIDE detailed comparative studies have been provided. Therefore – long time in advance of the actual congress – for each of the three topics, a 'questionnaire' has been carefully prepared by the 'General Rapporteur(s)' responsible of the topic. Based on these 'questionnaires', national

10. This headline is inspired from the slogan of the XXVIth FIDE Congress, which again is inspired from the headline of the following article: Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181. This use as the slogan has been permitted by Julia Laffranque. A slight change was made so that the slogan became: 'FIDE – Uniting Great Minds of EUropean Law'. The purpose was to stress the relationship between EU law and European law.

analyses were elaborated by national experts appointed by the national associations of FIDE.

All these reports have subsequently been published in this collection, along with the 'general reports' prepared by the 'General Rapporteurs' supplemented by so-called 'institutional reports' prepared by representatives of the EU institutions.[11] As FIDE and its congresses – based on long tradition – function on a trilingual basis, these are elaborated either in English, French, or German.[12]

Words of Gratitude

A project such as the organisation of an event like the FIDE Congress and the present publications could not have been possible without the help of many! Therefore, on behalf of the Danish Association for European Law (DFE), which is the Danish member association of FIDE (since 1973), we wish to express our gratitude to everyone whom we have met on our way, some having helped perhaps a little, others a great deal – some having helped at a more practical level, others financially.[13] FIDE and its congresses can only live on the basis of almost endless voluntary forces. We owe our thanks to all. No one mentioned, no one forgotten, it is often said in Danish when one wants to express one's gratitude, however being in fear of not being forgiven, if someone is unintendedly forgotten. Nevertheless, we dare to try to express our ex-

11. The analyses and results regarding Topic 1 are presented in Volume 1; of Topic 2 in Volume 2; and of Topic 3 in Volume 3. Those oral presentations received as papers, etc., are intended to be published on the website www.fide2014.eu.
12. That is also the reason why *e.g.* the 'questionnaires' and this introductory chapter exist in all three languages.
13. DFE was the seventh Member State association to become a member of FIDE, and thereby the first the join the 'original six' in the context of FIDE. The Board of Directors of DFE consists for the time being of: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Law Firm; Professor, Dr.jur., Dr. Jens Hartig Danielsen, School of Law, Aarhus University; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Head of Division, Christian Thorning, Ministry of Foreign Affairs; Justice Lene Pagter Kristensen, Supreme Court; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Law Firm; and Associate Professor, Dr. Grith Skovgaard Ølykke, Law Department, Copenhagen Business School. Until 14 November 2013, the Ministry of Foreign Affairs was instead of Christian Thorning 'represented' by Vibeke Pasternak Jørgensen, who stepped out due to a promotion.

plicit thanks to the following, and hope for forgiveness if anyone has been left out unintendedly.[14]

Warm and sincere tributes to His Royal Highness, the Crown Prince Frederik of Denmark, who had kindly accepted to be the Patron of the Congress as his mother HM the Queen did in relation to the FIDE Congress in 1978 in Copenhagen.

In 2009, at a meeting in the Steering Group (also known as the 'Comité Directeur' or the executive committee) of FIDE in Madrid, it entrusted to the DFE not only the Presidency of FIDE, but also the organisation of the FIDE Congress to take place in 2014. It was eventually decided by DFE to invite the Faculty of Law at the University of Copenhagen to be involved in the organisation for practical reasons and in order to ensure a high academic standard. Luckily, the Dean at that time, Henrik Dam, was very enthusiastic about the idea, and decided to support the forthcoming congress in various ways. It is clearly our wish to offer the most sincere thanks to him from DFE and FIDE for this decision and his continuous support. In that connection, our gratitude is also due to the more administrative team at the Faculty of Law helping the event come true, in particular project coordinator Tina Futtrup Borg, but also all her many helpers, as well as Head of Communications Birgitte Faber. At the Faculty of Law special mention should also be made of the PhD school and those persons who organised a PhD course on European Union Law in connection with the Congress (in particular Associate Professor Constanze Semmelmann and Associate Professor Clement Petersen).[15]

Also to be mentioned with great appreciation is the help provided by Secretary Jette Nim Larsen, Horten Law Firm, who in particular has given her precious administrative support with regard to all matters of concern to the Steering Group of FIDE. In addition, DIS Congress Service has been our professional partner, and from this company in particular Marianne Sjødahl and Peder Andersen have been invaluable. Chief editor Vivi Antonsen from DJØF Publishing, which is behind the present publications, has as always been efficient and patient, and indeed she deserves our deeply felt acknowledgement. Regarding the volume concerning 'General Topic 3' thanks to stud.HA-jur., Mette Marie Lamm Larsen should be expressed.

14. Since this 'Introduction' was written and turned in for publication, more help might have been received, and we are of course also grateful to all these at the present stage unknown supporters, *etc.*

15. To our knowledge, this is the first time such a course has been organised in relation to a FIDE Congress, and may among others be looked upon as an attempt to support the coming generations of researchers' interest and involvement in FIDE.

Furthermore, a sincere tribute to our supporters, foundations, and partners, should be paid. In particular, we are more than grateful to the following:

– The European courts (in particular President Vassilios Skouris; Vice-President Koen Lenaerts; Judge Lars Bay Larsen; and the many interpreters) and other European institutions;
– The Danish Ministry of Foreign Affairs (in particular Head of Division Vibeke Pasternak Jørgensen and Head of Division Christian Thorning);
– The Danish Supreme Court (in particular President Børge Dahl and Justice Lene Pagter Kristensen);
– The contributors Knud Højgaards Fond; Professor Dr.jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; and EURECO at the University of Copenhagen.
– The premium partner Kammeradvokaten, Law Firm Poul Smith (in particular partner Peter Biering);
– The congress supporter Horten Law Firm (in particular partner Andreas Christensen);
– The congress supporter Copenhagen Business School
– The congress supporter DJØF Publishing;
– Partner Per Magid, Bruun & Hjejle Law Firm;
– The congress exhibitioners; and
– The City of Copenhagen.

We also owe our special gratitude to the many members of the FIDE Steering Group who have so kindly been helpful in answering our many questions regarding FIDE traditions, expectations, *etc.* In particular, the associations of the following countries have provided extraordinary help: Austria (in particular Professor Heribert Köck), Estonia (in particular Judge Julia Laffranque), Germany (in particular Professor Peter-Christian Müller-Graff), and Spain (in particular Advocate Luis Ortiz Blanco).

Last, but not least, of course the XXVIth FIDE Congress and the present volumes could never have come to life without our enthusiastic, hardworking, flexible, and dedicated 'General Rapporteurs', *i.e.* Professor Fabian Amtenbrink, Professor Niamh Nic Shuibhne, Professor Jo Shaw, and Professor Roberto Caranta. In addition, the 'Institutional Rapporteurs', *i.e.* Jean-Paul Keppenne, Michal Meduna, and Adrián Tokár, have met the challenge with a similar positive spirit, which is equally highly appreciated. All national rapporteurs have made it possible to get a fairly full picture of the law and practice as this stands today in most of the Member States of the European

Union, and a huge tribute should consequently be paid to them for their tremendous and valuable contributions. Although lastly mentioned, not least important are the excellent speakers, moderators, and participants, whose work will undoubtedly contribute to the Congress becoming an excellent event as ever.

To sum up, what everyone has done and will do deserves the highest praise, and we are indeed grateful to all. It has been an honour and a pleasure – but also a challenge – to organise the XXVIth FIDE Congress and bring the present volumes to life. It is our belief that FIDE and its congresses even after having reached the age of more than half a century still have a lot to offer us all, which the present volumes hopefully can help document to some degree. We hope that both will continue to live and successfully develop themselves for many years to come.

Introduction

Ulla Neergaard et Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen et Grith Skovgaard Ølykke[1]

De 1978 à 2014

Le XXVIe congrès de la FIDE se tiendra du 28 au 31 mai 2014 à Copenhague. Ce sera la deuxième fois que Copenhague aura le plaisir d'accueillir un congrès de la FIDE. La première fois remonte à 1978, il y a 36 ans.[2] Le Professeur Ole Lando, Président de la FIDE à cette époque, tenait alors ces propos dans son discours d'ouverture :

« Quand vous commencez à avoir des cheveux blancs, vous avez tendance à vous retourner plus souvent vers votre enfance et votre jeunesse. Vous vous rappelez de votre façon de voir le monde à ce moment-là. Vous vous souvenez aussi comment les grandes personnes voyaient le monde à cette époque. Il y a quarante ans, ceux qui avaient des cheveux blancs étaient généralement très pessimistes à l'égard de l'Europe, par comparaison avec l'Europe de leur jeunesse. Alors qu'en 1898, l'Europe semblait être lancée sur la voie d'un progrès pacifique, en 1938, nombreux sont ceux qui prédirent la guerre, la tyrannie et la pauvreté, et à juste titre. En 1939, la guerre éclata. Pendant la guerre, la plupart d'entre nous ont subi la tyrannie, et en 1945, à la fin de la guerre, nous vivions dans la misère et la pauvreté. Pourtant, seulement dix ans après, six pays européens, dont deux avaient été en guerre contre les quatre autres, créèrent une Communauté économique. Ils avaient pour objectif de renforcer les liens entre les peuples européens, afin de favoriser le progrès éco-

1. Professeur, Dr Ulla Neergaard, Université de Copenhague, Présidente de l'Association danoise pour le droit européen, Présidente de la FIDE 2013-14 ; Maître de conférences, Dr Catherine Jacqueson, Université de Copenhague, Secrétaire générale de la FIDE 2013-14 ; Commissaire au droit de l'UE et aux droits de l'homme, Nina Holst-Christensen, Ministère de la Justice ; Professeur, Dr et Dr.jur, Jens Hartig Danielsen, Université d'Aarhus ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard et Catherine Jacqueson ont supervisé les trois volumes ; Jens Hartig Danielsen a contribué principalement au Volume 1, Nina Holst-Christensen au Volume 2 et Grith Skovgaard Ølykke au Volume 3.
2. Les sujets abordés étaient les suivants : 1. « L'égalité de traitement des entreprises publiques et privées » et 2. « Les garanties légales dans la procédure administrative ».

nomique et social, d'améliorer les conditions de vie et de maintenir et consolider la liberté et la paix. Lorsqu'en 1955 la création d'un Marché commun fut proposée, les peuples d'Europe se souvenaient encore de la guerre et étaient prêts à accepter des mesures susceptibles de garantir la paix et la liberté. La paix et la liberté étaient dans les esprits de ceux qui rêvaient de fraternité entre les pays européens et également de ceux qui souhaitaient garantir la prospérité en créant un marché élargi pour le commerce et l'industrie. Depuis, les craintes liées à la tyrannie et à la guerre se sont dissipées. Les organisations appelées Communautés européennes ne sont plus considérées comme destinées à préserver la paix et la liberté. La prospérité tant espérée est arrivée et a disparu à nouveau. Aujourd'hui, l'enthousiasme exprimé par le passé en faveur d'une Europe unie s'est évaporé. »[3]

Alors que près de quarante ans ont passé, nous pouvons à notre tour nous tourner vers le passé tout comme le Professeur Ole Lando. Comme nous le savons tous, il s'est passé tant de choses. L'Union européenne a connu de nombreux succès : un profond élargissement, la promulgation de la Charte des droits fondamentaux, l'élargissement de la démocratie et des valeurs essentielles, le renforcement du libre-échange, une relative prospérité, la création de la citoyenneté européenne et un plus haut degré de sécurité et de paix. Néanmoins, force est de constater que l'enthousiasme exprimé en faveur d'une Europe unie s'est dans une certaine mesure évaporé, et que la crise et les défis rencontrés à plusieurs niveaux sont durement ressentis. Le Congrès 2014 de la FIDE en explorera de nombreux aspects au travers d'une sélection de thèmes significatifs et importants, ce qui apparaît clairement à la lecture du présent volume et de ses « acolytes ».

La FIDE : une organisation européenne hors du commun

La FIDE (*Fédération Internationale pour le Droit Européen*) s'intéresse à la recherche et à l'analyse du droit de l'Union européenne et des institutions de l'UE, ainsi qu'à leurs interactions avec les systèmes juridiques des Etats membres. Elle réunit les associations nationales pour le droit européen de la plupart des Etats membres de l'UE et des pays candidats, ainsi que de la Norvège et de la Suisse. À l'heure actuelle, il existe 29 associations membres (toutes situées dans un pays différent). Toutes œuvrent bénévolement à la diffusion du savoir dans l'UE.

3. Ole Lando (traduit de l'anglais), « Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978 », dans « FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979 », p. 6.

La FIDE a été créée en 1961 et beaucoup considèrent qu'elle a joué un rôle très important dans la création initiale du droit de l'UE en tant que discipline juridique.[4] Aujourd'hui encore, malgré la mise en place de nombreuses autres organisations consacrées au droit communautaire, la conception, l'importance et l'influence extraordinaires des congrès biennaux de la FIDE et de ses publications connexes (l'activité la plus importante de la FIDE) sont toujours largement reconnues.[5]

Le XXVIe Congrès de la FIDE et ses thèmes principaux

Les thèmes principaux du XXVIe Congrès de la FIDE ont été choisis plusieurs années à l'avance, après avoir consulté à plusieurs reprises les acteurs concernés dans toute l'Europe. Ces thèmes sont les suivants :

- Thème général 1 : L'Union économique et monétaire : les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UE ;[6]
- Thème général 2 : La citoyenneté de l'Union : développement, impact et défis ;[7]
- Thème général 3 : Le droit des marchés publics : restrictions, possibilités et paradoxes ;[8] et
- Thème général du samedi : À l'ère du pluralisme juridique : relations entre les cours nationales, internationales et celles de l'UE et les interactions entre les multiples sources de droit.[9]

4. Voir à ce sujet Morten Rasmussen, p. ex. : « Establishing a Constitutional Practice: The Role of the European Law Associations », dans Wolfram Kaiser et Jan-Henrik Meyer (éd.) : « *Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992* », Palgrave Macmillan, 2013, p. 173-197 ; et Alexandre Bernier : « Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970 », dans « Contemporary European History », 2012, p. 399-415.
5. Voir également Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, pp. 173-181.
6. Sont nommés « Rapporteur général » : Professeur Fabian Amtenbrink ; et « Rapporteur institutionnel » : Jean-Paul Keppenne, Service juridique, Commission européenne.
7. Sont nommées « Co-rapporteures générales » : Professeur Niamh Nic Shibhne et Professeur Jo Shaw ; et « Rapporteur institutionnel » : Michal Meduna, DG Justice, Commission européenne.
8. Sont nommés « Rapporteur général » : Professeur Roberto Caranta ; et « Rapporteur institutionnel » : Adrián Tokár, Service juridique, Commission européenne.

Les thèmes choisis sont tous très importants pour la compréhension des défis auxquels l'Europe est actuellement confrontée et pour le développement du droit européen. Cette sélection permet d'aborder aussi bien les aspects constitutionnels qu'institutionnels. Par ailleurs, l'une des pierres fondatrices les plus importantes de l'UE, à savoir le marché intérieur, n'est pas oubliée. D'autre part, le choix des thèmes souligne l'importance de l'UE pour les individus, c'est-à-dire les citoyens de l'Union eux-mêmes. Nous espérons donc qu'il satisfera aussi bien les praticiens, les fonctionnaires, les universitaires, la société civile, etc.

Tout le monde conviendra certainement que le premier thème sur la gouvernance économique constitue un choix naturel et inévitable. En effet, l'Union économique et monétaire, créée il y a plus de vingt ans, est fortement contestée en cette période tumultueuse de crise financière et économique. Malgré la récente amélioration de la situation économique en Europe, rien n'est encore complètement stabilisé, et dans tous les cas une analyse juridique des faits s'impose. Le temps est donc venu d'évaluer le statut juridique de la gouvernance économique de l'UE, et la question de l'asymétrie constitutionnelle entre les politiques économiques et monétaires. D'autres questions restent à traiter, telles que : quelles sont les conséquences juridiques des possibles divergences par rapport au droit de l'UE ? Quel est le rôle de la Cour de justice de l'Union européenne ? Quelles sont les perspectives pour l'avenir ? Le renforcement de l'union budgétaire est-il une question d'équilibre entre la souveraineté nationale et les structures de gouvernance fondamentales de l'euro ? Est-il nécessaire de modifier le traité pour introduire les euro-

9. Le traitement de ce sujet n'a pas suivi le « système » de « questionnaires », « Rapporteurs généraux », « Rapporteurs institutionnels » et « Rapporteurs nationaux ». Une table ronde réunissant les présidents et juges de cours internationales et nationales, ainsi que des universitaires, a été organisée à la place. Bien que le « Thème général du samedi » ne fasse pas directement l'objet de la présente publication, par souci d'exhaustivité, il convient de mentionner que ce sujet, en apparence un peu théorique, a en fait une importance concrète dans le travail quotidien de nombreux juristes et d'autres acteurs. Il porte plus particulièrement sur la façon dont le droit communautaire doit opérer dans un ordre juridique à plusieurs niveaux, et donc sur la relation des cours entre elles, et sur la pluralité des sources de droit. Dans la conception du pluralisme juridique, les hiérarchies n'existent plus de la même manière que dans l'Etat-nation traditionnel. En outre, cette conception nous invite à accepter que l'état actuel des choses contient dans une certaine mesure des éléments de complexité et d'imprévisibilité, et qu'il convient de faire des compromis. Dans le cadre de la recherche de compromis, certains préféreront laisser à jamais ouverte la question de la suprématie.

obligations ? Dans quelle mesure la législation fiscale doit-elle être harmonisée ?

La citoyenneté de l'Union est un sujet tout autant d'actualité et stimulant. Quelle est la réalité de la citoyenneté de l'Union dans les Etats membres, plus de deux décennies après l'insertion du concept dans le traité ? L'objectif est de mieux comprendre la mise en œuvre et le respect des droits associés à la citoyenneté de l'Union par les autorités nationales. Il s'agit également d'aborder une question essentielle pour les citoyens, à savoir si la citoyenneté de l'Union pourrait avoir un effet inverse à celui prévu et affecter les droits « acquis » des travailleurs. La citoyenneté de l'Union est également intéressante du point de vue de la légitimité de l'UE, et il est intéressant d'examiner l'étendue du sentiment de solidarité des Etats membres et de leurs citoyens à l'égard des autres Etats membres et citoyens. En outre, d'autres sujets délicats, comme le regroupement familial, les expulsions et le cas particulier des ressortissants de pays tiers, peuvent s'avérer pertinents.

Le troisième thème général, qui concerne le droit des marchés publics, touche à un domaine du droit qui joue un rôle pratique considérable dans la plupart des Etats membres. Il est lié aux dépenses publiques et donc, dans une certaine mesure, à la crise financière et économique. La réglementation des marchés publics revêt une importance croissante pour de nombreux juristes, entreprises et pouvoirs publics. Il se trouve justement que les directives sur les marchés publics ont fait l'objet d'une révision ces deux dernières années, et le Congrès de la FIDE offre ainsi la possibilité de discuter de l'orientation des changements proposés et d'analyser leurs implications. Le même constat s'applique à la directive sur les recours. En période de crise économique, la question des partenariats public-privé et du financement des services d'intérêt économique général est cruciale et parfois assez controversée. Cela est probablement également vrai concernant la protection sociale et environnementale, qui prend une place de plus en plus importante dans ce domaine.

En résumé, le XXVIe Congrès de la FIDE et ce volume, ainsi que ses deux « acolytes », se proposent de prendre la température du droit de l'UE, tant au niveau de l'Union qu'au niveau national, en s'intéressant à trois domaines juridiques essentiels et d'actualité. Ils constitueront ainsi, nous l'espérons, une mine d'or pour les juristes de l'UE et les spécialistes du droit comparé.

Une collaboration des grands esprits du droit Européen[10]

Afin d'approfondir plus encore les discussions et les analyses, ces volumes comprennent des études comparatives détaillées, conformément aux traditions de la FIDE. Par conséquent, longtemps avant le congrès proprement dit, un « questionnaire » a été soigneusement préparé pour chacun des trois thèmes par le ou les « Rapporteurs généraux » en charge du thème. À partir de ces « questionnaires », des analyses ont été réalisées par des experts nationaux nommés par les associations nationales de la FIDE.

Tous ces rapports sont publiés dans cette collection, ainsi que les « rapports généraux » rédigés par les « Rapporteurs généraux », complétés par les « rapports institutionnels » élaborés par les représentants des institutions de l'UE.[11] Du fait de la longue tradition de trilinguisme adoptée par la FIDE et ses congrès, les rapports sont rédigés soit en anglais, français ou allemand.[12]

Remerciements

L'organisation d'un événement comme le Congrès de la FIDE et les présentes publications n'auraient pas pu voir le jour sans l'aide d'un grand nombre de personnes ! Aussi, au nom de l'Association danoise pour le droit européen (DFE), qui est l'association danoise membre de la FIDE (depuis 1973), nous tenons à exprimer notre gratitude à tous ceux que nous avons rencontrés sur notre chemin, quelle que soit l'étendue de leur aide, qu'elle soit à un niveau pratique ou financier.[13] La FIDE et ses congrès ne pourraient exister sans les

10. Ce titre s'inspire de la devise du XXVIe Congrès de la FIDE, elle-même inspirée du titre de l'article suivant : Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, p. 173-181. Julia Laffranque nous a autorisés à en faire notre devise. Celle-ci a été légèrement modifiée ainsi : « FIDE – Uniting Great Minds of EUropean Law », le but étant de souligner les relations entre le droit de l'UE et le droit européen.
11. Les analyses et les résultats concernant les thèmes 1, 2 et 3 sont présentés respectivement dans les volumes 1, 2 et 3. Les présentations orales reçues sous forme d'article, etc, sont destinées à être publiées sur le site Internet www.fide2014.eu.
12. Cela explique aussi pourquoi les « questionnaires » et ce chapitre d'introduction sont disponibles dans les trois langues mentionnées.
13. La DFE a été la septième association d'Etat membre à faire partie de la FIDE, et ainsi la première à se joindre aux « six premiers » dans le contexte de la FIDE. Le Conseil d'administration de la DFE comprend actuellement: Peter Biering, Kammeradvokaten ; Andreas Christensen, cabinet d'avocats Horten ; Professeur, Dr et Dr.jur. Jens Hartig Danielsen, Faculté de droit, Université d'Aarhus ; Commissaire au droit de

forces bénévoles quasi infinies qui les animent. À tous, nous disons merci. « Ne citons personne pour n'oublier personne », dit-on souvent en danois pour exprimer sa gratitude, mais également lorsque l'on craint de ne pas être pardonné si l'on a involontairement oublié quelqu'un. Néanmoins, nous osons exprimer explicitement nos remerciements aux personnes suivantes, en espérant être pardonnés si quelqu'un a été omis involontairement.[14]

Nous présentons nos hommages chaleureux et sincères à Son Altesse Royale, le Prince héritier Frederik de Danemark, qui a aimablement accepté d'être le parrain du Congrès, comme sa mère Sa Majesté la Reine le fut pour le Congrès de la FIDE organisé en 1978 à Copenhague.

En 2009, lors d'une réunion du Groupe de pilotage (appelé également « Comité directeur » ou comité exécutif) de la FIDE à Madrid, la DFE s'est vue confier non seulement la présidence de la FIDE, mais aussi l'organisation du Congrès de la FIDE en 2014. La DFE a ensuite décidé d'inviter la Faculté de droit de l'Université de Copenhague à participer à l'organisation, pour des raisons d'ordre pratique et afin d'assurer un haut niveau universitaire. Heureusement, Henrik Dam, doyen à ce moment-là, s'est montré très enthousiaste quant à cette idée, et a décidé de soutenir le prochain congrès de diverses manières. Nous souhaitons lui offrir les plus sincères remerciements de la part de la DFE et de la FIDE pour cette décision et son soutien continu. À cet égard, nous sommes également reconnaissants à l'équipe administrative de la Faculté de droit pour son aide dans la réalisation de cet événement. Nous remercions en particulier la coordinatrice du projet, Tina Futtrup Borg, mais aussi ses nombreux assistants, ainsi que la Chef de la communication, Birgitte Faber. À la Faculté de droit, nous souhaitons mentionner aussi l'école doctorale et les personnes ayant organisé un cours de doctorat sur le droit de l'Union européenne dans le cadre du Congrès (en particulier, Maître de conférences Constanze Semmelmann et Maître de conférences Clement Petersen).[15]

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l'UE et aux droits de l'homme Nina Holst-Christensen, Ministère de la Justice ; Chef de division, Christian Thorning, Ministère des Affaires étrangères ; Juge Lene Pagter Kristensen, Cour suprême ; Charlotte Friis Bach Ryhl, cabinet d'avocats Friis Bach Ryhl ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Département de droit, Copenhagen Business School. Jusqu'au 14 novembre 2013, le ministère des Affaires étrangères était « représenté » par Vibeke Pasternak Jørgensen au lieu de Christian Thorning, celle-ci s'étant retirée à la suite d'une promotion.

14. Depuis la rédaction de cette « Introduction » et sa remise pour publication, il est possible que nous ayons reçu de l'aide supplémentaire, et nous sommes bien sûr également reconnaissants à l'égard de tous ces soutiens non mentionnés, *etc.*

15. À notre connaissance, il s'agit de la première fois qu'un tel cours est organisé dans le cadre d'un congrès de la FIDE, et peut être considéré comme une tentative de favori-

Nous devons également exprimer notre grande reconnaissance pour les services reçus de la Secrétaire Jette Nim Larsen du cabinet d'avocats Horten, qui a notamment apporté un soutien administratif précieux sur de nombreux sujets au Groupe de pilotage de la FIDE. En outre, DIS Congress Service, notre partenaire professionnel, et ses collaborateurs, en particulier Marianne Sjødahl et Peder Andersen, ont joué un rôle inestimable. La rédactrice en chef Vivi Antonsen de DJØF Publishing, responsable des présentes publications, s'est comme toujours montrée efficace et patiente, et mérite amplement notre profonde reconnaissance. En ce qui concerne le volume abordant le « thème général 3 », nous devons également remercier Mette Marie Lamm Larsen, stud.HA-jur.

D'autre part, nous présentons notre sincère reconnaissance à nos soutiens, fondations et partenaires. En particulier, nous sommes plus que reconnaissants aux entités et personnes suivantes :

- Les cours européennes (en particulier, Président Vassilios Skouris ; Vice-président Koen Lenaerts ; Juge Lars Bay Larsen ; et les nombreux interprètes) et autres institutions européennes ;
- Le ministère danois des Affaires étrangères (en particulier, Chef de division Vibeke Pasternak Jørgensen et Chef de division Christian Thorning) ;
- La Cour suprême du Danemark (en particulier, Président Børge Dahl et Juge Lene Pagter Kristensen) ;
- Les contributeurs Knud Højgaards Fond ; Professor og Dr.jur Max Sørensens Mindefond ; Reinholdt W. Jorck og Hustrus Fond ; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet ; et EURECO à l'Université de Copenhague.
- Le partenaire premium Kammeradvokaten, cabinet d'avocats Poul Smith (en particulier, Peter Biering) ;
- Le soutien du congrès, cabinet d'avocats Horten (en particulier, Andreas Christensen) ;
- Le soutien du congrès, Copenhagen Business School ;
- Le soutien du congrès, DJØF Publishing ;
- Per Magid, cabinet d'avocats Bruun & Hjejle ;
- Les exposants du congrès ; et
- La ville de Copenhague.

ser l'intérêt et la participation des prochaines générations de chercheurs à l'égard des activités de la FIDE.

Nous tenons également à exprimer notre gratitude aux nombreux membres du Groupe de pilotage de la FIDE, qui ont répondu si gentiment à nos nombreuses questions sur les traditions de la FIDE, les attentes, *etc.* Les associations des pays suivants ont notamment fourni une aide extraordinaire : Autriche (en particulier, Professeur Heribert Köck), Estonie (en particulier, Juge Julia Laffranque), Allemagne (en particulier, Professeur Peter-Christian Müller-Graff) et Espagne (en particulier, Avocat Luis Ortiz Blanco).

Enfin, le XXVIe Congrès de la FIDE et les présents volumes n'auraient jamais vu le jour sans nos « Rapporteurs généraux » enthousiastes, travailleurs, flexibles et dévoués : Professeur Fabian Amtenbrink, Professeur Niamh Nic Shibhne, Professeur Jo Shaw et Professeur Roberto Caranta. D'autre part, les « Rapporteurs institutionnels », Jean-Paul Keppenne, Michal Meduna et Adrián Tokár, ont relevé le défi avec un esprit positif similaire, également très apprécié. Grâce à tous les rapporteurs nationaux, nous avons pu obtenir une image assez complète du droit et des pratiques en vigueur dans la plupart des Etats membres de l'Union européenne, et nous leur témoignons notre immense reconnaissance pour leurs considérables contributions si précieuses. Enfin, citons les excellents conférenciers, modérateurs et participants, dont le travail contribuera sans aucun doute à faire de ce Congrès, encore une fois, un événement d'exception.

En résumé, les actions de chacun méritent les plus grands éloges, et nous sommes profondément reconnaissants à tous. Ce fut un honneur et un plaisir (mais aussi un défi) d'organiser le XXVIe Congrès de la FIDE et de donner jour à ces volumes. Nous sommes convaincus que, même après plus d'un demi-siècle d'existence, la FIDE et ses congrès ont encore beaucoup à nous offrir à tous, comme en témoigneront à leur façon, nous l'espérons, les présents volumes. Nous espérons également que la FIDE et ses congrès perdureront et se développeront avec succès pendant de nombreuses années à venir.

Vorwort

Ulla Neergaard und Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen und Grith Skovgaard Ølykke[1]

Von 1978 bis 2014

Vom 28. bis 31. Mai 2014 findet in Kopenhagen der XXVI. FIDE-Kongress statt. Es ist bereits das zweite Mal, dass Kopenhagen die Ehre zuteil wird, diese Veranstaltung auszurichten. Im Jahre 1978, das heißt vor 36 Jahren, fand der Kongress zum ersten Mal in Kopenhagen statt.[2] Der damalige Präsident der FIDE, Professor Ole Lando, eröffnete das Treffen mit folgenden Worten:

»Wenn sich die ersten grauen Haare zeigen, denken Sie häufiger an Ihre Kindheit und frühe Jugend zurück. Sie erinnern sich oftmals daran, wie Sie damals die Welt sahen. Sie erinnern sich auch, wie die Erwachsenen der damaligen Zeit die Welt sahen. Vor 40 Jahren waren die ‚älteren Semester', die Europa mit dem Europa ihrer Jugend verglichen, im Allgemeinen von einer sehr düsteren Perspektive geprägt. Im Jahre 1898 schien Europa auf einen Kurs des Fortschritts in Frieden zu setzen. 1938 prophezeiten viele Menschen Krieg, Tyrannei und Armut, und sie hatten Recht. 1939 kam der Krieg. Fortan litten die meisten von uns unter der Tyrannei, und als der Krieg 1945 zu Ende war, lebten wir in Elend und Armut. Doch bereits 10 Jahre nach dem Krieg gründeten sechs europäische Länder, von denen zwei gegen die anderen vier Krieg geführt hatten, die Europäische Wirtschaftsgemeinschaft. Ihr Ziel war es, die europäischen Völker einander näher zu bringen, um wirt-

1. Professor, Dr. Ulla Neergaard, Universität Kopenhagen, Präsidentin der Dänischen Vereinigung für Europarecht (DFE), Präsidentin der FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, Universität Kopenhagen, Generalsekretärin der FIDE 2013-14; Kommissarin für EU-Recht und Menschenrechte, Nina Holst-Christensen, Justizministerium; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Universität Aarhus; und Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard und Catherine Jacqueson tragen die Gesamtverantwortung für alle drei Bände, wohingegen Jens Hartig Danielsen in erster Linie an Band 1 arbeitete, Nina Holst-Christensen an Band 2 und Grith Skovgaard Ølykke an Band 3.
2. Die behandelten Themen waren: 1.»Gleichbehandlung von öffentlichen und privaten Unternehmen«; und 2. »Fairer Prozess im Verwaltungsverfahren«.

schaftliches Wachstum und sozialen Fortschritt zu fördern, die Lebensbedingungen zu verbessern sowie Freiheit und Frieden zu bewahren und zu stärken. Als 1955 vorgeschlagen wurde, einen Gemeinsamen Markt zu schaffen, erinnerten sich die Menschen in Europa noch immer an den Krieg und waren bereit, eine Politik zu akzeptieren, die dazu bestimmt war, Frieden und Freiheit zu garantieren. Frieden und Freiheit dominierten sowohl in den Köpfen der Menschen, die die Vision einer Annährung der europäischen Nationen hatten, als auch jener, die den Wohlstand durch Schaffung eines größeren Marktes für Handel und Industrie gewährleisten wollten. In den zurückliegenden Jahren haben sich die Ängste vor Tyrannei und Krieg gelegt. Die als Europäische Wirtschaftsgemeinschaft bekannte Organisation wird nicht länger als Hüterin von Frieden und Freiheit gesehen. Der Wohlstand, den so viele herbeisehnten, ist gekommen und wieder gegangen. Heute hat sich die anfängliche Begeisterung für ein geeintes Europa verflüchtigt.«[3]

Auch jetzt, nachdem wieder fast vier Jahrzehnte vergangen sind, kann man in der gleichen Weise zurückblicken, wie es Professor Ole Lando getan hat. Wie wir alle wissen, ist sehr viel passiert. Die Europäische Union von heute hat viel erreicht, z. B. eine tiefgreifende Erweiterung; die Verabschiedung der Grundrechtecharta; der Demokratiegedanke und europäische Grundwerte wurden weiter verbreitet; die Stärkung des freien Handels; beachtlichen Wohlstand; die Unionsbürgerschaft und mehr Sicherheit und Frieden. Allerdings könnte man weiterhin behaupten, dass sich die Begeisterung für ein geeintes Europa teilweise verflüchtigt hat und dass die Krise und die damit verbundenen Herausforderungen unterschiedlich bewertet werden. Der FIDE-Kongress 2014 wird zahlreiche Facetten der Krise untersuchen in der Hoffnung, die richtigen Schwerpunkte gesetzt zu haben.

FIDE – eine besondere Europäische Organisation

Die FIDE (*Fédération Internationale pour le Droit Européen / Internationale Föderation für Europarecht*) konzentriert sich auf die Untersuchung und Analyse des Rechts der Europäischen Union und seiner Institutionen sowie auf deren Berührungspunkte mit den Rechtssystemen der Mitgliedsstaaten. Sie vereint die nationalen Verbände für Europäisches Recht der meisten EU-Mitgliedsstaaten und Beitrittsländer sowie der norwegischen und Schweizerischen Verbände. Gegenwärtig gibt es 29 Mitgliedsverbände – alle in einem anderen Land beheimatet – die es sich aufgrund eigener Initiative zum Ziel gesetzt haben, das Wissen über die EU zu verbreiten.

3. Siehe Ole Lando (übersetzt aus dem Englischen): »Europe: From quantity to quality. [Europa: von Quantität zu Qualität] Rede anlässlich der Kongresseröffnung am 22. Juni 1978« in »FIDE. Achter Kongress, 22.-24. Juni 1978. Zusammenfassung der Diskussionen. Band 1. Kopenhagen 1979«, S. 6.

Die FIDE wurde bereits 1961 gegründet und gilt gemeinhin als treibende Kraft hinter der Etablierung des EU-Rechts als juristischer Disziplin.[4] Heute gibt es zwar viele andere Kanäle, die sich mit dem EU-Recht befassen. Dennoch werden der alle zwei Jahre stattfindende FIDE-Kongress und die damit verbundenen Publikationen von vielen als außerordentlich wichtig angesehen aufgrund ihrer Gestaltung, ihres Stellenwertes und nicht zuletzt ihres Einflusses in Politik, Gesetzgebung und Wissenschaft.[5]

Der XXVI. FIDE-Kongress und seine Hauptthemen

Die Hauptthemen des XXVI. FIDE-Kongresses wurden bereits einige Jahre im Voraus bestimmt. Der Auswahl gingen eingehende Beratungen mit wichtigen Akteuren in ganz Europa voraus. Folgende Themen stehen zur Diskussion:

– Allgemeines Thema 1 – Die Wirtschafts- und Währungsunion: konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung innerhalb der EU;[6]
– Allgemeines Thema 2 – Unionsbürgerschaft: Entwicklung, Auswirkungen und Herausforderungen;[7]
– Allgemeines Thema 3 – Vergaberecht für öffentliche Aufträge: Begrenzungen, Möglichkeiten und Widersprüche;[8] und

4. Siehe die Diskussionen in Morten Rasmussen, z. B. »Establishing a Constitutional Practice: The Role of the European Law Associations«, in Wolfram Kaiser und Jan-Henrik Meyer (Hrg.): »*Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992*«, Palgrave Macmillan, 2013, S. 173-197; und Alexandre Bernier: „Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970“, in »Contemporary European History«, 2012, S. 399-415.
5. Siehe weiterhin Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181.
6. Ernannt als »Generalberichterstatter«: Professor Fabian Amtenbrink; »Berichterstatter aus den EU-Institutionen«: Jean-Paul Keppenne, Juristischer Dienst, Europäische Kommission.
7. Ernannt als »Generalberichterstatter«: Professor Niamh Nic Shibhne und Professor Jo Shaw; »Berichterstatter aus den EU-Institutionen«: Michal Meduna, Generaldirektion Justiz, Europäische Kommission.
8. Ernannt als »Generalberichterstatter«: Professor Roberto Caranta; «Berichterstatter aus den EU-Institutionen«: Adrián Tokár, Juristischer Dienst, Europäische Kommission.

– Generalthema am Samstag – Das Verhältnis zwischen EU, nationalen und internationalen Gerichten und das Zusammenspiel mehrerer Rechtsquellen im Zeitalter des Rechtspluralismus.[9]

Die ausgewählten Themen sind alle von eminenter Bedeutung, um die Herausforderungen Europas in diesen Jahren und die Entwicklung des Europäischen Rechts zu veranschaulichen. Mit dieser Auswahl ist sichergestellt, dass sowohl verfassungsrechtliche als auch institutionelle Aspekte behandelt werden. Damit ist auch gewährleistet, dass der EU Binnenmarkt, einer der wichtigsten Grundsteine der EU, auf dem Kongress in angemessener Form Beachtung findet. Zusätzlich wird der Bedeutung der EU für die EU-Bürger, also die Menschen innerhalb der EU, großes Gewicht beigemessen. Wir hoffen, dass die ausgewählten Themen auf breites Interesse stoßen im privaten und öffentlichen Sektor sowie in den Bereichen Forschung, Lehre und Zivilgesellschaft.

Das Thema der »Economic Governance« ist gegenwärtig relevant wie kaum ein anderes. Die Wirtschafts- und Währungsunion wurde vor mehr als zwanzig Jahren ins Leben gerufen und war während der turbulenten Finanz- und Wirtschaftskrise nicht unerheblichem Druck ausgesetzt. Obwohl sich die wirtschaftliche Situation in Europa zuletzt verbesserte, hat sie sich noch nicht gänzlich stabilisiert. Eine rechtliche Analyse der Entwicklungen ist unum-

9. Die Behandlung dieses Themas orientiert sich nicht am »System« der »Fragebögen«, »Generalberichterstatter«, »Berichterstatter aus den EU-Institutionen« und »Berichterstatter eines Länderberichts«; stattdessen wird eine Podiumsdiskussion der Präsidenten und Richter führender internationaler/nationaler Gerichte sowie von Vertretern aus der Wissenschaft organisiert. Obwohl die vorliegenden Publikationen nicht direkt auf das »Generalthema am Samstag« Bezug nehmen, muss aus Gründen der Vollständigkeit erwähnt werden, dass dieses Thema auf den ersten Blick etwas theoretisch erscheint, aber in Wirklichkeit von großer und konkreter Bedeutung für die tägliche Arbeit vieler Juristen ist. Es befasst sich damit, wie EU-Recht in einer vielschichtigen und zusammengesetzten Rechtsordnung angewandt werden muss, mit dem Zusammenwirken der Gerichte und dem Phänomen des Nebeneinanders verschiedener Rechtsquellen. Im Zeitalter des Rechtspluralismus fehlen Normhierarchien wie sie aus den meisten nationalen Rechtsordnungen bekannt sind. In einem solchen zusammengesetzten Gebilde scheint es unumgänglich, ein gewisses Maß an Komplexität und Unvorhersehbarkeit zu akzeptieren und auf Kompromisse bei der Interaktion verschiedener normativer Ebenen hinzuarbeiten. Auf der Suche nach derartigen Kompromissen wird zum Teil dafür plädiert, die Frage nach dem Geltungsgrund des Rechts in einer zusammengesetzten Rechtsordnung jenseits des Geltungsgrundes der einzelnen normativen Ebenen und damit der letztlich verbindlichen Autorität offenzulassen.

gänglich. Es ist daher angebracht, den rechtlichen Status der ‘Economic Governance‘ in der EU und die Asymmetrie in Bezug auf die Gesetzgebungskompetenzen in Wirtschafts- und Währungsfragen zu bewerten. Des Weiteren ist eine Auseinandersetzung mit folgenden Fragen notwendig: Wie sind mögliche Abweichungen vom EU-Recht zu sanktionieren? Welche Rolle spielt der Gerichtshof der Europäischen Union? Wie sind die Aussichten für die Zukunft? Müssen in einer Fiskalunion nationale Souveränität und grundlegende Governance-Strukturen des Euro aufeinander abgestimmt werden? Sind Eurobonds nur nach Vertragsänderungen möglich? In welchem Umfang kann das Steuerrecht harmonisiert werden?

Die Unionsbürgerschaft ist ein gleichermaßen aktuelles wie komplexes Thema. Wie sieht die Realität der Unionsbürgerschaft in den Mitgliedsstaaten mehr als zwei Jahrzehnte nach Einführung der Unionsbürgerschaft im Vertrag aus? Es gilt zu untersuchen, wie die mit der Unionsbürgerschaft verknüpften Rechte von den nationalen Behörden umgesetzt und angewendet wurden. Aus Sicht der EU-Bürger drängt sich die Frage auf, ob die Unionsbürgerschaft gar kontraproduktive Wirkungen zeigen und die ‚erworbenen‘ Rechte der Arbeitnehmer negativ beeinflussen könnte. Die Unionsbürgerschaft besitzt außerdem erhebliches Potenzial, die Legitimität der EU zu beeinflussen. In diesem Zusammenhang stellt sich die Frage, wie groß die Solidarität der Mitgliedsstaaten und ihrer Bürger mit anderen Mitgliedsstaaten und deren Bürgern ist. Darüber hinaus gewinnen politisch und sozial sensible Themen wie Familienzusammenführung, Ausweisung und die Rolle von Angehörigen aus Drittstaaten an Relevanz.

Im dritten allgemeinen Thema geht es um das Recht der Vergabe öffentlicher Aufträge. Damit wird ein Bereich des Rechts berührt, der in den meisten Mitgliedsstaaten von herausragender praktischer Bedeutung ist. Das Thema berührt Fragen der öffentlichen Haushalte und ist von der Finanz- und Wirtschaftskrise kaum zu trennen. Das Regelwerk für die Vergabe öffentlicher Aufträge prägt die tägliche Arbeit vieler Anwälte, Unternehmen und Stellen im öffentlichen Sektor mit zunehmender Tendenz. Als Reaktion auf aktuelle Entwicklungen wurden die Vergaberechtsrichtlinien in den letzten Jahren überarbeitet. Der FIDE-Kongress bietet die Möglichkeit, die vorgeschlagenen Änderungen zu erörtern und ihre Implikationen kritisch zu analysieren. Das Gleiche gilt in Bezug auf die Richtlinie über Nachprüfungsverfahren. In Zeiten wirtschaftlicher Krisen sind Fragen der »public-private-partnerships« und der Finanzierung von Dienstleistungen von Allgemeinem Wirtschaftlichen Interesse von entscheidender Bedeutung – sie werden daher nicht selten kontrovers diskutiert. Dies mag auch für Umwelt- und Sozialfragen gelten, denen

in diesem Zusammenhang in Zukunft größere Beachtung geschenkt werden muss.

Insgesamt laden der XXVI. FIDE-Kongress und die damit verbundenen Publikationen dazu ein, sich sowohl auf EU-Ebene als auch auf nationaler Ebene mit dem Stand des EU-Rechts auseinanderzusetzen. Zu Beginn stehen drei hochaktuelle und ebenso gewichtige Themen, die weitreichende Betätigungsmöglichkeiten für rechtsvergleichend und europarechtlich arbeitende Anwälte bieten.

Eine Zusammenarbeit kenntnisreicher Spezialisten und großer Denker im Europäischen Recht[10]

Um umfangreiche Diskussionen und Analysen anzuregen, wurden in Übereinstimmung mit den Traditionen der FIDE detaillierte Vergleichsstudien erstellt. Lange Zeit vor dem eigentlichen Kongress wurde daher für jedes der drei Themen sorgfältig ein »Fragebogen« von dem für das Thema verantwortlichen »Generalberichterstatter« vorbereitet. Auf Grundlage dieser »Fragebögen« wurden von nationalen Experten, die von nationalen Verbänden der FIDE ernannt wurden, nationale Untersuchungen durchgeführt.

All diese Berichte wurden anschließend in dieser Sammlung zusammen mit den von den »Generalberichterstattern« vorbereiteten »Allgemeinen Berichten« veröffentlicht. Ergänzend wurden so genannte »Berichte aus dem EU-Institutionen« beigefügt, die von den Vertretern der EU-Institutionen erarbeitet wurden.[11] Wie die FIDE und ihre Kongresse werden diese Unterlagen traditionsgemäß dreisprachig (Englisch, Französisch, Deutsch) gehalten.[12]

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10. Diese Überschrift orientiert sich am Slogan des XXVI. FIDE-Kongresses, der sich wiederum von der Überschrift des folgenden Artikels leiten ließ: Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181. Der Verwendung als Slogan hat Julia Laffranque zugestimmt. Eine kleine Änderung wurde vorgenommen, so dass der Slogan im Englischen wie folgt lautet: »FIDE – Uniting Great Minds of European Law«.
11. Die Analysen und Ergebnisse in Bezug auf Thema 1 werden in Band 1 vorgestellt, für Thema 2 in Band 2 und für Thema 3 in Band 3. Mündliche Präsentationen, die in Papierform etc. eingehen, werden, soweit möglich, auf der Webseite www.fide2014.eu veröffentlicht.
12. Aus diesem Grund sind die »Fragebögen« und dieses Vorwort auch in drei Sprachen verfasst.

Dankesworte

Die Organisation einer Veranstaltung wie des FIDE-Kongresses und die Vorbereitung der vorliegenden Publikationen wäre nicht möglich ohne die Hilfe der zahlreichen Mitarbeitenden. Daher danke ich im Namen der Dänischen Vereinigung für Europarecht (DFE) – seit 1973 der dänische Mitgliedsverband der FIDE – allen, die uns in der eine oder anderen Form durch tatkräftige Unterstützung und finanzielle Zuwendungen geholfen haben.[13] Die FIDE und ihre Kongresse basieren größtenteils auf der Unterstützung freiwilliger Helfer. Wir sind allen zu großem Dank verpflichtet. »Niemand erwähnt, niemand vergessen«, wie man im Dänischen sagt, um seinen Dank auszudrücken. Wir bitten um Verzeihung, wenn wir jemanden aus Versehen vergessen haben sollten. Dennoch möchten wir ausdrücklich folgenden Personen danken:[14]

Unser herzlicher und aufrichtiger Dank gebührt Seiner Königlichen Hoheit, dem Kronprinzen Frederik von Dänemark, der freundlicherweise die Schirmherrschaft für den Kongress übernommen hat, ebenso wie seiner Mutter, Ihrer Königlichen Hoheit, der Königin, anlässlich des FIDE-Kongress 1978 in Kopenhagen.

Die DFE hat nicht nur die Präsidentschaft der FIDE, sondern auch die Organisation des FIDE-Kongresses 2014 übernommen. Es wurde schließlich von der DFE beschlossen, die Juristische Fakultät der Universität Kopenhagen einzuladen, sich an der Organisation zu beteiligen, um einen hohen akademischen Standard zu gewährleisten. Glücklicherweise konnte der Dekan, Herr Henrik Dam, für diese Idee gewonnen werden und entschied sich dan-

13. Die DFE war die siebte nationale Vereinigung, die der FIDE beitrat und damit die erste, die zu den sechs Gründungsvereinigungen der FIDE dazustiess. Derzeit arbeiten folgende Personen im Vorstand der DFE: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Rechtsanwälte; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Rechtsfakultät Universität Aarhus; Kommissar für EU-Recht und Menschenrechte; Nina Holst-Christensen, Justizministerium; Referatsleitung, Christian Thorning, Außenministerium; Richterin Lene Pagter Kristensen, Oberster Gerichtshof; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Rechtsanwälte; und Associate Professor, Dr. Grith Skovgaard Ølykke, Abteilung Rechtswissenschaften, Copenhagen Business School. Bis zum 14. November 2013 war das Außenministerium durch Vibeke Pasternak Jørgensen vertreten. Nachdem diese wegen einer Beförderung den Posten aufgab, trat Christian Thorning an ihre Stelle.

14. Nachdem dieses Vorwort geschrieben und zur Veröffentlichung eingereicht worden ist, haben wir vermutlich noch weitere Unterstützung erhalten. Daher danken wir natürlich auch allen zum jetzigen Zeitpunkt noch unbekannten Unterstützern.

kenswerterweise, den bevorstehenden Kongress auf verschiedene Arten zu unterstützen. Seitens des DFE und der FIDE möchten wir Herrn Dekan Dam unseren aufrichtigen Dank für seine Entscheidung und die fortdauernde Unterstützung aussprechen. In diesem Zusammenhang danken wir auch dem administrativen Team der Juristischen Fakultät für die Unterstützung der Veranstaltung, insbesondere der Projektkoordinatorin, Frau Tina Futtrup Borg, und ihren vielen Helfern sowie der Leiterin der Kommunikationsabteilung, Frau Birgitte Faber. Innerhalb der Juristischen Fakultät möchten wir besonders die PhD School und jene Personen erwähnen, die einen PhD-Kurs zum Recht der Europäischen Union in Verbindung mit dem Kongress organisiert haben (insbesondere den beiden assoziierten Professoren, Frau Constanze Semmelmann und Herrn Clement Petersen).[15]

In großer Anerkennung und Dankbarkeit erwähnen wir die Hilfe, die wir von Jette Nim Larsen, Sekretärin der Rechtsanwaltskanzlei Horten, erfahren haben. Ihre administrative Unterstützung war bei allen Anliegen der FIDE-Lenkungsgruppe sehr wertvoll. Darüber hinaus fungierte der DIS Congress Service als unser Partner. Die Mitarbeit von Marianne Sjødahl und Peder Andersen war von unschätzbarem Wert. Die Chefredakteurin Vivi Antonsen von DJØF Publishing, die für die vorliegenden Publikationen verantwortlich ist, war eine höchst effiziente und geduldige Ansprechpartnerin, der unser besonderer Dank gilt. Mit Blick auf den Band »Allgemeines Thema 3« danken wir insbesondere Frau stud.HA-jur. Mette Marie Lamm Larsen.

Darüber hinaus gilt unser Dank unseren Unterstützern, sowie den beteiligten Stiftungen und Partnern. Ganz besonders danken möchten wir:

- Dem Europäischen Gerichtshof (insbesondere dem Präsidenten, Herrn Vassilios Skouris, dem Vizepräsidenten, Herrn Koen Lenaerts, dem Richter, Herrn Lars Bay Larsen, und den vielen Dolmetschern) und anderen europäischen Institutionen;
- Dem dänischen Außenministerium (insbesondere den Referatsleitern Vibeke Pasternak Jørgensen und Christian Thorning);
- Dem Obersten Dänischen Gerichtshof (insbesondere dem Präsidenten Børge Dahl und Richterin Lene Pagter Kristensen);
- Den Autoren Knud Højgaards Fond; Professor Dr. jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden

15. Unseres Wissens ist dies das erste Mal, dass ein solcher Kurs im Zusammenhang mit dem FIDE-Kongress organisiert wurde. Dieses Projekt kann als Versuch angesehen werden, die kommenden Generationen von Forschenden und ihr Engagement für die FIDE zu unterstützen.

til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; und EURECO an der Universität von Kopenhagen.
– Dem Premiumpartner Kammeradvokaten, Rechtsanwaltskanzlei Poul Smith (insbesondere dem Partner Peter Biering);
– Den Kongress-Helfern der Rechtsanwaltskanzlei Horten (insbesondere dem Partner Andreas Christensen);
– Den Kongress-Helfern von der Copenhagen Business School
– Den Kongress-Helfern von DJØF Publishing;
– Dem Partner Per Magid, Rechtsanwaltskanzlei Bruun & Hjejle;
– Den Kongress-Ausstellern; sowie
– Der Stadt Kopenhagen

Unser besonderer Dank gebührt auch den vielen Mitgliedern der FIDE-Lenkungsgruppe, die uns freundlicherweise geholfen haben, unsere vielen Fragen zu den Traditionen und Erwartungen im Zusammenhang mit FIDE zu beantworten, insbesondere den Verbänden folgender Länder, die uns tatkräftig unterstützt haben: Österreich (Professor Heribert Köck), Estland (Richterin Julia Laffranque), Deutschland (Professor Peter-Christian Müller-Graff) und Spanien (Rechtsanwalt Luis Ortiz Blanco).

Zuallerletzt bleibt hervorzuheben, dass der XXVI. FIDE-Kongress und die vorliegenden Bände niemals ohne die tatkräftigen und engagierten »Generalberichterstatter« möglich gewesen wären. Wir bedanken uns bei Professor Fabian Amtenbrink, Professor Niamh Nic Shibhne, Professor Jo Shaw und Professor Roberto Caranta. Darüber hinaus haben die »Berichterstatter von den EU-Institutionen« Jean-Paul Keppenne, Michal Meduna und Adrián Tokár, die Herausforderungen voller Enthusiasmus angenommen und mit Bravour erfüllt, wofür Ihnen unser höchster Dank gilt. Die nationalen Berichterstatter haben es ermöglicht, ein weitgehend vollständiges Bild von Gesetzgebung und Rechtspraxis in den meisten Mitgliedsstaaten der Europäischen Union zu erhalten. Wir danken ihnen für ihre umfangreichen und wertvollen Beiträge. Außerdem sollen die exzellenten Redner, Moderatoren und Teilnehmer nicht unerwähnt bleiben, deren Arbeit unzweifelhaft dazu beiträgt, den Kongress zu einem herausragenden und unvergesslichen Ereignis werden zu lassen. Tausend Dank an alle, die uns in welcher Form auch immer unterstützend zur Seite standen.

Es war uns eine große Ehre, Freude und zuweilen zugegebenermaßen eine kleine Herausforderung, den XXVI. FIDE-Kongress zu organisieren und die vorhandenen Bände zu vorzubereiten. Wir sind davon überzeugt, dass die FIDE und ihre Kongresse auch nach mehr als einem halben Jahrhundert noch immer eine große Bereicherung und Inspirationsquelle darstellen. Wir hoffen,

die vorliegenden Bände stellen dies unter Beweis. Wir wünschen uns, dass sowohl die FIDE als auch die Kongresse in Zukunft erfolgreich fortgeführt und weiterentwickelt werden können.

FIDE 2014

Questionnaire General Topic 2

Union Citizenship: Development, Impact and Challenges

Niamh Nic Shuibhne and Jo Shaw [1]

General Introduction

Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union. The purpose of this questionnaire is to stimulate national reports that enable us to understand better, as a primary objective, how the rights attached to Union citizenship are developing and being applied within the legal orders of the Member States. To achieve that objective, we are interested, in the first instance, in examples that demonstrate how national legislatures, administrations and judiciaries are interpreting and applying the aspects of EU citizenship that require implementation at the national level, but we are also keen to gather evidence on how those actors are responding to case law of the Court of Justice relating to citizenship rights that sit outside the parameters of direct national implementation.

Analysis of this rich empirical data will also enable us to present a comparative perspective on the development of EU citizenship rights. Most situations involving the application of EU legal rights happen at national level, and never reach the EU institutions at all. The EUDO Citizenship Observatory and its existing datasets on the acquisition and loss of citizenship and more recently on electoral rights[2] have started to fill a crucial information gap in this context; but cross-tabulation of that data with the national reports pre-

1. University of Edinburgh. All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.
2. *See* http://eudo-citizenship.eu/databases.

pared for the FIDE Congress will enhance the available material, and thus our understanding of the *reality* of Union citizenship, very significantly.

As a secondary objective, however, we are also keen to get a greater sense of how Union citizenship is developing within and/or impacting upon the *culture* of national citizenship. For example, how are EU citizenship rights being portrayed by the national media and in popular or civil society discourse? Media actors have an extraordinary platform from which to shape the tone of national debate; have they acted responsibly (e.g. by providing accurate information on the applicable rights) in the specific context of Union citizenship? How is civil society discourse (e.g. as emerging through blogs and websites) responding to that steer? More generally, how does EU free movement law, and the citizenship rights associated with it, sit alongside national *immigration* law? In addition, where the interface between national citizenship and EU citizenship is concerned, issues may also be raised about the rights that *static* EU citizens have, or do not have, and how this affects the perception of EU citizenship and those who hold the rights of *mobile* citizens.

The span of Union citizenship and associated rights covers a potentially enormous field and we have, therefore, decided to focus on four key, *citizen-specific* themes in the questionnaire. What we are seeking to understand is how national actors are interpreting and applying the *added-value* rights of Union citizenship i.e. rights beyond those attached to more established free movement categories, such as workers. Our four selected themes are:

A. Citizenship within Directive 2004/38/EC[3]
B. Citizenship beyond Directive 2004/38/EC
C. The political rights of EU citizens
D. The emerging culture(s) of citizenship.

By focusing on these distinct, yet interrelated elements of the development and impact of Union citizenship, we aim in our General Report to offer a cross section of insights into how EU citizenship has (or has not) become embedded into the national constitutional, legal and political cultures. We also intend to identify key challenges affecting the realisation of Union citizenship within the Member States.

3. 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, [2004] OJ L158/77.

Guide to Answering Questions

Please endeavour to answer questions in a manner that:

- Provides information in a way that is accessible to a range of national audiences (i.e. explaining national issues in their proper context) and which is comparable across Member States; and
- Is evidence-based and objective: we are interested in receiving examples, rather than a comprehensive account of national legal issues (beyond the scope of a single report), and examples objectively stated will offer much more important comparative data than the views of a particular commentator. Nevertheless, of course, if it is necessary to make a judgment about whether or not EU law is effectively implemented at the national level, this should be included.

Moreover, Rapporteurs are kindly requested, whenever appropriate, to include in their reports information on the position taken on the relevant legal issues by:

- Courts and tribunals in their case law in the relevant jurisdiction;
- Executives and parliaments in the Member State described;
- Academic and professional literature in the relevant Member State; and
- The media in the relevant Member State.

Themes and questions

A. Questions 1-6: Citizenship *within* Directive 2004/38/EC – Stability of Residence for Union Citizens and their Family Members

The adoption of Directive 2004/38/EC was a significant milestone in the regulation of Union citizenship. In particular, it was anticipated that the application of EU citizenship rights by national administrations, legislatures, and judiciaries would be considerably improved by the existence of this detailed framework text. But has this happened in reality? In this section of the questionnaire, we have developed a series of questions that engage with the citizenship-specific elements of the Directive against a thematic concern about *stability* of residence for EU citizens and their family members. The questions address: (1) the evolving definition of family members and relationships of dependency; (2) the potential challenge to residence stability generated by

the Directive's economic self-sufficiency conditions; (3) the ground-breaking creation of *direct* EU legal rights for the family members of Union citizens, including third country national family members; (4) the similarly revolutionary concept and status of 'permanent residence'; (5) the express temporal limitations placed on access to certain social security benefits; and (6) against the backdrop of surprisingly moderate recent guidance from the Court of Justice, and also considering the extent to which Member State authorities are considering and applying the Directive's 'softening' criteria when taking decisions about the expulsion of Union citizens or their family members, the legislatively intended distinctions between different groups of Union citizens in the context of expulsion.

1. With respect to a Union citizen's family members, how have Articles 2, 3, and 5 of the Directive been transposed into national law? How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?
2. Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?
3. How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?
4. How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of applications to date for the status of permanent residence been published for your Member State? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?
5. How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?[4]

4. *Compare* e.g. the 'real link' approach applied in Case C-209/03, *Bidar v London Borough of Ealing; Secretary of State for Education and Skills*, Judgment of the Court (Grand Chamber) of 15 March 2005, with the subsequent decision in Case C-158/07, *Förster v IB-Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008; and, in the context of job-seekers, Case C-138/02, *Collins v Secretary of*

6. Please describe how the national courts and tribunals have understood, applied and differentiated between the concepts of 'public policy, public security, or public health' (Article 27), 'serious grounds of public policy or public security', and 'imperative grounds of public security' (Article 28).[5] How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin?

B. Questions 7-8: EU Citizenship *beyond* Directive 2004/38/EC – Exploring National Application of Primary EU Law

Thinking especially of the decisions in recent case law such as *Rottmann* and *Ruiz Zambrano*,[6] it is clear that the adoption of Directive 2004/38 has not altogether curtailed the interpretative powers of the Court of Justice with respect to the primary citizenship rights conferred directly by the Treaties. In this section of the questionnaire, our questions are constructed to elicit information about the extent to which national authorities are responding to that jurisprudence and are willing to go beyond the boundaries of the Directive. We highlight two key areas in this respect: (1) 'purely internal situations' and the issue of reverse discrimination, especially in cases involving the rights of family members; and (2) the extent to which national rules on the acquisition and loss of citizenship accommodate, or otherwise, the specific implications of those rules for acquisition and/or loss of the status of Union citizenship.

State for Work and Pensions, Judgement of the Court (Full Court) of 23 March 2004 with Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Judgment of the Court (Third Chamber) of 4 June 2009.

5. *See* e.g. Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis*, Judgment of the Court (Grand Chamber) of 23 November 23 2010 and Case C-348/09, *P.I. v Oberbürgermeisterin der Stadt Remscheid*, Judgment of the Court (Grand Chamber) of 6 March 2012.
6. *See* Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2nd March 2010; and Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Judgment of the Court (Grand Chamber) of 8 March 2011.

7. To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation'? To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. *Chen*,[7] *Ruiz Zambrano*, and subsequent decisions) been effectively implemented and applied at the national level? Does national case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States?[8] Have legislative or specific administrative changes been put in place? How are these matters being dealt with by the national courts?
8. In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

C. Questions 9-12: Political Rights of EU Citizens

Notwithstanding the emphasis in the Lisbon Treaty on the participatory and representative nature of democracy in the Union legal order, the Member States continue to lag behind the vision spelled out in the EU Treaties and by the EU legislature with respect to the realisation of appropriate electoral rights for Union citizens. This set of questions examines: (1) the implementation of Directive 93/109/EC[9] on European Parliament elections; (2) the implementation of Directive 94/80/EC[10] on local elections; (3) the extent to which EU citizens residing in the country are granted electoral rights for re-

7. Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department*, Judgment of the Court (Full Court) of 19 October 2004.
8. *See* Case C-434/09 *McCarthy v Secretary of State for the Home Department*, Judgment of the Court (Third Chamber) of 5 May 2011; Case C-256/11 *Dereci and others v Bundesministerium für Inneres*, Judgment of the Court (Grand Chamber) of 15 November 2011.
9. Directive 93/109/EC, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L 329/34.
10. Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368/38.

gional and other elections under national law i.e. above and beyond the threshold requirements set out in the EU Treaties; and (4) national restrictions imposed on access to the electoral rights applied to Union citizens, including those imposed on their own citizens which may be affected by EU law.

9. Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts? What additional changes will be required by the December 2012 amendments to Directive 93/109/EC.[11]
10. Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?
11. Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?
12. Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)? In answering this question, rapporteurs may be interested to know about an emerging line of case law in the UK on the application of EU law, specifically Article 39 CFR, to restrictions on prisoners' voting, which will reach the UK Supreme Court in June 2013.[12]

11. An amending directive was adopted on 20 December 2012 by the Council of Ministers, but has yet to be published in the OJ (Council Document 17198/12, 19 December 2012).
12. The Scottish case of *McGeoch v Lord President of the Council* [2011] CSIH 67 and the English case of *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439 have been conjoined and will be heard together in the Supreme Court in June 2013. In both cases, the applicants will argue that the total ban on prisoners' voting rights in the UK in relation to the prospective European Parliament elections in June 2014 is disproportionate.

Please consider the EUDO Citizenship Observatory (FRACIT) data, especially the relevant national reports, in answering these questions.

D. Questions 13-15: Culture(s) of Citizenship

We intend to chart the emerging *cultures* of (Union) citizenship in three key respects: (1) the status of Union citizenship is constructed around the paradigm of individual *rights*; but immigration law more generally is traditionally grounded in an ethos of *permission* – do national actors (administrative, legislative; and judicial) tend to apply that distinction *appropriately* in their application and interpretation of Union citizenship? (2) To what extent has the culture of rights been strengthened by the changed legal status of the Charter of Fundamental Rights? Are rights-based arguments intensifying, in other words, since the Lisbon Treaty came into effect in 2009? (3) What is the general *tone* of the national debate, in the media and civil society more broadly, on the status of and the rights attached to Union citizenship?

13. On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?
14. Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?
15. Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g. expulsion; access to state benefits; derived rights for third country nationals)? How *accurate* is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?

FIDE 2014

Questionnaire du thème général 2

La citoyenneté de l'Union : développement, impact et défis

Niamh Nic Shuibhne et Jo Shaw [1]

Introduction générale

La citoyenneté de l'Union se trouve à l'intersection entre l'intégration et le constitutionnalisme, et elle reflète les principales tendances à la croisée entre les Etats membres et l'Union européenne. Le but de ce questionnaire est d'encourager l'élaboration de rapports nationaux qui nous permettent de mieux comprendre, en tant qu'objectif prioritaire, comment les droits liés à la citoyenneté européenne se développent et sont appliqués dans les différents ordres juridiques des Etats membres. Pour réaliser cet objectif, nous nous intéressons d'abord aux exemples qui montrent comment les législations, les administrations et les autorités judiciaires nationales ont interprété et appliqué les aspects de la citoyenneté européenne qui exigent une transposition au niveau national ; en outre, nous cherchons à recueillir des preuves sur la manière dont ces acteurs apportent une réponse à la jurisprudence de la Cour de Justice relative aux droits des citoyens qui ne sont pas couverts par les paramètres de transposition directe au niveau national.

L'analyse de ces données empiriques nombreuses nous permettra également de présenter une perspective comparative sur le développement des droits de la citoyenneté européenne. La plupart des situations qui impliquent une application des droits de l'UE sont examinées au niveau national, sans jamais atteindre les institutions européennes. L'observatoire EUDO de la citoyenneté et ses ensembles de données sur l'acquisition et la perte de la ci-

1. Université d'Edinburgh. Les trois questionnaires ont été initialement rédigés en anglais, puis ils ont été traduits en français et en allemand. En cas de divergence, veuillez vous reporter aux versions anglaises qui représentent mieux la pensée des rapporteurs généraux.

toyenneté, et plus récemment sur les droits électoraux[2] ont commencé à combler le manque significatif d'informations dans ce domaine ; mais un recoupement de ces données avec les rapports nationaux élaborés par le Congrès de la FIDE pourrait enrichir considérablement les informations déjà disponibles et nous permettre ainsi de bien mieux cerner la *réalité* de la citoyenneté de l'Union.

Notre deuxième objectif est de mieux percevoir la manière dont la citoyenneté de l'Union se développe et/ou influe sur la *culture* de la citoyenneté nationale. Par exemple, de quelle manière les droits de la citoyenneté européenne sont-ils décrits dans les médias nationaux, dans les débats publics et les discours de la société civile ? Les acteurs du monde des médias ont une extraordinaire plate-forme pour modeler le ton du débat public ; en ont-ils usé de manière responsable (notamment en fournissant des informations précises sur les droits en vigueur) sur le thème de la citoyenneté de l'Union ? Quel est le discours de la société civile (tel qu'il apparaît dans les blogs et les sites web, par exemple) en réponse à cette sollicitation ? De manière plus générale, comment la législation européenne en matière de libre circulation, et les droits du citoyen qui y sont associés, côtoient la législation nationale sur *l'immigration* ? Nous chercherons en outre à distinguer, dans l'interface entre la citoyenneté nationale et la citoyenneté européenne, quels sont les droits que les citoyens européens *statiques* possèdent, ou ne possèdent pas, et dans quelle mesure cela peut-il influer sur la perception de la citoyenneté européenne, et la perception de ceux qui exercent leur doit de libre circulation.

L'étendue de la citoyenneté de l'Union et des droits qui lui sont associés couvrant un champ de possibilités énorme, nous avons décidé de nous recentrer sur quatre thèmes principaux *spécifiques au citoyen* dans ce questionnaire. Nous essayons de comprendre comment des acteurs nationaux interprètent et appliquent les droits à *valeur ajoutée* que sont les droits de la citoyenneté de l'Union, dans la mesure où ils s'ajoutent à ceux qui sont liés aux catégories de libre circulation mieux établies comme celle des travailleurs. Les quatre thèmes sélectionnés sont les suivants :

A. La citoyenneté dans le cadre la directive 2004/38/CE[3]
B. La citoyenneté au-delà des dispositions de la directive 2004/38/CE

2. *Consulter le site* http://eudo-citizenship.eu/databases.
3. La directive 2004/38/CE relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres, [2004] JO L158/77.

C. Les droits politiques des citoyens européens
D. L'émergence d'une ou plusieurs cultures de la citoyenneté

En mettant l'accent sur ces éléments distincts mais interdépendants du développement et de l'influence de la citoyenneté de l'Union, nous souhaitons offrir un éventail représentatif des perceptions sur la manière dont la citoyenneté européenne a (ou n'a pas) trouvé d'ancrage dans les cultures constitutionnelles, légales et politiques au niveau national. Nous avons également l'intention d'identifier les principaux défis qui pèsent sur la prise de conscience de la citoyenneté de l'Union dans les Etats membres.

Lignes directrices pour répondre aux questions

Pour répondre au mieux aux questions, nous vous invitons à suivre les lignes directrices suivantes :

– Fournir des informations de manière à ce qu'elles puissent être accessibles à un large éventail de publics nationaux (notamment en expliquant les problèmes nationaux dans leur contexte), et de manière à ce qu'elles soient comparables avec celles d'autres Etats membres.
– Les réponses doivent reposer sur des éléments concrets et objectifs : nous souhaitons obtenir des exemples plutôt qu'un compte-rendu exhaustif des problèmes juridiques nationaux (qui dépassent le propos d'un simple rapport), et des exemples exposés objectivement offrent bien plus de données comparatives importantes que l'opinion personnelle d'un commentateur. Néanmoins, bien sûr, il pourra s'avérer nécessaire de porter un jugement sur la transposition effective ou non du droit européen au niveau national, et de l'inclure dans ce questionnaire.

Nous demandons en outre aux rapporteurs de bien vouloir inclure, chaque fois que cela s'avère opportun, des informations dans leur rapport sur la position prise sur les différentes questions juridiques par :

– les cours et tribunaux dans leur jurisprudence, pour la juridiction concernée
– l'exécutif et le parlement dans l'Etat membre décrit
– la doctrine de l'Etat membre en question
– les médias dans l'Etat membre en question

Thèmes et questions

A. Questions 1 à 6 : La citoyenneté *dans* le cadre de la directive 2004/38/CE – La stabilité de résidence des citoyens de l'Union et des membres de leurs familles

L'adoption de la directive 2004/38/CE a été une étape importante dans la réglementation de la citoyenneté de l'Union. Il était notamment prévu que l'application des droits de citoyenneté européens par les administrations, les législations et les autorités judiciaires serait nettement facilitée par l'existence de cette directive-cadre détaillée. Mais cela s'est-il réellement produit ? Dans cette partie du questionnaire, nous avons élaboré une série de questions concernant les éléments spécifiques à la citoyenneté dans la directive, en rapport avec une approche thématique : *la stabilité* de résidence pour les citoyens européens et les membres de leur famille. Les questions abordent : (1) l'évolution de la notion de membres de la famille et de la notion de relations de dépendance ; (2) le problème que risque de poser la notion de stabilité de résidence, suscité par les conditions d'autosuffisance économique stipulées dans la directive ; (3) la création sans précédent de droits juridiques européens *directs* pour les membres de la famille des citoyens de l'Union, dont les membres de la famille ressortissants de pays tiers ; (4) de même, le concept et statut révolutionnaire de la notion 'droit de séjour permanent'; (5) les limitations temporelles explicites pour accéder à certaines prestations de sécurité sociale ; et (6) compte tenu des orientations récentes et étonnamment tièdes de la Cour de Justice, et de la manière dont les autorités des Etats membres considèrent et appliquent les conditions d'assouplissement de la directive lorsqu'elles prennent des décisions d'expulsion envers les citoyens de l'Union ou les membres de leur famille, les distinctions prévues par la législation entre les différents groupes de citoyens de l'Union dans le cadre des expulsions.

1. En ce qui concerne les membres de la famille d'un citoyen de l'Union, comment les articles 2, 3 et 5 de la directive ont-ils été transposés en droit national ? Comment les cours et/ou les tribunaux nationaux ont-ils abordé les différents types de relations familiales décrites dans les articles 2 et 3 ? Les garanties procédurales décrites à l'article 5 fournissent-elles une protection *efficace* ?
2. Existe-t-il des éléments de preuve de l'expulsion de citoyens européens (et/ou des membres de leur famille) pour des motifs purement économiques (c'est-à-dire en raison de la non-satisfaction des conditions fixées à

l'article 7 de la directive), suite notamment à des décisions des cours et/ou des tribunaux nationaux ?

3. Comment les articles 12 à 15 de la directive ont-ils été transposés en droit national ? Des différends sur l'interprétation ou l'application de ces dispositions ont-ils été portés devant les cours ou tribunaux nationaux ?
4. Comment les articles 16 à 21 de la directive ont-ils été transposés en droit national ? Des données sur le volume des demandes concernant le statut de résident permanent ont-elles été publiées à ce jour dans votre Etat membre ? Des différends sur l'interprétation ou l'application de ces dispositions ont-ils été portés devant les cours ou tribunaux nationaux ?
5. Comment l'article 24(2) de la directive a-t-il été transposé en droit national ? Le droit national fait-il une distinction entre les catégories décrites à l'article 24(2) et les demandeurs d'emploi en ce qui concerne le droit aux prestations sociales ? L'article 24(2) a-t-il remplacé la jurisprudence relative au 'lien réel' de la Cour de Justice devant les cours et tribunaux nationaux ?[4]
6. Veuillez décrire comment les cours et tribunaux nationaux ont compris, appliqué et établi une distinction entre les notions « d'ordre public, de sécurité publique ou de santé publique » (article 27), « des motifs graves d'ordre public ou de sécurité publique » et « des raisons impérieuses de sécurité publique » (article 28).[5] Comment le principe de proportionnalité a-t-il été compris et appliqué dans ces différents cas ? De quelle manière les cours et tribunaux nationaux ont-ils tenu compte des considérations liées à la durée de séjour de la personne concernée sur son territoire, de son âge, son état de santé, sa famille et sa situation économique, son intégration sociale et culturelle dans l'Etat membre d'accueil, et l'étendue de ses liens avec le pays d'origine ?

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4. *Comparer* notamment l'approche du 'lien réel' utilisée dans l'affaire C-209/03, *Bidar contre London Borough of Ealing et Secretary of State for Education and Skills*, Arrêt de la Cour (grande chambre) du 15 mars 2005, avec la décision ultérieure dans l'affaire C-158/07, *Förster v IB-Groep*, Arrêt de la Cour (grande chambre) du 18 novembre 2008 ; et, dans le domaine des demandeurs d'emploi, l'affaire C-138/02, *Collins contre Secretary of State for Work and Pensions*, Arrêt de la Cour (assemblée plénière) du 23 mars 2004 pour les affaires jointes C-22/08 et C-23/08, *Vatsouras et Koupatantze contre Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Arrêt de la Cour (troisième chambre) du 4 juin 2009.
5. *Se reporter* notamment à l'affaire C-145/09, *Land Baden-Württemberg contre Panagiotis Tsakouridis*, Arrêt de la Cour (grande chambre) du 23 novembre 2010 et à l'affaire C-348/09, *P.I. contre Oberbürgermeisterin der Stadt Remscheid*, Arrêt de la Cour (grande chambre) du 6 mars 2012.

B. Questions 7 à 8 : La citoyenneté européenne *au-delà* des dispositions de la directive 2004/38/CE – Etudier l'application, au niveau national, du droit primaire européen

Nous rappelant tout particulièrement les décisions des affaires récentes comme *Rottmann* et *Ruiz Zambrano*,[6] il est clair que l'adoption de la directive 2004/38 n'a pas entièrement tronqué la compétence d'interprétation de la Cour de Justice relative aux droits de citoyenneté primaires conférés directement par les traités. Dans cette partie du questionnaire, nos questions sont formulées de manière à obtenir des informations permettant de déterminer à quel point les autorités nationales tiennent compte de cette jurisprudence et sont prêtes à aller au-delà des limites de la directive. Nous mettons l'accent sur deux domaines principaux : (1) les situations purement internes et la question de la discrimination à rebours, en particulier dans les affaires relatives aux droits des membres de la famille ; et (2) dans quelle mesure les règles nationales sur l'acquisition et la perte de la citoyenneté s'adaptent, ou bien quelles sont les conséquences spécifiques de ces règles sur l'acquisition et/ou la perte du statut de citoyen de l'Union.

7. En quelle mesure les cours et tribunaux nationaux tendent-ils à rejeter les arguments basés sur les droits de la citoyenneté européenne parce que le différend met en cause une 'situation purement interne' ? En quelle mesure la jurisprudence de la Cour de Justice fondée directement sur les dispositions relatives à la citoyenneté du TFUE (notamment *Chen*,[7] *Ruiz Zambrano* et les décisions ultérieures) a été réellement mise en œuvre et appliquée au niveau national ? La jurisprudence nationale fait-elle une claire distinction entre les droits acquis en vertu de la directive 2004/38 et ceux des articles 20 et/ou 21 du TFUE lorsque des citoyens européens demandent le regroupement familial dans leur Etat membre d'origine ?[8] Des changements législatifs ou administratifs particuliers ont-ils été mis

6. *Se reporter* à l'affaire C-135/08, *Janko Rottmann contre Freistaat Bayern*, Arrêt de la Cour (grande chambre) du 2 mars 2010 ; et l'affaire C-34/09, *Gerardo Ruiz Zambrano contre Office national de l'emploi (ONEm)*, Arrêt de la Cour (grande chambre) du 8 mars 2011.
7. L'affaire C-200/02, *Zhu et Chen contre Secretary of State for the Home Department*, Arrêt de la Cour (assemblée plénière) du 19 octobre 2004.
8. *Se reporter* à l'affaire C-434/09 *McCarthy contre Secretary of State for the Home Department*, Arrêt de la Cour (troisième chambre) du 5 mai 2011 ; et l'affaire C-256/11 *Dereci et autres contre Bundesministerium für Inneres*, Arrêt de la Cour (grande chambre) du 15 novembre 2011.

en place ? Comment ces questions sont-elles réglées par les cours et tribunaux nationaux ?

8. Dans le cadre de l'arrêt de *Rottmann*, en quelle mesure les règles d'acquisition et/ou de perte de la citoyenneté nationale tiennent-elles compte des implications liées aux exigences particulières de la citoyenneté européenne ? Veuillez prendre en considération les données de l'observatoire EUDO de la citoyenneté relatives à l'acquisition et à la perte de citoyenneté en répondant à cette question.

C. Questions 9 à 12 : Les droits politiques des citoyens européens

En dépit de l'accent mis, dans le traité de Lisbonne, sur le caractère participatif et représentatif de la démocratie dans l'ordre juridique de l'Union, les Etats membres continuent à accuser un certain retard face à la vision définie par les traités européens et par la législation européenne sur la mise en place de droits électoraux adéquats pour les citoyens de l'Union. Cette série de questions se penche sur : (1) La mise en œuvre de la directive 93/109/CE[9] sur les élections au Parlement européen ; (2) la mise en œuvre de la directive 94/80/CE[10] sur les élections locales ; (3) dans quelle mesure les citoyens européens qui résident dans le pays se voient accorder des droits électoraux pour les élections, notamment les élections régionales, dans le cadre du droit national, c'est-à-dire en sus des critères minimum fixés par les traités européens ; et (4) les restrictions nationales concernant l'accès aux droits électoraux qui s'appliquent aux citoyens de l'Union, notamment celles que les Etats membres imposent à leurs propres citoyens, qui peuvent être affectées par le droit communautaire.

9. Depuis quand la directive 93/109/CE sur les élections au Parlement européen est-elle entièrement mise en œuvre ? Y a-t-il eu des dérogations ? Existe-t-il des conditions supplémentaires imposées aux citoyens européens par rapport aux citoyens nationaux (procédure d'enregistrement spéciale ou exigences de résidence) ? Y a-t-il eu de la jurisprudence sur ce point dans les cours et tribunaux nationaux ? Quels changements sup-

9. Directive 93/109/CE, fixant les modalités de l'exercice du droit de vote et d'éligibilité aux élections au Parlement européen pour les citoyens de l'Union résidant dans un Etat membre dont ils ne sont pas ressortissants, [1993] JO L 329/34.
10. Directive 94/80/CE, fixant les modalités de l'exercice du droit de vote et d'éligibilité aux élections municipales pour les citoyens de l'Union résidant dans un Etat membre dont ils n'ont pas la nationalité, [1994] JO L 368/38.

plémentaires seront nécessaires suite aux modifications apportées par la directive 93/109/CE en décembre 2012.[11]

10. Depuis quand la directive 94/80/CE sur les élections locales est-elle entièrement mise en œuvre ? Y a-t-il eu des dérogations ? Existe-t-il des conditions supplémentaires imposées aux citoyens européens par rapport aux citoyens nationaux (procédure d'enregistrement spéciale ou exigences de résidence) ? Y a-t-il eu de la jurisprudence sur ce point dans les cours et tribunaux nationaux ?
11. Veuillez évoquer brièvement les élections, notamment les élections régionales, pour lesquelles les citoyens européens qui résident dans le pays se voient accorder des droits électoraux dans le cadre du droit national. Existe-t-il un droit de vote pour les citoyens européens qui va au-delà des droits électoraux aux élections locales et à celles du Parlement européen tels que prescrits dans le droit européen ? Pour quelles raisons ces droits ont-ils été étendus spécifiquement aux citoyens européens ?
12. Y a-t-il des domaines spécifiques dans lesquels il existe des tensions entre le droit européen et les dispositions nationales qui limitent l'étendue du droit de vote (notamment le droit de vote des personnes condamnées au pénal ou des personnes ayant un handicap mental) ? En répondant à cette question, les rapporteurs pourraient être intéressés de savoir qu'un nouveau courant jurisprudentiel est en train d'émerger au Royaume-Uni suite à l'application du droit européen, et plus particulièrement de l'article 39 de la Charte des droits fondamentaux, concernant des restrictions au droit de vote des prisonniers, qui sera soumis à la Cour suprême du Royaume-Uni en juin 2013.[12]

Veuillez prendre en considération les données de l'observatoire EUDO de la citoyenneté (FRACIT), notamment les rapports nationaux dans ce domaine, en répondant à ces questions.

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11. Une directive modificatrice a été adoptée le 20 décembre 2012 par le Conseil des ministres, mais elle n'est pas encore publiée au JO (Document du Conseil 17198/12, 19 décembre 2012).
12. L'affaire écossaise de *McGeoch contre Lord President of the Council* [2011] CSIH 67 et l'affaire anglaise de *Chester contre Secretary of State for Justice* [2010] EWCA Civ 1439 ont été jointes et seront entendues devant la Cour suprême en juin 2013. Dans les deux affaires, les requérants invoquent qu'une suppression totale du droit de vote des prisonniers au Royaume-Uni pour les prochaines élections du Parlement européen en juin 2014 est disproportionnée.

D. Questions 13 à 15 : Culture(s) de la citoyenneté

Nous avons l'intention de définir l'émergence des *cultures* de la citoyenneté (européenne) dans trois domaines essentiels : (1) le statut de la citoyenneté de l'Union se construit autour du paradigme des *droits* individuels ; mais les lois sur l'immigration sont traditionnellement fondées sur le principe de *l'autorisation* – les acteurs nationaux (administratifs, législatifs et judiciaires) cherchent-ils à appliquer cette distinction *de manière appropriée* dans leur application et leur interprétation de la citoyenneté de l'Union ? (2) En quelle mesure la culture des droits a-t-elle été renforcée par le changement de statut juridique de la Charte des droits fondamentaux ? En d'autres termes, assiste-t-on à une intensification des arguments fondés sur la protection des droits individuels droit depuis l'entrée en vigueur du traité de Lisbonne en 2009 ? (3) Quel est le *ton* général du débat public, dans les médias et la société civile au sens large, sur le statut et les droits liés à la citoyenneté de l'Union ?

13. Sur la base des réponses aux questions ci-dessus, considérez-vous que la mise en œuvre des normes en matière de citoyenneté européenne dans votre Etat membre est comprise au niveau national comme faisant partie d'une culture européenne basée sur les droits de la « libre circulation » et des droits « constitutionnels », ou comme un ajout aux systèmes d'immigration national basé sur le principe de 'l'autorisation' aux non-résidents d'être présents sur le territoire national ?
14. L'effet contraignant de la Charte des droits fondamentaux de l'Union européenne, suite à l'entrée en vigueur du traité de Lisbonne en 2009, a-t-il joué un rôle dans la manière dont les droits des citoyens européens sont interprétés par les cours et/ou les tribunaux nationaux ?
15. Veuillez décrire dans quelle mesure les questions liées à la citoyenneté européenne se sont imposées dans les médias nationaux, et la manière dont ces questions ont été reprises dans les médias nationaux. Certains thèmes ont-ils dominé dans les informations données par les médias (notamment l'expulsion, l'obtention de prestations sociales, les droits dérivés pour les résidents de pays tiers) ? Quelle est *l'exactitude* de l'information rapportée au niveau national sur les questions relatives à la citoyenneté européenne ? Pouvez-vous percevoir l'influence des médias dans le discours public au niveau national ?

FIDE 2014

Fragebogen, Generalthema 2

Unionsbürgerschaft: Entwicklung, Auswirkungen und Herausforderungen

Niamh Nic Shuibhne und Jo Shaw [1]

Einführung

Die Unionsbürgerschaft befindet sich an der Grenzfläche von Integration und Konstitutionalismus und ist somit ein Barometer für wichtige Trends und Einflüsse an den Schnittpunkten von Mitgliedstaaten und der Europäischen Union. Mit diesem Fragebogen soll die Ausarbeitung nationaler Berichte angeregt werden, die uns in erster Linie dabei helfen werden, ein besseres Verständnis für die Entwicklung der mit der Unionsbürgerschaft verknüpften Rechte und deren Anwendung in den Rechtsordnungen der Mitgliedstaaten zu entwickeln. Um dieses Ziel zu erreichen, sind wir zunächst an Beispielen dafür interessiert, wie nationale Legislativen, Exekutiven und Judikativen die Aspekte der Unionsbürgerschaft auslegen und anwenden, die eine Umsetzung auf nationaler Ebene verlangen. Wir möchten aber auch Hinweise darauf zusammentragen, wie diese Akteure auf die Rechtsprechung des Europäischen Gerichtshofs zu Bürgerrechten reagieren, die außerhalb der Parameter einer direkten nationalen Umsetzung liegen.

Eine Analyse dieser vielfältigen empirischen Daten ermöglicht auch die Darstellung der mit einer Unionsbürgerschaft verbundenen Rechte in einer vergleichenden Perspektive. Die Anwendung von EU-Recht erfolgt in den meisten Fällen auf nationaler Ebene, erreicht also nicht die EU-Institutionen selbst. Das EUDO Citizenship Observatory und dessen Datensätze über den Erwerb und Verlust von Staatsbürgerschaft und, jüngeren Datums, über das

1. Universität Edinburgh. Alle drei Fragebögen wurden ursprünglich auf English ausgearbeitet und anschließend ins Französische und Deutsche übersetzt. Sollte es Abweichungen geben, sind es die englischen Versionen, die am besten das Denken der Berichterstatter repräsentieren.

Wahlrecht,[2] beginnen, eine entscheidende Informationslücke in diesem Zusammenhang zu schließen. Mit der Kreuztabellierung dieser Daten und den für den FIDE Kongress vorbereiteten nationalen Berichten wird das verfügbare Material weiter deutlich verbessert und damit auch unser Verständnis für die *Realität* der Unionsbürgerschaft vertieft.

Wir möchten aber auch, als zweites Ziel, ein besseres Verständnis dafür entwickeln, wie sich die Unionsbürgerschaft im Rahmen der *Kultur* nationaler Staatsbürgerschaften entwickelt bzw. sich auf diese auswirkt. Wie werden beispielsweise die mit der Unionsbürgerschaft verknüpften Rechte in nationalen Medien und im öffentlichen oder zivilgesellschaftlichen Diskurs dargestellt? Medienakteure können aufgrund ihrer Position den Ton der nationalen Debatte besonders leicht prägen. Haben die Medien, was die Unionsbürgerschaft betrifft, Verantwortungsbewusstsein gezeigt, beispielsweise durch die Weitergabe korrekter Informationen über geltende Rechte? Und wie hat der zivilgesellschaftliche Diskurs, z. B. über Blogs und Websites, auf diese Lenkung reagiert? Allgemeiner gefragt, wie ist das Verhältnis des EU-Rechts der Freizügigkeit und der damit verbundenen Bürgerrechte zu nationalem *Einwanderungsrecht*? Außerdem können im Überschneidungsgebiet von nationaler Staatsbürgerschaft und Unionsbürgerschaft Fragen über die existierenden und nicht existierenden Rechte von *nicht von ihrem Recht auf Freizügigkeit Gebrauch machenden* Unionsbürgern auftreten und wie diese die Wahrnehmung der Unionsbürgerschaft und von Personen, die die Rechte *mobiler* Bürger in Anspruch nehmen, beeinflussen.

Die Fragen zur Unionsbürgerschaft und der damit verbundenen Rechte decken ein potenziell riesiges Gebiet ab. Wir haben uns deswegen entschlossen, den Schwerpunkt in diesem Fragebogen auf vier vorrangige *bürgerspezifische* Themenbereiche zu legen. Dabei versuchen wir zu verstehen, wie nationale Akteure die einen *Mehrwert* bietenden Rechte der Unionsbürgerschaft auslegen und anwenden, d. h. solche Rechte, die über die Rechte hinausgehen, die an bekanntere Kategorien der Freizügigkeit geknüpft sind, wie z. B. bei Arbeitnehmern. Unsere vier Schwerpunktthemen sind:

A. Unionsbürgerschaft im Rahmen der Richtlinie 2004/38/EG[3]
B. Unionsbürgerschaft außerhalb der Richtlinie 2004/38/EG
C. Politische Rechte von Unionsbürgern

2. *Siehe* http://eudo-citizenship.eu/databases.
3. Richtlinie 2004/38/EG über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, ABl. L158/77 2004.

D. Neu entstehende Kultur(en) der Staatsbürgerschaft

Mit diesen unterschiedlichen, allerdings zusammenhängenden Elementen der Entwicklung und Auswirkungen einer Unionsbürgerschaft präsentieren wir in unserem gemeinsamen Bericht einen Querschnitt an Erkenntnissen darüber, wie die Unionsbürgerschaft in die nationalen konstitutionellen, rechtlichen und politischen Kulturen eingebettet ist (oder auch nicht). Außerdem ist es unser Ziel, wichtige Herausforderungen aufzuzeigen, die die Umsetzung der Unionsbürgerschaft in den Mitgliedstaaten beeinflussen.

Leitlinien zur Beantwortung der Fragen

Bitte beachten Sie bei der Beantwortung der Fragen Folgendes:

- Informationen sollten so dargestellt werden, dass sie Zuhörern aus den verschiedensten Ländern zugänglich sind, d. h., nationale Fragen sollen in einem verständlichen Zusammenhang erklärt werden und über alle Mitgliedstaaten hinweg vergleichbar sein.
- Antworten sind evidenzbasiert und objektiv darzulegen: Wir sind mehr an Beispielen interessiert als an einem vollständigen Bericht zu nationalen Rechtsproblemen (was die Möglichkeiten des Berichts eines Einzelnen überschreitet). Objektiv dargelegte Beispiele bieten deutlich bessere Vergleichsdaten als die Ansichten eines bestimmten Berichterstatters. Nichtsdestotrotz sollte die Beurteilung, ob EU-Recht wirksam auf nationaler Ebene umgesetzt ist, falls erforderlich, aufgenommen werden.

Berichterstatter werden außerdem gebeten, soweit angemessen, Angaben über die Stellungnahmen der folgenden Institutionen/Körperschaften zu einschlägigen Rechtsfragen in ihren Bericht aufzunehmen:

- Rechtsprechung von Gerichten und Rechtsinstanzen im jeweiligen Zuständigkeitsbereich
- Exekutive und Legislative in den beschriebenen Mitgliedstaaten
- Akademische Artikel und Fachartikel aus dem jeweiligen Mitgliedstaat
- Medien aus dem jeweiligen Mitgliedstaat

Themen und Fragen

A. 1.-6. Frage: Unionsbürgerschaft *im Rahmen* der Richtlinie 2004/38/EG – Beständigkeit des Aufenthalts von Unionsbürgern und ihren Familienangehörigen

Die Annahme der Richtlinie 2004/38/EG war ein wichtiger Meilenstein für die Regelung der Unionsbürgerschaft. Insbesondere ging man davon aus, dass die Anwendung der mit der Unionsbürgerschaft verknüpften Rechte durch nationale Exekutiven, Legislativen und Judikativen aufgrund der Existenz dieses ausführlichen Rahmentextes deutlich verbessert würde. Aber ist dem tatsächlich so? Die für diesen Abschnitt des Fragebogens ausgearbeiteten Fragen beschäftigen sich mit für die Unionsbürgerschaft spezifischen Elementen der Richtlinie vor dem Hintergrund einer thematischen Fragestellung zur *Beständigkeit* des Aufenthalts von Unionsbürgern und ihren Familienangehörigen. Angesprochen wird Folgendes: (1) die sich herausbildende Definition von Familienangehörigen und Abhängigkeitsverhältnissen; (2) die potenziellen Probleme der Aufenthaltsbeständigkeit aufgrund der Forderung der Richtlinie nach finanzieller Unabhängigkeit; (3) die wegweisende Schaffung von *direkten* EU-Rechten für Familienangehörige von Unionsbürgern, einschließlich Angehöriger, die nicht die Staatsangehörigkeit eines Mitgliedstaats besitzen; (4) das ähnlich revolutionäre Konzept und der Status eines »Daueraufenthalts«; (5) die ausdrückliche zeitliche Begrenzung des Anspruchs auf bestimmte Sozialhilfeleistungen; und (6) die rechtlichen Unterschiede zwischen verschiedenen Gruppen von Unionsbürgern in Verbindung mit der Ausweisung, insbesondere vor dem Hintergrund der überraschend moderaten jüngsten Urteile des Europäischen Gerichtshofs und in Anbetracht des Ausmaßes, in dem Behörden der Mitgliedstaaten die »Aufweichungskriterien« bei Entscheidungen über die Ausweisung von Unionsbürgern und ihren Familienangehörigen in Erwägung ziehen und anwenden.

1. Wie wurden Artikel 2, 3 und 5 der Richtlinie in Bezug auf Familienangehörige von Unionsbürgern in nationales Recht umgesetzt? Wie gehen nationale Gerichte und Rechtsinstanzen mit den verschiedenen in Artikel 2 und 3 genannten Verwandtschaftsgraden um? Bieten die Verfahrensvorschriften in Artikel 5 einen *wirksamen* Schutz?
2. Gibt es Beweise für die Ausweisung von Unionsbürgern (und/oder ihren Familienangehörigen) aus rein finanziellen Gründen (d. h. Nichterfüllung

der Auflagen in Artikel 7 der Richtlinie), beispielsweise in Urteilen nationaler Gerichte und Rechtsinstanzen?

3. Wie wurden Artikel 12 bis 15 der Richtlinie in nationales Recht umgesetzt? Wurden Streitigkeiten in Bezug auf die Auslegung oder Anwendung dieser Rechtsvorschriften vor ein nationales Gericht oder eine nationale Rechtsinstanz gebracht?
4. Wie wurden Artikel 16 bis 21 der Richtlinie in nationales Recht umgesetzt? Wurden in Ihrem Mitgliedstaat Daten über die bisherige Anzahl Anträge für den Status Daueraufenthalt veröffentlicht? Wurden Streitigkeiten in Bezug auf die Auslegung oder Anwendung dieser Rechtsvorschriften vor ein nationales Gericht oder eine nationale Rechtsinstanz gebracht?
5. Wie wurde Artikel 24 Absatz 2 der Richtlinie in nationales Recht umgesetzt? Unterscheidet nationales Recht ebenfalls zwischen den in Artikel 24 Absatz 2 genannten Kategorien und Arbeitssuchenden, was Anspruch auf Sozialhilfe betrifft? Hat Artikel 24 Absatz 2 die Rechtsprechung zur »tatsächlichen Verbindung« des Europäischen Gerichtshofs an nationalen Gerichten oder Rechtsinstanzen ersetzt?[4]
6. Bitte beschreiben Sie, wie nationale Gerichte und Rechtsinstanzen die Konzepte »öffentliche Ordnung, Sicherheit oder Gesundheit« (Artikel 27), »schwerwiegende Gründe der öffentlichen Ordnung oder Sicherheit« und »zwingende Gründe der öffentlichen Sicherheit« verstehen, anwenden und unterscheiden.[5] Wie wird der Grundsatz der Verhältnismäßigkeit in diesem Zusammenhang verstanden und angewendet? Wie wurden von nationalen Gerichten und Rechtsinstanzen Gründe wie die Dauer des Aufenthalts des Betroffenen im Hoheitsgebiet, sein Alter, sein Gesundheitszu-

4. *Vergleiche* z. B. den Ansatz der »tatsächlichen Verbindung« in der Rechtssache C-209/03, *The Queen, auf Antrag von Dany Bidar gegen London Borough of Ealing und Secretary of State for Education and Skills*, Urteil des Gerichtshofes (Große Kammer) vom 15. März 2005, und das anschließende Urteil in der Rechtssache C-158/07, *Jacqueline Förster gegen Hoofddirectie van de Informatie Beheer Groep*, Urteil des Gerichtshofes (Große Kammer) vom 18. November 2008; und in Verbindung mit Arbeitssuchenden die Rechtssache C-138/02, *Brian Francis Collins gegen Secretary of State for Work and Pensions*, Urteil des Gerichtshofes (Plenum) vom 23. März 2004 in Verbindung mit den Rechtssachen C-22/08 und C-23/08, *Athanasios Vatsouras und Josif Koupatantze gegen Arbeitsgemeinschaft (ARGE) Nürnberg 900*, Urteil des Gerichtshofes (Dritte Kammer) vom 4. Juni 2009.
5. *Siehe* z. B. Rechtssache C-145/09, *Land Baden-Württemberg gegen Panagiotis Tsakouridis*, Urteil des Gerichtshofes (Große Kammer) vom 23. November 2010, und Rechtssache C-348/09, *P.I. gegen Oberbürgermeisterin der Stadt Remscheid*, Urteil des Gerichtshofes (Große Kammer) vom 22. Mai 2012.

stand, seine familiäre und wirtschaftliche Lage, seine soziale und kulturelle Integration im Aufnahmemitgliedstaat und das Ausmaß seiner Bindungen zum Herkunftsstaat berücksichtigt?

B. 7. -8. Frage: Unionsbürgerschaft *außerhalb* der Richtlinie 2004/38/EG – Untersuchung der nationalen Anwendung von primärem EU-Recht

Angesichts insbesondere der jüngsten Urteile wie in den Fällen *Rottmann* und *Ruiz Zambrano*[6] steht fest, dass die Annahme der Richtlinie 2004/38/EG die Auslegungsbefugnis des Europäischen Gerichtshofs in Bezug auf die direkt über Verträge verliehenen primären Bürgerrechte nicht vollständig eingeschränkt hat. Die für diesen Abschnitt des Fragebogens ausgearbeiteten Fragen sollen Informationen über das Ausmaß bereitstellen, in dem nationale Behörden auf diese Rechtsprechung reagieren und bereit sind, die durch die Richtlinie gegebenen Grenzen zu überschreiten. In diesem Zusammenhang konzentrieren wir uns auf zwei Hauptbereiche: (1) »rein interne Situationen« und die Frage einer umgekehrten Diskriminierung, insbesondere in Fällen, bei denen es um die Rechte von Familienangehörigen geht; und (2) das Ausmaß, in dem nationale Vorschriften über den Erwerb und den Verlust der Staatsbürgerschaft die spezifischen Auswirkungen der Vorschriften für den Erwerb und/oder den Verlust des Status der Unionsbürgerschaft berücksichtigen oder nicht.

7. In welchem Ausmaß neigen nationale Gerichte und Rechtsinstanzen dazu, Argumente auf der Grundlage von mit der Unionsbürgerschaft verknüpften Rechten mit der Begründung zurückzuweisen, dass die Streitigkeit eine rein interne Situation darstellt? In welchem Ausmaß wurde die Rechtsprechung des Europäischen Gerichtshofs, die direkt auf den Vorschriften des AEUV über die Unionsbürgerschaft beruht (z. B. *Chen*,[7] *Ruiz Zambrano* und Folgeurteile), wirksam auf nationaler Ebene umgesetzt und angewendet? Unterscheidet die nationale Rechtsprechung eindeutig zwischen Rechten gemäß der Richtlinie 2004/38/EG und denen gemäß Arti-

6. *Siehe* Rechtssache C-135/08, *Janko Rottmann gegen Freistaat Bayern*, Urteil des Gerichtshofes (Große Kammer) vom 2. März 2010; und Rechtssache C-34/09, *Gerardo Ruiz Zambrano gegen Office national de l'emploi (ONEm)*, Urteil des Gerichtshofes (Große Kammer) vom 8. März 2011.
7. Rechtssache C-200/02, *Kunqian Catherine Zhu und Man Lavette Chen gegen Secretary of State for the Home Department*, Urteil des Gerichtshofes (Plenum) vom 19. Oktober 2004.

kel 20 und/oder 21 AEUV, wenn Unionsbürger ihr Recht auf Familienzusammenführung aus ihren Herkunftsmitgliedstaaten geltend machen?[8] Wurden rechtliche oder spezifische verwaltungsrechtliche Veränderungen eingeführt? Wie gehen nationale Gerichte mit diesen Fragen um?

8. In welchem Ausmaß reflektieren die Vorschriften über den Erwerb und/oder den Verlust einer nationalen Staatsbürgerschaft angesichts des Urteils in der Rechtssache *Rottmann* die Auswirkungen der fraglichen Anforderungen für die Unionsbürgerschaft? Bei der Beantwortung dieser Frage sollten die Daten über Erwerb und Verlust der Staatsbürgerschaft des EUDO Citizenship Observatory berücksichtigt werden.

C. 9.-12. Frage: Politische Rechte von Unionsbürgern

Ungeachtet der Bedeutung der partizipatorischen und repräsentativen Ausübung von Demokratie in der EU-Rechtsordnung, wie dies im Vertrag von Lissabon eindeutig festgelegt ist, ist es den Mitgliedstaaten immer noch nicht gelungen, die in den EU-Verträgen und durch die EU-Rechtsprechung geschaffene Vorstellung eines angemessenen Wahlrechts für Unionsbürger umzusetzen. In diesen Fragenblock untersuchen wir: (1) die Umsetzung der Richtlinie 93/109/EG[9] über Wahlen zum Europäischen Parlament; (2) die Umsetzung der Richtlinie 94/80/EG[10] über Kommunalwahlen; (3) das Ausmaß, in dem Unionsbürger mit Wohnsitz in einem anderen Mitgliedstaat nach nationalem Recht, d. h. über die durch die EU-Verträge gesetzten Grenzen hinaus, Anspruch auf Ausübung des Wahlrechts bei regionalen und anderen Wahlen haben; und (4) nationale Beschränkungen der Ausübung des Wahlrechts von Unionsbürgern, einschließlich solcher, die auch für die eigenen Bürger gelten, wodurch EU-Recht betroffen sein kann.

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8. *Siehe* Rechtssache C-434/09 *Shirley McCarthy gegen Secretary of State for the Home Department*, Urteil des Gerichtshofes (Dritte Kammer) vom 5. Mai 2011; Case C-256/11 *Murat Dereci und andere gegen Bundesministerium für Inneres*, Urteil des Gerichtshofes (Große Kammer) vom 15. November 2011.
9. Richtlinie 93/109/EG über die Einzelheiten der Ausübung des aktiven und passiven Wahlrechts bei den Wahlen zum Europäischen Parlament für Unionsbürger mit Wohnsitz in einem Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, ABl. L 329/34 1993.
10. Richtlinie 94/80/EG über die Einzelheiten der Ausübung des aktiven und passiven Wahlrechts bei den Kommunalwahlen für Unionsbürger mit Wohnsitz in einem Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, ABl. L 368/38 1994.

9. Seit wann ist die Richtlinie 93/109/EG über Wahlen zum Europäischen Parlament vollständig umgesetzt? Gibt es Ausnahmeregelungen? Gibt es zusätzliche Auflagen für Unionsbürger im Vergleich zu den Bürgern des fraglichen Landes (besondere Registrierung oder Wohnsitzvorschriften)? Liegen einschlägige Urteile der nationalen Gerichte vor? Welche zusätzlichen Änderungen ergeben sich aus den Änderungen zur Richtlinie 93/109/EWG vom Dezember 2012?[11]
10. Seit wann ist die Richtlinie 94/80/EG über Kommunalwahlen vollständig umgesetzt? Gibt es Ausnahmeregelungen? Gibt es zusätzliche Auflagen für Unionsbürger im Vergleich zu den Bürgern des fraglichen Landes (besondere Registrierung oder Wohnsitzvorschriften)? Liegen einschlägige Urteile der nationalen Gerichte vor?
11. Nennen Sie kurz regionale und andere Wahlen, bei denen Unionsbürger mit Wohnsitz in Ihrem Land nach nationalem Recht das Wahlrecht ausüben können. Haben Unionsbürger Rechte, die über das ihnen nach EU-Recht zustehende Recht zur Teilnahme an Kommunalwahlen und Wahlen zum Europäischen Parlament hinausgehen? Wie wurde die Ausweitung derartiger Rechte auf gerade Unionsbürger begründet?
12. Gibt es in bestimmten Bereichen Konflikten zwischen EU-Recht und nationalen Vorschriften, wodurch der Anwendungsbereich des Rechts begrenzt wird (z. B. in Bezug auf das Wahlrecht von verurteilten Straftätern oder Personen mit geistigen Behinderungen)? Bei der Beantwortung dieser Frage ist es für Berichterstatter vielleicht von Interesse, dass sich in dem Vereinigten Königreich eine Rechtsprechung in Bezug auf die Anwendung von EU-Recht, insbesondere Artikel 39 der EU-Charta der Grundrechte, herausbildet, mit der das Wahlrecht von Häftlingen eingeschränkt wird. Eine Entscheidung des Obersten Gerichtshofs des Vereinigten Königreichs wird für Juni 2013 erwartet.[12]

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11. Eine geänderte Richtlinie wurde am 20. Dezember 2012 vom Ministerrat verabschiedet, ist jedoch noch nicht im Amtsblatt veröffentlicht (Ratsdokument 17198/12, 19. Dezember 2012).
12. Die schottische Rechtssache *McGeoch gegen Lord President of the Council*, [2011] CSIH 67, und die englische Rechtssache *Chester gegen Secretary of State for Justice*, [2010] EWCA Civ 1439, werden gemeinsam im Juni 2013 vor dem Obersten Gerichtshof verhandelt. In beiden Fällen werden die Kläger vorbringen, dass die totale Verweigerung des Wahlrechts für Häftlinge im Vereinigten Königreich in Bezug auf die kommende Wahl zum Europäischen Parlament im Juni 2014 unverhältnismäßig ist.

Bei der Beantwortung der Fragen sollten auch die Daten des EUDO Citizenship Observatory (FRACIT) berücksichtigt werden, insbesondere der einschlägigen nationalen Berichte.

D. 13.-15. Frage: Kultur(en) der Staatsbürgerschaft

Die neu entstehenden *Kulturen* der Unionsbürgerschaft sollen in drei wesentlichen Bereichen beleuchtet werden: (1) Der Status der Unionsbürgerschaft beruht auf dem Paradigma individueller *Rechte*; die Grundlage des Einwanderungsrechts ist traditionell mehr in einer Grundhaltung der *Erlaubnis* zu suchen. Wird diese Unterscheidung von nationalen Akteuren (Exekutive, Legislative und Judikative) bei der Anwendung und Auslegung der Unionsbürgerschaft *angemessen* beachtet? (2) In welchem Ausmaß wurde die Kultur der Rechte durch den geänderten Rechtsstatus der EU-Charta für Grundrechte gestärkt? Anders ausgedrückt: Nehmen die auf Rechten basierenden Argumente seit des Inkrafttretens des Vertrags von Lissabon im Jahr 2009 zu? (3) Wie ist der allgemeine *Ton* der nationalen Debatte in den Medien und allgemeiner in der Zivilgesellschaft über den Status der Unionsbürgerschaft und der damit verbundenen Rechte?

13. Sind Sie angesichts der Antworten auf die vorigen Fragen der Auffassung, dass die Umsetzung der Unionsbürgerschaft in Ihrem Mitgliedstaat auf nationaler Ebene als Teil der auf Rechten basierenden Freizügigkeit und konstitutionellen Kultur innerhalb der EU verstanden wird oder als ein Zusatz für das nationale Einwanderungssystem, das Menschen aus anderen Staaten die Erlaubnis für den Aufenthalt im Hoheitsgebiet erteilt?
14. Hat die bindende Wirkung der EU-Charta der Grundrechte nach dem Inkrafttreten des Vertrags von Lissabon im Jahr 2009 eine Rolle dabei gespielt, wie die Rechte von Unionsbürgern von nationalen Gerichten und Rechtsinstanzen ausgelegt werden?
15. Beschreiben Sie das Ausmaß, in dem Fragen zur Unionsbürgerschaft zu wichtigen Fragen in nationalen Medien wurden und wie nationale Medien mit diesen Fragen umgegangen sind. Wird die Berichterstattung der Medien von speziellen Themen beherrscht (z. B. Ausweisung, Sozialhilfeleistungen; abgeleitete Rechte von Bürgern aus Drittländern)? Wie *korrekt* ist die nationale Berichterstattung über Fragen zur Unionsbürgerschaft? Können Sie Hinweise auf den Einfluss der Medien auf die nationale öffentliche Debatte entdecken?

General report

Niamh Nic Shuibhne and Jo Shaw[1]

Introduction

Let us pause for a moment to consider the scale of the issue. In 2013, the population of the European Union stood at an estimated 507m person,[2] of whom around 20m are not citizens of an EU Member State. That leaves nearly 490m EU citizens resident within the EU and doubtless quite a number who are resident in third countries. Some 13m persons are resident in a Member State other than the State(s) of which they have citizenship, or, if they have the citizenship of the host State, are resident as migrant EU citizens.[3] This is the primary group of persons benefitting from the free movement rights associated with Union citizenship on a longer term basis, although there are, of course, many millions more who exercise these freedoms and rely upon their equal treatment rights on a daily or almost daily basis – as tourists and travellers, as frontier workers, as persons providing or receiving services on a cross-border basis, as consumers of products originating in another Member State. Union citizens who reside in another Member State still remain a small proportion of EU citizens overall, but they now constitute a sizeable group – equivalent to the population of a smallish Member State.

Union citizenship is a legal status established by the EU Treaties, which is additional to national citizenship (and dependent upon it). According to the Court of Justice, it is a status that is 'destined to be the fundamental status of nationals of the Member States'.[4] In this Report, by reference to data generated by national reports and supported by the insights of the Institutional Report, we attempt to uncover a little more about what it actually means, and

1. Niamh Nic Shuibhne, Professor of European Union Law, University of Edinburgh; Jo Shaw, Salvesen Chair of European Institutions and Director of the Institute for Advanced Studies in the Humanities, University of Edinburgh. The report was finalised on the 12th of March 2014.
2. See the data at http://europa.eu/about-eu/facts-figures/living/index_en.htm.
3. See the data at http://epp.eurostat.ec.europa.eu/statisticsexplained/ index.php/Migration_and_migrant_population_statistics.
4. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31.

how it is experienced as a legal status by those who rely upon the rights associated with it.

Moreover, as both a status and an ideal, Union citizenship stands at the interface of integration and constitutionalism, and is a barometer for key trends and influences at the current crossroads between the Member States and the European Union. It is also a status that is shared between and shaped by both levels of governance. What are the consequences and implications of that dynamic in reality?

The primary purpose of the questionnaire developed for this topic was to stimulate national reports that enable us to understand better how the rights attached to Union citizenship are developing and being applied within the legal orders of the Member States. To achieve that objective, we were interested, in the first instance, in examples that demonstrate how legislatures, administrations, and judiciaries are interpreting and applying the elements of EU citizenship that require implementation at national level. Fundamentally, are EU citizenship claims treated *differently from* or as a subsumed *part of* national immigration law?

We were also keen to gather evidence on how national actors are responding to case law of the Court of Justice relating to citizenship rights that sit outside the parameters of direct national implementation. For example, thinking about the boundary between national citizenship and EU citizenship, questions were asked about the rights that *static* EU citizens have, or do not have, and about how recent developments in this area have affected perceptions of EU citizenship within the Member States.

Analysis of this rich empirical data has enabled us to present a comparative perspective on the development of EU citizenship rights. Most situations involving the application of EU legal rights happen at national level, and never reach the EU institutions at all. The EUDO Citizenship Observatory and its existing datasets on the acquisition and loss of citizenship, and more recently on electoral rights, have started to fill a crucial information gap in this context (http://eudo-citizenship.eu/databases); but cross-tabulation of that data with the national reports prepared for the FIDE Congress enhances the available material on these questions, extends the dataset into several other dimensions of Union citizenship, and thus informs and deepens our understanding of the *reality* of Union citizenship very significantly.

As a secondary objective, we were also keen to get a greater sense of how Union citizenship is developing within and/or impacting upon *culture(s)* of citizenship. For example, how are EU citizenship rights being portrayed by the national media and in popular or civil society discourse? Media actors have an extraordinary platform from which to shape the tone of national de-

bate; have they acted responsibly (e.g. by providing accurate information on the applicable rights) in the specific context of Union citizenship? How is civil society discourse (e.g. as emerging through blogs and websites) responding to that steer?

Turning to questions of methodology, the span of Union citizenship and associated rights covers a potentially enormous field[5] and we decided, therefore, to focus on four key *citizen-specific* themes in the questionnaire. What we were seeking to understand is how national actors are interpreting and applying the *added-value* rights of Union citizenship i.e. rights beyond those attached to more established free movement categories, such as workers. Our four selected themes are:

A. Citizenship within Directive 2004/38;
B. Citizenship beyond Directive 2004/38;
C. The political rights of EU citizens;
D. The emerging culture(s) of citizenship.

By focusing on these distinct yet interrelated elements of the development and impact of Union citizenship, we seek to offer in our General Report a cross section of insights into how EU citizenship has (or has not) become embedded into national constitutional, legal, and political cultures. We also present reflections on the extent to which national law and practices influence EU law and practices, and vice versa. Finally, we try to identify key challenges affecting the realisation and enforcement of Union citizenship within the Member States, and to anticipate some emerging frontiers of citizenship's continuing evolution.

Two final points should be noted with respect to our general approach. First, noting that the context of and history behind the development of current EU law is presented so comprehensively in the Institutional Report, we have not tried to replicate that dimension of the story of citizenship rights here. Rather, the two Reports can be taken as complementary from that perspective. Second, noting the different versions (and thus pagination) of national reports that we have worked with over the duration of preparing this Report, we do not use specific page references when national reports are cited or short quotations are included in this Report. All references to national reports that fol-

5. This is one reason among several why we were grateful to the FIDE 2014 organising committee for giving us the opportunity to work as co-Rapporteurs on this topic, thus bringing to the table our complementary areas of expertise in this vast field.

low can therefore be taken to relate to the specific question being discussed unless otherwise specified.

Finally, we wish to thank Katarína Macdonald Tömölová for her invaluable research assistance on this project, supported by the School of Law at the University of Edinburgh; Kat led on the drafting for Question 15.

Citizenship *within* Directive 2004/38 – Stability of residence for Union citizens and their family members

The adoption of Directive 2004/38/EC[6] was a significant milestone in the regulation of Union citizenship. Its preamble articulates a dual ambition: to *simplify* and *strengthen* the right of free movement and residence of all Union citizens. In particular, it was anticipated that the application of EU rights by national legislatures, administrations, and judiciaries would be considerably improved by the existence of this detailed framework text. To explore the extent to which this has materialised in reality – and, in particular, to build on the Commission's disquieting 2008 report on the application of the Directive[7] – the questions discussed in this part of the Report engage with citizenship-specific elements of the Directive against a thematic concern about *stability* of residence for EU citizens and their family members when they move to and reside in host Member States. The questions address:

(1) Evolving definitions of **family members** and **relationships of dependency**;
(2) Potential challenges to residence stability generated by the Directive's **self-sufficiency** conditions;
(3) Ground-breaking *direct* **EU rights for family members** of Union citizens, including third country national family members;
(4) The revolutionary concept and rights of **permanent residence**;
(5) Express temporal limitations placed on **access to certain social security benefits**; and
(6) Intended distinctions between different groups of Union citizens in the context of **expulsion**.

6. 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, [2004] OJ L158/77.
7. COM(2008) 840 final.

Question 1

With respect to a Union citizen's family members, how have Articles 2, 3 and 5 of the Directive been transposed into national law? How have national courts dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?

Article 2: Definitions

For the purposes of this Directive:
1) 'Union citizen' means any person having the nationality of a Member State;
2) 'Family member' means:
   (a) the spouse;
   (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
   (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
   (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3) 'Host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

1.1. Article 2: Introduction

Article 2(1) confirms the basic gateway condition to Union citizenship that is laid down in Article 20 TFEU: the holding of Member State nationality. Article 2(2) then provides a definition of 'family members' of Union citizens – a definition that goes beyond previous legislation in certain respects. Building on the logic of the decision in *Reed*,[8] for example, Article 2(2)(b) includes the registered partner of a Union citizen – but only if such partnerships have been, first, contracted 'on the basis of the legislation of a Member State' and, second, are treated as equivalent to marriage in the legislation of the host State (and in accordance with any conditions also laid down in that legislation). For direct descendants of Union citizens (or of their spouses or registered partners) who are over 21 – and also for direct relatives in the ascending

8. Case 59/85 *Reed* [1986] ECR 1283.

line of the citizen (or of his or her spouse, or his or her registered partner) – the criterion of 'dependency' must be met.

Article 2(3) reflects a critical point about the scope of Directive 2004/38 generally: it applies only when a Union citizen has moved to another State. Conversely, the Directive was not intended to address situations that are purely internal to a Member State[9] and it does not address – directly at least – situations in which a Union citizen returns to his or her home State after a period of residence in another Member State. Whether or not the conditions and limitations contained in the Directive apply *indirectly* in such situations is one of the issues addressed very recently by the Court of Justice.[10] Interestingly, some States had already addressed the question. For example, the report for Finland mentions that the national rules implementing Directive 2004/38 apply to the family members of Finnish citizens 'if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later'. Questions about differential treatment of home State nationals in a 'returning' situation are also raised in the reports for Estonia and Ireland.

Three general points on the scope of Article 2 can be noted here. First, the significance of qualifying as an Article 2(2) family member who accompanies or joins a migrant Union citizen is seen in Article 3(1): simply put, the substantive provisions of the Directive – including the right to work in the host State – will apply.

Second, while the situation of registered partners is rendered host State conditional in Article 2(2)(b), the legal position of same sex *spouses* is not clear: do *all* spouses fall within Article 2(2)(a)? Such an interpretation could

9. Confirmed in e.g. Case C-434/09 *McCarthy* [2011] ECR I-3375, paras 39-41.

10. Case C-456/12 *O* and Case C-457/12 *S*; both judgments were delivered on 12 March 2014. On this point, the Court ruled: '[s]o far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in a host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 20004/38 for the grant of such a right of residence ... in a case where that citizen has exercised his right of freedom of movement ... Even though Directive 2004/38 does not cover such a return, *it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national*, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third−country national who is a member of his family' (*O*, para. 50; emphasis added).

be supported by recital 31 of the preamble, which confirms that the Directive 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as ... sexual orientation'.

Third, the criterion of dependency is not (in contrast to Article 3(2), discussed in Section 1.3 below) elaborated, suggesting that it should be defined in accordance with EU rather than national law. In *Iida*, the Court stated that a status of dependency 'is the result of a factual situation characterised by the fact that *material support* for the family member is provided by the holder of the right of residence'.[11] In *Reyes*, it added that a descendant over 21 does not need 'to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself' and, moreover, 'the fact that a relative – due to personal circumstances such as age, education and health – is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in that provision that he be a 'dependant'.'[12]

Importantly, however, the Court also confirmed in *Reyes* that a dependent family member who does subsequently engage in economic activity in the host State does not lose his or her right of residence there, since to conclude otherwise would 'infringe Article 23 of [the Directive], which expressly authorises such a descendant, if he has the right of residence, to take up employment or self-employment'.[13]

1.2. Transposition, application, and interpretation of Article 2

No widespread problems with the transposition of Article 2 into national law were raised in the national reports, with most noting that the provision has

11. Case C-40/11 *Iida*, judgment of 8 November 2012, para. 55 (emphasis added), affirming the pre-Directive position established in e.g. Case C-1/05 *Jia* [2007] ECR I-1, para. 35. For national case law examining the extent of material dependency in the context of Article 2(2), see the reports for Slovenia, and Spain (which also addresses dependency beyond *economic* need, on the premise of respect for family life).
12. Case C-423/12 *Reyes*, judgment of 16 January 2014, paras 25 and 33.
13. *Reyes*, paras 31-32.

been translated very directly or literally in the relevant national measures.[14] In fact, it is clear that several States have chosen to provide for more extensive protection of family members than Directive 2004/38 actually requires. Nevertheless, the definitions codified in the Directive raise critical questions about equal treatment for different kinds of families and relationships.

1.2.1. Definition of family members

Here, there is considerable variation with respect to the inclusion/exclusion of same sex partnerships in particular, with examples ranging from: recognition of same sex marriage on the same basis as heterosexual marriage (e.g. France, the Netherlands, Sweden); recognition of same sex registered partnerships as equivalent to marriage (e.g. Finland, Ireland); no recognition of same sex registered partnerships in law (e.g. Estonia, Italy, Malta);[15] and express legal designation of marriage as being between a man and a woman only (e.g. Croatia, Poland).

It was noted in Section 1.1 that the position of same sex spouses under the Directive is not yet clear.[16] What can be said, however, is that the rights extended to the same sex partners of Union citizens clearly varies across the Member States, having obvious implications for the exercise of free movement and residence rights – something that is increasingly difficult to reconcile with a status of citizenship in a Union committed to the prohibition of discrimination on the grounds of sexual orientation. Article 2(2) also excludes partnerships contracted outwith the Union Member States. These limitations are amplified by the lesser legal protection extended to partners in a 'durable relationship' under Article 3(2)(b) of the Directive, discussed further in Section 1.3 below.

On the application and interpretation of Article 2(2) – and providing a good example of national responsiveness to the dynamic nature of EU legal change through case law – several reports refer to the removal from national rules of conditions requiring prior lawful residence in the EU for third coun-

14. Cf. the report for Spain, where the annulment of several provisions of the national implementing measure by the Supreme Court is discussed in detail (e.g. to address the exclusion of separated spouses); and the report for Switzerland.
15. Additionally, in some States, there is further potential for confusion where registered partnerships for same sex couples are not recognised in national law and specific conditions exist for recognition of other forms of partnership (see e.g. the discussion on 'common law marriage' in the report for Croatia).
16. This issue has arisen for consideration by national courts in Italy.

try national family members, following the Court's ruling in the *Metock* case.[17] Another theme that emerges in this context is a concern to ensure that family relationships – and marriages in particular – are *genuine* in connection with the interpretation and application of Article 2(2).[18] This issue was also raised in responses to questions about expulsion, and is discussed further in Section 6.2.5 below.

Finally, national courts have also has been engaged in the interpretation of some of the ambiguities of the Directive. The reports for Austria and Croatia note, for example, that the reference to 'direct descendants' in Article 2(2)(c) has interpreted as including grandchildren. In some States, national courts had made relatively generous assumptions that were later circumscribed by Court of Justice case law.[19]

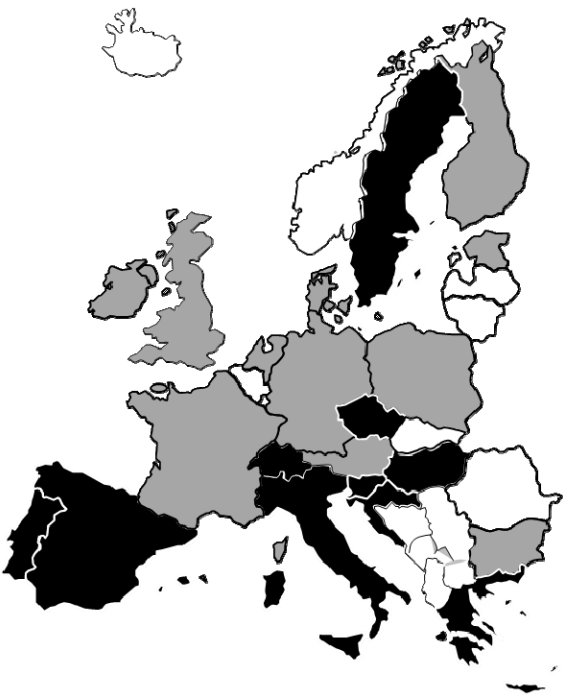
1.2.2. More extensive national protection

There are several examples of States extending more protection than the Directive requires with respect to defining family members. Some reports provide specific examples;[20] but two thematic trends can be discerned more generally.

First, several States extend the scope of the Directive to the family members (irrespective of nationality) of their own *static* nationals, as illustrated below:[21]

17. Case C-127/08 *Metock and others* [2008] ECR I-6241; see e.g. the reports for Denmark, Finland, Ireland, and the UK (however, that report also points to judicial criticism levelled at the UK Government for the slowness of its response).
18. See e.g. the reports for the Czech Republic, Cyprus, Denmark, and the UK. In line with the recognition of cohabiting partners as family members (see below), the report for Sweden outlines related national case law on the definition of 'cohabitant'. Other reports raise the distinction between civil and religious marriage (e.g. the report for France).
19. E.g. in the UK, the Court of Appeal held that dependency could, in its view, arise in the host State i.e. a situation of dependency need not be pre-existing in the country from which a Union citizen's family member has come (*Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358); but cf. *Reyes*, para. 30. Another example of national/EU judicial divergence can be seen with respect to Article 3(2) of the Directive (e.g. cf. *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144 and Case C-83/11 *Rahman*, judgment of 5 September 2012, para. 33).
20. E.g. in the report for Bulgaria, it was reported that the legislation transposing Article 2 refers generally to dependent 'descendants' and 'relatives in the ascending order', without the *direct* proviso contained in Article 2(2).
21. The majority of States achieve this through expanding the personal scope of the Directive's implementing measures; but the issues can also emerge through national case law (see e.g. the reports for Cyprus, Poland, and Spain).

STATES THAT DO/DO NOT EXTEND THE SCOPE OF DIRECTIVE 2004/38 TO STATIC NATIONALS*



YES	NO
CROATIA	AUSTRIA
CZECH REPUBLIC	BULGARIA
GREECE	CYPRUS
HUNGARY	DENMARK
ITALY	ESTONIA
PORTUGAL	FINLAND
SLOVENIA	FRANCE
SPAIN	GERMANY
SWEDEN	IRELAND
SWITZERLAND	MALTA
	NETHERLANDS
	POLAND
	UNITED KINGDOM
10 STATES	*13 STATES*

* This map serves for reference and illustrative purposes only and does not reflect accurate geographic scale. It has been produced under the free Creative Commons Attribution-NoDerivs 3.0 Unported License (see http://ppt-toolkit.com).

Noting the endurance of the debate on whether reverse discrimination can and/or should be addressed at EU level, a debate that has only intensified following the ruling in *Ruiz Zambrano*,[22] it is important to remember that through the application of national legal requirements on equal treatment, several States strive to ensure that situations of reverse discrimination will not actually occur in the first place in connection with, primarily, family reunification rights.[23]

Second, several States extend the scope of the Directive to family members other than those specified in Article 2(2) – in essence, collapsing together the different types of families and relationships that are distinguished by Articles 2 and 3 of the Directive in a way that clearly benefits Union citizens. This issue is picked up again in Section 1.4 below but, for example, it was reported that the definition of 'family members' for the purpose of the status and rights conferred by Article 2(2) also includes:

Bulgaria:	'persons in factual cohabitation with a Union citizen'
Denmark:	'a durable relationship under the same roof'
Estonia:	'people who, in the country from which they arrive, are ... members of the household of the Union citizen'
Finland:	'persons living continuously in a marriage-like relationship in the same household regardless of their sex ... if they have lived in the same household for at least two years', with the latter condition not applying 'if the persons living in the same household have a child in their joint custody or if there are other weighty reasons for it'
Hungary:	'the person having parental custody over a minor child who is a Hungarian national'
Slovenia:	'a partner with whom the EU citizen resides in a long-term partnership'
Sweden:	'cohabiting partners'

22. Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; see e.g. K Hailbronner and D Thym, 'Comment on Case C-34/09 *Ruiz Zambrano*' (2011) 48 CMLRev 1253; H van Eijken and SA de Vries, 'A new route into the Promised Land? Being a European citizen after *Ruiz Zambrano*' (2011) 36 ELRev 704; and F Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration' (2011) 17 ELJ 34.
23. See e.g. the case law on this point discussed in the reports for Cyprus, and Spain.

However, looking across the responses to the questionnaire as a whole, it will become more apparent that when States depart from a literal transposition of the Directive's provisions, they tend on balance to add *more restrictive* than *rights-enhancing* additional national conditions.

Article 3: Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

1.3. Article 3: Introduction

Article 3(1) of the Directive confirms an essential point already mentioned in Section 1.2: that the measure 'shall apply' to Union citizens who move to *or* reside in a Member State other than that of which they are a national, and to their family members per Article 2(2) who accompany *or* join them.

Article 3(2) has a wider personal scope than Article 2; but the rights conferred by its material scope are significantly different. First, on personal scope, the provision applies to 'other family members' who meet specified conditions as well as to the partner (with no reference to gender) with whom a Union citizen has a 'durable relationship'. In Article 3(2)(a), we see a wider understanding of dependency beyond material support, noting the inclusion of 'serious health grounds'. There is also a more general reference to 'members of the household' of a Union citizen who are not subject to any conditions of dependency, the only requirements appearing to be that the connection to the Union citizen was established 'in the country from which [the

members of the household] have come' and that the person is a 'family member' – the precise meaning of which (e.g. objective blood relationship only?[24]) is not specified in the Directive.

Second, as regards material scope, the Directive per se does not apply to persons who meet the personal scope criteria of Article 3(2). Rather, the host Member State is required to 'facilitate' their entry and residence, undertake an 'extensive examination' of their personal circumstances, and justify any denial of entry or residence decisions.

The Court of Justice discussed the scope of Article 3(2) in *Rahman*. There, Article 3(2) was considered to 'impose an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen'.[25] The purpose of the provision was linked to recital 6 of the Directive's preamble i.e. 'to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) ... but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances'.[26]

The Court then articulated the limits of Article 3(2) and the parameters of related State discretion in more detail. When examining the personal circumstances of an applicant, States should 'take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join'.[27] But the Court acknowledged – noting the reference to 'national legislation' in Article 3(2) – that 'each Member State has a wide discretion as regards the selection of the factors to be taken into account'.[28] In that context, a State may include in its legislation 'particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of de-

24. Cf. the reference in the report for Ireland to a case in which the High Court suggested that 'household' might cover 'an elderly housekeeper now retired who had lived with and been supported by the family over many years and thus was part of the household' (*Wang v MJLR* [2012] IEHC 311, para. 21).
25. Case C-83/11 *Rahman*, judgment of 5 September 2012, para. 22; in para. 25, the Court also confirmed such an applicant's entitlement to judicial review of a refusal decision.
26. *Rahman*, para. 32.
27. *Rahman*, para. 23.
28. *Rahman*, para. 24.

pendence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State'.[29] The Court also confirmed that 'the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent'.[30]

1.4. Transposition, application, and interpretation of Article 3

Picking up on the point made in Section 1.2 on the collapsing together of Articles 2 and 3 of the Directive, it is remarkable to note that several States extend a derived *right* to enter and reside within their territory to persons that fall under the personal scope of Article 3(2)[31] – resulting in considerably stronger legal protection for a much wider range of family members than EU law actually requires. More generally, two key issues emerged: questions connected to the transposition of Article 3(2); and questions that arise because of the discretion inherent in its application.

1.4.1. Transposition

While, once again, no recurring problems with the transposition or application of Article 3 became apparent, specific exclusions from national implementing measures were reported. At the time of reporting, Article 3(2) had not been directly transposed into German or Polish law (but an amendment of the relevant legislation was proceeding through the Polish parliament). In the report for Spain, it was noted that Article 3(2)(a) had not been transposed; and in Estonia and Malta, the reference to partners in a durable relationship in Article 3(2)(b) was excluded.[32]

We also found evidence of additional conditions that appear to go beyond the level of discretion permitted by the Directive (discussed separately below in Section 1.4.2). In the report for Estonia, for example, it is suggested that national law would seem to require 'that a *dependent* person must already have resided together with the Union citizen prior to arriving in Estonia' – a

29. *Rahman*, para. 38.
30. *Rahman*, para. 35.
31. See e.g. the reports for Bulgaria, Denmark, and Estonia.
32. For discussion of a case before the Constitutional Court that similarly ignored the potential implications of Article 3(2)(b) for unmarried partners, see the report for Malta.

requirement that may, it is pointed out, 'prove to be problematic' in light of the Court's decision in *Rahman*.[33] This example reflects the fact that the criteria in Article 3(2) are sequential rather than cumulative – dependent *or* member of household *or* serious health grounds – but that they are not necessarily applied in that way in national law.

Similar examples of additional conditionality can be seen in the reports for Hungary, where it is noted that the national implementing legislation specifies a period of 'at least one year' with respect to dependency or being a household member 'in the country from which they are arriving'; and the UK, where a prior EEA residence requirement had been imposed before the ruling in *Metock*.[34]

1.4.2. The impact of national discretion in practice

Article 3(2) expressly requires that the obligation to facilitate entry and residence rights should be discharged by a State 'in accordance with its legislation'. That requirement – the implementation of which is taken seriously by the Commission[35] – ensures that Union citizens are informed about the procedures that will be applied if they seek such rights in a host State for family members that come within the personal scope of the provision. However, the discretion conferred on the Member States – acknowledged by the Court in *Rahman* – clearly has an impact on the development of citizenship *practice* in reality.

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33. See the report for Estonia, referring to paras 27-35 of the decision in *Rahman*; see especially, para. 31 ('there is nothing to indicate that the term 'country from which they have come' or 'country from which they are arriving' ['pays de provenance'] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a 'dependant' of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen') and para. 33 ('such ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State. On the other hand, the situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent').
34. The report also notes that this requirement was deemed to be unlawful by national courts, and that the relevant national regulation was subsequently amended.
35. See e.g. the report for Cyprus.

What might constitute a 'durable relationship, duly attested' provides a good example of this. The requirement in Article 3(2) that national authorities 'shall undertake an extensive examination of the personal circumstances' does appear to be widely recognised.[36] And it is not surprising to see that relatively short periods of 'common life' will not be sufficient to constitute the requirement of durability.[37] It is also to be expected that States require more than formal proof in these circumstances. For example, in Hungary, the fact that the Union citizen and the relevant family member have the same registered address will not be enough; instead, the fact that they have been 'living together in one household' for at least one year needs to be verified. The report for Greece details other criteria that can 'serve as proof of the durability of the relationship' i.e. 'the undertaking of shared long-term legal, social or financial commitments (for example, a mortgage to buy a house) ... especially if the EU citizen and his/her partner live under the same roof'.

Beyond more obvious cases, however, we see variation. In the report for Denmark, reference is made to a Supreme Court case[38] in which an Iraqi national failed to demonstrate that he was in a durable relationship with a Union citizen even though, according to the national report, 'it was not disputed that the couple had known each other for at least six years, and had in fact lived together for at least one year. The fact that they had a child together and another to come did not alter this finding'.

But having a child or children together is more decisive, in a positive sense, in other States. For example, referring to a ministerial decision, the report for Greece notes that having or adopting children together means that a durable relationship is then 'irrefutably presumed to exist'. In the report for Hungary, it is noted that, in accordance with a decision of the Supreme Court,[39] a declaration of paternity where the actual paternal relationship has 'no real substantive elements' will not suffice; indeed, it was suggested that claiming residence rights on that basis was 'incompatible with the primary purposes of EU law and national law'. The report for the Netherlands emphasises that, responding to criticism of undue restrictiveness from the Council of State, policy was revised in June 2013 to make it clear that the evidence

36. E.g. the report for Hungary observes that this principle has been recognised by the Supreme Court 'in several judgments'.
37. E.g. the report for France notes two cases in which periods of 'common life' ('*une communauté de vie*') for three and four months were not sufficient.
38. Judgment of the Supreme Court of 24/8/12 in Case 58/2012, reported in U.2012.3399H.
39. Kfv.II.37.566/2011/6.

specified in applicable policy guidance was not to be considered as precluding other means of proof of a durable relationship; rules that *are* specified include cohabitation for six months (demonstrated by a common municipal address registration if the couple cohabited in the Netherlands, or through e.g. a joint lease or utility bills if the couple had cohabited in another country) or having a child together.

Article 5: Right of Entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

3. The host Member State shall not place an entry or exit stamp in the passport of family members who are not nationals of a Member State provided that they present the residence card provided for in Article 10.

4. Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence.

5. The Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.

1.5. Article 5: Introduction

Article 5 of the Directive outlines formal aspects of the right to enter a host Member State for Union citizens and for third country national family members. The provision captures key principles from the case law, reflecting the fact that the right of entry is communicated rather than constituted by relevant documentary permits.[40] The explicit emphasis on proportionality and implicit concern for respect for family life in paragraphs (4) and (5) signal another important example of this case law-formed approach. Our aim here was to discover if the safeguards established are providing *effective* protection in reality.

1.6. Transposition, application, and interpretation of Article 5

The majority of the national reports confirm that the implementation of Article 5 has been straightforward.[41] Most authors also report that no evidence questioning the effectiveness of the procedures implemented has emerged to date, noting in particular the absence of national case law on these issues. Some reports expressly suggest a positive impact.[42]

The importance of Article 5 for third country national family members is the primary theme that emerges from the data presented. Many reports make express reference to the establishment of an accelerated procedure for the issuing of visas to third country national family members in accordance with

40. See e.g. Case C-459/99 *MRAX* [2002] ECR I-6591, esp. paras 57-61.
41. An exception to this general impression can be seen in the report for Ireland, noting strong judicial criticism of 'the State's implementation and executive application of Article 5 of the Directive' notwithstanding the fact that the actual wording of the implementing measure 'does reflect the provisions of Article 5' (*Raducan v Minister for Justice, Equality and Law Reform* [2011] IEHC 224). See also, the report for Slovenia, where it is noted that the 'procedural safeguards contained in Article 5(4) of the Directive have not been transposed' into national law'; and the report for the UK, noting a preliminary reference currently pending before the Court of Justice (Case C-202/13 *McCarthy and others v Secretary of State for the Home Department*, [2013] OJ C189/6) asking (inter alia) whether 'Article 35 of Directive 2004/38/EC ... entitle[s] a Member State to adopt a measure of general application to refuse, terminate, or withdraw the right conferred by Article 5(2) of the Directive exempting non-national EU family members who are holders of residence cards issued pursuant to Article 10 of the Directive ('residence card holders') from visa requirements'.
42. See e.g. the reports for Austria ('valuable and appropriate'), and Finland ('significant procedural protection').

Article 5(2),[43] and to other preferential procedures that are applied in such cases.[44] In that context, reports also discuss a requirement of proof of the family relationship.[45] Others address the 'reasonable period of time' provided for in Article 5(4).[46]

Additionally, some States implement reporting mechanisms, as permitted by Article 5(5). In the report for Croatia, for example, it is stated that EEA nationals and their family members must 'register their address, temporary residence or permanent residence at the latest eight days from the date of arrival ... or from the change of address, temporary residence or permanent residence'. A fine of HRK 100.00 (approx. €13) applies where there has been a failure to comply with this obligation.

The system outlined in the report for Italy does not establish an *obligation* to report presence within the Italian territory to the police. However, 'if the Union citizen has not reported to the police office, s/he shall be regarded as having stayed in Italy for more than three months, unless s/he can prove otherwise' – a position that has obvious implications for the citizen vis-à-vis the conditions outlined in Article 7 of the Directive, discussed in Section 2 below.[47]

1.7. Question 1 – emerging issues and themes

Directive 2004/38 makes choices when it establishes specific definitions of the concept of **family member**, the political background to which is detailed in the Institutional Report. However, the result is that some types of family

43. See e.g. the reports for Denmark ('not exceeding 15 days unless the situation is exceptional and duly justified'), Finland (reporting evidence from an embassy website that 'processing times for the free visas of EU/EEA citizens' TCN family members varies between 3 to 10 days as compared to the normal 15 days'), and Hungary ('within ten working days').
44. E.g. the report for Finland notes that an oral hearing may be arranged for visa applicants who are third country national family members, which is not part of visa application procedures more generally; decisions denying a visa in such cases are 'more comprehensive' as well as benefitting from 'enhanced legal safeguards in the form of appeals which follow a more thorough and substantial procedure'. See similarly, the report for Sweden.
45. See e.g. the reports for Denmark, and Estonia.
46. See e.g. the report for Greece ('one month').
47. The report also notes that registration with the municipal authority of the place of domicile is also required for residence in Italy for more than three months, an obligation that could similarly, then, be deemed to have been infringed in such cases.

circumstances and relationships are more privileged than others, which may well, to use the language of free movement restrictions, disadvantage certain Union citizens if they choose to move to another State or even deter them from moving in the first place.

Tellingly, the Institutional Report notes that the 'issue of the protection Directive 2004/38/EC should afford to **same-sex relationships and unmarried partners** was the most divisive issue during the discussions in the Council'. The compromise that was adopted raises challenging questions about the locus of responsibility for *pioneering* as well as *reflecting* social change when the equal treatment of Union citizens is clearly at stake. It also suggests a potential gap between EU, ECHR, and national approaches to discrimination that may become even more apparent as the free movement equality paradigm is likely to shift beyond a conventional focus on nationality discrimination to other forms of discriminatory treatment, especially in light of the now-binding effect of the Charter of Fundamental Rights.[48]

The level of **national regulatory discretion** permitted through the application of Article 3(2) is also important to note. The resulting legal distinction between persons that come within the scope of Article 2(2) and Article 3(2) respectively has been characterised as a distinction between members of the 'nuclear family' and 'other family members'.[49] At one level, this approach reflects the fact that Union citizenship and free movement rights more generally involve *shared* EU/Member State competence. But the outcome is that citizens encounter different levels of recognition and protection of their family circumstances in different States – something that the Directive exists precisely to guard against. This issue thus raises one of our Report's central thematic questions about **cultures of citizenship** right from the very outset of the questionnaire i.e. the extent to which citizenship rights are implemented from a *rights*-based or *permission*-based perspective, and the differences that such a choice actually makes to *citizenship practice*.

48. See e.g. the report for Cyprus on this point, in connection with the 'evolving notion and meaning of "family" and "marriage"'; there, it is also noted that the Cypriot Equality Body has acknowledged the discretion conferred on Member States by the Directive, but referred also to 'broader considerations' on the issue of non-discrimination, principally the ECHR, general principles of EU law (including proportionality), and the case law of both the Court of Justice and the European Court of Human Rights.
49. See e.g. AG Mengozzi in *Reyes*, paras 33-37 of the Opinion.

Another dynamic that surfaces in some of the national reports at this stage[50] is the **interplay between national legislative and/or administrative authorities and national courts and tribunals** in the realisation of citizenship rights that comply with EU legal obligations. Significantly, national courts tend to be portrayed, on the whole, as *correcting* errors made in either transposing or applying the Directive. This point leads to two important observations – about the importance of *legal disputes* in the furthering of citizenship rights; but also, about recognising that *relatively few* individuals will actually persist with a legal challenge in the first place – points picked up again in several of the sections that follow.

Finally, while we tend to think of Union citizens as a relatively composite group, what emerges from the data reported is that there are at least **five different groups of Union citizens** that need to be considered: (1) migrant Union citizens residing in host States; (2) migrant Union citizens who have returned to their home States; (3) static Union citizens residing in their home States for whom EU legal protection applies in exceptional circumstances (see further, Section 7.1 below); (4) static Union citizens residing in their home States for whom EU legal protection has been extended by analogy through national law; and (5) static Union citizens residing in their home States for whom no EU protection is relevant. Directive 2004/38 applies directly to Union citizens in category (1) only; primary citizenship rights conferred by the Treaty apply to those belonging to categories (2) and (3).

The implications of this distinction are discussed more fully under Q7 below, but a preliminary comment can be made here. On the one hand, Directive 2004/38 has certainly simplified the 'sector-by-sector, piecemeal approach' (recital 4) previously applied to the regulation of free movement rights, in the sense of consolidating several legislative measures at EU level. But perhaps what we now see is that **a more *substantive* diffusion in the movement and residence status of citizens persists** notwithstanding the simplification of the framework, and thus presenting a different kind of challenge for *stability of residence*. There is a distinction, in other words, between simplification of the *expression* of rights and complexity of their substantive *application.* Life is complicated, and EU regulation of citizenship and free movement rights cannot change this. But it should try to avoid exacerbating it.

50. See e.g. the responses to Question 1 in the reports for Spain, and the UK.

Question 2

Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?

Article 7: Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
(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; or
(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, 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;
or
(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3 ...

2.1. Introduction

The conditions for lawful residence in a host Member State for longer than three months create, broadly speaking, two alternate obligations for Union citizens: either being engaged in economic activity (as a worker or self-employed person); or having 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of

the host State' (noting the different phrasing in Article 7(1)(c) for students) as well as 'comprehensive sickness insurance'. The Institutional Report outlines the origins of these conditions in three Directives adopted in the early 1990s that extended free movement and residence rights to Member State nationals who were not economically active, as well as the history of their retention in Directive 2004/38.

It is a general principle of free movement law that the grounds on which a Member State may restrict free movement rights – public policy, public security, or public health – may not be invoked to serve economic ends.[51] That position is affirmed explicitly in Article 27(1) of the Directive,[52] but recital 16 of the preamble is more nuanced:

> 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 job-seekers* as defined by the Court of Justice save on grounds of public policy or public security [emphasis added].

The proportionality principle frames the intended distinction between 'reasonable' and 'unreasonable' burden. Relatedly, Article 14(3) of the Directive confirms that '[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' (emphasis added) – an approach confirmed by the Court in *Brey* through its citation of the criteria listed in recital 16.[53]

The Court emphasised that 'the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member

51. E.g. Case C-35/98 *Verkooijen* [2000] ECR I-4071, para. 48: 'according to settled case law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty'.
52. The report for Germany notes that this distinction is also clearly drawn in national law.
53. Case C-140/12 *Brey*, judgment of 19 September 2013, para. 69.

State'.[54] But even accepting that 'the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of [the Directive]',[55] it has to be acknowledged that recourse to the host State's social assistance system *can* be a legitimate factor in expulsion decisions in appropriate cases.[56]

Article 7 should also be read in conjunction with Article 8(4), which provides:

> 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.

In the Institutional Report, the position taken in the Commission's 2009 Transposition Guidelines is reaffirmed i.e. 'the notion of sufficient resources should be assessed against the national criteria to be granted basic social assistance benefit, not any social assistance benefit Member States may provide for in their national laws'.[57] The Court of Justice confirmed this view in *Brey*.[58] Importantly, however, the Court also clarified that 'although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned'.[59]

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54. *Brey*, para. 75.
55. *Brey*, para. 71.
56. See Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 42 '[t]hat interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it'. See further, however, the report for France, referring to a case in which the *Conseil d'Etat* held that an expulsion decision based on the insufficiency of resources can be taken even if the person concerned has *not yet* resorted to the social security system.
57. The Institutional Report refers to COM(2009) 313 final, at pp. 8-10.
58. *Brey*, para. 67.
59. *Brey*, para. 68. See further, Section 13.4 below.

The requirement of self-sufficiency that Article 7 embodies is one of the most controversial features of citizenship law. As the Court of Justice has acknowledged, the condition of self-sufficiency 'is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances'.[60] However, recognition of this fact, however politically expedient, clearly challenges the conventional view that aims of a 'purely economic nature' are excluded from consideration as a public interest justification for restrictions on free movement.

At present, the significance of the self-sufficiency requirement and the legitimacy of its various aims have been accentuated by the tenor of political and public debate on intra-EU migration, discussed in more detail below in the discussion on Q15. In connection with Q2, we sought to determine the extent to which a failure to satisfy the conditions set out in Article 7 features in national decision-making on the expulsion of Union citizens from host States, against the backdrop of the framework outlined briefly above – a framework that reflects both a permitted sphere of discretion for the Member States and the determining of the outer boundaries of that discretion through general principles of EU law.

2.2. Article 7 in the context of expulsion

In most of the reports submitted, it is noted that there is no evidence – from reported case law, at least – that decisions on expulsion have been based on purely economic grounds.[61] That does not necessarily mean that the possibility is absent from relevant national rules.[62] But the authors of several national reports distinguish between cases where either a residence permit and/or entitlement to social assistance is denied, on the one hand, and cases that lead to

60. *Brey*, para. 55.
61. See e.g. the reports for Austria, Bulgaria, Croatia, Estonia, Greece, Hungary, Italy, Malta, Poland, Portugal, Slovenia, Spain, and Sweden.
62. See e.g. the report for Finland; the imprint of proportionality is also evident here, however, noting that the prospect of Union citizens and their family members becoming an 'unreasonable burden' on Finland's social security system is characterised by 'resorting *repeatedly* to social assistance' (emphasis added). See also, the reports for France, Germany, and Sweden. Cf. the report for Poland, where it is noted that 'once the card of residence is granted, it may not be retired on economic grounds. The residence card may be annulled only in exceptional cases, namely when it was obtained as a result of submitting false documents or fraudulent information'.

actual expulsion orders on economic grounds, on the other.[63] In the report for the UK, for example, the authors note that:

> The solution adopted by the UK courts is to treat EU citizens who do not enjoy a right of residence by virtue of [Article 7 of the Directive] as simply 'present' in the United Kingdom. That status does not confer any right of residence in the UK under either EU or national law. Such persons are deemed subject to UK immigration control and, therefore, liable to removal by the Secretary of State.

Evidence of clear progression to expulsion decisions on the basis of economic circumstances is provided only in a minority of the reports. The report for Denmark cites information published by a Danish NGO in this context. Similarly, in the report for the UK, and picking up on the text extracted above, the authors point to 'clear evidence of targeted administrative efforts to deport EU citizens from the UK on grounds that are inherently linked to economic considerations ... at least with respect to specific categories of non-economically active EU citizens'. To illustrate the implications of the strategy in practice, 'a pilot scheme aimed at removing homeless EEA nationals from the United Kingdom' is discussed.

Importantly, it was emphasised in several reports that the rationales underpinning expulsion decisions can be blurred together. As the report for Denmark points out, 'some expulsions on grounds of protection of the public order are inherently linked to economic considerations'. In that connection, the report notes that 'fines for minor offences, such as 'squatting' have justified expulsion on grounds of protection of the public order, but were annulled by the Supreme Court'. Similarly, in the report for Sweden, it is noted that '[t]here are for example situations where Union citizens have been expelled from Sweden because of begging or prostitution, in both cases because of dishonest self-support. However, neither begging nor to work as a prostitute is criminal in Sweden'. These issues are picked up again in the discussion on Q6 below.

63. See e.g. the reports for the Netherlands, and the UK. Similarly, in the report for Ireland, reference is made to a decision in which a residence card was denied, but no expulsion order was made because 'the applicant had not established any basis for an Article 7 entitlement' (referring to *Singh and Anor v Minister for Justice, Equality and Law Reform* [2010] IEHC 86).

2.3. Determining self-sufficiency in practice

Short of expulsion scenarios, the responses to Q2 also generated evidence about administrative guidelines and procedures developed for the application of Article 7 in practice. In most of the reports, it was clear that national implementing measures expressly incorporate the obligation to evaluate the personal circumstances of the individual concerned, as required by Article 8(4) of the Directive.[64] In the report for Poland, for example, it is noted that proof of sufficient resources can be demonstrated by means such as the possession of a credit card 'or a certification of having funds at a bank or other financial institution confirmed by a seal and a signature of an authorized officer of the bank or institution, issued one month before submitting an application for registration of stay at the latest'. The report for France is one of the few in which reference is made to administrative guidelines that address the relative comprehensiveness of national/other sickness insurance. That report also alludes to the fact that, as confirmed by EU case law, financial resources can be provided on behalf of the Union citizen by a third person;[65] but the relevant national guidance requires, in such situations, that the Union citizen must justify the sufficiency and duration of such resources.

However, more problematically, it also appears that some States either have in the past imposed or continue to impose minimum quantitative thresholds for the determination of sufficient resources.[66] It can also be seen that additional conditions have been attached to the application of Article 8(3) of the Directive,[67] such as a requirement to submit proof of accommodation.[68] In

64. In the report for the Netherlands, reference was made to a case in which it was held that 'municipalities are under an obligation to assess *themselves* whether the EU citizen has a right of residence. They cannot rely on the residence status as recorded by the immigration authorities' (emphasis in original).
65. E.g. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
66. See e.g. the reports for Cyprus, Denmark, and France. These conditions are not necessarily addressed only to citizens who are not engaged in economic activity; see e.g. the report for Cyprus, noting that while the Commission had confirmed (in letters sent to the Cypriot Government) that national law correctly transposed Article 7 of the Directive, 'administrative practice deviates from that by requiring that the workers demonstrate certain income for themselves and their families to recognise their right to residence under art. 7(1)'.
67. With respect to periods of residence longer than three months, Article 8(3) provides: 'For the registration certificate to be issued, Member States may only require that – Union citizens to whom point (a) of Article 7(1) applies present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons; – Union citizens to whom

the report for Estonia, for example, the requirement of a registered place of residence as being 'the constitutive element of a Union citizen's right of residence' for periods longer than three months is highlighted as a 'questionable' linkage vis-à-vis the idea of proportionate sanctions for failure to comply with registration procedures suggested within Article 8 of the Directive.[69] The author also recalls recital 11 of the preamble, which states that '[t]he fundamental and personal right of residence in another Member State is conferred directly on citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures'. In contrast, however, the same report also provides a rare example, in this context, of more extensive protection than EU law requires.[70]

The report for Denmark outlines another anomalous national practice: here, it is reported that '[d]ecisions refusing or terminating the right of residence on the specific ground of lack of sufficient resources can only be taken

point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein; – Union citizens to whom point (c) of Article 7(1) applies present a valid identity card or passport, provide proof of enrolment at an accredited establishment and of comprehensive sickness insurance cover and the declaration or equivalent means referred to in point (c) of Article 7(1). Member States may not require this declaration to refer to any specific amount of resources'.

68. E.g. report for the Czech Republic.

69. The first and second paragraphs of Article 8 provide: '1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities. 2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions'.

70. In that report, it is stated that the national implementing measure 'does not lay down any conditions for the right of residence of a Union citizen for more than 3 months in Estonia except the requirement to register one's residence in the population register. This means that the Union citizen does not have to prove employment, sufficient resources or valid health insurance coverage. However, the requirement of sufficient financial resources does come into play when a Union citizen who has come to reside in Estonia wishes to be joined by his family members who themselves are not EU nationals'. This distinction between Union citizens and third country nationals provides an interesting interpretation of the difference between reasonable and unreasonable burdens on the social assistance system.

within the *first 3 months of arrival* and by administrative decision'.[71] But Article 7 of the Directive makes it very clear that self-sufficiency conditions apply only to periods of residence for *longer* than three months.[72]

2.4. Question 2 – emerging issues and themes

Responses to Q2 indicate, overall, a reasonable approach to the evaluation of an individual's economic and personal circumstances and **little evidence that ready recourse to expulsion occurs** where Union citizens cannot demonstrate compliance with the conditions in Article 7 – whatever current political and media rhetoric might suggest. However, such citizens can be left in an **unstable liminal legal space** in consequence: 'present' but not lawfully resident in the host State, under EU or national law, until or unless the authorities do progress to issuing a residence permit – or making an expulsion order. Some of the issues raised thus provide a preliminary indication of **concern about the appropriate exercise of State discretion in the sphere of expulsion** – a point addressed in detail in Section 6 below.

The way in which Article 7 is being applied in practice also raises important questions about the **extent to which administrative practices conform** to the framework established by the Directive, as fleshed out by the case law of the Court of Justice. A related issue concerns how (or even whether) judicial interpretation of the Directive's concepts and definitions properly filters down to national authorities other than courts or tribunals. A directive can never capture each and every circumstantial nuance that might be relevant; but there is a question about **whether even *core* concepts – such as 'sufficient resources' – might need to be further developed or elaborated in follow-up legislation** in order to ensure a greater degree of consistency of application and interpretation at national level.

The data presented in the national reports on this issue also **reinforces more general patterns already identified for Q1** – (1) *pockets* of problems that are often *specific* to individual Member States rather than more widespread or systemic transposition failures; (2) the imposition of, on balance, more *rights-limiting* than rights-expanding national conditions, even where such conditions would seem to be precluded by the wording of the Directive

71. Report for Denmark (emphasis in original), referring to Section 28 of the Aliens Act of 2013.
72. See also, the report for France, referring to concerns outlined in a report by Human Rights Watch on this point.

itself; and (3) the critical importance of *judicial review* in terms of redressing problematic procedures that restrict the scope of the Directive – and thus the implementation of citizenship rights – in practice.

Question 3

How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Article 12: Retention of the right of residence by family members in the event of death or departure of the Union citizen

1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. 'Sufficient resources' shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.

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

Article 13: Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or
(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or
(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or
(d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14: Retention of the right of residence

1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. 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.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. 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.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or
(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 15: Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

3.1. Introduction

The protection guaranteed by Articles 12-15 of Directive 2004/38 marks a critical advance for protection of the retention of residence rights in a host State, especially in light of our thematic focus on *stability* of residence. The provisions are, in essence, about the consequences for residence status when

life intervenes – and they have particular implications for third country national family members.[73] In that context, the statement in Articles 12(3) and 13(2) that '[s]uch family members shall retain their right of residence on a personal basis' signals a path-breaking shift from the standard derived rights paradigm.

Reflecting both the simplifying and strengthening aims of the Directive, the provisions construct a detailed framework that clearly exceeds the piecemeal guidance it replaces – with respect to both repealed legislative measures[74] and relevant case law.[75] The particular position of jobseekers, raised in Article 14(4), will be picked up in the discussion on Q5 below.

3.2. Articles 12-15: transposition, application, and interpretation

Overall, the responses to Q3 indicate that Articles 12-15 have been correctly transposed into national law.[76] In fact, the reports often use terms such as 'faithfully', 'fully', 'identical', 'literal' or 'reproducing' vis-à-vis the wording of the provisions. Additionally, we found several instances of where national implementing measures provide even more extensive protection than required by the Directive.[77] Respect for family life emerges as the common linking thread in that respect. Few reports indicate that Articles 12-15 have been considered in national case law.[78]

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73. For an example of contrasting interpretations – and outcomes –before the adoption of the Directive, cf. the judgment and Opinion in Case C-257/00 *Givane* [2003] ECR I-345.
74. See e.g. Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, [1970] OJ L142/24; and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, [1975] OJ L14/10.
75. E.g. on the position of separated spouses, see Case 267/83 *Diatta* [1985] ECR 567 and Case C-370/90 *Singh* [1992] ECR I-4265; for discussion of the retention of residence rights in the event of divorce, see Case C-413/99 *Baumbast and R* [2002] ECR I-7091 (which also addresses the situation in which the Union citizen departs from the host State).
76. Cf. the report for Switzerland.
77. For example, in the report for Hungary; cf. three years in Article 13(2)(a) of the Directive and two years in the national measure. See also, the reports for Ireland, Italy, and Portugal.
78. But see e.g. the reports for France, and Ireland.

However, other reports identify transposition problems that relate to differences between either the Directive and national law or Court of Justice judgments and national law. In particular, the report for Bulgaria outlines a cluster of inconsistencies between the provisions of the Directive and the national implementing measures. For example, the self-sufficiency requirement in Articles 12(2) and 13(2) of the Directive has also been applied to the transposition of Article 12(3) – even though the latter provision makes no reference to that requirement, a point confirmed in the case law of the Court of Justice.[79] Relatedly, the national implementing measure in France defines 'completion of studies' as the completion of secondary school education, providing another example of a national condition at odds with the jurisprudence of the Court.[80] The report for Poland provides a contrasting example on this point.[81]

In Italy, the national implementing measure constrains the scope of Article 13(2)(c) by imposing an additional condition requiring national criminal proceedings.[82] A generally strict approach to the same provision is also highlighted in the report for the UK, this time in connection with a requirement to demonstrate self-sufficiency.[83]

79. See e.g. Case C-310/08 *Ibrahim* [2010] ECR I-1065, paras 48-50; cf. the reports for Denmark and the UK on this point.
80. See e.g. Case C-529/11 *Alarape and Tijani*, judgment of 8 May 2013, especially paras 25 ('since, according to the Court's settled case-law, the scope of Article 12 of Regulation No 1612/68 extends also to higher education, the date on which a child completes his or her education may lie after reaching the age of majority') and 28 ('as regards the derived right of residence of a parent who cared for a child who has reached the age of majority and who is exercising the right to continue his/her education in the host Member State, the Court has held that, although that child is in principle assumed to be capable of meeting his or her own needs, the right of residence of that parent may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education').
81. There, it is stated that the implementing measure 'takes into account widely understood education, both obligatory education at school as well as studies, which seems to be connected with higher education at the university'.
82. Article 13(2)(c) has been transposed in Italy as requiring that 'the concerned person is the offended party in criminal proceedings, pending or defined by a judgment of conviction for crimes against the person committed within the family'.
83. See the report for the UK, including references to relevant national case law; cf. the finding that a third country national 'who had obtained a retained right of residence following divorce did not lose that right if he subsequently ceased to be employed or self-employed' (referring to *Samsam v Secretary of State for the Home Department* [2011] UKUT 165 (IAC)).

Most national reports confirm appropriate transposition of the procedural safeguards enshrined in Article 15 of the Directive. However, a problem in this respect is identified in the report for the UK, concerning 'access to appeal rights for family members in specific instances' and a requirement of proof of the family relationship before a right to appeal is granted. The report notes that this practice was highlighted by the Commission in its 2008 report on the application of the Directive, but points out that '[t]hese issues are yet to be addressed by the UK'.

Linking back to the discussion on Q1, and to Sections 1.2.1 and 1.7 in particular, some reports raise questions about the uncertain legal position of same sex partners who do not fall within the scope of Article 13(2).[84] In that context, the extension of the scope of Article 13(2)(a) by a national court in the Netherlands to 'unmarried third country national partners of EU citizens' who can establish that they were in 'a durable relationship for at least three years with an EU citizen, at least one of which was spent living legally in the Netherlands' provides a welcome example of good practice aimed at the achievement of effective equal treatment at national level.[85]

Finally, and picking up on another theme noted in Section 1.2.1, a concern to ensure that family relationships are *genuine* re-emerges in some reports under Q3 too, reflecting State concerns to identify possible cases of abuse of EU rights.[86]

3.3. Question 3 – emerging issues and themes

Broadly speaking, the responses to this question indicate a strong standard of rights recognition at the national level with respect to Articles 12-15 of the Directive – which may be connected to the **degree of detail specified** in these provisions.

84. See e.g. the reports for Cyprus, the Czech Republic, and the Netherlands (where it is reported that 'the Netherlands has explicitly chosen to treat the non-registered partners of EU citizens in a similar way to spouses or registered partners').
85. Cf. however, the report for the UK, where national case law has confirmed that the rights conferred on third country nationals by Article 13 of the Directive 'apply only to the dissolution of marriages/civil partnerships and not with respect to durable relationships'.
86. See e.g. the report for Finland; however, the report for Ireland indicates that marriages of convenience were deemed to be lawful under Irish law by the High Court in *Izmailovic v Minister for Justice, Equality and Law Reform* [2011] 2IR 522, paras 22-36.

Confirming themes already identified, the **broad picture of transposition** could be summarised as follows: appropriate implementation of the Directive overall, with consistent examples of *both* more extensive protection *and* problematic additional conditions (or failure to transpose at all) too. A positive conclusion that can be drawn from this depiction is that we are not, on the provisions analysed thus far at least, dealing with widespread or *systemic* transposition breakdown. But there is perhaps a more problematic side to the patchy and fragmented picture that results too: fundamentally, how should this ***range* and *variety* of transposition problems be *monitored* and *addressed* effectively** by the EU institutions?

Question 4

How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of permanent residence been published for your Member State? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Article 16 (Permanent residence): General rule for Union citizens and their family members

1. Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 17: Exemptions for persons no longer working in the host Member State and their family members

...

Article 18: Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State

Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.

4.1. Introduction

Permanent residence is one of the most significant innovations of Directive 2004/38. Recital 17 of the preamble proclaims an intention that permanent residence 'would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion'. In essence, the status attributes significance to the fact that an extended period of residence in a host State – a continuous period of five years, in accordance with conditions and exemptions laid down in the Directive – generates a *degree* of integration that should be recognised in a distinctive way.

Two concrete examples of that distinctiveness are provided by the fact that, first, the right to permanent residence is not subject to the conditions in Chapter III of the Directive – including the obligation to be either economically active or self-sufficient – and, second, permanent residents benefit from a greater level of protection against expulsion under Article 28(2), discussed in more detail for Q6 below. Further reflecting the sense that Directive 2004/38 signals an inclination towards more autonomous rights for family members in certain circumstances, it is significant that 'family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years' (Article 16(2)) also acquire the right of permanent residence there.

Conditions regarding permitted interruptions to continuity of residence are outlined in Article 16(3) and, according to Article 16(4), the right will be lost only through absence from the host State for a period exceeding two consecutive years. Articles 17 and 18 set out a series of exemptions and other conditions e.g. relating to acquisition of the right before five years in certain cases, and Articles 19-21 outline relevant administrative formalities.

Early case law on permanent residence addressed whether or not periods of legal residence completed in States prior to the expiry of the transposition period for Directive 2004/38,[87] as well as prior to the accession of the host State to the Union,[88] could be counted towards the acquisition of permanent residence – with both points responded to positively by the Court of Justice, on the basis that concluding otherwise would deprive the relevant rights of their effectiveness.

The meaning of 'residing legally' has come under scrutiny more recently. In *Ziolkowski and Szeja*, the Court held that the wording of Article 16(1) 'does not give any guidance on how the terms "who have resided legally" in the host Member State are to be understood' but that, equally, the Directive 'does not contain any reference to national laws as regards the meaning of those terms either'.[89] The Court thus reasoned that legal residence had to be considered as 'an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States'.[90] Drawing from the general scheme of the Directive, the Court held:

> [T]he concept of legal residence implied by the terms 'have resided legally' in Article 16(1) ... should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1). Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1).[91]

The Court was careful to point out that its approach does not preclude the application of more favourable national provisions.[92] However, as a matter of EU law, periods of residence in which the self-sufficiency conditions in Article 7(1) are not met cannot then be counted towards the acquisition of permanent residence.

Another dimension of this issue concerns periods of imprisonment in a host State. In *Onuekwere*, the Court considered the question with respect to third country national family members of Union citizens. First, it reasoned

87. Case C-162/09 *Lassal* [2010] ECR I-9217.
88. Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, judgment of 21 December 2011; Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, judgment of 6 September 2012.
89. *Ziolkowski and Szeja*, para. 33.
90. *Ziolkowski and Szeja*, para. 33.
91. *Ziolkowski and Szeja*, paras 46-47.
92. *Ziolkowski and Szeja*, para. 50.

that the acquisition of permanent residence by family members 'is dependent ... not only on the fact that the Union citizen himself satisfies the conditions laid down in Article 16(1) ... but also on the fact that those family members have resided legally and continuously 'with' that citizen for the period in question, the word "with" reinforcing the condition that those family members must accompany or join that same citizen'.[93] The Court went on to emphasise the *integration* of the individual into host State society as a 'precondition' for acquiring permanent residence rights, and thus concluded:

> Such integration ... is based not only on territorial and temporal factors but also on qualitative elements, relating to the *level* of integration in the host Member State ... to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence *even outside the circumstances mentioned in Article 16(4) of Directive 2004/38* ... The imposition of a prison sentence by the national court is such as to show the *non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law*, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence ... would clearly be contrary to the aim pursued by [Directive 2004/38] in establishing that right of residence [emphasis added].[94]

The same analysis would presumably apply if the applicant were a Union citizen.[95]

The Court is clear about the fact that it is introducing a precondition 'outside the circumstances' of the Directive – notwithstanding the stipulation in Article 21 TFEU that conditions placed on citizenship rights must be *laid down* in either the Treaty or secondary legislation. Moreover, within the text extracted above, we can see potential for other restrictions to be placed on the acquisition of permanent residence i.e. imprisonment being just one example of a situation that could be seen as an 'undermining of the link of integration'. An illustration is provided by one of the questions recently sent by the High Court in Ireland for a preliminary ruling:

93. Case C-378/12 *Onuekwer*e, judgment of 16 January 2014, para. 23.
94. *Onuekwer*e, paras 25-26. On the same basis, the Court also clarified that imprisonment interrupts the 'continuity of residence' demanded by Article 16(2) and (3) of the Directive.
95. On the application of *Onuekwer*e to Article 28(3) of the Directive in a case concerning a Portuguese national residing in the UK, see Case C-400/12 *MG*, judgment of 16 January 2014.

Can it be said that the spouse of an EU national who was not at the time himself a national of a Member State has 'legally resided with the Union citizen in the host Member State for a continuous period of five years' for the purposes of Article 16(2) of Directive 2004/38/EC2, in circumstances where the couple had married in May 1999, where a right of residency was granted in October 1999 and where by early 2002 at the absolute latest the parties had agreed to live apart and where both spouses had commenced residing with entirely different partners by late 2002?[96]

That question seeks to tease out the significance of residing 'with' the Union citizen – a seemingly simple expression that could turn out to have serious consequences here and in similar cases.

Another dimension of the decision in *Onuekwere* worth noting is the Court's reference to the 'strengthen the feeling' phrase from recital 17. The Court referred to recital 17 for the first time in *Lassal*, but there, in order to apply a broad reading of the objectives and purpose – and thus of the conditions underpinning the acquisition – of permanent residence.[97] In *Onuekwere,* Advocate General Bot drew from the same words to contextualise his view that 'citizenship is for the citizen a guarantee of belonging to a political community under the rule of law'.[98] In its judgment, the Court used recital 17 to claim that the 'EU legislature *accordingly* made the acquisition of the right of permanent residence ... subject to the integration of the citizen of the Union in the host Member State'.[99]

The invocation of recital 17 in this manner raises two key questions of interest for present purposes. First, in what ways does the status of permanent residence engender a *second tier* of Union citizenship *beyond* the pointers specified in the Directive, such as enhanced protection against expulsion and entitlement to social assistance in a host State? To what extent should it? How does the ethos of *strengthening the feeling* of Union citizenship differ (if at all) from the Court's classic characterisation of citizenship as the *fundamental status* of Member State nationals?[100] Second, if permanent residence cannot be accrued because of non-compliance with 'the values expressed by the society of the host State in its criminal law', there is a potentially broader link here between the specific question of permanent residence and the treatment of criminal convictions more generally in the context of Member State expulsion practices – and, relatedly, between how State and EU policies and

96. Case C-244/13 *Ogieriakhi*, pending; see [2013] OJ C189/12.
97. *Lassal*, paras 32 and, in particular, 53.
98. AG Bot in *Onuekwer*e , paras 51-52 of the Opinion.
99. *Onuekwer*e , para. 24 (emphasis added).
100. See e.g. *Grzelczyk*, para. 31.

practices flow backwards and forwards from one level to the other. This issue will be picked up again below in the discussion on Q6. But here, alongside the ongoing process of judicial interpretation of the scope of permanent residence at EU level, we sought through Q4 further to enhance understanding of the right by looking at its transposition, application, and interpretation at national level since the entry into force of the Directive.

4.2. Transposition, application, and interpretation of permanent residence

The data collected suggest that, on the whole, there has been appropriate transposition of the substantive elements of the right to permanent residence – i.e. Articles 16-18 – and, once again, it is perhaps useful to recall that these provisions of the Directive are quite detailed. Additionally, several reports included specific comments about the provisions on administrative formalities i.e. Articles 19-21.

4.2.1. Permanent residence: substantive rights

We found some evidence of the shift in mindset that the status of permanent residence is intended to effect. For example, the report for Finland discusses a case in which the Supreme Administrative Court held that an Italian national who had resided lawfully in Finland for more than five years was no longer required to register his residence there since 'an *ipso jure* right of permanent residence existed, and a document certifying this [could] be issued upon application'. This approach reflects very well the notion that permits merely evidence rather than confer EU rights.[101] Similarly, national courts in the UK have held that 'a right to permanent residence ... cannot be lost even by significant periods of imprisonment'.[102]

In some reports, the requirement and/or the task of demonstrating compliance with the condition of 'legally residing' in the host State was highlighted; and it is not uncommon to observe that a strict approach is taken by national authorities in this context. In the report for the UK, for example, the authors refer to a case in which a claim for permanent residence 'was rejected on the basis that the applicant's sickness insurance *complemented* rather than *re-*

101. See similarly, the cases outlined in the report for Sweden.

102. Report for the UK, referring to *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199, in which the Court of Appeal referred to the Court of Justice's decision in Case C-145/09 *Tsakouridis* [2010] ECR I-11979.

placed all services provided by the UK's publicly-funded National Health Service'.[103] In the report for the Netherlands, however, it was stated that '[l]egal residence for a continuous period of five years is presumed if the relevant authorities have not withdrawn the residence permit'.

There are also instances of more extensive protection being extended under national rules than the baseline set subsequently by EU law. For example, it was interesting to note that national 'practice assimilates imprisonment to lawful residence' in Denmark, a point that has now, as discussed in Section 4.1, been determined to the contrary by the Court of Justice. The same issue is discussed in the report for the UK, where the authors refer to several decisions in which national courts ruled that periods of imprisonment do *not* count towards the acquisition of 'legal' residence under Article 16 of the Directive. However, the authors do note that the reference in *Onuekwere* – seeking definitive clarification of this issue – came from a tribunal in the UK, notwithstanding the approach taken consistently in national case law.

The importance of guidance from the Court of Justice on the interpretation of the Directive is further shown by contrasting a case outlined in the report for Ireland with the reasoning of the Court on the same question i.e. counting periods of residence in a host State prior to the accession of the State of nationality to the EU.[104] In the report for the UK, however, the approach of the national courts to periods of residence that do not comply with the requirements of the Directive reflects the reasoning of the Court more closely. Importantly, the UK courts distinguish between lawful residence under national law or under *other* frameworks of EU law, on the one hand, and lawful residence under the Directive, on the other. This issue is discussed in more detail under Q7 below.

Transposition, application, and interpretation anomalies can, of course, stem from ambiguities in the Directive itself. The potential significance of residing 'with' a Union citizen for the purposes of Article 16(2) was raised in Section 4.1 above, noting a preliminary reference from Ireland currently pending before the Court of Justice. A national court in the UK has ruled that 'spouses who derive residence rights from a working or self-sufficient Union citizen do not have to live in the matrimonial home with that citizen in order

103. Report for the UK (emphasis in original), referring to *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302. The authors also note that the UK's 'refusal to view NHS provision as 'sufficient medical insurance' in relation to Union citizens is currently the subject of infringement proceedings'.

104. Cf. the decision in *B v Minister for Justice, Equality and Law Reform* [2009] IEHC 447, paras 18-20, with the ruling in *Lassal.*

for the residence to be "legal" under Art 16'.[105] But the issue is raised in a different context in the report for Croatia – since Article 18 of the Directive has not been transposed into national law, the author suggests that it is unlikely that family members claiming rights on the basis of Articles 12(2) and 13(2) could then be granted a right to permanent residence in Croatia in consequence.

Providing an example of additional conditionality at national level, the significance of having a registered place of residence in Estonia has consequential implications for the acquisition of permanent residence too: 'the concept of legal residence ... in Art 16(1) of the Directive can, in the context of the [implementing measure], be construed to mean having a registered place of residence in Estonia according to [national law]'. In the report for Slovenia, the issuing of a permanent residence permit is made subject to a series of conditions – some of which (e.g. 'if there are no grounds to believe that his residence in the country *would be associated* with terrorist or other violent acts, illegal intelligence activities, trafficking in drugs, or with the commission of any other criminal acts') differs from the imprisonment situation considered by the Court in *Onuekwere*. However, it is a useful illustration of a point made in Section 4.1 above: the fact that a broader test – i.e. 'the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law' – is contained within the judgment.

Finally, some reports again raised the issue of less favourable treatment of different categories of family members. For example, in the report for Denmark, it was noted that national rules require a third country national family member who has acquired a right of permanent residence to demonstrate that they can support other third country national family members who seek to join them; whereas family members have an unconditional right to reside with a permanently resident Union citizen.[106] Other reports discuss the situation of family members who do not fall within the scope of Article 2(2) of the Directive, especially same sex partners in a durable relationship with a Union citizen.[107]

105. See the report for the UK, referring to *PM (Turkey) v Secretary of State for the Home Department* [2011] UKUT 89 (IAC).
106. Report for Denmark, referring to the contrasting decision of the EFTA Court in Case E-4/11 *Clauder* with respect to the situation of Union citizens.
107. See e.g. the report for Croatia; cf. the more extensive scope outlined in the reports for Finland, and the Netherlands.

4.2.2. Procedural rights

Broadly speaking, national procedures either comply with or surpass the requirements of the Directive in terms of the specifications on timing. For example, in the report for Bulgaria, it is noted that permanent residence cards are issued 'on the same day' for Union citizens (cf. Article 19(2) of the Directive – 'as soon as possible') and 'within one month' for family members who are not Union citizens (cf. Article 20(1) – 'within six months').[108] But transposition anomalies emerge here too. For example, even with respect to the clear and unambiguous statement in Article 20(1) that a permanent residence card 'shall be renewable automatically every ten years', the Netherlands has transposed the point of renewability as five years.

The option of applying 'proportionate and non-discriminatory sanctions' in cases of failure to apply for a permanent residence card before the current residence card expires – provided for in Article 20(2) – has been realised in practice. Some States have implemented specific sanctions in this respect; others take a more general approach. For example, the report for Bulgaria notes that the national implementing act 'does not lay down specific sanctions for failing to apply for a permanent residence card but stipulates instead that 'minor' violations of the [act] shall be subject to a fine of [approx. €10]'. This contrasts sharply with the enactment of a specific penalty in Cyprus of 'up to 1500 Cypriot pounds' – which amounts to approx. €2500 and thus seems unlikely to stand as a 'proportionate' sanction.

Noting that Article 21 of the Directive provides that 'continuity of residence may be attested by any means of proof in use in the host Member State', some reports also provided examples of the types of evidence that would normally be used – including e.g. work or rental contracts.[109] It is important to reiterate the general convention that administrative guidance can provide examples of evidence that are indicative only and may not exclude consideration of other documents or forms of evidence not specified.[110] However, national rules in Denmark expressly provide that permanent residence

108. See also e.g. the report for Finland, where it is noted that '[i]n 2012, the average time of processing EU citizens' documents on permanent residence was 14 days and for TCN family members 43 days', and the report for Spain (three months for third country national family members).
109. See e.g. the report for Austria; see similarly, the report for the Netherlands, noting that 'the liberal rules on evidence generally adhered to in Dutch administrative law apply'.
110. On this point, see the report for Cyprus.

ends where it has been achieved through fraudulent means (e.g. 'marriage of convenience or false declaration').[111]

Finally, most of the reports include data on applications for permanent residence cards.[112] It is difficult to extract general themes on this point, since the data provided differ in several key respects e.g. the time period covered. But some interesting points of comparison can be noted nonetheless. Some States provide information on an annual basis,[113] while others publish updated data more regularly.[114] Some States publish data on both successful and unsuccessful applications,[115] while others publish the former only.[116] One statistic stands out from the report for Finland, however: in 2011 and 2012, applications for permanent residence amounted to just 0.5% 'of all alien licenses and permits'.[117]

4.3. Question 4 – emerging issues and themes

The issues discussed in connection with the right of permanent residence provide an interesting bridge between Q4 and the preceding questions, on the one hand, and Qs5-8 below, on the other, in two key respects. First, the patterns and themes that emerge from the national reports on the transposition, application, and interpretation of Articles 16-21 **mirror in several respects the patterns and themes already established** for Qs1-3. For example, it is confirmed once again that detailed legislative provisions do not preclude transposition anomalies altogether – whether these result from clearly divergent (and thus presumably deliberate) national transposition choices or ambiguities inherent in the EU measure itself. However, where a greater *degree* of

111. See similarly, the report for Hungary.
112. In the report for Greece, it is noted that data on applications for permanent residence submitted by EU citizens are not published, in contrast to applications from third country national family members; the author traces this distinction to the 'fragmentation of powers and competencies' for the two groups between two different national authorities.
113. See e.g. the report for Hungary.
114. See e.g. the report for the Czech Republic, referring to the publication of monthly statistics online; and the report for Spain ('every three months').
115. See e.g. the report for Finland, and the report for the UK (which also discusses statistics on 'invalid' applications).
116. See e.g. the report for Spain.
117. In the report for Slovenia, it is reported that EEA residence permits amounted to 'slightly over 3% of all permanent residence permits issued in 2012'.

detail is specified in the EU provisions, a correspondingly higher degree of transposition compliance can generally be seen too.

Second, the responses to Q4 also raised the **importance of the interpretative guidance provided by the Court of Justice**. This becomes the focus of attention in Qs5-7, where we first explore the interplay between case law and certain provisions of the Directive (on equal treatment and expulsion) but then move on to consider how national authorities receive and apply case law guidance on citizenship rights *beyond* the Directive altogether – looking, in that context, at case law that draws directly from the rights conferred by Articles 20-21 TFEU in connection with, first, residence rights for third country national family members – on which various concerns have already been raised under most of the questions discussed thus far – and, second, the shaping of national rules on loss (and acquisition) of nationality.

Question 5

How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and jobseekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?

Article 24: Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

5.1. Introduction

Article 24(1) of the Directive confirms the fundamental commitment to equal treatment expressed in Article 18 TFEU: a principle of non-discrimination on the grounds of nationality, with host State nationals as the relevant comparator group. Importantly, and again mapping the Directive's incremental enhancement of rights beyond the derived rights paradigm, Article 24(1) also establishes that '[t]he benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence'.

By focusing here on the derogation outlined in Article 24(2), however, we sought, in particular, to gain greater understanding of, first, how case law shapes the application and interpretation of the Directive, and, second, how national authorities actually manage the resulting *hybridity* of legal sources.

The wording of Article 24(2) is clear. It establishes that a Member State is not obliged to confer any entitlement to social assistance (1) during the first three months of residence; or (2) cross-referencing to Article 14(4)(b), where 'the Union citizens entered the territory of the host Member State in order to seek employment' and noting that 'the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine change of being engaged'. Article 24(2) further provides that prior to the acquisition of permanent residence, a Member State is not obliged to provide maintenance aid for studies 'to persons other than workers, self-employed persons, persons who retain such status and members of their families'. However, case law – both prior to *and* after the entry into force of the Directive – has established broader principles.

First, with respect to social assistance generally, the Court held in *Trojani* that while Member State nationals who are neither economically active nor self-sufficient could not derive a right to reside in another State from Union law 'for want of sufficient resources ... a citizen of the Union who is not economically active may rely on [Article 18 TFEU] where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.[118] On that basis, the Court concluded that 'national legislation [which] does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State,

118. Case C-456/02 *Trojani* [2004] ECR I-7573, paras 36 and 43 respectively.

constitutes discrimination on grounds of nationality prohibited by Article [18]'.[119]

Second, the position of jobseekers has long been – and continues to be – treated distinctively. Their status under EU law can be traced in three key stages. Before the adoption of the Directive, the test captured by Article 14(4)(b) was developed by the Court in *Antonissen*, which established that jobseekers came within the personal scope of what is now Article 45 TFEU.[120] Next, following the creation of Union citizenship but before the adoption of the Directive, the Court took a mixed approach to personal scope in *Collins*, finding that:

> In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment *enjoyed by citizens* of the Union, it is no longer possible to exclude from the scope of *Article [45](2)* [TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU] – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[121]

The Court confirmed that a test linking entitlement to jobseeker's allowance with a habitual residence requirement amounted to indirect discrimination and could be justified 'only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'.[122] On the first point, the Court confirmed that 'it may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State'.[123] The Court also provided a framework for assessing the proportionality of such a test:

> [I]ts application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy

119. *Trojani*, para. 44.
120. Case C-292/89 *Antonissen* [1991] ECR I-745.
121. Case C-138/02 *Collins* [2004] ECR I-2703, para. 63 (emphasis added).
122. *Collins*, para. 65.
123. *Collins*, para. 69.

themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.[124]

The referring court in *Vatsouras and Koupatantze* explicitly queried the compatibility of the restriction laid down in Article 24(2) of the Directive with Article 18 TFEU, bearing in mind the case law summarised above. Affirming the principles established in *Collins*, the Court held that 'the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article [45(2) TFEU]' – with the result that, in its view, '[b]enefits of a financial nature which, *independently 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'.[125]

Finally, third, the granting of maintenance aid to students can be linked to two different lines of case law. When migrant students who are lawfully resident in accordance with *national* law claim entitlement to the general social assistance system of a host State, they fall under the *Trojani* framework, as summarised above.[126] Additionally, however, the Court confirmed in *Bidar* that the creation of Union citizenship means that 'the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of [Article 18 TFEU] for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs'.[127] Here, the Court focused on a different kind of 'genuine link' when compared to the labour market connections relevant for jobseekers, confirming that 'it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated *a certain degree of integration into the society* of that State'.[128]

Soon after the adoption of the Directive, but before its entry into force, it appeared that the Court was abandoning this *qualitative* understanding of integration – necessarily assessed on a case-by-case basis – to a more rigid five-

124. *Collins*, para. 72.
125. Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paras 44-45 (emphasis added).
126. See e.g. Case C-184/99 *Grzelczyk* [2001] ECR I 6193.
127. Case C-209/03 *Bidar* [2005] ECR I-2119.
128. *Bidar*, para. 57; the Court also held that residence requirements could capture the relevant 'guarantee of sufficient integration into the society of the host Member State' (para. 60).

year rule, mapping the text of Article 24(2).[129] However, when national rules do not fit directly with the express exclusions listed in that provision, the 'genuine link' approach will still be applied. Indeed, in *Prinz and Seeberger*, the Court recently expanded on both the meaning of this test and how to demonstrate its fulfilment:

> [T]he proof required ... must not be too exclusive in nature or unduly favour one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements ... Although the existence of a certain level of integration may be regarded as established by the finding that a student has resided in the Member State where he may apply for an education or training grant for a certain period, a sole condition of residence ... risks ... excluding from funding students who, despite not having resided for an uninterrupted period of three years in [the State] immediately prior to studying abroad, are nevertheless sufficiently connected to [that] society. That may be the case where the student is a national of the State concerned and was educated there for a significant period or on account of other factors such as, in particular, his family, employment, language skills or the existence of other social and economic factors.[130]

Relatedly, the Court has stressed that Article 24(2), as a derogation from the principle of equal treatment, must be interpreted narrowly. It therefore held in *Commission v Austria* that while reduced transport fares granted to certain students did 'constitute maintenance aid for them, only maintenance aid for studies "consisting in student grants or student loans" come within the derogation from ... equal treatment provided for in Article 24(2)'.[131] The Court has also adopted a generous approach to the definition of a worker in this context, preserving the special position created by Article 24(2) for the economically active vis-à-vis entitlement to study grants.[132]

All in all, by layering the multiplicity of principles established through case law *over* the wording of Article 24(2) of the Directive, a complicated picture of entitlement to social assistance is constructed. Social security systems across the Member States already differ in fundamental respects. Rules

129. Case C-158/07 *Förster* [2008] ECR I-8507.
130. Joined Cases C-523/11 & C-585/11 *Prinz and Seeberger*, para. 42, paras 37-38.
131. Case C-75/11 *Commission v Austria*, judgment of 4 October 2012, paras 54-55.
132. See e.g. Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187; and Case C-46/12 *LN*, judgment of 21 February 2013. The latter was described as a 'shock for politicians' in the report for Denmark, which also notes that the ruling 'reactivated in the media fears of social tourism with its waves of students especially from Eastern EU-countries invading Danish universities' – these issues are picked up again in the discussion on Q15 below.

on access to benefits that qualify as 'social assistance' are scattered across different measures and different processes within those systems. The national legal frameworks that are relevant or potentially relevant here can therefore seem maze-like even when taken on their own; aiming to compare them brings an additional challenge. We have thus focused our remarks in this section on specific issues connected to Article 24(2) only, exploring the extent to which the complexity of the blended Directive/case law framework also affects the application and implementation of the provision in national practice.

5.2. Transposition, application, and interpretation of Article 24(2)

Many reports suggest that while there is no *specific* transposition of Article 24(2) into national law, the limitations on access to social assistance that the provision establishes can be identified across fragmented pockets of national rules.[133] We also found evidence of understandable (in our view) confusion, as national lawmakers and other national authorities try to grapple with both the implications and the outer parameters of the Court's case law.

5.2.1. First three months of residence (and beyond)

Reports that address the first three months of residence normally do so to confirm that any entitlement to social assistance for Union citizens is excluded.[134] However, some States provide for temporary assistance during this time period if exceptional circumstances materialise – e.g. 'if their living circumstances so require' (report for Croatia); 'anyone in need of urgent support' (report for Finland). These examples provide another illustration of the *reasonable* burden that a *certain degree of financial solidarity* could be said to require.[135] In the same context, but sending a rather different message, the report for Denmark notes that national law provides 'financial help to get back home' for short-term residents and jobseekers.

Another example discussed in the report for Denmark provides an apt illustration of disconnect in Union citizenship law between residence rights

133. See e.g. the reports for Bulgaria, Croatia, Denmark, Estonia, and the UK.
134. See e.g. the reports for Denmark, and France. Some reports do distinguish between an exclusion of entitlement for citizens who are not economically active and confirmation of entitlement for workers or the self-employed (see e.g. the report for Germany).
135. See again, *Grzelczyk*, para. 44.

and self-sufficiency, on the one hand, and support in exceptional circumstances, on the other. The issue concerns access to shelter homes for homeless persons who are nationals of other Member States. The report establishes that, according to Danish law, shelter homes 'which are to some extent State-funded shall only accept persons who are legally residing in the country' – a status that has been 'interpreted restrictively as excluding undocumented citizens (i.e. those who do not have a registration certificate, a residence card or a Danish health card)'. But the report points out that, first, Member State nationals have an unconditional right to reside in Denmark for three months (or longer if seeking employment) without a registration document; and, second, that registration documents are not, in any event, *constitutive* of the residence rights conferred by EU law. The limitations on access to State-funded shelter would appear to be justifiable, however, in light of Article 24(2) regarding the first three months of residence (or longer for jobseekers, recalling that *Vatsouras and Kouptantze* privileges benefits that 'facilitate access to the labour market' only) and in light of the Article 7(1) self-sufficiency requirement for residence longer than three months. But a technically lawful outcome does not always sit well with broader commitments to dignity and solidarity that underpin the Directive and the *idea* of Union citizenship.

The significance of lawful residence appears in the report for Estonia in a different way, noting that access to social benefits is granted to 'Union citizens and their family members *who have the right of residence* in Estonia' (emphasis in original). That right is, in turn, linked to registration of the place of residence. Significantly, the author notes that while there is 'no requirement to register a place of residence during the first three months of a person's stay in Estonia, there is nothing to prevent a Union citizen from doing so. Consequently, there do not seem to be any exceptions that would specifically limit access to social assistance' during that period.

A similar framework – emphasising residence registration – is outlined in the report for Hungary. Interestingly, the report notes that the obligation *not* to become an unreasonable burden applies to 'all groups' i.e. including the economically active. Linking back to the discussion in Section 2.3 above, it is also noted that recourse to social benefits for more than three months must be reported to the immigration authorities, who then 'decide on a case by case basis whether the person has sufficient resources in order not to become an unreasonable burden on the social assistance system of Hungary'. But it is also reported that 'in practice not a single case has ever been reported in which the right to [free movement] was withheld because of lack of financial resources and recourse to the social protection system'.

5.2.2. A special position for jobseekers?

Few reports outline a clear distinction in national law between access to social assistance generally and access to jobseeker's allowance specifically.[136] This does not necessarily mean that jobseekers are treated less favourably than the case law requires.[137] However, that outcome[138] or the risk of such an outcome[139] is explicitly alluded to in some reports.

The situation is more tangled in most States. For example, the report for Germany distinguishes between jobseekers qua EU law and persons who do not meet those criteria – e.g. persons who are not looking for a job, such as pensioners, persons with illnesses, or parents focusing on childcare; or persons who do not meet the *Antonissen* criteria because of absence of genuine willingness to commence work or sustained failure to secure employment because of lack of skills – but may still be eligible for certain social benefits if they are in a position to work as a matter of principle. In the report for the Netherlands, it is stated that '[n]ational law does not distinguish between the categories specified in Article 24(2) and jobseekers. Just like the categories specified in [that provision], job seekers do not have a right to receive social benefits'. However, it is also confirmed there that 'the 'real link' test is still used as an additional test, in order to verify whether there are grounds on which a right to social benefits ... may not be denied to an EU citizen under Article 18 TFEU' – and alongside national decisions on maintenance aid for studies, case law applying the test to the situation of (inter alia) jobseekers is also referenced.

In contrast, in the report for Germany, it is observed that domestic courts have mostly ignored the EU law requirement that applicants must demonstrate a real link with the German labour market. Rather, the question that is outlined in detail in the report concerns a hangover from *Vatsouras and Koupatantze* i.e. whether or not the Court intended to draw a distinction between the entitlement of jobseekers to benefits *specifically* aimed at 'facilitating ac-

136. But see e.g. the report for Cyprus (however, a more nuanced position emerges from the discussion of national *practices*). See also, the reports for Ireland, and Sweden (which also references case law on the scope of the status of jobseeker); and the report for the UK, noting the consequential implications outlined vis-à-vis access to other social benefits.
137. See e.g. the discussion in the report for Finland.
138. See e.g. the report for Italy: 'jobseekers do not enjoy the right to social assistance and are equated to EU citizens during the first three months of residence'.
139. See e.g. the report for Greece.

cess to the labour market' – clearly outwith the scope of the derogation in Article 24(2) – and their entitlement to *more general subsistence benefits*. In that context, the report traces the background in national case law to a preliminary reference seeking clarification of this point that is currently pending before the Court of Justice.[140] It is noted in the report for Denmark that first-time jobseekers are excluded from 'entitlement to a non-contributory benefit ensuring a minimum means of subsistence' – a restriction that the rapporteur queries in light of the Court of Justice's case law as 'this benefit can be *assimilated to a jobseeker allowance* since it is conditional upon the person being available to work and actively looking for employment' (emphasis added).[141] These contrasting examples underscore the need for clear guidance from Luxembourg.

5.2.3. Access to maintenance aid for studies

In a minority of States, Union citizens have full access to maintenance aid for studies either without any apparent restrictions[142] or subject to conditions lower than the five-year threshold in Article 24(2).[143] In most reports, however, the exclusion permitted by Article 24(2) has been transposed into national rules.[144] The converse of this position could be expressed, more positively, as *confirming entitlement* to study grants for workers, self-employed persons, persons who retain such status and members of their families, as well as for permanently resident Union citizens.[145]

However, even where formal rules specify a five-year rule, the requirement to evaluate the degree to which applicants for study grants can demonstrate a genuine link to the society of the host State appears to be recognised *in parallel* in some States[146] – interestingly, the report for France suggests a more successful embedding of this test with respect to students than is the case for jobseekers.

But we can also find examples of unduly restrictive practices. For example, linking back to the decision of the Court of Justice in *LN* – in which it

140. Case C-333/13 *Dano*, pending; [2013] OJ C226/9.
141. See relatedly, the decision in Case C-367/11 *Prete*, judgment of 25 October 2012.
142. See e.g. the report for Bulgaria.
143. See e.g. the reports for Hungary, and the UK.
144. See e.g. the reports for Denmark, and Germany.
145. See e.g. the report for Finland.
146. See e.g. the report for Sweden – in this case, however, the 'real link' test originates from national rather than EU law; see also, the report for the UK.

was confirmed that even '[t]he fact that the person entered the territory of the host Member State with the principal intention of pursuing a course of study is not relevant for determining whether he is a "worker" within the meaning of Article 45 TFEU' (para. 51) – the ability to apply for study loans in Estonia is nevertheless restricted to Union citizens (and their family members) who have acquired a right to permanent residence, 'regardless of whether the Union citizens simultaneously fall under the category or worker, self-employed person or someone who has retained such status'.

5.3. Question 5 – emerging issues and themes

The transposition, application, and interpretation of Article 24(2) exemplifies the **acute and persistent tension in Union citizenship law** between *limits expressly placed on movement and residence rights by legislation*, on the one hand, and an ambition to *give meaningful effect to the rights conferred by the Treaty through case law*, on the other.

The significance of the shaping of the Directive by the Court of Justice cannot be overstated. That judicial work guides the realisation of Union citizenship rights and also the national practices that deliver those rights in reality. But **the functions and purposes of interpretation can become frustrated when case law becomes unduly complex**, potentially *endangering* rather than *supporting* the implementation of rights.

Another facet of the relationship between codification and interpretation concerns the **mechanisms and priorities of enforcement**. Broadly speaking, the wording of Article 24(2) is, when transposed at all, transposed correctly. However, when national measures or practices are measured against the penumbra of related case law, a different reading of compliance with EU law materialises. How should these dynamics be managed?

Question 6

Please describe how the national courts and tribunals have understood, applied and differentiated between the concepts of 'public policy, public security or public health' (Article 27), 'serious grounds of public policy or public security' and 'imperative grounds of public security' (Article 28). How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation,

social and cultural integration into the host Member State and the extent of his/her links with the country of origin?

Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health

Article 27: General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

...

Article 28: Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous ten years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

6.1. Introduction

Chapter IV of Directive 2004/38 establishes the framework within which Member States may 'restrict the freedom of movement and residence of Union citizens and their family members' i.e. on grounds of public policy (better captured by the French term, *ordre public*), public security, or public health (Article 27). Additionally, Article 28 confirms that States may take an expulsion decision against Union citizens or their family members on the same (or versions of the same) grounds.[147]

These provisions provide an excellent example of judicial/legislative synergy, since several of the phrases and tests now codified in the Directive come from classic (and now repealed) legislative measures as interpreted by the case law. In particular, Article 3(1) of Directive 64/221 had provided that '[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned'. This phrase is restated in Article 27(2) of Directive 2004/38, but it is followed by the explanation that, first, such conduct 'must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' and, second, conversely, measures relying on 'considerations of general prevention shall not be accepted' – principles developed by the Court.[148]

The discretion accorded to Member States in this context is further curtailed by more general interpretive principles. First, the basic convention that free movement rights must be interpreted broadly whereas derogations must be construed strictly is obviously relevant here.[149] The implications of this approach were explained in *Jipa*:

147. Article 29(1) outlines the scope of public health in this context: 'diseases with epidemic potential as defined by ... the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State'. It is important also to note the protection contained in Article 29(2): '[d]iseases occurring after a three-month period from the date of arrival shall not constitute ground for expulsion from the territory'. Given the limited parameters of Article 29, we did not pursue its application further through the questionnaire. For an example provided in the area of public health, see the report for Cyprus on *OFU v Republic*, Case Number 857/2010, judgment of 24 April 2013.
148. See e.g. Case 30/77 *Bouchereau* [1977] ECR 1999, para. 35; Case 67/74 *Bonsignore* [1975] ECR 297, para. 7.
149. See e.g. Case 41/74 *Van Duyn* [1974] ECR 1337, para. 18; Case 36/75 *Rutili* [1975] ECR 1219, paras 26-27.

> [W]hile Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the [Union] context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the [Union] institutions.[150]

The finding was amplified even further by citizenship: 'a *particularly restrictive* interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union' (para. 41, emphasis added). After all, as the Court has frequently asserted, Union citizenship is 'destined to be the fundamental status of nationals of the Member States'.[151]

Second, the importance of taking any restriction or expulsion decisions in line with the requirements of proportionality is reinforced both by the general reference to the principle in Article 27(2) and in the more specific instructions about consideration of individual circumstances detailed in Article 28(1) – a template for which the origins can, once again, be traced in the case law.[152]

It is also important to emphasise the statement in Article 27(2) that '[p]revious criminal convictions shall not in themselves constitute grounds for the taking of such measures'. In *Orfanopoulos and Oliveri*, the Court interpreted this limit (which comes from Article 3(2) of Directive 64/221) as part of the general scheme of public policy:

> While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, *the public policy exception must, however, be interpreted restrictively*, with the result that the existence of a *previous* criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are *evidence of personal conduct constituting a present threat* to the requirements of public policy ...[153]

The Court thus held that national systems where an expulsion measure 'automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person repre-

150. Case C-33/07 *Jipa* [2008] ECR I-5157, para. 23.
151. Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para. 65.
152. See e.g. *Orfanopoulos and Oliveri*, paras 95-99.
153. *Orfanopoulos and Oliveri*, para. 67 (emphasis added), citing Case C-348/96 *Calfa* [1999] ECR I-11, paras 22-24.

sents for the requirements of public policy' are contrary to EU law.[154] More specifically, national authorities must remember that 'the previous criminal conviction of the person concerned *is not by itself sufficient* to permit the view to be taken, *automatically*, that he represents a genuine, present and *sufficiently serious threat to one of the fundamental interests of society*, that being *the sole possible justification* for a restriction on the rights conferred on him by European Union law'.[155]

Chapter IV also establishes relevant procedural safeguards.[156] First, while the Directive does not deal expressly with how Member States should frame exclusion orders in terms of *duration*, Article 32(1) provides that '[p]ersons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order ... by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion'. Second, and again reflecting the ruling in *Orfanopoulos and Oliveri,* Article 33(1) prohibits the issuing of expulsion orders 'as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29' of the Directive.

Finally, it is significant that Article 28 of the Directive introduces distinctions vis-à-vis the *level* of protection provided to *different categories of persons* for the first time. According to Article 28(2), Union citizens (or their family members) who have the right of permanent residence may only be expelled from the host State on 'serious' grounds of public policy or public security. Article 28(3) then establishes that only decisions based on 'imperative grounds of public security' may be taken against Union citizens who have resided in the host State for the previous ten years, or are minors (unless the expulsion is necessary for their best interests). The Court interpreted the scope of 'imperative grounds of public security' in *Tsakouridis*:

> It follows from the wording and scheme of Article 28 ... that by subjecting all expulsion measures in the cases referred to in Article 28(3) ... to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature *clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances'*, as set out in recital 24 in the preamble to that directive. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such

154. *Orfanopoulos and Oliveri*, para. 68.
155. Case C-430/10 *Gaydarov* [2011] ECR I-11637, para. 38 (emphasis added).
156. On which, see more generally, Case C-300/11 *ZZ*, judgment of 4 June 2013.

a threat is *of a particularly high degree of seriousness* ... As regards public security, the Court has held that this covers both a Member State's internal and its external security ... The Court has also held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security ...[157]

The Court held that 'objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group' could fall within that definition.[158] However, its framing of the test in *PI* around conduct 'constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of "imperative grounds of public security"' has been criticised.[159]

Finally, and mirroring the discussion in Section 4.1 above, the Court has also held that 'periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) ... and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision'.[160]

Being permitted to enter and/or remain in a host State is the very crux of free movement – these are the gateway points to most of the other rights conferred by the Treaties and by relevant legislation. In consequence, the framework established by the Directive, read in light of the case law interpreting the relevant principles and tests, sets a deliberately high threshold of protection for Union citizens and their family members against restrictions of their free movement rights, up to and including expulsion measures. But it is, of course, a palpable intrusion into and adjustment of the national immigration sovereignty otherwise practised by States.[161]

In this part of the questionnaire, we sought to examine the extent to which the high standards intended by EU law are applied by national authorities *in*

157. Case C-145/09 *Tsakouridis* [2010] ECR I-11979, paras 40-44 (emphasis added).
158. *Tsakouridis*, para. 45.
159. Case C-348/09 *PI*, judgment of 22 May 2012, para. 28; for comment, see D. Kochenov and B. Pirker, 'Deporting citizens within the European Union: a counter-intuitive trend in Case C-348/09 *PI v Oberbürgermeisterin der Stadt Remscheid'* (2013) *Columbia Journal of European Law* 369.
160. Case C-400/12 *MG*, judgment of 16 January 2014, para. 33.
161. A statement from the Supreme Court of Cyprus noted in that report captures this point well: 'the deportation order, especially in cases where public order is affected, does not have a punitive character but is rather an expression of state sovereignty' (*Krisztian Bekefi v Republic*, Case Number 293/2012, judgment of 7 March 2012).

practice. It can be noted from the outset that, regrettably, the gap between the articulation of citizenship law in principle and the application of citizenship law in practice is perhaps wider here than we found for any other part of the questionnaire.

6.2. Restrictions on free movement law: the gap(s) between principle and practice

The national reports provided extensive responses to Q6, which are summarised here as follows. First, we tend to think about public policy or public security primarily in connection with expulsion measures, but it is important to recognise that States restrict free movement rights at the points of *entry to* or *exit from* their territories too (Section 6.2.1). We then present the data relevant to expulsion measures (Section 6.2.2), aiming to compare the threshold applied in practice with the framework communicated by the Directive. Three issues are outlined in more detail – bans on re-entry; where abuse of rights concerns fit in the restriction framework; and whether or not the three levels of protection indicated by Articles 27 and 28 are materialising in practice. The application of proportionality/consideration of individual circumstances is examined separately in Section 6.3.

6.2.1. Restrictions on entry to and exit from Member States

The standards that we normally think about in the context of expulsion apply to restrictions on movement and residence more generally too, as confirmed by the general 'restriction' language in Article 27(1) and (2) of the Directive in particular. The language used in several national reports conveys this point clearly too.[162] For example, in the report for Estonia, the quashing by the court of appeal of a ban on entry addressed to a Finnish citizen is connected to the prohibition of measures taken on 'considerations of general prevention' in Article 27(2) of the Directive.

This unified approach contrasts with the distinction drawn between refusing entry and requiring deportation in the report for Finland, where it is noted that:

> [T]he threshold for the former is *far lower than for the latter*. In practice, EU citizens, their family members or other relatives have been refused entry *on the basis of fairly minor of-*

162. See e.g. the report for Denmark.

fences. According to the information obtained from the Finnish Immigration Service, *even the suspicion* of having committed an offence has led to refusing entry into Finland. Repetitive petty theft and shoplifting, drug offences (other than for minor self-use) and multiple cases of driving while seriously intoxicated have, also led to the refusal of entry. Such criminal behaviour and the refusal of entry related thereto are justified under 'public order and security' [emphasis added].

The practices outlined above are explained as applying more specifically to 'EU citizens whose residence has not been registered and their family members or other relatives who have not been issued with a residence card'. Even so, however, while such decisions may be limited to that specific context and be based on the personal conduct of the individual concerned, they appear to take little account of either the proportionality or 'genuine, present and sufficiently serious threat to one of the fundamental interest of society' tests that must pervade *all* national measures taken on grounds of public policy or public security according to Article 27(1).[163]

In the report for Greece, reference is made to a case in which a Polish national was 'denied a registration certificate on the sole ground that she had been recently convicted to a minor sentence for insulting a police officer' – here, the Council of State overturned that decision. However, the Council of State upheld a similar decision taken in 2008 'on the sole ground that [the applicant, a Romanian national] had been convicted for committing a series of burglaries over a long period of time and for illegally entering Greece' – but the convictions dated 'back from 1998-2002', raising doubts about the extent to which the applicant was really a *present* threat.

Restricting the right to leave a Member State is discussed in detail in the report for Bulgaria, outlining cases challenging the legality under EU law of restrictions placed on Bulgarian citizens because of the commission of a criminal offence while residing in another State, or having a tax, social security, or private debt of more than approx. €2500. In a related preliminary ruling, the Court of Justice held that 'the right of free movement of Union citizens is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect'.[164] Article 4 of the Directive, which articulates the right of exit, does not acknowledge the permissibility of national restrictions on that right. However, the Court noted that relevant 'limitations and conditions stem, in partic-

163. Cf. the report for Slovenia, noting consideration of these grounds by courts reviewing decisions denying temporary residence permits for family members.

164. *Gayadarov*, para. 39.

ular, from Article 27(1) of Directive 2004/38',[165] going on to emphasise the general principles that should guide the application of that provision as well as the right to effective judicial review of related national decisions. The discussion in the national report also provides a useful illustration of cases where national, EU, and ECHR law overlap, yet lead to different outcomes in substance.

6.2.2. Deporting Union citizens and their family members: is the framework of the Directive being applied in practice?

It should first be noted that in some of the national reports, a finding that national practice is closely aligned to the case law of the Court of Justice is clearly presented.[166] Additionally, even where more problematic aspects of national case law are discussed below, it should be pointed out that there are also examples of case law – including in the same States – where compliance with EU legal standards is clear.[167] However, there are multiple examples in the national reports that illustrate a profoundly problematic understanding and/or application of the EU legal framework on expulsion. Most expulsion decisions are taken in connection with criminal convictions,[168] and reports point to difficulties in connection with demonstrating a *present* threat on the basis of *past* convictions;[169] as well as the question of managing *cumulative* convictions.[170]

On the first point, we did find evidence of efforts to establish patterns of behaviour that would fit with the 'genuine, present and sufficiently serious threat' test in Article 27(2) of the Directive, as well as its statement that pre-

165. *Gayadarov*, para. 30; on the legality of debt-linked restrictions, see Case C-434/10 *Aladzhov* [2011] ECR I-11659 (public debt) and Case C-249/11 *Byankov*, judgment of 4 October 2012 (private debt).
166. See e.g. the report for Austria, where the Court's interpretation of public security, in particular, is clearly traced within national case law.
167. See e.g. the text in the report for Denmark linked to notes 49-52.
168. See statements to the same effect in e.g. the reports for France, Germany, and the UK.
169. See e.g. decisions of the Regional Administrative Court in Warsaw on this point outlined in the report for Poland.
170. See e.g. the report for Sweden.

vious criminal convictions shall not *in themselves* constitute grounds for expulsion.[171] In the report for the UK, for example, it was noted that:

> The risk of re-offending is often central to the question of whether the appellant poses a *present* threat and to whether deportation is proportionate. Following *Tsakouridis*, this risk is increasingly assessed by reference to the potential impact of deportation on the rehabilitation and social integration of the EU citizen/family member concerned. The 'European' dimension to this question is acknowledged. Thus, the Court of Appeal has stated that 'common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life'.[172]

More typically, however, we find evidence of what could be described as 'expulsion reflex'. Also in the report for the UK, for example, the authors acknowledge that 'national courts consistently take into account factors such as the applicant's social, familial and cultural links in the UK and compare them with, for instance, the individual's knowledge of the language of his/her Member State of origin, and the availability (or not) of familial and financial support in that State'. However, they also provide 'examples of a potentially tokenistic consideration of these questions resulting from a possible tendency by the national courts to overlook personal circumstances or use a one size fits all approach to personal wealth'.

Examples of cases where the expectations set by EU law made scant impact also include the discussion in the report for Cyprus of the *Vorel* case – where a deportation order was issued following the Romanian applicant's arrest even though he had 'no criminal record; had no prior conviction and no criminal proceedings were pending against him'.[173] In the report for Denmark, the expulsion and exclusion for five years of two Polish nationals 'convicted of stealing in a supermarket and sentenced to 60 days [in] prison' is noted – with the Supreme Court confirming that the offences committed 'were a serious threat to the public order and security'.[174]

171. See e.g. the text in the report for Denmark linked to notes 53 and 56-58; linking questions about 'whether there is a tangible risk of repetition of criminal offences' to proportionality assessments, see the report for Germany.
172. Report for the UK (emphasis in original), citing *Flaneur's Application for Judicial Review, Re* [2011] NICA 72.
173. *Anghel Vorel v Republic*, Case Number 1064/2012, judgment of 2 August 2012; the order preventing the applicant from re-entering Cyprus was subsequently suspended by the Supreme Court.
174. Judgment of the Supreme Court of 19 October 2009 in case 425/2008, reported in U.2010.250H.

In the majority of cases, courts – and mainly higher courts[175] – have overturned unsubstantiated (from the EU law perspective) expulsion decisions taken by administrative authorities. But how many applicants do *not* challenge an expulsion measure; and of those who do, how many *persist* through the appellate chain?

On the second point, about cumulative offences, the report for the Netherlands highlights a ministerial statement from 2011 that 'the accumulation of offences (that individually would not reach the threshold of constituting a threat to a fundamental interest of society) could together be considered to meet that threshold'. Interestingly, it is observed that the Commission 'did not raise any objections to this new approach, whereas the judiciary has been careful to check whether the behaviour of the individual concerned still constitutes a genuine and sufficiently serious threat to a fundamental interest of society'. The report cites the decision of the Court of Justice in *Polat* on this point, which reaffirms that an expulsion measure is justified only if the relevant 'personal conduct indicates a specific risk of *new and serious* prejudice to the requirements of public policy'.[176]

The report for Denmark outlines a starkly formalistic approach to the connection between criminal convictions and expulsion that the rapporteur describes as being 'contrary to the Directive' i.e. rules specifying *type*s of offences that can justify expulsion are included in the national transposition measure – a system that plainly contravenes several of the principles set out in Articles 27 and 28, and is discussed further in Section 6.2.4 with respect to its transgression of the different *levels* of protection expected under Articles 27, 28(2) and 28(3).

Finally, the discussion in Section 2.2 above should also be recalled, on the point that 'the rationales underpinning deportation decisions can be blurred together'. There, we cited examples of expulsion decisions taken ostensibly on grounds of protecting the public order for minor offences that, according to the report for Denmark, are 'are inherently linked to economic considerations' (Q2). In the report for Cyrpus, it is noted similarly that cases involving restrictions on free movement rights have clustered around three issues – reverse discrimination, marriages of convenience, and the non-recognition of

175. For a rare example of a higher court taking a *narrower* view on appeal, see the report for Sweden's discussion of MIG 2009:21; the rapporteurs point out that the narrowness of the decision also runs counter to the general approach of the appellate criminal courts.

176. Case C-349/06 *Polat* [2007] ECR I-8167, para. 35 (emphasis added).

registered partnerships – rather than being linked directly to Articles 27-33 of the Directive.

Overall, therefore, it would seem that the idea of *stability* of residence – a concept that surely befits an area without frontiers with its own citizenship status – is being severely impinged on several fronts by national practices on expulsion and exclusion.

6.2.3. Bans on re-entry

The permitted duration of an expulsion order – of, in other words, a ban on re-entering the State in question – is not something that has arisen frequently in the case law of the Court of Justice aside from the point noted in Section 6.1 above: that EU free movement law precludes national legislation in which expulsion from the State automatically follow a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy; the duration of the expulsion order is also subject to proportionality review in a more general sense.[177]

We were struck, however, by the frequency with which bans on re-entry were discussed in the national reports – an obvious yet perhaps under-explored facet of the legitimacy of national expulsion orders: no doubt because EU lawyers tend to focus mainly on 'central' sources of EU law. Unsurprisingly, the question of exclusion orders was almost always raised in connection with expulsion decisions linked to criminal convictions, and examples of the kinds of bans imposed are included across several parts of this Section (e.g. from the report for Denmark, a ban on re-entry for six years for the use of false identity documents that constituted the basis of a claim for residence and a right to work, outlined further in Section 6.2.5 below).

6.2.4. Articles 27 and 28: three levels of protection?

Generally, national transposition measures are reported to effect the distinctions set out in Articles 27 and 28 of the Directive.[178] We also found particular awareness of the specific gravity of imperative grounds of public security, often in connection with the trafficking of narcotics and closely reflecting the

177. See again, *Orfanopoulos and Oliveri*, para. 67, citing *Calfa*, paras 22-24.
178. Cf. however, the report for Estonia, where it is noted that the concepts are not clearly distinguished.

reasoning of the Court in *Tsakouridis* in this respect.[179] In the report for Bulgaria, it is noted that the requirement of 'serious' grounds of public policy or public security for cases involving citizens who have acquired the right of permanent residence seems to have been transposed also for citizens who have resided there for less than five years – providing an example of more national favourable treatment than EU law requires. There are also, however, some notable instances of transposition transgression.

Recalling the approach to criminal convictions operating in Danish law, introduced in Section 6.2.1 above, the illustrations noted in that report show that the relevant national rules link the expulsion of a foreigner who has lived for more than nine years in Denmark to offences punishable by more than three years in prison – since most of these cases will in fact involve residence for more than ten years, can we really say that this is a correct understanding of 'imperative grounds of public security' in accordance with Article 28(3)? When a foreigner has lived there for between five and nine years, offences that are punishable by just one year in prison will be sufficient – again, very unlikely to align with *serious* grounds of public policy or public security within the meaning of Article 28(2). And it is perhaps even more striking that in all other cases – which necessarily involves situations where Union citizens or their family members have not yet acquired permanent residence in Denmark – 'offences which are punished by a prison sentence are sufficient, or where the person *otherwise* constitutes a threat to the public order, security or health' (emphasis added). This sentence-driven system skirts close to a *presumption* of expulsion: something that is, as we have seen, consistently censured by the Court of Justice in its case law.[180]

In the same report, a problematic decision of the Appeal Court from 2008 is also outlined.[181] In that case, a Slovakian national who had resided in Denmark for more than ten years had been sentenced to four years and six months in prison for offences that included theft and violence against persons. The Appeal Court 'considered that he should be expelled for life relying essentially on the serious nature of the committed offences' alongside the fact that he had previously been sentenced to five years in prison 'for similar of-

179. See e.g. the reports for Finland, and the Netherlands.

180. For another example of a system that links the application of the Directive's concepts to the gravity of the offences committed rather than to a timeline of residence per se, see the report for France; but note also, the emphasis placed on proportionality and individual circumstances in the same report. See further, the report for Italy.

181. Judgment of the Western Appeal Court of 13 November 2008, S-1421/08, reported in U.2009.581V.

fences'. However, '[i]t was not disputed that he had strong links to Denmark, had three sisters living there and spoke the language. In contrast he had no link to Slovakia and could barely speak th[at] language'.

Ironically, the Appeal Court counted his previous term in prison as lawful residence – something that is not required by EU law, we learned subsequently, according to the decision of the Court of Justice in *MG*. However, following its more generous reasoning on that point, and while the situation was addressed by the Appeal Court under Article 28(3)(a) of the Directive – *imperative* grounds of public *security* – it concluded that the seriousness of the offences committed met that threshold, a finding patently at odds with the reasoning in *Tsakouridis* and *PI*, as outlined in Section 6.1 above (and with the reasoning applied later by the Danish Supreme Court in a 2012 case on the same provision that is also outlined in the report). The fact that the order mandated expulsion *for life* added another layer of *dis*-proportionality.

The report for the UK provides comprehensive discussion of the prevalence in national case law of questions connected to the calculation of periods of residence, which in turn determines the level of expulsion protection that should be applied. However, the intensity of that case law is premised on another point made in the report: '[a]t the administrative level, a lack of consistency as to whether a person will be considered to have resided in the UK for [the] past ten years, despite a period of imprisonment prior to the deportation order, has led to a "luck of the draw" application of [Article 28(3)(a)] protection'. The Court of Justice does, as noted above, exclude periods of imprisonment. But the theme of administrative inconsistency redressed through the process of judicial review is, by now, a familiar one.

The report for the UK also states that national courts have 'openly questioned whether administrative guidance adequately distinguishes between different levels of protection, especially in light of the case law of the Court of Justice. As a result, differentiation based on "severity" of the conduct or custodial sentence length alone has been rejected'. Nonetheless, the Report goes on to outline a series of offences that have been held to constitute 'serious' or 'imperative' grounds in *both* administrative guidance and national case law.[182]

182. See the text in the report for the UK linked to notes 132-147.

6.2.5. Abuse of rights

The national reports highlight an important question that has not yet been addressed definitively by the Court of Justice: do situations of abuse of free movement rights preclude the application of free movement law altogether, or are the underlying issues better considered when restrictions placed on those rights are being evaluated at the stage of State justification arguments? Article 35 of the Directive appears to leave room for the operation of both approaches:

> Member States may adopt the necessary measures to *refuse, terminate or withdraw* any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31 [emphasis added].

In a memo published on 15 January 2014, the Commission outlines a *dual* expulsion/exclusion approach:

> National authorities may investigate individual cases where they have a well-founded suspicion of abuse and, if they conclude that there is indeed an instance of abuse, they *may withdraw the person's right of residence and expel him/her from the territory*.
>
> *In addition*, after assessing all relevant circumstances and depending on the gravity of the offence (for instance, forgery of a document, marriage of convenience with involvement of organised crime), *national authorities may also conclude that the person represents a genuine, continuous and sufficiently serious threat to public order* and, on this basis, also issue an exclusion order in addition to expelling him/her – *thus prohibiting his/her re-entry into the territory for a certain period of time*.[183]

Through this method, the Directive's requirements on public policy become relevant only if a Member State intends to attach an *exclusion* order to an *expulsion* measure – with the latter being justifiable solely on the basis that a finding of abuse has been made. Does national practice reflect or differ from the Commission's proposed framework? And does it shed any light on the merits, or otherwise, of that approach?

183. 'European Commission upholds free movement of people' (emphasis added), available at http://europa.eu/rapid/press-release_MEMO-14-9_en.htm. The Commission also stated that it will 'will help national authorities implement EU rules which allow them to fight potential abuses of the right to free movement by preparing a Handbook on addressing marriages of convenience by spring 2014'; that publication remains forthcoming at the time of writing.

There are signs that national authorities *do* separate out the application of Articles 27/28 and Article 35 in certain respects. But the consequences of doing so can differ significantly. In the report for the Czech Republic, for example, reference is made to a decision of the supreme administrative court in which it was confirmed that 'illegal stay or entry to the Czech Republic' could not of itself constitute a genuine, present and sufficiently serious threat to public order, with the court making particular reference to protecting family members in this respect. The report also notes that the court distinguished between the expulsion system set out in Articles 27-33 of the Directive and the notion of 'abusing rights or deception' laid down in Article 35, using the examples of fictitious marriages and fictitious declarations of paternity to illustrate the latter concept.

Interestingly, however, precisely because 'fictitious marriage could [not] be subsumed under the concept of "public order"', the court concluded that an expulsion decision made on that basis could not be considered to be a 'proportionate intervention'. The national court thus extended more protection to the individuals concerned than would seem to be required by a literal reading of Article 35 of the Directive – which makes reference only to the procedural safeguards specified in Articles 30 and 31, and recalling that the proportionality and individual circumstances review requirements of Articles 27 and 28 refer to expulsion decisions based on public policy, public security or public health only. This national interpretation thus illustrates a lacuna in the Commission's proposed approach, when read against the scheme and general principles of the Directive as a whole.

The view of the national court in the Czech Republic contrasts with cases outlined in the report for Denmark, where – linking also to the proportionality requirements considered in Section 6.3 below – the author comments that in cases where it is found that a Union citizen's family member is residing illegally there, 'it seems very difficult to prove that deportation ... is disproportionate, the argument being that the link to Denmark has been established illegally'. The cases discussed concern the use of false identity cards 'in order to manufacture a right of residence and work'. The Danish Supreme Court has ruled that such activities – as well as the practice of illegal residence and work – '*make the person* a genuine, present and sufficiently serious threat to one of the fundamental interests of society pursuant to the Directive which can justify expulsion for six years'.'

The fact that the applicant (an Iraqi national) had a child with a national of another State residing in Denmark and that the couple was expecting a second

child at the time 'did not alter this finding'.[184] The Supreme Court's approach thus conflated the application of Article 35, on the one hand, with the tests set out in Articles 27 and 28, on the other – but without actually seeking to *apply* the principles and protections that frame the latter set of provisions. It is especially remarkable that the prison sentence that had been imposed in this case was just 60 days.

6.3. Proportionality and individual circumstances

The relevance – or, regrettably, otherwise – of proportionality has already been mentioned in several parts of Section 6.2, but it is worth drawing attention to this dimension of the expulsion system more specifically too. There is, once again, a clear division in the national reports on this aspect of Q6.

It is clear that national authorities in some States carefully *apply* the principles of the Directive in this respect – described, for example, as 'a fundamental part of the [expulsion] decision' in the report for Austria.[185] In the report for the Netherlands, it is pointed out that the burden of proof for proportionality considerations lies with the individual challenging an expulsion decision: '[i]f no elements linking the individual to Dutch society are brought forward, or if the individual explicitly stated that there is no reason for staying in the Netherlands, national courts generally accept that the principle of proportionality was respected. When elements are brought forward individuals must provide sufficient evidence to support the claim'.

Respect for family life is the interest specified most often with respect to consideration of individual circumstances.[186] Some reports suggest, however, that *strong* links to the State or to family members residing there will be nec-

184. This part of the case is also discussed in the report for Denmark under Q1; judgment of the Supreme Court of 24 August 2012 in case 58/2012, reported in U.2012.3399H.

185. See further, the discussion of proportionality vis-à-vis national case law and the practices of national administrative authorities in the report for Portugal. See also, the reports for Finland ('the court's reasoning emphasises proportionality'), and Greece.

186. See e.g. the reports for Austria, Cyprus (where it is noted, however, that consideration of this right is 'almost exclusively done in relation to Article 8 ECHR, and not (yet) the EU Charter of Fundamental Rights, at least in a manner that has a practical effect for the outcome of the review'), Finland ('[e]mphasis is placed on the best interests of the child as well as the protection of family life'), France, and Italy (where it is again pointed out that Article 8 ECHR remains, for now at least, the key touchstone in this respect).

essary in order to overturn an expulsion decision on that basis.[187] In the report for the Netherlands, for example, a list of considerations that have *not* been accepted as sufficient to displace expulsion decisions include 'having a relationship with a person living in the Netherlands'; 'good behaviour in prison'; 'birth of a child/back on the right path'; and 'economic situation in country of origin'.

However, we found several examples on the basis of which it could be claimed that national authorities might *recite* the principles codified in the Directive but that does not necessarily mean that they apply them in line with EU legal standards in reality. Interestingly, the report for Cyprus draws a distinction between the application of proportionality by the Supreme Court when reviewing administrative decisions generally ('applied vigorously') and reviewing expulsion decisions where, in contrast, 'the application of the test seems to be deferential to the discretion of the decision-making body'.[188]

In a case outlined in the report for Denmark – based on Article 28(3)(a) i.e. legal residence exceeding ten years – it was noted that '[t]he convicted person's personal situation and his link to Denmark could not outweigh the seriousness of the criminality committed. This was despite the fact that it was not disputed that he grew up in Denmark where his family was living, that he had no link to Croatia and could only speak Roma besides Danish'. And what were the *imperative* grounds of public *security* at issue? – A five-year sentence for robbery, in the light of previous conviction and imprisonment for similar offences.

6.4. Question 6 – emerging issues and themes

In the Institutional Report, post-Directive case law is characterised as follows: '[a]dmittedly, the Court of Justice was at pains to *qualify* most of the rules established in [its] judgments but one thing stands out from those rul-

187. See e.g. the report for Denmark ('[p]ersonal circumstance are unlikely to make the balance tip in another direction').

188. See e.g. the discussion on *Krisztian Bekefi v Republic*, Case Number 293/2012, judgment of 7 March 2012. The report points also, however, to the manner in which the Supreme Court resolves cases for the benefit of the individual by applying the principle of equal treatment, thus characterizing concerns about the approach to proportionality as 'of secondary value as long as the approach of the [Supreme] Court remains focused on safeguarding the intensity of review of the administrative actions in this field'.

ings – the Court of Justice was meticulously ensuring that it cannot be seen as an insurmountable obstacle to expulsion by interpreting the enhanced protection against expulsion as any sort of an *absolute prohibition*' (emphasis added). Even so, the evidence presented in national reports suggests that, in contrast to most of the preceding findings in this Report, **there is a systemic problem with the application of EU legal standards in the area of expulsion**.

EU law establishes a high threshold of protection against restrictions on free movement rights and against expulsion for *all* Union citizens who reside in other States. The relevant provisions of Directive 2004/38 are relatively detailed and have, on the whole, been properly transposed into national law. The extensive case law of the Court of Justice has explained and reinforced the principles that those provisions capture. And national courts have been notably willing to refer questions about the *new* thresholds created by the Directive. We saw, for example, that the decision in *Tsakouridis* has already left a clear imprint on national judicial consciousness.

However, **national practices consistently fall short of the *citizen-centric* framework established by EU law**. The national reports, taken together, evidence a troubling degree of disconnect from what *should* be happening if the EU legal framework were correctly applied – demonstrating powerfully that **transposition is just the first step towards building up the national implementation matrix**.

A particularly strong theme of **expulsion as punishment for criminal activity** emerges from the national reports. Linking back to the discussion on permanent residence in Section 4.1, we see further fleshing out of 'good' and 'bad' citizenship narratives. Who shapes that narrative, and on what basis? The Institutional Report raises a general question about **how the conservatism of the Member States feeds upwards to the Court of Justice**. To put it another way, without saying so directly, the Institutional Report is acknowledging that in many if not all States, the deportation of foreign national prisoners – whether EU citizens or third country nationals – is an issue of high political salience, representing one of the key tests that governments have to pass in order to be seen as effective in the area of immigration policy. But there is a dangerous line between appropriate and dynamic political pragmatism and mutual institutional engagement, on the one hand, and undue political influence, on the other. The challenges raised by expulsion are not easy to resolve. But, for now at least, the Member States have *chosen* to manage these challenges within a *rights*-based citizenship framework – not a privilege-focused immigration mindset that is shaped by *permissions*.

The Institutional Report states that '[t]he strong attachment of the Member States to the possibility of restricting free movement on the grounds of public policy or public security and the Court of Justice's willingness not to stand as an obstacle to this means that no absolute protection against expulsion is likely for the foreseeable future'. But it also emphasises that the '**procedural safeguards** of EU citizens that help them to fight arbitrary or incorrect decisions restricting their rights are being strengthened by the Court of Justice'. The procedural dimension of the Directive is critical. But it should not be seen as a substitute for appropriate decision-making in the first place. After all, **most individuals never seek judicial review** of 'arbitrary or incorrect decisions' in the first place.

In our view, **further legislation at EU level may be needed** – especially to elaborate on how to manage criminal convictions within the framework of expulsion. Legislation cannot account for every twist that will arise in national practice, but the breadth of the principles that we have at present – notwithstanding their interpretation over several decades by the Court of Justice – is just not working. This point also bridges well to Q7 and Q8, both of which address the application of principles of EU law at national level where there is no legislative underpinning of those principles in Directive 2004/38 at all.

EU citizenship *beyond* Directive 2004/38/EC – Exploring national application of primary EU law

Thinking especially of the decisions in *Rottmann* and *Ruiz Zambrano,*[189] it is clear that the adoption of Directive 2004/38 did not diminish the interpretative powers of the Court of Justice with respect to the primary citizenship rights conferred directly by the Treaties. Our questions here were constructed to elicit information about the extent to which national authorities are responding to that jurisprudence and are willing to go beyond the boundaries of the Directive in appropriate cases. We highlighted two key areas in this respect:

(1) **Purely internal situations** and the issue of reverse discrimination, especially in cases involving family reunification claims; and

189. Case C 135/08 *Rottmann* [2010] ECR I-1449; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

(2) The extent to which **national rules on the acquisition and loss of citizenship** accommodate, or otherwise, the specific implications of those rules for acquisition and/or loss of the status of Union citizenship.

Question 7

To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation'? To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. *Chen*, *Ruiz Zambrano* and subsequent decisions) been effectively implemented and applied at the national level? Does the case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States? Have legislative or specific administrative changes been put in place? How are these matters being dealt with by the national courts?

7.1. Introduction

In Section 1.7, the complexity of EU citizenship law was illustrated by outlining the different categories of Member State nationals that come within the scope of either the Directive or the primary rights conferred by the Treaty. In this part of the questionnaire, the focus falls on two of those categories in particular: migrant Union citizens who have returned to their home States; and static Union citizens residing in their home States for whom EU legal protection applies in exceptional circumstances.

The scope of Directive 2004/38 is tied expressly to situations where a Member State national (1) exercises movement, and (2) is *in* a host State. Since the decision in *Singh*, however, we know that a shield of EU legal protection continues to attach to the migrant citizen – and by extension to his or her family members – when s/he returns to the home State. Responding to a question about whether a third country national spouse could claim residence rights after the couple had returned to the (formerly) migrant citizen's home State, the Court concluded:

> A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the

conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.[190]

The same reasoning was extended in *D'Hoop* to the refusal of a tideover allowance to a Belgian national on the grounds that she had completed her secondary education in another Member State. Again, within a broader context of effectiveness, the Court emphasised that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'.[191] As noted in Section 1 above, the Court has ruled in *O* that the conditions for lawful residence laid down in Directive 2004/38 also apply by analogy to claims for family reunification that an applicant makes once back in the home State – a ruling that was described as 'nervously awaited' in the report for Denmark.[192] In the same case, the Court also imposed, in effect, a *minimum duration* for the exercise of free movement rights that needs to be met before the protective EU shield can be generated, by aligning the idea of 'genuine residence' with residence established under Article 7(1) – and not Article 6(1) – of the Directive i.e. residence for more than three months.[193]

In *Chen*, the Court had confirmed that a minor Union citizen had a right under EU law to reside in a host Member State; and that the parent who was her primary carer derived residence rights there on the same basis. It was pointed out, however, that the child was 'covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State'.[194] Another point is also important to note from the decision – the child had acquired an Irish passport, in accordance

190. Case C-370/90 *Singh* [1992] ECR I-4265, paras 19-20.
191. Case C-224/98 *D'Hoop* [2002] ECR I-6191, para. 30.
192. Case C-456/12 *O*, judgment of 12 March 2014. The case stems from proceedings in the Netherlands, and is discussed in that report around the text in notes 60-63 and after the text at note 65. See also, the discussion of the cases outlined at notes 62-63 in the report for Denmark, and at notes 45-46 in the report for Germany.
193. *O*, esp. paras 52-53.
194. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para. 47.

with Irish nationality law, by virtue of being born in Northern Ireland. The intention was always to live in the United Kingdom; crucially, the holding of an Irish passport was sufficient to trigger a sufficient connection to EU law, even in the absence of *physical* movement between the two States.

For static citizens, the general position was that EU law has no bearing on matters that are purely internal to one State, and that Union citizenship had not altered this limitation.[195] However, building on the ruling in *Rottmann* – considered separately under Q8 below – the Court created a revolutionary new test in *Ruiz Zambrano*:

> As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States ... In those circumstances, Article 20 TFEU precludes national measures which have the effect of *depriving citizens of the Union of the genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union.[196]

Addressing the particular circumstances of the case, the Court held that a 'refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect',[197] since 'such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents'.[198] The Court extended the same assumption to the refusal to grant a work permit on the grounds that 'if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union'.[199]

The resulting intervention of EU law in purely internal situations is a truly ground-breaking constitutional development, widely discussed in the academic literature.[200] In subsequent case law, however, the Court placed firm

195. See e.g. Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.
196. *Ruiz Zambrano*, paras 41-42 (emphasis added).
197. *Ruiz Zambrano*, para. 43.
198. *Ruiz Zambrano*, para. 44.
199. *Ruiz Zambrano*, para. 44.
200. See e.g. K. Hailbronner and D. Thym, 'Comment on Case C-34/09 Ruiz Zambrano' (2011) 48 CMLRev 1253; D. Kochenov and R. Plender, 'EU Citizenship: From an incipient form to an incipient substance? The discovery of the Treaty text' (2012) 37 ELRev 369; H. van Eijken and SA. de Vries, 'A new route into the Promised Land? Being a European citizen after Ruiz Zambrano' (2011) 36 ELRev 704; and F. Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizen-

emphasis on the *exceptional* nature of that intervention, stressing a threshold of *forced* departure from the *territory of the Union* before the genuine enjoyment of the substance of citizenship rights could be considered at risk. In *Dereci*, for example, the Court distinguished such a situation from a claim for family reunification per se:

> [T]he mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.[201]

Additionally, in *McCarthy*, the Court drew a line under the *Chen* judgment: holding a second Member State passport does *not* alter the legal situation of a static citizen who has never left their *home* State – only an obstacle to that citizen's freedom of movement within the Union or forced departure from the territory of the Union will engage the rights conferred by Articles 20 and 21 TFEU.[202]

The Court thus articulated the limits of the *Ruiz Zambrano* test relatively quickly. However, an as yet unresolved issue concerns whether residence rights should be granted to a *primary carer* only, or also to others e.g. the *parents* of minor citizens who qualify for EU protection. The final part of the *Ruiz Zambrano* judgment refers to 'a third country national upon whom his minor children, who are European Union citizens, are dependent'.[203] In *O and S* – a ruling delivered just under two years after *Ruiz Zambrano* – the phrasing is slightly different; and it differs also from the *Chen* language of primary carer: 'a third country national in the Member State of residence of his minor children, nationals of that Member State, who are dependent on him *and of whom he and his spouse have joint custody*, the Court has held that the refusal to grant a right of residence would have the consequence that those children, who are citizens of the Union, would have to leave the territory of the Union *in order to accompany their parents*'.[204] Does this expression

ship and its dynamics for shifting the economic paradigm of European integration' (2011) 17 ELJ 34.

201. Case C-256/11 *Dereci*, judgment of 15 November 2011, para. 68.
202. Case C-434/09 *McCarthy* [2011] ECR I-3375.
203. *Ruiz Zambrano*, para. 46.
204. Joined Cases C-356/11 and C-357/11 *O and S*, judgment of 6 December 2012, para. 46 (emphasis added).

of things intentionally soften the harder consequences of *Ruiz Zambrano* when read in the light of *McCarthy* and *Dereci*?

Additionally, the Court stressed in *O and S* that 'while the principles stated in the *Ruiz Zambrano* judgment apply only in exceptional circumstances, it does not follow from the Court's case-law that their application is *confined to situations in which there is a blood relationship* between the third country national for whom a right of residence is sought and the Union citizen who is a minor from whom that right of residence might be derived' – therefore, 'the fact that the third country nationals for whom a right of residence is sought are not persons on whom those citizens are *legally, financially or emotionally dependent* must be taken into consideration when examining the question whether, as a result of the refusal of a right of residence, those citizens would be unable to exercise the substance of the rights conferred by their status'.[205]

Later in the judgment, the Court turned its analysis to family reunification for third country nationals under Directive 2003/86, emphasising the importance of Article 7 of the Charter, which 'must also be read in conjunction with the obligation to have regard to the child's best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents'.[206] What does the same obligation require in the context of Articles 20 and 21 TFEU?

We were keen to understand how national authorities – and national courts and tribunals in particular – have responded to the initial fundamental shift in the scope of Union law brought about by *Ruiz Zambrano*, but also the confusion that might be caused by the different *tones* of subsequent judgments, especially in the absence of more detailed legislative guidance. Linking back to the map included in Section 1.2.2 above, the discussion below relates primarily to the States in which the protection of Directive 2004/38 has not been extended, under national law, to static citizens.

205. *O and S*, paras 55 and 56 (emphasis added). See similarly, the report for Ireland (cases outlined at notes 59-62, applying *Ruiz Zambrano* where 'refusal to grant a right of residence or a work permit causing the absence of a family member required for care and social and/or financial support').

206. *O and S*, para. 76; referring to Directive 2003/86/EC on the right to family reunification, [2003] OJ L251/12.

7.2. Responding to the evolving interpretation of primary rights: judicial engagement

Two broad themes are addressed in turn in this Section: first, national judicial absorption of the *limits* of the *Ruiz Zambrano* case law; and, second, the ambiguities in this area that are still emerging through these national cases.

7.2.1. Adhering to the case law: and its limits

On the whole, we found that national courts and tribunals have absorbed the case law on primary rights and its distinctiveness vis-à-vis claims that fall, by contrast, within the scope of the Directive.[207] In the report for the Netherlands, an interesting decision of the District Court of Arnhem is noteworthy for its expansive application of the sufficient resources dimension of *Ruiz Zambrano* – granting not a work permit to the Venezuelan mother of a Dutch child but, rather, entitlement to a social allowance.[208] This issue arises also in the report for the UK, where it is observed that the intervention of the Home Secretary in a case on this question 'suggests that the question of a *Ruiz Zambrano*-based right to social welfare has arisen frequently at the administrative level'. The report distinguishes two kinds of situation in this context: entitlement to social welfare assistance *after* a residence right has been established on the basis of *Ruiz Zambrano*; and whether or not denial of social welfare can *itself* establish such a right on the basis of forced departure.

But we found that particular emphasis has been placed on implementing the *strictness of the limits that followed* in subsequent ruling such as *McCar-*

207. See e.g. the report for the Netherlands (cases outlined at notes 56 and 57 applying *Ruiz Zambrano*, and case outlined at note 65 applying *Chen*); the report for Sweden (on MIG 2009:22 applying *Chen*); and the report for the UK (cases outlined at notes 161-164 applying *Chen*). National case law on citizenship rights extends beyond family reunification too: see e.g. the report for Poland, outlining cases in the areas of tax discrimination and access to benefits. Cf. the report for Bulgaria, where the author suggests that national courts, first, 'do not distinguish clearly between rights acquired under Directive 2004/38 and under Arts 20 and/or 21 TFEU; secondly, that they do not fully apprehend the Court's case-law; thirdly, that there is a general unease when having to address "purely internal situations"' (providing case law examples to illustrate this critique).

208. Report for the Netherlands, text at note 54. Cf. the approach noted in the report for Ireland, case outlined at note 66.

thy and *Dereci*.[209] We also suggest, however, that these national disputes have, in turn, highlighted uncertainties about the intended scope of those limits.

As a somewhat technical but important point, it is worth noting the reference in the report for Germany to a judicial revolution discourse that developed immediately after the judgment in *Ruiz Zambrano*, with the authors noting that German courts and also academics quickly understood the fundamental implications of the ruling and were keen to test its implications. It was shown in Section 7.1 above, however, that the Court of Justice quickly closed down the revolutionary potential of the judgment – something not easily predictable at the time and which could, therefore, have had complex repercussions within quickly reactive national systems.

Addressing the subsequently determined limits of the genuine enjoyment test raises some difficult questions. First, there is *uncertainty about how the 'new' case law relates to the framework constructed in previous decisions*. For example, in the report for Sweden, an expulsion case involving a Colombian mother and her Spanish minor daughter turned on the absence of sickness insurance, with the Migration Court of Appeal ruling that expulsion from Sweden to Spain would not breach the *Ruiz Zambrano* forced departure from the Union threshold. This is certainly correct; and comprehensive sickness insurance is clearly required by Article 7 of the Directive. But how does the decision sit with the ruling in *Baumbast* that 'the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality'?[210] In *Baumbast*, an *element* of sickness insurance was missing from the family's cover – is that the point of material difference?

Picking up on the potentially softening effects of the decision in *O and S,* a case concerning a national of Kosovo who did not have a residence permit in the Netherlands is discussed in that report.[211] She gave birth there to two

209. See e.g. the report for Finland (on KHO 2013:97, emphasising the significance of having custodial rights); the report for France (cases outlined at notes 108-110, applying *Ruiz Zambrano*); the report for Germany (cases outlined at notes 43-44); the report for the Netherlands (case outlined at note 62, where the exercise of free movement rights precluded the applicant from claiming that he had been deprived of the genuine enjoyment of the substance of his citizenship rights); the report for Sweden (on MIG 2011:17, applying *McCarthy*); and the report for the UK (cases outlined at notes 166-170, applying *Ruiz Zambrano* plus *Dereci*).

210. Case C-413/99 *Baumbast* [2002] ECR I-7091*,* para. 94.

211. Rechtbank 's-Gravenhage, zittingsplaats Roermond, 28 March 2011.

children of Dutch nationality; her partner is also a Dutch national. However, the national court rejected her claim for a residence permit based on *Ruiz Zambrano* on the grounds that her children 'could still enjoy residency in the EU, with their father, who had Dutch nationality'. Again, this decision fits with the clarification of *Ruiz Zambrano* that we find in *Dereci*. But does it fit with the ethos of citizenship when read in the light of respect for family life or the best interests of the child more generally?

Second, and perhaps most fundamentally, there is the issue of *unintended consequences of the strictness of the genuine enjoyment test*. Cases discussed in the report for the Netherlands illustrate this concern very starkly; for example:

> It was ruled that a Moroccan father did not have a derived right to stay in the Netherlands, because the Dutch mother could not take care of the children and the children were forced to stay in a foster home. The Court ruled that in these circumstances, the children were not obliged to leave the territory of the EU. Another example is a case where the Dutch parent was mentally ill and could not take care of her children. It was also held that there was no derived residence right [for] the other parent with the third country nationality.

Again, these decisions are 'correct' in the sense of being in line with the Court of Justice's forced departure test. Moreover, it is fitting that a test activating a role for EU law in otherwise sheltered national regulatory space should be a delimited one. But could the Court really have intended these troubling consequences, and is the outcome really compatible with *genuine enjoyment* of Union *citizenship*?

7.2.2. Managing ambiguities: the particular challenge of scope-in-motion

In other cases discussed in the report for the Netherlands, a different decision was reached – for example:

> The Dutch mother was in the position to take care of her child. Nevertheless, due to the mental illness of the father, the Council of State ruled that the Turkish father had a derived right to reside in the Netherlands. There were indications that a deportation to Turkey would lead to so much psychological suffering that his Dutch spouse and child had no other choice than to join the father and thus to reside outside the EU.

Linking back to the discussion under Q1 on the meaning and nature of dependency, this extract fits with the *wider* understanding of dependency conveyed in *O and S*. At one level, then, this national case perhaps shows an ap-

propriate correction of prior restrictiveness that maps how the trajectory of Court of Justice case law evolved.[212] But an approach concerned with *degrees* of emotional dependency suggests potential for subjective decisions. In the UK, national courts have distinguished between the fact that 'strong emotional and psychological ties within the family would be significantly likely to rupture in instances of separation, *diminishing enjoyment of life in the UK*' (emphasis added) and the *Ruiz Zambrano* forced departure threshold i.e. 'when quality of life is so diminished that an individual is effectively compelled to leave Union territory'. But how is that distinction to be *determined* in practice?

Case law twists also affect the work of national administrative authorities. For example, that the scope of the *Ruiz Zambrano* test is 'very narrow' was confirmed in a ministerial Briefing Note on the judgment discussed in the report for Denmark; it was also noted that the Note has been updated following *McCarthy*, *Dereci*, and *O and S*. The Note prescribes a series of conditions that have to be taken into account in such family reunification cases, including that the case 'must concern the right of residence of a *parent* to a Danish child' – but in line with the *O and S* benchmark of '*persons* on whom those citizens are legally, financially or emotionally dependent', the Note goes on to clarify that 'the parent does not need to be the biological parent, but can be another adult on whom the child is dependent'.

The point that forced departure of a Danish child who has a third country national parent, broadly understood, from the Union territory is 'most likely where there is *no other parent with whom the child can live*' (emphasis added) would seem to avoid some of the more difficult outcomes discussed earlier with respect to case law in the Netherlands, where foster care, for example, was deemed to be an appropriate alternative to granting a parental residence permit.[213] But, as the author points out, restrictiveness taints other elements of the Danish system: for example, 'a right of residence pursuant to Art 20 might also arise in cases where the Union citizen is not a child, but an adult who is dependent on another person for his financial and emotional needs'.[214]

212. See also, the report for Germany, reflecting this point through the comparison between the narrow approach applied in *Dereci* and a greater flexibility presumed after the *O and S* ruling.
213. See also, the report for the UK, cases outlined in notes 169-170; including a decision in which it was recognised that 'Union citizen could not be cared for by their abusive Italian father if their Argentine mother were deported'.
214. This question is also raised in the Institutional Report.

Interestingly, the author also queries the compatibility of Danish rules with EU law on the point about 'refusal to give a right of residence under EU law to the other parent who is also a third-country national (Mrs Zambrano)'. As noted in Section 7.1, it is not clear from the decision in *Ruiz Zambrano* what the status of the children's mother actually is. Could she be considered to be a *primary carer* alongside the father's position as a parent on whom the children are *dependent* in a *different* i.e. material way? In the report for the UK, national regulations provide that 'where a Union citizen minor has two primary carers ... *both* primary carers must be required to leave the UK before a derivative right can be enjoyed' by the person who has primary responsibility for care. The position of *parents* alongside or as opposed to *primary* carers is clearly something that needs to be clarified.[215]

As a final point, and linking back to the discussion in Section 4.2.1 above, it is still unclear whether family members who derive their rights of residence from the primary rights of Union citizens can also acquire permanent residence rights on that basis.[216] It is suggested here that a distinction may be drawn between rights claimed on the basis of *Ruiz Zambrano* – i.e. cases that involve residence rights in a Union citizen's *home* State and so do not fall within the scope of Directive 2004/38, the sole repository of the status of permanent residence[217] – and rights based on the decision in *Chen*. In the latter case, self-sufficiency was a critical factor in the granting of the residence right under EU law, and it is difficult to see how periods of residence accrued on that basis could be deemed *not* to meet the requirements of Article 7 of the Directive – and thus the requirements of 'legal residence' under Article 16 too.

215. The case law on residence rights derived from the children of migrant workers in host State education opens a window here: 'where children enjoy ... the right to continue their education in the host Member State, although the parents who are their careers are at risk of losing their rights of residence, a refusal to allow *those parents* to remain in the host Member State during the period of their children's education might deprive those children of a right which has been granted to them by the legislature of the European Union' (Case C-529/11 *Alarape and Tijani*, judgment of 8 May 2013, para. 26, emphasis added).
216. This question is also raised in the Institutional Report.
217. A point reflected in national regulations discussed in the report for the UK.

7.3. Responding to the evolving interpretation of primary rights: legislative and administrative change

Our questions focused primarily on how national courts and tribunals are managing the Court of Justice's case law, but some authors raised issues about how family reunification issues are covered by national legislation – and/or whether developments such as *Ruiz Zambrano* prompted amendments to national rules, some of which have already been outlined in Section 7.2.[218]

In the report for the Netherlands, it was noted that discussions about whether or not the developments in Court of Justice case law require legislative change at national level are ongoing. The same point was made in the report for Ireland, but here, pointing to specific concerns that have been raised because of the absence of a 'comprehensive approach to family reunification' – in fact, it was noted that 'Ireland is the only EU Member State not to have such rules enshrined in legislation' at all.

7.4. Question 7 – emerging issues and themes

On the whole, the examples discussed in this section show a national judiciary trying hard to discern and to follow the twists and turns of jurisprudence-in-progress at EU level. The openness of national courts and tribunals to case law change and, more particularly, the **implications at national level of rapid *EU-level* case law correction** can be seen in several of the national cases discussed.

At one level, it is an entirely **natural and expected characteristic of case law that subsequent decisions sharpen the scope of relevant principles and tests**. It is often only through later cases that the *layers* inherent in principles and test are revealed through the lens of different facts-sets.

The difficulty here is simply that the judgment in *Ruiz Zambrano* initiated such an intensive *wave* of responses, at all levels: not just through litigation but also, as pointed out in the Institutional Report, 'an increasing number of citizens' complaints, petitions and parliamentary questions on this new line of jurisprudence'. That Report attributes the force of this 'stimulating effect' to the fact that the judgment in *Ruiz Zambrano* 'appeared to offer a whole new world of EU law-argumentation to long-standing constellations and issues

218. See e.g. the reports for Denmark, France, and the UK.

that were considered problematic or unsatisfactory but for which no EU law remedy seemed traditionally in reach'.

Additionally, the discussion has revealed several examples of **questions and ambiguities that need still to be resolved** – e.g. what rights beyond residence and the right to work attach to a residence right grounded in *Ruiz Zambrano*? Are parents or only primary carers – whether parents or not – protected under EU law in these kinds of internal situations? And finally, linking back to the discussion under Q1, what does dependency really mean in non-conventional situations? A continuing stream of preliminary references is inevitable in this regard.

The responses received to this question also reflect earlier discussions about the **pioneering capacity of EU law** – about when that function *should* kick in; but also, when it should *not*. This point also revives questions about **the role(s) of the legislature(s)**: at national level, on the one hand – to cite AG Sharpston on this point, as the Institutional Report does, '[w]hy a Member State would wish ... to treat its own nationals less favourably than other EU citizens ... is curious'[219] – but also at EU level: specifically, when critical developments occur through case law, at what point is a *responsibility* to step in established, in order to provide framing and unifying legislative guidance on questions where there is clear inconsistency of approach; or does case law in fact serve its own *autonomous* purpose?

Question 8

In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

Article 9 TEU

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

219. AG Sharpston, Joint Opinion for Case C-456/12 *O* and Case C-457/12 *S*, judgments delivered on 12 March 2014, para. 86 of the Opinion.

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

8.1. Introduction – the interdependency of national laws and EU law on citizenship

Through Question 8, we wanted to interrogate more closely the relationship between national citizenship – and, specifically, national rules on the acquisition and loss of citizenship – and EU citizenship. EU citizenship, as is well known, only attaches to those who have the nationality or (in some language versions, e.g. Italian or Spanish) the 'citizenship' of a Member State. What is meant by this is that the group of EU citizens is the same group as those who are recognised by law, both internally and externally, as being members of a particular national polity (i.e. a Member State), whether they have acquired that citizenship at birth or afterwards.

Some Member States have strengthened that link, by making it easier for EU citizens from other Member States to acquire national citizenship when resident in the host State (e.g. Czech Republic (from 2014), Hungary, Ireland, and Italy[220]). This can offer an important complement to the benefits of permanent residence under Directive 2004/38, because it also ensures that, as a citizen, that person can vote in national elections and does not suffer possible disenfranchisement.[221]

The interdependency of national laws on citizenship and EU law has become more complex over the years. This is a result of the development of the constitutional concept of EU citizenship, complementing and building upon the free movement rights established in the founding Treaties. It also owes much to the case law of the Court of Justice, which has established a number of principles regarding the implications of EU law for what one might expect – *prima facie* – to be the freedom of Member States to apply their own citizenship laws, subject only to the strictures of international law.

220. This typically involves shorter residence periods.

221. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33; this initiative is discussed in detail under Q12 below.

In a first step, the Court established a principle of mutual recognition. Already, in the pre-EU citizenship era, the Court concluded in *Micheletti* that as regards a dual citizen, a Member State was not at liberty to treat that person as a third country national if he or she also held the citizenship of a Member State.[222] The Court held that 'it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.[223]

The specifics of national citizenship laws returned to the Court in the *Chen* case,[224] where a third country national family had relied upon the particularities of Ireland's (then) rules on *ius soli* acquisition of citizenship by all children born on the island of Ireland to ensure that their child acquired Irish nationality without leaving the territory of the UK. Again, the UK was required to recognise the legitimate acquisition of the citizenship of another Member State, which gave the child (and thus her mother, as her primary carer) a right of residence in the UK. It is well known that it was cases such as this that lay behind a change to the law in Ireland in 2004, on the basis of a constitutional referendum.[225]

By the time the *Rottmann* case came before the Court,[226] its formulation of the interaction between EU law and national law in relation to citizenship had moved on yet further. It now comprised, on the one hand, the assurance from the Court to the Member States that the rules of acquisition and loss of citizenship were in principle a matter for national law (subject to international law, of course), but, on the other hand, a familiar assertion that 'the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'.[227]

Operating the national rules of acquisition – or, in *Rottmann* more particularly, of loss – with due regard to EU law means seeing in the first place

222. Case C-369/90 *Micheletti* [1992] ECR I-4239.
223. *Micheletti*, para. 10.
224. Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
225. See the report for Ireland at note 69 *et seq*.
226. Case C-135/08 *Rottmann* [2010] ECR I-1449. For extended discussion by a number of commentators, see J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI RSCAS Working Paper 2011/62, available at http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3.
227. *Rottmann,* para. 41.

whether this is a matter that falls within the ambit of EU law. Taking a decision to withdraw a naturalisation decision, even one procured by fraud, where this means that the person ceases to be a citizen of the Union because he or she has also lost the citizenship of the original state on acquisition of another citizenship, is a situation which 'by reason of its nature and consequences' falls within the ambit of EU law.[228] For losing EU citizenship means losing all the rights attached to that status.[229] Thus, in the circumstances, it is reasonable to subject even a decision to withdraw a naturalisation decision to judicial review carried out in the light of EU law.[230]

It is not unreasonable in principle for Member States to protect the public interest by withdrawing a naturalisation decision obtained by means of fraud or deception, in order to protect 'the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[231] Withdrawing nationality obtained by deception would not be – in the Court's reading of international law – an arbitrary act, and thus it would, in principle, be in accordance with the requirements of international law. But losing EU citizenship as a consequence of the withdrawal decision does add a further element to the argument, according to the Court, because of 'the importance which primary law attaches to the status of citizen of the Union' (i.e. 'destined to be the fundamental status of the nationals of the Member States', etc.).[232]

In practice, what EU law demands is a test of proportionality, which takes into account both the nature of the deception and the consequences that the decision entails for the person in question and for the members of his or her family. The issue as to whether it is possible for the person affected to recover his or her original nationality would also be a matter to take into account – and whether, perhaps, he or she might be afforded a period of time in order to achieve this challenge – although the fact that the person affected has not (yet) recovered the original nationality is not in and of itself a reason to refrain from withdrawing nationality.

228. *Rottmann*, para. 42.
229. *Rottmann*, para. 46.
230. *Rottmann,* para. 48.
231. *Rottmann*, para. 51.
232. *Rottmann*, para. 56.

8.2. Implementation of the Rottmann judgment

As regards the implementation of the judgment in *Rottmann* at national level, we found little evidence in the national reports that the ruling has had a major disruptive effect upon national law or national procedures. Sweden offers a rare case where there has been a specific endeavour to review how EU law impacts upon citizenship law in the context of the work of a Commission of Inquiry on Swedish Citizenship.[233] For some States (e.g. the Netherlands), the principle of proportionality is already part of national law so far as concerns citizenship, and the Guide to the Netherlands Nationality Act has long referred to the role of proportionality in decisions withdrawing citizenship.[234]

There are very rare instances of specific reference being made to *Rottmann* in national law.[235] It is possible that this is because these types of situations arise relatively rarely (and even more rarely come before the courts); additionally, so far, there has been a tendency to confine the *Rottmann* judgment to its rather specific facts.[236] In other words, the issue would only arise in circumstances where the person affected had been required to renounce their previous citizenship in order to acquire the host State citizenship, or had lost their home State citizenship by operation of law when they acquired the citizenship of another state. Where states do not require surrender of the previous citizenship, it is already less likely that a *Rottmann*-type case will arise.[237] It will also not arise if there is a rule in national law prohibiting the withdrawal of citizenship (even in cases of fraud, e.g. Sweden) where this renders a person stateless (e.g. Bulgaria, Slovenia) or restricts the withdrawal of nationality to cases where the person acquires another citizenship or acts contrary to the interests of the State (Greece); where there is a prohibition on withdrawing citizenship, even if obtained by fraud (e.g. Croatia); or where there is no requirement to surrender the first citizenship if a person is acquiring a second one (e.g. Croatia).

233. See the report for Sweden at note 20.
234. See the report for the Netherlands at note 66.
235. See e.g. in the report for Estonia, where the updated commentary to the Constitution refers to the requirement that conditions of acquisition and loss of citizenship must have due regard to EU law.
236. One Member State where these sorts of situations have arisen because of the insularity of citizenship law (which requires surrender of the previous citizenship) is Denmark, and its pre-*Rottmann* case law does seem questionable in this light; see that report at note 74.
237. On this point, see e.g. the reports for France, and Ireland.

Quite a number of States also provide for citizens who have voluntarily surrendered their citizenship to re-acquire it (e.g. Croatia, Finland, Hungary, Slovenia, UK).[238] Increased toleration of dual citizenship, exemplified by recent changes in the Czech Republic and Latvia, further closes the risk that another *Rottmann*-type case could arise in a purely intra-EU context. However, that leaves open the question of loss of citizenship where the national citizenship at issue is the *only* EU citizenship that the person affected has, regardless of whether it otherwise renders the person stateless.

There seems to have been little appetite in national courts to explore these and related issues. Thus no further analogous or complementary cases have been referred to the Court of Justice. For instance, in Ireland, the case of *Mallak*[239] saw the High Court insisting firmly that *Rottmann* only applied to *loss* and not to decisions on *acquisition* of citizenship. A Dutch court decided that the withdrawal of a grant of citizenship to a Somali citizen who had given false identity information did not trigger the *Rottmann* case because the Somali national had never properly acquired Dutch, and therefore EU, citizenship.[240]

The UK's rather broad provisions on deprivation of citizenship in circumstances where this is 'conducive to the public good' seem in principle to be defensible by reference to the comment in *Rottmann* that Member States are allowed to justify revocation decisions by reference to reasons 'relating to the public interest'.[241] That said, as the UK has now extended its legislative provisions to make it possible for a person to be deprived of citizenship in these circumstances (e.g. if suspected of serious terrorist offences) even if that renders him or her stateless, it seems difficult to see how the argument put forward by the Court of Appeal in *G1* v *Secretary of State* denying a cross border element in the circumstances where a person was deprived of their UK citizenship can continue to be justified.[242] Since the majority of the deprivation decisions taken by the UK authorities in recent years have been taken specifically when the person concerned is not in the UK (and usually not

238. Or rather, in some cases, the release granted (in order to obtain another citizenship) does not come into effect because the person does not provide evidence that he or she has acquired another foreign citizenship; see e.g. the reports for Croatia, and Slovenia.

239. *Mallak v Minister for justice, Equality and Law Reform* [2011] IEHC 306, paras 25-61.

240. See the report for the Netherlands at note 67. This would mean applying the *Kaur* case rather than the *Rottmann* case: Case C-192/99 *Kaur* [2001] ECR I-1237.

241. *Rottmann*, para. 51.

242. *G1* v *Secretary of State* [2012] EWCA Civ 867.

elsewhere in the EU), the likelihood that they will thereby be deprived of the substance of their rights as EU citizens seems very high.

8.3. The wider implications of Rottmann

There also seems to be little evidence of national courts exploring further some of the wider implications of *Rottmann*, such as whether the references to the role of judicial review in decisions on the loss of citizenship could also be extended to require judicial review in relation to decisions refusing the acquisition of citizenship (e.g. in the case of decisions refusing ordinary naturalisation). And yet, the Institutional Report highlights, in particular, that the Court's judgment in *Rottmann* may open up new avenues to explore the bringing of other aspects of access to national citizenship under judicial control, under the optic of having 'due regard' to EU law; although it suggests that *Rottmann* alone might provide a weak basis for this, since what is needed is a wider impact upon EU citizenship to trigger a broader EU interest.

As yet unpublished research by de Groot and Vonk[243] charting national practices on judicial review and the reasoning of citizenship decisions is premised on the significance of *Rottmann* for national citizenship law practices, when combined with Articles 11 and 12 of the European Convention on Nationality (which does not bind all of the Member States but which sets a useful international benchmark) – which provide for the reasoning and judicial review of citizenship decisions – as well as the 2011 European Court on Human Rights judgment in *Genovese* v *Malta*.[244] This case establishes for the first time that measures relating to citizenship can be brought within the scope of the ECHR if they affect fundamental rights such as the right to non-discrimination affecting a person's social identity. In their work, de Groot and Vonk show that, at present, 27 of 35 European States surveyed provide for judicial review of negative decisions refusing ordinary residence-based naturalisation.

243. G-R. de Groot and O. Vonk, 'Scrutinising Citizenship Decisions: Analysing Judicial Review in Europe', Paper presented at the ACIT Mid-Term Workshop on *Comparing Citizenship Across Europe: Law, Implementation and Impact*, EUI Florence, June 2012 (held on file by J. Shaw).

244. *Genovese* v *Malta*, Application Nr. 53124/09, 11 October 2011. The case involved a challenge to a Maltese law that discriminated between children born out of wedlock between Maltese mothers and Maltese fathers.

It is interesting to note that at least one additional Member State has begun to permit judicial review of naturalisation decisions since this survey was conducted (Denmark), specifically on the grounds that there is a need to allow judicial review to ensure that in naturalisation decisions Denmark's international obligations are respected.[245] There is perhaps more scope for courts to explore possible conflicts between EU law and the Danish Nationality Act, which draws distinctions between children born in Denmark and those born in another country. As nationality law issues are a hot topic in Denmark at the present time, as that report notes, there may be potential for the courts to become more involved in the future, applying the *Rottmann* principle of proportionality. We could also expect further litigation if the commentary on the Estonian Constitution noted above comes into play in that State. As with Denmark, Estonia does not permit dual citizenship in the context of naturalisation.

Another legal issue that may be explored in the future is the situation of dual citizens by birth (e.g. by *ius sanguinis* from both parents, or by a combination of *ius soli* through birth in the territory to settled parents and *ius sanguinis* through the parents), where one or more of the states requires the child to make a choice at the age of 18. This could theoretically be an issue in Estonia; but since Estonian law makes no provision for depriving a person who acquires citizenship by birth of that citizenship, then there is no procedure to enforce the theoretical choice.

The issue has already arisen in Germany, where children who acquire dual citizenship at birth are supposed to make a choice within five years of reaching 18 as to which they choose. This so-called *Optionspflicht* does not apply where the other citizenship that the child holds is that of another Member State. Enforcing the option thus means that the child has to choose between EU citizenship (via German citizenship) and third country citizenship. The option has been criticised for imposing an unreasonable choice on the children in question (the first cohort of whom reached 23 in 2013), and for forcing a choice that many do not have to make. For example, while (legally speaking) Germany is still in principle hostile to dual citizenship, in practice it is widespread, both because of the exception allowed for citizens of other Member States to hold that citizenship with German citizenship, and because it does not require those who naturalise to renounce the citizenship of another

245. Judgment of the Danish Supreme Court of 13 September 2013 in Case 306/2012; see also the note in the EUDO Citizenship Observatory case law database available at http://eudo-citizenship.eu/databases/citizenship-case-law/?search=1&name=&year=&country=Denmark&national=1).

state if it is impossible so to do.[246] Not least because of the increased political saliency of the issue in 2013, the latest German coalition government agreed in November of that year to abolish this controversial provision, this being one of the prices exacted by the Social Democratic Party as a condition for entering government with the Christian Democratic Union.[247]

8.4. Rottmann and citizenship by investment

The potentially wider significance of *Rottmann* was brought into the public eye in 2013 and 2014 by the controversy surrounding the proposal by Malta to 'sell' national citizenship to investors and other wealthy persons. This brings us back to the question raised in the Institutional Report, whether the case for applying *Rottmann* also to the acquisition of citizenship is premised upon being able to point to some negative impact upon rights protected by EU law or the status of EU citizenship more generally.[248] This would mean giving such persons automatic access to Union citizenship and thus to all its rights and duties – notably, rights of free movement and residence throughout the territory of the Union (Article 21 TFEU).

Unsurprisingly, the Maltese proposal attracted a great deal of comment – most of it negative in character – about the ethics of 'selling' citizenship,[249] with a minority of comments focused more specifically on the question of the

246. C. Morehouse, 'Although legally an exception, dual nationality has become the rule in Germany', EUDO Citizenship Observatory, 7 March 2012, available at http://eudo-citizenship.eu/news/citizenship-news/606-although-legally-an-exception-dual-nationality-has-become-the-rule-in-germany.

247. L. Block, 'Germany: Coalition government parties agree to scrap 'option model' for ius soli children', 28 November 2013, available at http://eudo-citizenship.eu/news/citizenship-news/998-germany-coalition-government-parties-agree-to-scrap-option-model-for-ius-soli-children.

248. Institutional Report, notes 175-176.

249. A. Shachar and R. Bauböck (Eds), *Should Citizenship be for Sale?*, EUI Working Paper RSCAS 2014/01 (available at http://eudo-citizenship.eu/images/docs/Citizenship-for-Sale-RSCAS_2014_01.pdf); S Peers, 'Want to be a EU citizen? Show me the money!', available at http://eulawanalysis.blogspot.co.uk/2014/01/want-to-be-eu-citizen-show-me-money.html, 28 January 2014. For references to other commentaries, and also to news reports, see the work of the European Parliamentary Research Service (http://epthinktank.eu/2014/01/15/eu-citizenship-and-residence-permits-for-sale/) or visit the EUDO Citizenship Observatory country profile page for Malta and see the news items presented there (http://eudo-citizenship.eu/country-profiles/?country=Malta).

interface with EU law. The original proposal was to grant citizenship based on a donation to the State treasury of €650k. Subsequent amendments raised this to €1.15m, including the acquisition of government bonds and property, at least for a certain period of time. Finally, after pressure was brought to bear by the European Commission, which announced that it intended to bring infringement proceedings against Malta, and by the European Parliament, which agreed a resolution condemning citizenship for sale because of the implications for Union citizenship,[250] the Government conceded that more needed to be done to demonstrate a real link between the State and the individual investor seeking citizenship before the grant of citizenship, and so instituted a one-year residency rule.[251] This decision leaves open, however, the question of how the Member State might interpret the residency requirement.

This entire story leaves many questions unanswered, for the Maltese scheme is by no means unique, as the European Parliament's ThinkTank's own research demonstrates, and as has been fully analysed by writers such as Jelena Džankić.[252] 'Investor citizenship' or so-called 'golden residence' schemes (which give investors residence permits, and often Schengen visas, and a rapid pathway to citizenship for them and their families) are common in the EU Member States. Greece, Hungary, Latvia, Portugal, Spain, and the UK have the latter. Austria, Bulgaria, Cyprus, and now Malta have versions of the former. Furthermore, if residence is to be the key issue in scrutinising of the granting of national citizenship given its implications for Union citizenship, what then of the external citizenship programmes of numerous EU Member States, including Croatia, Hungary, and Italy, which see the descendants of former emigrants (re)acquiring national citizenship on the basis of rather tenuous historic or ethnic ties across multiple generations?

The crucial EU law question seems, therefore, to be whether 'due regard to EU law' in relation to the operation of national citizenship laws triggers, in

250. European Parliament Resolution of 16 January 2014, P7_TA-PROV(2014)0038, voted on after a debate in plenary on 15 January where parliamentarians queued up to condemn the Maltese scheme.

251. See the joint press release of the Maltese Government and the European Commission, MEMO 14-70, 29 January 2014, available at http://europa.eu/rapid/press-release_MEMO-14-70_en.htm.

252. For a shorter summary of Džankić's reflections, see 'Can Money Buy Citizenship?', *Citizenship in South East Europe*, 6 February 2012, available at http://www.citsee.eu/citsee-story/can-money-buy-citizenship. See also, Džankić's full paper on 'The Pros and Cons of *Ius Pecuniae*: Investor Citizenship in Comparative Perspective', EUI Working Papers, RSCAS 2012/14, available at http://cadmus.eui.eu/handle/1814/21476.

turn, the duty of loyalty in Article 4(3) TEU, which provides that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. [...] Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives'. It is clear that the intertwining not only of national citizenship and EU citizenship, as exemplified in the previous paragraphs, but also of the citizenship regimes of the Member States *inter se*, could trigger the principle of sincere cooperation. Whether it could do so to the extent that the Commission could successfully bring a Member State before the Court of Justice in respect of its creation of a new scheme for naturalisations where there appears to be a weak link between the putative citizens and their new State is a moot point, and the Maltese case is not now going to test it. But the point remains, as the Institutional Report rightly states that the Member States could and should work together more closely in the area of nationality, in order to 'share knowledge and experience on conditions and procedures for obtaining Member States' nationality.'

8.5. Question 8 – emerging issues and themes: the 'value' of citizenship

What emerges from the discussion above is one of the paradoxes of EU citizenship. We can see how **the value of (national) citizenship is enhanced as a status by operation of EU law and by the rights attaching to EU citizenship**. It is hence an attractive status, a point recognised in some of the post-2004 Member States (such as Poland[253]), as well as being explicit in reactions to the Maltese investor scheme.

And yet, as many have noted, as a rights-status, **national citizenship has been hollowed out by EU citizenship**, with very few rights reserved by States for national citizens alone. This is partly because of the operation of EU law, but in a few cases it is because of national choices made by Member States (e.g. the intertwining of citizenship and citizenship rights in Ireland and the UK). This has led commentators such as Gareth Davies to wonder what is left of national citizenship, if residence is the new reference point.[254] It seems likely, as the Institutional Report notes, that the intertwining of these two statuses is likely, in the future, to lead to **more, not less, cooperation be-**

253. See the analysis of the Constitutional Tribunal decision on Article 30 of the Act on Polish Citizenship in the report for Poland.

254. G. Davies, ''Any Place I Hang My Hat?' or: Residence is the New Nationality' (2005) 11 ELJ 43.

tween the institutions and the Member States, and amongst the Member States themselves.

Political rights of EU citizens

This section of the Report deals with the political rights of EU citizens under EU law. Notwithstanding the emphasis in the Lisbon Treaty on the participatory and representative nature of democracy in the Union legal order, the Member States continue to lag behind the vision spelled out in the Treaties and by the EU legislature with respect to the realisation of appropriate electoral rights for Union citizens. This set of questions examines:

(1) The implementation of **Directive 93/109 on European Parliament elections**;[255]
(2) The implementation of **Directive 94/8 on local elections**;[256]
(3) The extent to which Union citizens residing in a host State are granted **electoral rights for regional and other elections** under national law i.e. above and beyond the threshold requirements set out in the Treaties; and
(4) **National restrictions imposed on access to the electoral rights applied to Union citizens**, including those imposed on their own citizens that may be affected by EU law.

Through these questions, we were asking national rapporteurs to explore how each Member State integrates these rights into the domestic political system. We wanted to know not only how well the two key Directives giving effect to Articles 20(2)(b) and 22 TFEU have been implemented at national level, but also whether the Member States have chosen in any way to go beyond the scope of current EU law in the granting of electoral rights. It was important too to see how the Member States have gone about using the derogations provided for in the Directives. This was one way in which we could open up the question of how EU electoral rights might develop in the future.

255. Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L329/34, as amended by Directive 2013/1/EU, [2013] OJ L26/27.
256. Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L368/38.

Although drafted in the same way in the Treaty, the two sets of rights have slightly different purposes and rather different roots. While it is partly the purpose of the European Parliamentary electoral rights to make migrant EU citizens feel at home and better integrated in their host State, these rights are also underpinned by a sense of the significance, for the EU, of the direct elections to its own parliamentary body introduced in 1979[257] and of the need to ensure that all EU citizens resident in the Union should have the right to vote in these elections. D'Oliveira called these twin roots 'the emergence of a Community or Union collectivity' and 'the principles of democracy'.[258]

Of course, one of the paradoxes of European Parliament elections is that they are in large measure still regulated by national law, notwithstanding the existence of the Act on Direct Elections, so that the rules concerning, for example, EU citizens resident outside the territory of the Union fall to be decided by each individual State in respect of their own citizens.[259] In addition, in the political sphere, it is still the case, 35 years after the first direct elections, that there is little evidence of Europe-wide electoral campaigning based on transnational party programmes, or of key political figures who are seeking the approval of the electorate on a the basis of an identifiable political programme.

This has changed somewhat in the 2014 European Parliament elections with several (but not all) of the transnational parties selecting in advance a candidate for the position of Commission President who would expect to be endorsed by the European Council as a single name proposal for approval by the European Parliament under Article 17(7) TEU, assuming it was their par-

257. The original Act on Direct Elections dates from 1976, and – as with the most significant and recent amendment in 2002 to ensure that all elections are conducted according to some form of proportional representation system – had to be ratified by the Member States in accordance with their respective constitutional requirements. See Council Decision 2002/772 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage annexed to Decision 76/787, [2002] OJ L283/1. Article 223 TFEU continues to require a unanimous vote in the Council, the consent of the Parliament, and ratification by the Member States of any provisions necessary for the elections of the Members of the Parliament by direct universal suffrage.

258. HUJ d'Oliveira, 'European Citizenship: its Meaning, Its Potential', in R. Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (Sweet & Maxwell, 1994) 126 at 142. This point is discussed in more detail in J Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, (Cambridge University Press, 2007) Chapter 4.

259. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

ticular party group which won most seats in the EP elections.[260] But even the Court of Justice has acknowledged that what we have had so far have been (now 28) separate national elections, in which national issues predominate over EU ones.[261] We still stand a long way away from truly 'federal' European Parliament elections.

The grant of local voting rights, meanwhile, was very much the expression of the idea of giving mobile EU citizens certain participation rights that reflect their residence, and these rights find a reflection, more generally, in the Council of Europe's Convention on the Political Participation of Foreigners in Local Life,[262] which obviously extends beyond the confines of the Union. These political rights represent one response to the challenge of integrating migrant EU citizens in the communities where they find themselves as a result of exercising their free movement rights. They do not differ, in that respect, from the local electoral rights granted for many decades to *all* non-citizens by a number of States (e.g. the Nordic countries, Ireland, and the Netherlands) or established more recently by a number of older and newer Member States (e.g. Belgium, Hungary, Luxembourg, and Slovenia). However, they do remove discriminatory residence requirements, which those States that enfranchise third country nationals usually include (when compared to the treatment of citizens).[263]

In some cases, the reasons for recent extension of rights have been related to the particular position of one non-citizen group (e.g. see the reports for Estonia and Lithuania, as regards Russians and other ex-USSR citizens). In fact, because EU electoral rights specifically privilege certain groups of 'second country nationals', they could be said to have more in common with those measures in place in States that only enfranchise certain groups on the basis of historical ties (e.g. the UK, with its electoral rights for Irish and Commonwealth citizens) and/or reciprocity (e.g. Portugal and Spain).

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260. See, for the European Parliament's wish list around the 2014 EP elections, its resolution of 22 November 2012, on the elections to the European Parliament in 2014, P7_TA(2012)0462. This includes urging the European political parties to nominate candidates for the Presidency of the Commission and calling for as many members of the next Commission as possible to be drawn from Members of the European Parliament, to reflect the balance between the two chambers of the legislature.
261. Case C-145/04 *Spain v UK (Gibraltar)* [2006] ECR I-7917.
262. ETS No. 144.
263. For example, the 1996 implementation of the municipal elections Directive by the Netherlands involved only the removal of the requirement that a non-national should have resided in the Netherlands for five years before being able to vote in local elections.

At the same time, however, the EU provisions are a constitutional novelty for many States that would otherwise have a constitutionally-based prohibition on allowing any person who was not formally a member of the polity (i.e. a citizen who is part of the demos) to vote in *any* elections. This is the case in Germany and Austria, where previous constitutional court cases had struck down attempts at local or city level to introduce voting rights for third country nationals.[264] Numerous other States had to change their constitutions to accommodate EU electoral rights (e.g. Portugal). Interesting tests of the constitutionality of EU electoral rights – albeit within a framework where none of the courts involved appeared to be questioning the primacy of EU law – came in France and Poland,[265] producing reflections upon the concept of the 'national people', in its various guises, in the post-EU citizenship era.

We also wanted to gather data on whether, were the Court of Justice to confirm a substantive (citizens') right to vote in European Parliament elections under EU law, buttressed by Article 39(2) of the Charter of Fundamental Rights, there is substantial scope for conflict between national law and EU law in this context. This might mean, for example, reading across case law on Article 3 of Protocol 1 to the ECHR, such as *Hirst (No 2)* (on the disenfranchisement of prisoners)[266] and *Kiss* (on the disenfranchisement of persons with mental disabilities)[267] into fact situations that fall within the scope of EU law. Such a move would, however, require a decisive extension of the Court's previous case law on the scope of the right to vote in European Parliament elections in *Eman and Sevinger,* which was, at best, ambiguous on this point.

This is one of the areas in which the Charter may have a substantive impact upon the exercise of the rights of EU citizenship in the future (see also Q14). We directed the attention of the national rapporteurs to a line of case law in the UK in which the applicants argued *inter alia* that the total ban in national law on prisoners' voting rights in relation to the prospective European Parliament elections in June 2014 was disproportionate, although, in the

264. For discussion of these cases, see Shaw, *The Transformation of Citizenship*, Chapter 9.

265. See respectively, Conseil Constitutionnel, judgment of 9 April 1992, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1992/92-308-dc/decision-n-92-308-dc-du-09-avril-1992.8798.html; and Judgment of 31 May 2004, K 15/04, available at http://www.trybunal.gov.pl/eng/summaries/documents/K_15_04_GB.pdf

266. *Hirst v United Kingdom (No 2)* App no 74025/01 (2006).

267. *Kiss v Hungary* App no 38832/06 (2010).

event, all such arguments were rejected by the UK Supreme Court in an October 2013 judgment.[268] This was perhaps unsurprising, in view of the politicisation of prisoners' voting rights in the UK at present and the ongoing refusal by the UK Parliament to take steps to ensure Convention-conformity of UK law in this area by amending the current blanket disenfranchisement.[269]

Questions 9 and 10[270]
Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

Article 20(2) TEU

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

...
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

268. The Scottish case of *McGeoch v Lord President of the Council* [2011] CSIH 67 and the English case of *Chester v Secretary of State for Justice* [2010] EWCA Civ 1439 were conjoined before the Supreme Court. A seven-member Supreme Court bench unanimously rejected all the applicants' contentions (which related to the ECHR as well as to EU law); see [2013] UKSC 63.
269. For full details of the debate on prisoner voting in the UK, see House of Commons Library Standard Note SN/PC/01764, *Prisoners' Voting Rights*, last updated 15 January 2014.
270. In this section of the Report, we treat the responses to and discussion of Questions 9 and 10 together – resulting in Sections numbered 9.2/10.2 etc in order to maintain consistency. We also draw on data from the FRACIT reports, especially in cases where there was not FIDE report for a particular State.

Article 22 TEU

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 223(1) TFEU

The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.

9.1./10.1. Introduction – EU electoral rights

In 1993 and 1994, the EU legislature adopted the measures necessary to give effect to the electoral rights for resident EU citizens introduced into what was then the EC Treaty by the Treaty of Maastricht. The timescale for the implementation of the 1993 EP Elections Directive was tight: it was adopted on 9 December 1993, and the first elections to be conducted under its provisions were held in June 1994. All 12 then Member States were able to do so in time, and indeed every acceding Member State has successfully implemented Directive 93/109 since then.

The 1994 Local Elections Directive, adopted in December 1994, allowed for a more relaxed implementation timetable of one year; but, in fact, only four of the 12 Member States managed to implement the Directive on time. Gradually, each of the Member States introduced implementing provisions as they held local elections (which, of course, are held on different timetables in every Member State) and it was not until 2001 that the Directive was first applied in France. Belgium was the slowest Member State to comply, partly because of internal difficulties within the complex Belgian quasi-federal system connected to obtaining all of the necessary consents to the implementing legislation; it only finally complied after an enforcement action was brought by the Commission before the Court of Justice.[271]

The key to the equal treatment rights contained in both Directives is providing for equivalence of residence. For example, Article 5 of Directive 93/109 provides:

> If, in order to vote or to stand as candidates, nationals of the Member State or residence must have spent a certain minimum period as a resident in the electoral territory of that State, Community voters and Community nationals entitled to stand as candidates shall be deemed to have fulfilled that condition where they have resided for an equivalent period in other Member States.

In addition, the Directives set out various principles giving substantial leeway in implementation by the Member States. In practice, because of the diversity of practices among the Member States – e.g. in relation to registration practices – the reality of 'Union voting' is perhaps more complex than the simplicity of the Treaty provisions would at first blush suggest. For example, in relation to European Parliament elections, so-called 'Union voters' have freedom of choice to vote in the host State or in the home State (where this is possible – it is not in all Member States[272]), but they may only vote in one Member State. Likewise, they may only stand as a candidate in one Member State. Operationalising this option can become complicated: the Directive is predicated upon some quite complex arrangements for the exchange of in-

271. Case C-323/97 *Commission* v *Belgium* [1998] ECR I-4281.

272. *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Citizens Residing in Third Countries*, Study for the European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, 2013, prepared by the EUDO Citizenship Observatory, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474441/IPOL-AFCO_ET%282013%29474441_EN.pdf, Table 1, at pp. 22-23 (EUDO FRACIT Report).

formation between the Member States to try to ensure that persons do not vote twice.

Member States must also, under both Directives, take the 'necessary measures' to ensure that EU citizens expressing the wish to vote are entered in the register sufficiently far in advance of polling day. The general tenor of the approach to registering to vote is that while this will require some action or expression of willingness in the first instance, those who have been registered once should stay registered until they cease to be entitled to vote. Those seeking to vote, or standing as candidates, are only required to produce the same documentation that nationals are required to produce, although they may be required to produce identity cards.

The EP Elections Directive allows the Member State of residence to require a Union voter to show that he has not been deprived of the right to vote in his Member State of origin. Both Directives allow Member States to prevent persons deprived of the right to stand as a candidate in their home State from standing as candidates. The 2013 amending Directive replaces the requirement to produce an attestation from the home State that the person wishing to stand as a candidate has not been deprived of his or her right to stand as a candidate with a simple statement to that effect submitted along with other paperwork, whilst at the same time placing additional onus on the Member States to cooperate and on the home State to provide the State of residence with information when requested. Austria can be cited as an example of early implementation of these very principles. Already in the 2009 European Parliament elections, the relevant Ministry contacted the authorities in the other Member States to obtain confirmation about the right to vote.

Widespread and effective compliance had not necessarily been assured, however, in time for the 2014 EP elections. It is noted in the Institutional Report that only half of the Member States had notified their transposition measures by the date of implementation (January 2014). In line with its general trend towards automatically beginning enforcement proceedings against Member States for failure to notify implementing measures, by February 2014 the Commission had already begun actions against all non-complying States.[273] But it is likely that these actions will be discontinued before they reach the Court of Justice , as Member States are pushed towards compliance by the Commission's actions.

273. See http://ec.europa.eu/eu_law/eulaw/decisions/dec_20140205.htm.

9.2./10.2. Key findings on transposition, application, and interpretation

National reports set out in detail the sometimes complex implementation arrangements for the relatively straightforward equal treatment rights first introduced by the Treaty of Maastricht and by the two Directives. The key to implementing these rights is to give resident EU citizens the right to vote in European Parliamentary and municipal elections in the host State *on the same basis as nationals*. In practice, unless there is some form of automatic registration of both nationals and EU citizens, this is quite hard to bring about, which is one reason why registration levels amongst EU citizens are much lower than for the citizens of the host State.

Challenges faced by EU citizens include not only difficulties in becoming and staying registered to vote, but also restrictions on membership of or the right to found political parties. For the broader context of EU electoral rights concerns political culture and not just individual rights to vote on the basis of residence. Political parties are important gateways for those wishing to be elected in the State of residence; and, moreover, it is important that political parties and political elites communicate the message to resident EU citizens that they are valued members of the electoral community for the purposes of these two types of elections where the right to participate is regulated at the EU level. In reality, as the Commission has acknowledged, awareness has gradually risen over the years.[274] But there are still not that many examples of good practice in relation to the provision of information. Moreover, it is well known that political party engagement with EU electoral rights has been patchy in many Member States (as has, indeed, been political party engagement with immigrant origin voters more generally).[275]

The latest data on local elections is contained in a 2012 Commission report on the implementation and application of Directive 94/80.[276] Turnout – discerned on the basis of levels of registration – continues to be generally ex-

274. This is demonstrated by the 2010 Flash Eurobarometer Report concentrating on voting rights, although in fact knowledge is not precise because many people think that resident ES citizens can vote in the national elections of the host State: see http://ec.europa.eu/public_opinion/flash/fl_292_sum_en.pdf.

275. For examples, see Shaw, *The Transformation of Citizenship*, at pp. 269-272. Useful, if now somewhat outdated, information about the political activism of immigrants can be found in the findings of the Politis Project, see http://www.politis-europe.uni-oldenburg.de/index.html.

276. Report on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final at para. 2.1.

tremely low (even in the context of general trends towards low turnout in local elections in many Member States). Generally, Member States do not collect data that make it possible to ascertain turnout levels by EU citizens specifically. The exceptions – where there seems to be greater activation of EU citizens towards registration (and therefore, it is assumed, towards voting) – tend to map onto those cases where EU citizen groups in the host State are dominated by one nationality.[277] Numbers of EU citizens running as candidates (and being elected) are also very low.

The evidence does not, therefore, indicate a high level of political integration of EU citizen countries into their host States.[278] The issue of registration becomes particularly urgent every five years with impending European Parliament elections, staggered over several days for May 2014. At that point, awareness arises of the fact that registration deadlines vary across the Member States, although with the increased use of the internet and social media for political information purposes (#EP2014 on twitter), there seems to be relatively little reason why EU citizens should struggle to find out what their deadline would be.[279]

While the Commission report on the 2009 European Parliament elections[280] emphasised that the number of EU citizens registering was rising in most Member States, it also highlighted that these were not rising in proportion to the increase in the numbers of resident EU citizens. In other words, free movement rights are being exercised, but EU citizens are not using the associated political rights. The Commission's Communication and Recommendation for 2014 emphasised the importance of connecting the national debates and campaigns (and the role of political parties) to European level debates and parties, and also of using the European Parliament electoral pro-

277. COM(2012) 99, at Section 2.3.

278. See further, the press release on the independent study on integration of mobile EU citizens in six cities, published on 11 February 2014, available at http://europa.eu/rapid/press-release_IP-14-137_en.htm.

279. A recent article in eu*observer* contains a list of all the deadlines highlighting the variation very clearly: see further, the report at http://euobserver.com/eu-elections/123291.

280. COM(2010) 605 final, Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC, at p. 5.

cess in order to assist in the identification of who the next Commission President will be.[281]

Yet overall, in formal terms, the implementation of electoral rights has been satisfactory. The Institutional Report sketches areas of action for the Commission, and we discuss these further in Section 9.3/10.3 below. It was interesting to see that only one case had to be brought before the Court of Justice in order to ensure basic formal compliance by all Member States (the local elections case brought against Belgium, noted above) despite the fact that electoral rights are so closely associated with the exercise of national sovereignty. These rights are not (any more) seen as major constitutional challenges to the Member States, even now during a period in the history of the European Union when EU 'immigration' (often not 'free movement') is seen by a number of States as a challenge to the domestic capacity to control the border.

This level of acceptance may be, in part, of course because the 'Europeanness' of European Parliamentary elections is on the whole gradually becoming better understood in the Member States, making it obvious to any observer that all EU citizens resident in the Member States should be able to vote whether in the home or the host State; and because – unfortunately – for the most part, local electoral rights are regarded as politically relatively unimportant. This point is re-emphasised by reference to the case of Luxembourg, which is the only State to hold a derogation based on the numbers of resident EU citizens being above a certain threshold. In that case, the Member State is permitted to set residence requirements which ensure that EU citizens wanting to exercise electoral rights (active and passive) must have been resident for a certain period of time.

In other words, the assumption has been, since the inception of the Directive, that where voting rights might in fact matter, because non-national EU citizens are a sufficiently large constituency to affect outcomes, they can be restricted by hard-to-satisfy residence requirements. We return to the issue of derogations in Section 9.5/10.5 below, when we consider the implicit claim in the Institutional Report that derogations have had their time.

Equally, there can be difficulties with determining the 'basic unit of local government' for the purposes of the Local Elections Directive. The fact that

281. Commission Communication, *Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct*, COM(2013) 126 final; and Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, C(2013) 1303. This is also reflected in the European Parliament's November 2012 resolution on the same topic (P7_TA (2012)0462).

in those federal States where there are 'city states' (i.e. Germany and Austria), the Member States do not allow voting in 'city state' elections but only in elections for very low level communal authorities (which have very few powers) continues to reinforce the marginality of these rights.

The national reports have also emphasised the almost complete absence of examples of individual citizens using the law to enforce their rights.[282] The only example of litigation given in the reports dates back to the 1995 local elections in Valencia, where two French residents excluded from the franchise successfully sought the annulment of an election and its re-running with them exercising their right to vote. In that sense, it would seem that these are EU rights that are generally accepted and properly applied by the Member State administrations, even if there is sometimes evidence of a lack of knowledge and training at the lower levels of administration.[283]

It is surely the case that, from time to time, EU citizens try but fail to obtain timely registration and thus the right to vote, or fall foul of a requirement to register on the roll. But while there has been, in some areas, an increased litigation culture in relation to electoral rights (one thinks of the case of prisoner voting rights in particular, especially in the two States where the right to vote is completely excluded, namely Estonia and the UK), litigation has obviously not been the chosen avenue of disappointed EU citizens seeking to vote in local or European Parliamentary elections in their State of residence. Moreover, as we shall see in the next Section, the Commission approach to enforcement and to the task of addressing actual or potential infringements has primarily been through the use of dialogues with Member States, involving very limited public statements about non-compliance in the context of periodic reports. This has been judged, one must assume, to have been thought to be the most effective way of improving the level of compliance overall.

9.3./10.3. Areas for Commission action

Details of the areas where implementation and application of the electoral rights Directives may be thought to be lacking can be gleaned from the Insti-

282. The Reports for Estonia, France, and Poland highlight meta level 'constitutional' challenges testing out the 'fit' between the electoral rights and the national constitutions.

283. See the complaints-based evidence presented in European Commission, *EU Citizenship Report 2013-EU citizens: your rights, your future*, COM(2013) 269 final at p. 17.

tutional Report, read in conjunction with the Commission's previously published reports focusing on the implementation of the two Directives. They pertain in particular to the additional requirements that Member States may impose on EU voters.

Three particular areas of concern can be picked out for brief comment. The first is the possibility in the Directives for Member States to require EU citizens to prove their identity in order to exercise the right to vote. It was only in 2012 that the Maltese authorities, for example, amended their national provisions to remove the obligation on EU citizens to show a *Maltese* identity card in order to prove identity.

The second concerns the residence issues that emerge in some Member States, especially in central and eastern Europe, which make it hard for EU citizens who do not go through a relatively heavy and bureaucratic residence registration process at the local level (which would not necessarily be strictly required for the EU citizen still to be resident lawfully in the territory) to become registered to vote. The report for the Czech Republic (echoing also the FRACIT Report for the same State[284]) notes the requirement of 'permanent residence'. Only 40% of EU citizens resident in the Czech Republic have this form of 'permanent residence'.

In like manner, there appears to be a similar restriction in Estonia; and in Bulgaria, where the Commission has indeed taken action. However, the cases concerned with the requirement of 'durable or permanent residence in Bulgaria' referred to in the report for Bulgaria were closed in September 2013.[285] As the Commission notes in its 2012 report,[286] it is good practice to enrol citizens automatically in the register once they have expressed an initial wish to be registered.

The third area of concern relates to the right to found and to become a member of a political party. Perhaps one of the most notable examples of this – and an example of legislative responsiveness in the face of challenges in the national courts as well as questions being raised by the Commission – is that of Estonia, which amended its legislation to allow foreigners to participate in political parties in 2006. The reports for Greece and Spain also note that only citizens can found political parties. In the Institutional Report, the Commis-

284. P. Kandalec, *Access to Electoral Rights. Czech Republic*, EUDO Citizenship Observatory, FRACIT Report, June 2013, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=136-Chech-FRACIT.pdf.

285. See the record of Commission enforcement action decisions at http://ec.europa.eu/eu_law/eulaw/decisions/dec_20130926.htm.

286. COM(2012) 99, p. 13.

sion makes it clear that it regards restrictions on accessing political parties as important obstacles to the enjoyment of political participation rights.

9.4./10.4. Special problems and limitations

Article 1(2) of Directive 93/109 places clear limits on the EU level regulation of the right to vote in EP elections at present. It provides that:

> Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate of its nationals who reside outside its electoral territory.

In similar terms, Article 1(2) of Directive 94/80 provides:

> Nothing in this Directive shall affect each Member State's provisions concerning the right to vote or to stand as a candidate either of its nationals who reside outside its territory or of third country nationals who reside in that State.

The absence of a savings clause for resident third country national voters was, of course, one of the focus points that have arisen regarding the character of EU electoral rights. In *Spain v UK*,[287] after the UK had sought to implement the human rights mandate arising from the earlier ECtHR *Matthews* case – according to which those EU citizens resident in Gibraltar must also be included in the franchise for European Parliament elections[288] – Spain suggested that the UK should not extend its normal inclusive franchise to Gibraltar and thus should not include Commonwealth citizens in the franchise for European Parliament elections. It sought, by various means, to encourage the Court of Justice to find that the franchise for EP elections should be a European franchise – i.e. covering EU citizens, wherever resident, but not non-EU citizens. In *Spain v UK*, the Court of Justice specifically recognised that allowing Commonwealth citizens the right to vote was one of the constitutional traditions of the UK, and confirmed that it was 'within the competence of each Member State in compliance with [Union] law' to define the persons entitled to vote and stand in EP elections.[289] We return in the discussion under Q12 to the implications of the Court's ruling on the scope of EU citizenship and the right to vote in *Spain v UK* and the related *Eman and Sevinger* case.

287. Case C-145/04 *Spain v UK* [2006] ECR I-7917.
288. *Matthews v United Kingdom* App no 24833/94 (1999).
289. *Spain* v *UK*, paras 78 and 79.

The EUDO FRACIT report shows that there remains uneven coverage amongst the Member States in respect of external voting in European Parliament elections – albeit an inclusive approach is more common than an exclusive one, and there have been a number of cases (e.g. Germany[290]) where States have become more inclusive in recent years on the voting rights of non-resident citizens more generally. The *Eman and Sevinger* case demonstrates that the general principle of non-discrimination is still relevant in the field of external voting, if Member States have established what might be described as an irrational scheme.[291] In that case, problems arose because, normally, Netherlands citizens may vote abroad in European Parliament elections, but not if they reside in or have moved to Aruba, which is an island territory that is part of the broader Kingdom of the Netherlands, but subject to specific self-governing arrangements. The Court of Justice concluded that there was a difficulty with the scheme applied by the Dutch state, because it failed to treat groups of similarly situated Dutch citizens (i.e. those not residing in 'mainland' Netherlands) in the same way, but distinguished between those residing in another part of the Kingdom and those residing outside the Kingdom altogether.

The report for Denmark, building also on the FRACIT Report on Denmark, suggests that Denmark may have a similar problem. Here, the comparison is as regards the external voting rights of those Danish citizens moving to the Faroe Islands and Greenland (both self-governing territories within the Kingdom of Denmark but outside the EU) when compared with the situation of Danish citizens who move out of Denmark but intend to return within two years, who can vote as external voters.[292]

It is worth noting two other cases where the electoral arrangements for European Parliament elections are not wholly consolidated. The first case is Cyprus, where there are considerable difficulties around the participation of Turkish Cypriots – who are EU citizens – in EP elections. It has been announced that the Cyprus Government intends to ease their path to participa-

290. BVerfG, 2 BvC 1/11 from July 4 2012, available at http://www.bverfg.de/entscheidungen/ cs20120704_2bvc000111.html. See further, L. Pedroza, *Access to Electoral Rights. Germany,* FRACIT Report, June 2013, at p. 4, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1313-Germany-FRACIT.pdf.

291. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

292. Discussed in more detail in E. Ersbøll, *Access to Electoral Rights. Denmark*, FRACIT Report, June 2013, at p. 9, available at http://eudo-citizenship.eu/admin/?p=file &appl=countryProfiles&f=137-DK-FRACIT.pdf.

tion in the 2014 EP elections.[293] It is worth noting – since this is a group of citizens resident in a territory that is not controlled by the Greek Cypriot Government – that Cyprus is another Member State with restrictive rules on external voting.

Finally, to Croatia – a state with inclusive external voting arrangements, but an electoral register that continues to be marked by anomalies which arose as a result of the violent disintegration of Yugoslavia in the 1990s and the access to Croatian citizenship on the part of ethnic Croats (and indeed others) resident in Bosnia and Herzegovina. As the FRACIT Report on Croatia shows in detail, Croatia is now completing the process of consolidating its electoral framework including dealing with problems of an outdated and probably over-inclusive electoral register.[294]

9.5./10.5. Questions 9 and 10 – emerging issues and themes

The Institutional Report suggests that while the **derogations provided for in the Directives** are legally compatible with the Treaties, they 'seem at odds with the very objectives of EU citizenship and are likely to be eroded in the future'. There are two derogations currently in place allowing Member States to impose residence criteria and protecting national specificities: first, for Belgium, for local elections, responding to sensibilities around language (Article 12(2) of Directive 94/80); and, second, for those States with a resident non-national EU citizen population of voting age of more than 20% (i.e. in practice, just Luxembourg) in respect of both local and EP elections (Article 12 of Directive 94/80 and Article 14 of Directive 93/109). The Institutional Report notes, however, that Luxembourg has eased its residence requirements to make it easier for EU citizens to exercise their right to vote, whilst maintaining the essence of the derogation in place.

There are also restrictions that Member States are able to apply in Articles 5(3) and (4) in respect of certain posts or offices (e.g. elections for Mayor or Deputy Mayor), or roles where local elected representatives take part in the election or designation of members of national parliamentary assemblies.

293. 'Cabinet eases path for Turkish Cypriots to vote in euro elections', *CyprusMail*, 23 January 2014, available at http://cyprus-mail.com/2014/01/23/cabinet-eases-path-for-turkish-cypriots-to-vote-in-euro-elections/.

294. J. Sajfert, *Access to Electoral Rights. Croatia*, FRACIT Report, June 2013, available at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=135-Croatia-FRACIT.pdf.

These latter restrictions chime very much **with a continued respect in the scheme of EU electoral rights for the prerogatives of sovereignty and nationality in the Member States**, and here, too, the Institutional Report foresees a possibility that a deepening of the Union in a federalist direction – or indeed a separate cultural trend resulting from the intermingling of the Member State societies and peoples – could lead to the dropping away of these restrictions.

Aggregated data published in the Annual Report of the Fundamental Rights Agency for all Member States in 2012, drawing also on the Commission's own work in this area as well as on national reports,[295] indicated that of 27 Member States at that time, 14 have essentially no restrictions, and 11 have restrictions to a greater or lesser degree. Austria and Germany are not covered, as here the restrictions (which do exist) are applied at the state, not the federal, level. Croatia, which has joined the EU since that survey, does have restrictions. Thus it would seem that in this domain of EU electoral rights, **the Member States are more or less equally split between restrictions/no restrictions**.

The future of EU electoral rights is undoubtedly intimately connected to broader questions about **the future of European Parliament elections**. 2014 is seeing a **watershed of campaigning on social media** (e.g. #EP2014 on Twitter), allowing more widespread citizen engagement for those active online.

But even here the picture is mixed – the comments earlier in this Report about the potential to use citizens' concerns about the identity of the European Commission President as a trigger in relation to increased transnational campaigns for EP elections need to be offset by the **concerns raised by the judgment of the German Federal Constitutional Court in February 2014** to abolish a proposed 3% threshold for parties seeking election to the EP in Germany.[296] This ruling followed an earlier judgment declaring that a previous 5% threshold – still in force for national elections in Germany – was contrary to the constitutional guarantee of electoral equality. Some concerns have been raised in initial commentary about this (majority) judgment because the

295. Luxembourg: Publications Office of the EU, 2013; available from the FRA website at http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report. See Chapter 7 on Participation of EU citizens in the Union's democratic functioning, especially Figure 7.1 on p. 215. This is a fuller dataset than we can derive from the national reports submitted to FIDE.

296. Judgment of the Federal Constitutional Court of 26 February 2014, summary available at http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-014en.html.

Court expressed the view that there were no reasons related to the need for stability of the EP which would offset the argument that such a threshold creates – in a proportional system – electoral inequalities with respect to individual voter choices. This judgment **runs directly counter to the European Parliament's November 2012 resolution on the 2014 EP elections**, where it explicitly asked the Member States to introduce such thresholds in order to reinforce the stability of the Parliament, stemming from the fear of the increased representativeness of small and splinter parties.[297]

Discussion of the unsuccessful *LetMeVote* European Citizens' Initiative[298] is reserved until later in this Report, when we turn directly to issues of enfranchisement and disenfranchisement under Questions 11 and 12; but other **civil society initiatives have emerged in the run up to #EP2014** such as the campaign of *Europeans Abroad*[299] to help Europeans living outside the EU to find out if or how to exercise their vote in the EP elections (and to campaign for those States which do not grant external voting rights to do so).

Direct activation of citizens' concerns and social media responses to such activation may, in the longer term, be game changers for EU electoral rights. For example, recognising the complexities of national external voting rights provisions for EP elections – which may differ depending upon whether a citizen is resident in the EU (and thus may have the option to vote in the State of residence or the home State) or a third state – does not prevent the presentation online of exceptionally attractive visualisations that give EU citizens a first point of reference when considering their rights.[300]

Question 11

Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral

297. It should be noted that not all commentary is hostile to this approach; indeed, there are some arguing that, in the name of equality, the national parliamentary election threshold should be removed: S-C. Lenski, 'Wer hat Angst vor Franken und Rentnern? Wie Karlsruhe den europäischen Wähler stärkt', *Verfassungsblog*, 27 February 2014, available at http://www.verfassungsblog.de/de/wer-hat-angst-vor-franken-und-rentnern-wie-karlsruhe-den-europaeischen-waehler-staerkt/. The argument here is that the Court's approach strengthens the individual voter and their say in the outcome.
298. See http://www.letmevote.eu.
299. See http://www.europeansabroadvote2014.eu/.
300. See, for example, http://www.europeancitizensabroad.eu/can-you-vote.html.

rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?

Article 25 TFEU

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

11.1. Introduction

By definition, there is no formal EU law in existence that underpins this question. By asking the question, we were therefore looking specifically at where Member States go *beyond* EU law; and, in doing so, we also opened up the opportunity for more general speculation about the prospects for and desirability of such a development based on the dynamic nature of Article 25 TFEU.

Given the peculiarities of the UK's approach to EU electoral rights, which has seen the local electoral register on which EU citizens are included also used for a range of other elections and referendums, it is perhaps inevitable that the UK's experience could dominate the discussion of existing practices. This is all the more so because the UK has in place extensive electoral rights for Irish and (settled) Commonwealth citizens, predating EU law and EU citizenship and derived from the UK's imperial past and its continued relationships with those states. Since the 1980s, Ireland has reciprocated the UK position by allowing UK citizens resident in Ireland to vote for the Irish Lower House or *Dáil*. Perhaps most remarkable from the perspective of those observing the UK from a position of the constitutional exclusivity of the demos, EU citizens will be able to vote in the Scottish referendum on independence on 18 September 2014, just as they did in the referendum on devolution in 1997 and as they have done in every Scottish Parliament election since. It is interesting to note that the Scottish independence referendum franchise legislation includes an explicit reference to European Union citizens as voters.

This differs from previous arrangements, e.g. for Scottish Parliament elections, where, as noted in the report for the UK, EU citizens have been allowed to vote by default because the register on which they appeared (the local elections register) was the one used also for those elections (as it was for elections to assemblies in Wales and Northern Ireland too).

Beyond these instances, the national reports report on patchy extensions of the strict letter of EU law on local electoral rights. The report for the Czech Republic points out that EU citizens can vote in city commune elections in Prague even though, as well as being a commune and thus a basic local government unit, Prague is also considered to be on the same level as the other 13 Czech regions. The report for Denmark notes that EU citizens can also vote for five regional councils. Finally, some of the recent statutes of Autonomy in Spain provide for specific measures to promote the active participation of EU citizens in regional political life and in the political affairs of the autonomous communities, although this could not be extended to a right to vote unless Article 13 of the Spanish Constitution were amended.

In sum, there are few examples across the EU of Member States enfranchising citizens of other Member States to vote in national or regional elections, especially where the latter are elections for bodies that have legislative powers under the national constitutional settlement. On the contrary, to gain the right to vote in these elections – which many might regard as the gold standard of political participation in a state – EU citizens would need to naturalise as citizens of the host State, on the basis of accrued residence and after passing whatever citizenship tests the host State applies.

11.2. The possibilities for enfranchisement

The case for the broader enfranchisement of mobile EU citizens remains a consistent question within the framework of European integration, emerging regularly in Commission reports on EU citizenship. This concern is also reflected in public opinion and in complaints that come before the Commission.

Thus, in its 2013 Report on citizenship, the Commission highlighted public opinion findings on perceptions about electoral rights:

> In the 2012 public consultation on EU citizenship and in the 2013 Eurobarometer on electoral rights, 72% and 67 % of respondents respectively thought that non-national EU

citizens should be allowed to vote in the national elections of their host country. This represents a significant increase since 2010 (+17 percentage points).[301]

Similarly, in its 2010 Citizenship Report, the Commission noted the letters that it receives about the loss of the right to vote in any national elections, which some mobile EU citizens experience if their State does not give the right to vote to external voters (or curtails it after a certain period of time, as in the case of the UK).[302] It was this report that triggered the Commission's engagement with the area or enfranchisement and disenfranchisement, as the Commission committed itself to working with the Member States to try and eliminate such gaps in the coverage of suffrage that result from free movement. We return to the issue of *disenfranchisement* in the discussion under Q12.

Referring specifically to Article 25 TFEU, and including in the discussion both regional and national elections, the Commission in its 2013 Report committed itself to engage with the admittedly more difficult issue of *enfranchisement* in the future:

> In the context of the broader reflections on the shape of the future of the European Union, the Commission will examine ways to enable EU citizens to participate in national and regional elections in their country of residence.[303]

But any such endeavour would inevitably run up against the immediate problems of, for example, the constitutional entrenchment of the right to vote in national elections for citizens only in States such as Austria and Germany, which would be extremely hard to alter even if there were political will to grant such rights to vote. For example, in the report for Austria, it is noted there would probably need to be a referendum as this is a core principle of the Constitution.

The 2014 Commission Communication on disenfranchisement does address the alternatives to the *disenfranchisement* route that it adopts (in the initial form of a recommendation to the Member States) and dismisses all of them as less attractive.[304] It dismisses the idea of encouraging resident EU

301. European Commission, *EU Citizenship Report 2013 – EU citizens: your rights, your future*, COM(2013) 269 at p. 22 *et seq*.
302. European Commission, *On progress towards effective EU Citizenship 2007-2010*, COM(2010) 602.
303. *EU Citizenship Report 2013 – EU citizens: your rights, your future*, at p. 24.
304. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33 at p. 8.

citizens to naturalise as contrary to the spirit of EU citizenship, and notes the possibility that EU citizens may have successive, shorter periods of residence in a variety of Member States where the naturalisation option would not be feasible. The Communication also dismisses a proposal, developed by one of the authors of this Report, to create an EU level framework convention as a 'laboratory of integration' within which Member States might proceed on the basis of reciprocity, as in the case of the UK and Ireland they already do.[305] This would lead, suggests the Commission, to a fragmentation of outcomes. It also accepts that political participation in the host State, while desirable, is very much a long-term option.

One reason is because of the complexity of the issues that it raises. These were fully canvassed in a EUDO Citizenship forum debate which generated a dialogue between a group of citizens proposing a European Citizens' Initiative seeking the enfranchisement of resident EU citizens in host country national elections (*LetMeVote*) and various academic and political/civil society interlocutors.[306] While the LetMeVote Citizens' Initiative was not ultimately successful in terms of the ECI framework, which requires one million signatures, it was certainly successful in raising the profile of the issues; and especially in highlighting the relationship between naturalisation, voting in the country of origin, and voting in the host country. Bauböck, in particular, has argued in favour of portable voting rights – the solution adopted by the Commission as its preferred first step and discussed at the end of the next Section (along with making national citizenship much more open to mobile EU citizens). For Bauböck, three reasons buttress the case for portable external voting rights. First, the idea can be linked to the core of EU citizenship, which is the right of free movement; second, it respects the principle that EU citizenship is derived from Member State nationality rather than from residence; and, third, it ensures that free movers will not lose their indirect representation in EU legislation through the vote of their national government in the Council.[307]

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305. See Shaw, *The Transformation of Citizenship*, at pp. 206-208.

306. P. Cayala, C. Seth, and R. Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections?*, EUI RSCAS Working Paper 2012/32, available at http://cadmus.eui.eu/bitstream/handle/1814/22754/RSCAS_2012_32.pdf?sequence=1.

307. R. Bauböck, 'EU citizens should have voting rights in national elections, but in which country?', in Cayala, Seth and Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections*, at p. 4.

Meanwhile, as one of the authors of this Report argued in her contribution to the forum dialogue, the debate should not just focus on the Member States – which, after all, would be the entities required to instantiate any necessary legal and/or constitutional changes – but, rather, on the nature of the bonds of solidarity that exist (or do not (yet) exist) across the EU's common citizenship area.[308] For it is only if such bonds were in place that there would be a genuine political will to engage, on a transnational basis, with challenges faced by all Member States such as the financial crisis, youth unemployment and climate change.

We assess the treatment of EU citizenship at the national level more closely below, when we look at the responses to Question 13.

Question 12

Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)?

Article 10(2) TEU

Citizens are directly represented at Union level in the European Parliament.

Article 14(3) TEU

The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

Article 39(2) Charter of Fundamental Rights

Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

308. See J. Shaw, 'Testing the bonds of solidarity in Europe's common citizenship area', in Cayala, Seth and Bauböck (Eds), *Should EU Citizens Living in other Member States Vote there in National Elections*, at p. 8.

Article 1 of the Act on Direct Elections

The representatives in the Assembly of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

Article 3 of Protocol No 1 to the ECHR: Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

12.1. Introduction – national rules on disenfranchisement

All states restrict the 'right to vote' in some way. All apply (minimum) age criteria and (some form of) citizenship criteria. Some apply residence criteria, a point we explore in Section 12.2 below. Many states also apply criteria based on mental capacity, and in relation to the deprivation of liberty or some form of probity criterion (e.g. disenfranchising prisoners or – as in many states of the US – disenfranchising those convicted of felonies for life).

The hypothesis explored in Question 12 was whether there was any traction in Article 39(2) of the Charter of Fundamental Rights.[309] According to the explanations attached to the Charter,[310] this is one of those rights that are mentioned in the Treaties and it applies under the conditions – and, as such, is subject to the limitations laid down – in the Treaties and under Article 52(2) of the Charter. Clearly, this provision must also be subject to Article 51(1) of the Charter – that is, it only applies to the Member States when they are implementing EU law. However, as to content, Article 39(2), according to the explanations, 'takes over the basic principles of the electoral system in a democratic State.'

We can find evidence of what these principles might be from Article 3 of Protocol No 1 to the ECHR. This provision, which was long neglected in the context of the development of the interpretation and application of the ECHR, is now understood to contain both passive and active elements, including the individual right to vote, but it is subject to implicit limitations, such as those

309. For fuller discussion of the implications of the Charter in relation to EU free movement, see the discussion under Q14 below.

310. Explanations relating to the Charter of Rights, [2007] OJ C303/02.

discussed above.[311] Two particular pinch points concern the disenfranchisement of persons deprived of their liberty following criminal proceedings and of those declared to have a mental impairment. In its case law, the ECtHR has repeatedly argued that the right to vote is not a privilege, and that the presumption in a democratic society must be in favour of inclusion.[312] In case law that has not been uncontested at the national level,[313] the ECtHR has concluded that the UK's blanket ban on prisoner voting (with the exception of prisoners held on remand) fell outside the margin of appreciation given to contracting states in the implementation of the rights contained in Article 3 of Protocol No 1 pursuant to the obligation to hold free and fair elections.[314] In similar terms, the same Court concluded that the Italian restrictions at issue in *Scoppola*, which entailed a lifetime ban from voting for someone convicted of murder and other serious offences, was not proportionate.[315] In *Kiss v Hungary,* the ECtHR concluded that there was a violation of Article 3 of Protocol No 1 in a blanket disenfranchisement of all those subject to a partial guardianship procedure, regardless of their particular mental capacities.[316]

A Resolution of the Parliamentary Assembly of the Council of Europe in 2012 included a call for the abolition of 'legal provisions providing for general, automatic and indiscriminate disenfranchisement of all serving prisoners irrespective of the nature or gravity of their offences'.[317] In 2011, the EU itself ratified the UN Convention on the Rights of Persons with Disabilities, the first time that the EU had become a party to an international human rights treaty.[318] The Convention is concerned with ensuring that disabled persons

311. For further discussion, see R. O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy' (2010) 61 NILQ 263.
312. *Hirst v UK (No 2)*, para. 59.
313. For a review of this case law, which is kept up to date and which has been prepared for the benefit of UK parliamentarians who have been dealing with this issue as a result of the fall out from ECHR case law (and the marked reluctance of the UK to comply with its ECHR obligations), see the House of Commons Library Standard Note, *Prisoners' Voting Rights – in brief*, SN/PC/06480, last updated 15 January 2014.
314. See *Hirst (No 2)* and also *Greens and M.T. v United Kingdom* App. 60041/08 and 60054/08 (2010).
315. *Scoppola v Italy (No 3)* App no 126/05 (2012).
316. *Kiss v Hungary* App no 38832/06 (2010).
317. See p. 217 of the FRA Report 2012: PACE Resolution 1897 (2012) *Ensuring greater democracy in elections* (available at http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19121&lang=en) at para. 8.1.2.
318. See 'EU ratifies UN Convention on disability rights', IP11/04, 5 January 2011, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm.

enjoy their rights without restriction, including the right to vote.[319] The press release on ratification notes that ratifying *countries* have to make sure that disabled persons enjoy their right to vote, but it is clear that, with respect to European Parliament elections, this obligation may be hedged around in some respects by EU law obligations on those States as well.

The national reports (backed up where appropriate by data from the FRACIT reports) provide some important contextualisations of these provisions and reveal a wide variety of practice as regards different elections. For example, it is clear from the FRACIT report for Luxembourg that there is strict disenfranchisement of those subject to a guardianship order by a court.[320] The report for Ireland queries whether national arrangements fall below the bar set for individualised assessment in *Kiss*. In the report for Cyprus, we see that there is quite strict disenfranchisement for those deprived of liberty but also for those declared to be persons with mental impairment. Denmark disenfranchises those who have been declared legally incompetent. The Czech Republic only disenfranchises prisoners in local elections. Difficulties with obtaining an ID card in some cases for prisoners also represent a practical obstacle to voting. There appears to be a high level of restriction on voting rights for those who have been incapacitated according to the civil law, even though this has been criticised by the Constitutional Court.[321] Other States disenfranchise prisoners from candidacy rights, but not from the right to vote (e.g. Spain).

In some States, there have recently been moves towards enfranchisement. For example, Croatia has recently enfranchised mentally disabled persons. In 2008, the Netherlands withdrew a provision from the Constitution removing the right to vote from persons deemed legally incompetent by irrevocable court judgment.

Aside from the UK, to which we turn below, only one other Member State has had significant litigation on the issue of voting rights, in particular prisoner voting rights, and that is Estonia. The Estonian Supreme Court has found that Articles 39 and 40 of the Charter of Fundamental Rights only ap-

319. The Fundamental Rights Agency Report 2012 (available at http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf) has a comprehensive table (at p. 222) dividing the Member States between those that provide for exclusion, those that allow for limited participation, and those that provide for inclusion.

320. D. Scuto, *Access to Electoral Rights, Luxembourg,* EUDO Citizenship Observatory, FRACIT Report, p. 4.

321. P. Kandalec, *Access to Electoral Rights. Czech Republic*, EUDO Citizenship Observatory, FRACIT Report, p. 4.

ply to the rights of *non-national* EU citizens to participate in municipal and European Parliamentary elections under the same conditions as nationals. In other words, that court has not found a freestanding right in relation to universal suffrage – even in relation to European parliamentary elections, which are the European Union's 'own' elections. The Estonian rapporteur doubts, however, whether Article 39(2) can be so easily dismissed as regards its importation of universal suffrage principles into EU law for the purposes of regulating how Member States manage elections.

There are, of course, advantages to using EU law as the legal basis for contesting an exclusion from the franchise, compared to relying on ECHR law, as the UK example shows. The UK provides an illustration of a State where there may be no effective remedies for individuals arising at national level through the courts, just because the ECtHR has made a finding that the national legislature is not in compliance with the ECHR (as it has done in *Hirst*) and notwithstanding the fact that national courts themselves have made declarations of incompatibility between national law and the ECHR rights instantiated in the Human Rights Act 1998. However, so far, these declarations have not given rise to any individual remedies for prisoners (e.g. granting of the right to vote, or damages) who have argued that they have been deprived of their right to vote. The situation is aggravated by the refusal of the UK legislature to come into compliance with the ECHR, by introducing, for example, a differentiation that would allow perhaps some prisoners with short sentences to be excluded from the general ban on prisoner voting.

The question of whether EU law changes the situation – at least as regards the issue of voting in European Parliament elections – was canvassed in the UK cases of *Chester* and *McGeoch*.[322] It is clear that the EU law principles of direct effect and primacy could be of assistance in national challenges, in combination with the principle of effective remedies. For example, were a national court to conclude that a situation had arisen where a national law – in a case where the Member State was 'implementing' EU law – was contrary to a right contained in the Charter, then this should lead it to set aside the national law and apply EU law instead (in this case, 'the basic principles of the electoral system in a democratic State' as suggested in the Charter and thus, one assumes, ECtHR case law on Article 3 of Protocol No 1).

In fact, the UK Supreme Court found nothing in EU law that conferred an individual right to vote in the European Parliament elections on EU citizens,

322. *R (on the application of Chester) v Secretary of State for Justice; McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63. For discussion in the report for the UK, see at fn.235 and following.

relying for its conclusions on the approach taken by the Court of Justice in *Eman and Sevinger*. The Supreme Court further doubted that the Strasbourg case law had been incorporated into EU law. It was certain that Articles 39 and 40 of the Charter were only concerned with the equal treatment right, that is, the right of EU citizens to vote in the State in which they are resident *if they are not citizens of that State*.

In considering the approach taken by the Supreme Court, the contestedness of the issue of prisoner voting, and notably of the stance taken by the judges of the ECtHR, needs to be taken into account. As what is needed in the UK to ensure compliance is a legislative scheme ensuring that some prisoners can vote, UK judges are anxious to defer in that respect to Parliament and not to take on the decision for themselves as to who might qualify and who might not. It should be noted, in that context, that both applicants in *Chester* and *McGeoch* were convicted of very serious crimes and were serving life sentences.[323]

It is clear that some confusion does appear to arise because of the juxtaposition of Article 39(2) of the Charter with the right in Article 39(1), which replicates the right of EU citizens to vote in European Parliament elections in the State in which they are resident provided for in Article 22(2) TFEU, discussed above in relation to Qs 9 and 10. Nonetheless, there is one interpretation of the judgment in *Eman and Sevinger* that does create the necessary connection to EU law in order to bring the Charter into play: namely, that the Member States are 'implementing' EU law because they are seeking to limit the process by which the European Parliament is elected 'by direct universal suffrage in a free and secret ballot', as set out in Article 14(3) TEU. This connection is akin to the proposition developed by the Court of Justice in *ERT*,[324] whereby Member States are, when seeking to rely upon an exception laid down in the Treaty (in that case, to a free movement right), bound by general principles of EU law, including fundamental rights – a line of case law that has now been taken up in relation to the applicability of the Charter in the review of national measures.

While the case of prisoners' voting rights is likely to run on inconclusively – at least in the UK – it is possible that there might be more scope for running a similar argument challenging national restrictions on EU citizens' right to vote in European Parliament elections on grounds of mental disability or impairment, when this is read in conjunction with the EU's explicit commitment

323. For further discussion, see A. Lansbergen, 'Prisoner disenfranchisement in the United Kingdom and the scope of EU law' (2014) ECLRev (forthcoming).
324. Case C-260/89 *ERT* [1991] ECR I-2925.

to the principle of non-discrimination on the grounds of (inter alia) disability, reflected in Article 21(1) of the Charter, and its ratification of the UN Convention on the Rights of Persons with Disabilities. The years to come may see such cases come before the Court of Justice, and indeed the issue has already been raised in Poland as regards access to the franchise for the 2014 EP elections.[325]

12.2. The Commission's disenfranchisement proposal

An unexpected offshoot of our Q12 emerged when the Commission issued a Communication in January 2014 recommending that Member States who currently do not grant voting rights to citizens who move outside their Member State but within the European Union should review their policies in the light of the principles of European citizenship and free movement.[326] As this was a new development, national reporters did not have the opportunity to respond to it and to assess its internal implications.

The Commission terms this a 'disenfranchisement' situation, although this presupposes that the default scenario is that a residence criterion for voting in elections is (no longer) a normal condition for the exercise of the franchise, especially in (national and European) parliamentary elections. Although the ECtHR has acknowledged that a good majority of ECHR contracting states do give such votes to their non-resident citizens (reflecting a wider international trend[327]), that Court has also confirmed that Article 3 of Protocol No 1 to the ECHR does not oblige contracting parties to take steps to make it pos-

325. See A. Bodnar, 'European Parliament elections without legally incapacitated persons: Trouble ahead for Poland',*Verfassungsblog*, 9 March 2014, http://www.verfassungsblog.de/en/wahlrechtsausschluss-fuer-entmuendigte-auf-polen-kommt-aerger-zu/#.UyGm_17eP0s.

326. Commission Communication, *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 33 final, 29 January 2014; Commission Recommendation of January 29 2014, A*ddressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement*, C(2014) 391.

327. IDEA and IFE, *Voting from Abroad. The international IDEA handbook*, Stockholm and Mexico City, International Institute for Democracy and Electoral Assistance and Instituto Federal Electoral de Mexico, 2007. Extended data on EU Member States and selected third countries is also available in the EUDO FRACIT Report, distinguishing between different elections (local, regional, national, European, executive, referendums, etc.).

sible for expatriate citizens to vote in parliamentary elections,[328] and that it is legitimate for states to distinguish between resident and non-resident citizens on the grounds of their respective connection with the home polity.[329] Most recently, in the *Shindler* case,[330] it also upheld the UK's 15-year rule for non-resident voters, limiting external voting to 15 years after the last date on which a person was registered to vote at an address in the UK; this rule has also survived a challenge in the national courts in the light of EU law.[331]

The key to the Commission's argument – and its recommendation for change by certain Member States – is that it poses the problem as one where disenfranchisement arises by virtue of the exercise of free movement rights under the EU Treaties. Mobile EU citizens are quite likely to lose voting rights in national (and often regional) elections because of a combination of the following factors: (1) some States do not allow external voting (or limit it to a considerable degree); (2) very few States allow non-citizens to vote in such elections on the basis of residence; and (3) there are few incentives for EU citizens to naturalise in the host State. In relation to the latter point, all the usual issues regarding naturalisation will arise with a national of a Member State who resides in another Member State. That is, she or he must balance the benefits of naturalising against the restrictions imposed by either the host State or the State of origin (e.g. if either or both States do not allow dual citizenship) and the 'costs' (fees, tests, oaths of allegiance, etc) of naturalising. This point links back to the points made under Q1 about the blurred borderline between *equal* treatment and *special* treatment.

In addition, and linking back to the discussion under Q6 in particular, the status of EU permanent residence, acquired after five years of legal residence, and the enhanced protections against deportation achieved after ten years of residence, narrow the 'distance' between the legal status of settled resident EU citizens and national citizens to an extent that is unusual even in the con-

328. *Sitaropoulos and Others v Greece (No 1)* App no 42202/07 (2010) (confirmed in *Sitaropoulos and Others v Greece (No 2)* App no 42202/07 (2012).

329. *Hilbe* v *Liechtenstein* App no 31981/96, 7 September 1999.

330. *Shindler* v *UK* App no 19840/09, 7 May 2013.

331. *R. (on the application of Preston)* v *Wandsworth LBC* [2012] EWCA Civ 1378, discussed in the report for the UK. The Court of Appeal rejected the possibility of the rule having a deterrent effect on those wishing to exercise their free movement rights. Another challenge that may emerge in the UK courts is one against the scope of the franchise that has been defined for the referendum on Scottish independence on 18 September 2014. An argument has been raised that the exclusion of those born in Scotland (or previously resident there) who are now resident elsewhere in the UK would be an infringement of their EU citizenship rights.

text of systems of regional integration.[332] And finally, it seems reasonable to argue that EU free movement is more often 'circular' or 'multipolar' than 'ordinary' international migration. Many mobile EU citizens intend to return to their home country or move to another Member State (or to a third country) after a period of time residing in the host State, and so have no intention of acquiring the citizenship of that State.

The Commission picks up a logic based on free movement and citizenship in its Communication that underpins the Recommendation. It argues that EU citizenship being *additional* to national citizenship should mean that 'one would not expect that the exercise of the rights attached to Union citizenship results in the loss of the right to vote in national elections, which is generally linked to national citizenship.'[333] Second, it points out that EU citizens may be affected in their behaviour in relation to free movement as a result of national disenfranchisement policies. Note that the Commission does not suggest that such policies may *dissuade* EU citizens from moving – the argument rejected as spurious in the UK court – but rather, that it might affect their practices, so that they may not declare their presence in an administrative process in order to protect their registration in the home State. To put it another way, they will not *formalise* their move in case this affects rights such as the right to vote in the home State, and the unstated assumption is that this may have other consequences at a later stage (perhaps in relation to the claiming of benefits – although benefits in the host State are not supposed to be dependent upon engaging in any specific bureaucratic process – or the acquisition of permanent residence). Finally, the Commission suggests that it is inconsistent with efforts to encourage citizen engagement with the political process to have gaps such as that caused by uneven disenfranchisement policies.

The Communication and Recommendation only address, in effect, the five States that disenfranchise, or place restrictions on the franchise, i.e. Cyprus, Denmark, Ireland, Malta, and the UK. The Commission does not engage with

332. In fact, as the Institutional Report points out at fn. 5 (drawing on data at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Acquisition_of_citizenship_statistics), there are a number of Member States where citizens of other Member States rank among the top recipients of citizenship of the host State, suggesting that there is still some way to go before EU citizenship is perceived as a substitute for naturalization in all cases. The point made in the Institutional Report is as follows: '[l]ooking at top five nationalities which acquired nationality of a Member State in 2012, nationals of at least one other Member States feature in 14 Member States (Belgium, Czech Republic, Germany, Estonia, France, Italy, Cyprus, Luxembourg, Hungary, Malta, Slovenia, Slovakia, Finland and Sweden).'

333. COM(2014) 33, at p. 7.

the restriction on voting except by accessing the ballot 'in country' in relation to Greece (the ECtHR *Sitaropoulos* case). It is worth noting, when considering the options for change, that restrictions in Denmark are constitutionally grounded; the legislature there has already gone as far as it can without changing the Constitution.[334]

The Commission's Recommendation is not that Member States should simply reverse their existing policies. On the contrary, what it recommends is that those states that currently do not provide unrestricted external votes could draw on what it sees as best practice, evidenced by the good practice outlined in the report for Austria – where external voters have to renew their registration in the *Wählerevidenz* every ten years in order to demonstrate ongoing commitment to the voting in elections. So the Commission suggests only that Member States change the rules for citizens resident elsewhere in the EU who demonstrate a continuing interest in the politics of the home State by some form of proportional step such as periodic re-registration (which the Commission states should always be possible online).

In practice, distinguishing between external voters living elsewhere in the EU and those living in third countries may be a step too far for some States, so it is likely that if they felt pressured by the Commission's Recommendation – only a soft law measure, it must be noted – to change the national practice, they may make blanket changes for all external voters. In practice, it seems unlikely that we will see widespread changes to national law any time soon as a result of this Recommendation. But what it does is establish a benchmark that may have traction in the future, for example, if the Member States decide they want to add to the corpus of rights using Article 25 TFEU, and they may therefore bring political rights back to the table for discussion.

12.3. Political rights of EU citizens – emerging issues and themes

In sum, we should note that while the introduction of political rights for EU citizens in the Treaty of Maastricht was **intended to contribute a major element of the newly constitutionalised form of EU citizenship, in practice the exercise of these rights has often been a damp squib**, because of difficulties in exercising these rights for mobile EU citizens. That said, political rights continue to offer points of reference around which EU citizens may mobilise, especially but not only if they are resident in another EU Member State.

334. Ersbøll, *Access to Electoral Rights. Denmark*, FRACIT Report, at p. 2.

Questions have also been raised by **EU citizens resident in third countries**. In some states, the issue of whether Member States make provision for universal suffrage for European Parliament elections has become salient. The fact that EU citizens have political rights remains an important dimension of the (as yet incomplete) common citizenship area.

Culture(s) of citizenship

For this set of questions, our intention was to chart the emerging *cultures* of (Union) citizenship in three key respects:

(1) **The status of Union citizenship is constructed around the paradigm of individual *rights*; but immigration law more generally is traditionally grounded in an ethos of *permission*** – do national actors (administrative, legislative, and judicial) tend to apply that distinction *appropriately* in their application and interpretation of Union citizenship?
(2) To what extent has the culture of rights been **strengthened by the changed legal status of the Charter of Fundamental Rights**? Are rights-based arguments intensifying, in other words, since the Lisbon Treaty came into effect in 2009?
(3) What is **the general *tone* of the national debate, in the media and civil society** more broadly, on the status of or rights attached to Union citizenship?

Question 13

On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?

Article 9 TEU

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

Article 20(2) TFEU

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties ...

Article 26(2) TFEU

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Article 67 TFEU

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.[335]

...

13.1. Introduction

The objective of this question was to ask national rapporteurs to reflect back on the responses they had already given to previous questions, in order to try to discern what type of 'culture(s) of citizenship' they felt might be revealed by those answers as regards the 'fit' between EU law and immigration law. We were aware, on the basis of previous research on the UK in which both of this Report's authors were involved,[336] of the complexities involved in as-

335. This provision is drawn from Title V of Part Three of the TFEU. Neither the UK nor Ireland takes part in the adoption of measures under this Title, except under arrangements for 'opt in'. The provision is used here as the basis for a generalised observation about the differences in legal treatment between EU citizens and third country nationals.

336. J. Shaw, N. Miller and M. Fletcher, Getting to grips with EU citizenship: understanding the friction between UK immigration law and EU free movement law, (2013) Edinburgh Law School Citizenship Studies (available at http://www.frictionandoverlap.ed.ac.uk/) and J Shaw and N Miller, 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law' (2013) 38 ELRev 137.

sessing the fit between national immigration law and EU free movement law, and it was clearly beyond the scope of this exercise to undertake a wide-ranging assessment based on a scientific body of empirical evidence. In that earlier research, however, it was found that problems of 'friction' and 'misfit' between the systems existed at the edges of free movement law, and, in particular:

(a) As regards the first entry and residence stability of third country national family members;
(b) As regards the use of residence tests ('right to reside') in relation to access to certain social welfare benefits;
(c) As regards those who may be deemed not to benefit (any longer) from EU free movement rights, such as those who have committed crimes and may be subject to deportation proceedings or those who are not deemed to be (sufficiently) economically self-sufficient and thus who are said to be an unreasonable burden on the state; and
(d) As regards those in transitional or partial regimes of free movement or equal treatment, such as citizens of Member States that joined the EU after 2004 and Turkish citizens.

The research found that, in many of these situations, there was a mindset amongst decision-makers, especially those responsible for taking what are called in the UK EEA decision (i.e. decisions under the EEA Regulations, which implement Directive 2004/38) but also, in some cases, in parts of the judiciary responsible for hearing appeals against decisions, which reflected a failure to grasp the rights-based nature of EU free movement rights. There was also evidence that reasoning to be found in immigration law, where there is an onus on the applicant to demonstrate why they should be given leave to enter or leave to remain, also seeps into the field of free movement law. The negative findings of this research were replicated in further studies contained in the report for the UK, which identifies additional cases where, reflecting a trend that has arisen in different parts of this Report, the courts have been obliged to correct decisions taken by UK Border Agency officials – now the Visas and Immigration section of the Home Office, which continues to be tasked with applying EU free movement law – because they had erred in their understanding of EU law.

As the texts highlighted in the box above show, EU law itself draws a distinction between citizens and third country nationals. Under the TEU, citizenship now has a constitutional status in the EU; and under Article 20 TFEU, Union citizens have rights to free movement and equal treatment. Free

movement is, as Article 26 TFEU shows, fundamental to the very character of the EU, and the Union must pursue this as an objective. But according to Article 67 TFEU, third country nationals should be treated 'fairly', and the notion of the area of freedom, security and justice, within which EU immigration law is nested, rests on the proposition that freedom, justice, and security are things that should be protected and pursued primarily in the interests of the (EU) citizen.

In reality, as even a cursory familiarity with many national systems of immigration will show, such an ideal of fair treatment is not fully achieved at the national level in many cases. EU measures – e.g. on long term residence or family reunification for third country nationals – have had an impact in terms of levelling up at the national level in many States (although these are measures that Denmark, Ireland, and the UK opt out of) – but that immigration/free movement distinction is still clearly a central one within which EU law works, and indeed it remains fully visible within the political rhetoric of the Union and its institutions.

13.2. Key findings from the national reports

The prevailing view within the national reports is that there are often some elements in the national systems that involve EU free movement issues being treated as an adjunct to the national immigration systems.[337] In legal terms, this can be seen, for example, where Member States take a more restrictive approach to the treatment of registered partnerships, creating gaps in coverage;[338] or where the emphasis is placed more on repression and control than on rights.[339]

In Denmark, which takes a formalistic approach to the application of EU law, and where judges and administrators thus use the national legal framework and culture as a starting point, this generates a clear impression that national law is somehow being given priority. The example is given of expulsion decisions where cases are first decided by reference to the Aliens Act and its formal categories, and only afterwards is compliance with EU law checked. The Aliens Act is, moreover, very much aimed at the administration rather than the citizen, with a complex structure and non-transparent vocabulary. These points recur at several points in the discussions earlier in this Re-

337. See e.g. the reports for the Czech Republic, Hungary, and Malta.
338. See e.g. the report for Cyprus.
339. See e.g. the report for Italy.

port, but it is worth noting in particular that Denmark has a restrictive interpretation in place for important areas such as social benefits and family reunification, affecting both EU citizens' rights and also the rights of Denmark's own citizens who might be covered by the *Ruiz Zambrano* doctrine. It is possible that Denmark's culture is further buttressed by its isolationist character, noting the absence of references for a preliminary ruling from the Court of Justice with the exception of a case on student grants and loans.[340] It is interesting to note that the character of Danish exceptionalism, noted not only in the report for Denmark but also in other secondary literatures on the weaknesses in the implementation of Directive 2004/38 viewed from the political science perspective of adaptation and Europeanisation,[341] is reflected in the comparatively insular character of Danish citizenship law, as highlighted in the comparative analyses of European citizenship regimes carried out by Maarten Vink and Rainer Bauböck.[342]

Domestic legal culture is also emphasised as a factor in another Nordic state, Finland. Here, too, there is a dualist system and a positivist legal culture, which sees judges much preferring to interpret and apply national norms. Even so, that does not always mean that they are not aware of and respectful of EU law and the case law of the Court of Justice. A contrasting case, where the national rapporteur felt confident about the domestic 'constitutionalisation' of EU law was that of France. Here, the courts are felt to be ahead of the legislature in recognising the right of residence as one of the '*droits 'constitutionnels' français*' and in the introduction of an effective proportionality test in order to assess deportation measures where there may be family life issues at play. Even so, the report for France acknowledges some cases, notably the right to welfare benefits for jobseekers, where the national courts have failed to take the relevant Court of Justice case law into consideration.

There are some other counter examples visible in the national reports, such as the presumption of lawful residence by EU citizens that municipalities must apply in the Netherlands unless the IND (the Dutch national immigration authority) has decided otherwise.[343] Even in Sweden, however, where a

340. Case C-46/12 *LN*, judgment of 21 February 2013, discussed under Q5 above.
341. M Wind, 'The European 'rights revolution' and the (non) implementation of the citizenship directive in Denmark', in L Miles and A Wivel (Eds), *Denmark and the European Union*, (Routledge, 2013), pp. 159-174.
342. M. Vink and R. Bauböck, 'Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe' (2013) 11 CEP 621-648.
343. See the report for the Netherlands, response to Q2.

generally positive balance sheet of implementation and application of EU free movement law and of the rights of EU citizens can be reported, with a high level of understanding of the issues within the administration,[344] problems can arise because the question of assessing whether an EU citizen's residence is lawful or not is one to be decided separately by each individual local authority, resulting in deviations in practice in the approaches taken.[345] Here, the need for a unified approach to EU citizenship runs up against the traditional Swedish respect for the autonomy and independence of local authorities and administrations.

Some cases suggest a bifurcation in approach, so that where EU citizens themselves are affected, a rights-based system prevails; but where the rights of EU citizens with respect to their third country national family members are at stake, the issues are more readily treated as an adjunct to the immigration system.[346] In Bulgaria a different preoccupation has emerged – not over immigration, but over emigration, and over controls placed on certain citizens who have been convicted of offences, preventing them from leaving the country.[347]

It is quite common for States to have an approach where, in principle, free movement is acknowledged as a cornerstone of membership of the EU; but, in practice, there is a high degree of hostility because it is assimilated in public discourse or the popular imagination to 'ordinary' migration. This is clearly the case in the UK, where the 2010-2015 Coalition Government has set itself a target of reducing net migration – into which it has included EU free movement – to less than 100,000 by the date of the 2015 general election. This is just one reason why so much of the press coverage in the UK, which will be discussed in more detail under Q15, is extremely hostile to EU free movement at the present time. In the UK, as in Ireland,[348] the language that dominates the debate at present is of 'EU migrant workers' and 'EU immigration – not mobile EU citizens. This language has become pervasive in the UK. A bifurcation of theoretical approval and practical resistance is also reported in Austria.

In Estonia, a different set of pressures is reported around the institution of citizenship. There, the Supreme Court emphasised in 2008 that citizenship by

344. See the report for Sweden at fn. 23.
345. See the report for Sweden at fn. 22.
346. See e.g. the reports for Bulgaria, and Slovenia.
347. See Section 6.2.1 above.
348. Report for Ireland, discussing the title of a report of the Oireachtas Joint Committee on European Affairs of 2006, noted at fn. 97.

naturalisation is not a fundamental right, but a privilege.[349] This context is set by a wider set of concerns within politics and society about the constitutional status of Estonia as a rather recently reconstituted independent state, and the position of the Russian minority therein, many of whom do not have Estonian citizenship. Set against that background, EU citizenship issues in fact provide a backdrop of a Western ideal for self-determination and independence, which is set – in the Estonian national imaginary – against the history of Soviet occupation and domination from the Second World War until the breakup of the Soviet Union. Tying EU citizenship to Estonian citizenship thus provides an important symbolic way of filling out national citizenship.

A similar 'move' can be seen in an even newer Member State, Croatia, which is the only State to report having a constitutional provision on EU citizenship effectively replicating Article 20 TFEU.[350] This provision helps to reinforce Croatia's European future as part of its accession story, suggesting a future that goes beyond an exclusively nationally-based story of belonging which emerged during and after the wars of the Yugoslav secession and which involved Croatia for several years during the 1990s. This 'top down' move is clearly aspirational in character, and can come into conflict with other definitions of what it means to be Croatian and European. For example, on the initiative of a conservative and religious 'pro-family' organisation, a referendum was held in Croatia in December 2013 on enshrining in the Constitution a definition of marriage as being between a man and a woman, 'goldplating' the existing legislative provision that already limits marriage in this way. The initiative occurred as a reaction to a government proposal to legalise same sex partnerships – a move that would have brought Croatia into the European mainstream more generally, since the majority of Member States now recognise some form of same sex union.[351] On a turnout of 38%, however, 66% of voters approved the constitutional amendment.

Historical factors also come into play in Greece, where the effect of Bulgaria and Romania acceding to the EU in 2007 has been to move two of the largest groups of immigrants resident in Greece (after Albanians) into a new and, of course, more favourable legal category. Despite the best efforts of the Greek Government to implement Directive 2004/38 effectively, this has not

349. Judgment No. 3-3-1-42-08 – discussed in more detail in the response to Q8 in the report for Estonia.

350. For further discussion, see T. Orsolic Dalessio, 'The constitutional provision on EU citizenship: the case of Croatia', 2012, *Citizenship in South East Europe*, available at http://www.citsee.eu/node/87.

351. For more details, see the discussion above at Section 1.2.1.

necessarily translated into an effective communication of a new rights-based approach to these groups of non-citizens resident in Greece.

But some national reports also show that, away from the field of free movement in its 'immigration' guise, there are good examples at national level of the culture of Union citizenship as a rights-based structure being fully embraced. A good example concerns the electoral rights given to EU citizens in the UK, which go well beyond the strict requirements of EU law.

13.3. The institutional reaction

As the Institutional Report notes, the baseline for the Commission, in particular, is the rigorous enforcement of EU law. There is plenty of evidence from regular reports, and from a number of enforcement actions that have been started against the Member States in respect of Directive 2004/38, that the Commission is well aware of the divergences that exist between the Directive and national laws. In the Commission's first report on the implementation of Directive 2004/38,[352] profound disappointment was expressed about the transposition effort:

> Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States.

The Institutional Report comments that issues arise from 'a lack of understanding of national administrations of the fundamental difference between the subjective rights of EU citizens stemming directly from the Treaty, and the broad discretion national administrations traditionally have in the area of migration law relating to non-EU nationals.'[353]

The Commission, though, likes to use dialogue to solve cases. Not one single case on what might be termed the 'immigration'-related aspects of Directive 2004/38 initiated by the Commission against the Member States has yet to reach the Court of Justice.[354] Indeed, in the Institutional Report, the Commission notes that it does not believe that there is 'a generalized unwill-

352. Report from the Commission to the Council and the European Parliament on the application of Directive 2004/38/EC, COM(2008) 840 final, at p. 4.
353. Institutional Report, Section 5.1.
354. See Shaw and Miller, 'When Legal Worlds Collide', where details of actions initiated by the Commission are given at fn. 5.

ingness of front-line administrations or judiciaries in Member States to grant EU citizens' their rights. On the contrary, it believes – although it is not clear that this assertion is evidenced completely by the national data discussed in this Report – that Member States do make an effort to separate out the two issues in national implementing legislation, through separate laws/regulations or at least separate chapters within those measures.

Finally, it is interesting to note the comment in the Institutional Report that the separation between free movement law and immigration law is fully recognised in the manner in which the relevant fields of law are taught in universities. This is a question that merits closer examination before a firm conclusion can be reached. For example, in the report for Greece, it is specifically noted that the two topics *are* in fact dealt with side by side in university law schools.

13.4. Question 13 – emerging issues and themes

EU free movement law is under pressure from a number of sides.[355] While we will return to this issue in more detail when considering media coverage of free movement under Q15, and in our General Conclusions, it is important to note a number of emerging trends in this Section.

The report for Ireland highlights in some detail **how the language of immigration has entered the field of EU free movement**. It quotes a paradoxical comment from a previous Minister noting that 'it is difficult in EU law, for a Member State to *impede* the free movement of EU citizens' and expressing a desire that this '*privilege*' should not be abused. In similar vein, we can note a collaboration between the Dutch Minister of Social Affairs, Lodewijk Asscher and a British commentator, David Goodhart, arguing for limits to EU free movement – an approach which seems to be premised on the idea that abuses of free movement are rife and that a new 'code' (the 'code orange'[356]) is needed because of the excessive burden on the national systems of EU free movement.[357] The report for Spain notes a bifurcation between

355. For an excellent short review, see R. Barbulescu, 'EU freedom of movement is coming under increasing pressure in the UK and other European states', LSE EUROPP blog, 20 February 2014, available at http://bit.ly/1jI6XOG.

356. See the report for the Netherlands at note 87.

357. L. Asscher and D. Goodhart, 'Code Oranje voor vrij werknemersverkeer binnen EU' *De Volkskrant*, 17 August 2013 and 'So much migration puts Europe's dykes in danger of bursting', *The Independent*, 18 August 2013.

elite political or legal perceptions of EU free movement and its culture of (EU) citizenship, on the one hand, and a wider popular view that may be dominated by a sense that EU free movement is simply 'an artificial door opened to other EU nationals in order to avoid application of immigration law', on the other.

As the Commission has commented on many occasions, **fraud and abuse do represent limitations upon free movement law**.[358] But the Commission has also tried to call out Member States that seek to take adopt a lazy approach to these matters by claiming that abuse and fraud are rife, whilst being unable to prove this through robust evidence.[359] Even so, the UK, in particular, is constantly trying to test the limits of free movement law, most recently through a restriction that will subject all EU citizens on low incomes falling below £150 per week to an individual assessment in order to determine whether they have work that is 'genuine and effective'. If not, they will be denied the status of 'worker' and thus the in-work benefits that bring the UK's poverty wages in some sectors up to a living wage.[360] EU citizens are thus, arguably, discriminated against unfairly compared to British low paid workers, and they will also be vulnerable to removal.

As the Commission notes in the Institutional Report, the difference between the politicisation of EU free movement today and how it was treated in previous years concerns both **the nature and scope of the claims being made**. Strong claims are made by politicians, and even ministers, about the nature of free movement and free movers that are simply **not backed up by evidence**. A good example is to be found in a report in the *Financial Times*, a newspaper that deserves plaudits for its balanced and sober approach to reporting, but which does, sometimes, do precisely that, namely report a view but without contesting it. Thus in a report in February 2014 about the extent to which the numbers of EU citizens resident in the UK are balanced by UK citizens resident abroad, the following comment appears:

358. Commission Communication, *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013) 837, at pp. 7-8.

359. The Institutional Report refers at note 248 to note 43 of *Five actions to make a difference,* which charts Member State responses to requests from the Commission for evidence about the scale of abuse.

360. S. Peers, 'Is the UK's restriction on EU workers' access to benefits legal – and if not, should it be?', *EU Law Analysis*, 19 February 2014, available at http://eulawanalysis.blogspot.co.uk/2014/02/is-uks-restriction-on-eu-workers-access.html, and D Flynn, 'New rules threaten EU migrant workers with discrimination', *Migrants' Rights Network Blog*, 19 February 2014, available at http://www.migrantsrights.org.uk/blog/2014/02/new-dwp-rules-threaten-eu-migrant-workers-major-discrimination.

Mark Field, Conservative MP for the Cities of London and Westminster, said comparison was difficult. 'These [figures] are not like for like: Lots of Brits abroad are successful people living in second homes in Spain or France. Most Brits living abroad are not aggressive beggars or sleeping rough on the streets: just comparing headline figures doesn't tell the whole story.'[361]

We return to the issue of press coverage in more detail in our discussion of Q15.

Question 14

Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?

14.1. Introduction

Article 6(1) TEU reflects a milestone constitutional step achieved through the ratification of the Lisbon Treaty:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

Respect for fundamental rights was already a well-entrenched dimension of the case law on Union citizenship, primarily in the context of the right to respect for family life as a general principle of Union law.[362] And even before the Lisbon-driven amendments to Article 6 TEU, Recital 31 of the preamble to Directive 2004/38 made it clear that the measure 'respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union'.

But the binding effect now attributed to the Charter brings two important twists with it: first, the explicit depiction of certain citizenship rights as sub-

361. E. Rigby, 'EU migrants moving to UK balanced by Britons living abroad', *Financial Times*, 10 February 2014, available at http://www.ft.com/cms/s/0/5cd640f6-9025-11e3-a776-00144feab7de.html#axzz2vAcJoYV8.

362. See e.g. Case C-459/99 *MRAX* [2002] ECR I-6591.

stantive fundamental rights included in the Charter too;[363] and, second, the fact that the *limits* placed on the scope of the Charter receive binding primary law effect too. On the second point, Article 51(2) is particularly relevant: its statement that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties' was expressly cited by the Court in *Dereci*, for example, a judgment in which the potentially expansionist effects of *Ruiz Zambrano* were deliberately, as we have seen, reined in.[364]

Noting the relatively short time frame between the ratification of the Lisbon Treaty and the completion of the national reports, we chose to place a question about the impact of the Charter in our discussion of the *cultures* of citizenship. Essentially, and drawing from the Institutional Report's depiction of the impact of the *Ruiz Zambrano* jurisprudence, we wanted to see if a similar 'stimulating effect' could be detected in national case law from this perspective – fundamental rights could previously have been raised in citizenship cases at national level already, but does the *particular* legal change concerning the Charter bring something new to the discourse?

14.2. The Charter and national case law

The dominant message in the majority of the responses received is that the legal status of the Charter since Lisbon has not (yet?) made any substantive impact in national case law.[365] In many of these reports, it is clear that this is purely because there have been no relevant cases; a persisting tendency to have first recourse to more *familiar* national or other international (mainly, the ECHR) instruments that protect fundamental rights is also apparent.[366]

Where the Charter is discussed in more detail, however, its potential significance for reinforcing the fundamental rights of Union citizens is expressly

363. See Articles 15(2) (freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State), 39 (right to vote and stand as a candidate in European Parliament elections), 40 (right to vote and stand as a candidate in municipal elections), 45 (right to move and reside), and 46 (diplomatic and consular protection in third countries) of the Charter.

364. *Dereci*, para. 71.

365. See the reports for Croatia, Cyprus, the Czech Republic, Denmark, Hungary, Italy, Malta, Poland, Slovenia, and Sweden. This point is also confirmed in the Institutional Report.

366. See e.g. the reports for Cyprus, France, Germany, and Ireland.

noted – in the reports for Austria, Greece, and Portugal, for example, on effective judicial protection and the administrative and procedural safeguards that form a critical dimension of citizenship rights. Similarly, we saw the potential relevance of the Charter to national restrictions placed on the voting rights conferred by Union citizenship in the discussion on Q12, especially in connection with restrictions on prisoners' voting rights and the voting rights of persons with a mental impairment.

The report for the UK presents perhaps the most palpable evidence of a 'stimulating Charter effect' at national level to date, noting that '[l]egal practitioners increasingly make reference to the Charter to support arguments concerning the interpretation of the rights of Union citizens before national courts'.

More generally, three thematic points link the responses given under Q14. First, some reports note that references to the Charter were already a typical feature of national case law on citizenship rights i.e. even *before* the legal change effected by Lisbon. For example, in the report for Estonia, it is noted that 'the Supreme Court was rather forward thinking in that it repeatedly made reference to the [Charter] before its entry into force as a binding instrument'. Similarly, it was confirmed in the report for Finland that the Charter 'has received judicial attention ... well before the entry into force of the Lisbon Treaty' – including case examples that demonstrate that the Charter was 'legally relevant'.[367]

Second, a parallel emphasis on the limits as well as the rights contained in the Charter can be seen.[368] For example, the report for Finland notes that relevant post-Lisbon national cases include 'explanations for why particular rights in the [Charter] are not an obstacle to the application of national law', mainly in cases on deportation and expulsion. A similar point is made in the report for the Netherlands.[369] The problems identified in this sphere of citizenship law in the discussion on Q6 demonstrate that the absence of reflection on the Charter may well be linked to the systemic harshness shaping these decisions that is evident across the EU Member States. Perhaps reflecting a similar theme, it is also noted in the report for the Netherlands that '[t]he binding effect of the Charter has played a role in how rights of EU national are being interpreted, although it rarely as led to a more favourable result for the claimant'.

367. See the report for Finland, with case examples in note 126.
368. See e.g. the report for Ireland, with case examples at notes 110-111.
369. See the report for the Netherlands, with case examples at note 91.

But the report for Finland does emphasise that national courts have engaged with the Court of Justice on the meaning and scope of various Charter rights through the preliminary rulings procedure.[370] The report thus reflects the balance inherent in the Charter itself in the statement that 'it is clear that some lower courts also have a clear appreciation of the significance of the Charter, and are prepared to refer questions that concern its outer limits'.

Third, a degree of confusion with respect to the respective relevance of national law, the Charter, and/or the ECHR was mentioned in the report for Bulgaria, where it is suggested that the Court's instruction in *Dereci* on this point – i.e. 'if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR'[371] – 'does not appear to have been fully understood' by the national courts.

However, the discussion in the reports for the Netherlands and the UK present an alternative picture on this issue, with a series of cases confirming that the Charter can only apply if the applicant's situation falls within the scope of Union law; following *Dereci* very closely, it has been emphasised that fundamental rights contained in the Charter do not *themselves* form part of the 'substance' of citizenship rights under the *Ruiz Zambrano* test.[372]

On the other hand, reflecting the ambition of *substantive* convergence conveyed by Article 52(2) and (3) of the Charter, it is noted in the report for Ireland that '[t]here is evidence that the courts, while acknowledging that these three sources are not identical in their obligations, will in practice consider claims invoking these various provisions as substantially equivalent'.[373]

370. See similarly on that point, the report for Germany.

371. *Dereci*, para. 72.

372. See the report for the Netherlands, with case examples outlined at note 88; and the report for the UK, with case examples outlined at notes 272-275 (where it is also noted, however, that 'national courts have also remarked that *Dereci* is not entirely clear on whether the separation of family members can ever trigger the [genuine enjoyment] test').

373. See the report for Ireland, with case examples outlined at notes 105-106.

14.3. Question 14 – emerging issues and themes

Perhaps somewhat surprisingly, any stimulating effect that *might* have been expected to be attributed to the Charter in terms of providing a route for new arguments at national level that are pinned to EU law and its powerful – and often speedy, compared to ECHR law – remedies is **not yet apparent in the specific field of citizenship rights**. Instead, national legal activity remains focused on the substantive development of citizenship rights per se, whether within or beyond the scope of Directive 2004/38. It is a little disquieting, however, to ponder the absence to date of a more concerted Charter-linked fundamental rights discourse in national case law.

Question 15

Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g., expulsion; access to state benefits; derived rights for third country nationals)? How accurate is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?

15.1. Introduction

Recent years have witnessed an increase in attention directed towards EU citizenship, prompted in part by events such as the rulings of the Court of Justice on crucial citizenship issues. These cases include *Metock*, *Ruiz Zambrano*, *McCarthy, Dereci*, and *Rottmann*. But other factors have raised the salience of citizenship and free movement issues too, including the accession of Romania and Bulgaria to the EU, and the subsequent lifting of transitional restrictions in January 2014. Some useful reference points from recent citizenship history can be drawn from the European Commission's 2013 Communication on free movement.[374] Starting at around 1.6% of the total population at the end of 2004, the proportion of mobile EU citizens increased to 2.4% four years later and then more slowly (to 2.8% by the end of 2012), due to both

374. European Commission, *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013) 837 final, at p. 3.

the economic recession and the gradual reduction in the mobility potential from central and eastern Member States.

Of course, as both the percentages and the overall population numbers have increased (as there are more EU Member States in 2014 than in 2004), this has been a considerable increase overall, although it is still a very small percentage of the EU population. But because the exercise of free movement rights and patterns of mobility are not even across the EU, perceptions tend to be distorted. It is perceptions – as much as facts – which have driven other developments such as the letter sent in April 2013 by the Interior ministers of Austria, Germany, the Netherlands, and the UK to the Presidency of the Council of Ministers on the burdens imposed by free movement and on the purported abuse of the social welfare systems of some Member States by nationals of some other Member States.[375] It is also worth noting the various events and programmes associated with the designation of 2013 as the *European Year of Citizens*, which sought to increase the visibility of EU citizenship and of the rights associated with it – and, conversely, of the obstacles experienced by those seeking to exercise those rights.[376]

Responding to all these factors, we were interested to discover the manner and the frequency of the reporting of issues related to EU citizenship in the national media across the Union. We wanted to know which issues received particular attention, and we asked national rapporteurs to indicate their impressions of the general tone or tenor of those national debates. Our questions were rather broad, and did not mandate a specific methodology. Some authors approached the issue by using databases and by searching the internet; others focused on specific issues and provided narrative data about how these have been treated.[377]

It was interesting to observe from the national reports that despite its profile at the supranational level, Union citizenship as a general concept, and the full range of rights and liberties that it implies, does not appear to be a particularly salient issue for the national media of most of the Member States; or –

375. The letter received significant attention from the media and the European institutions, as discussed in Section 15.2 below. For the text of the letter, see: http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf.
376. For further details, see http://europa.eu/citizens-2013/en.
377. There are, of course, plenty of examples in political science research of more scientific approaches to the use of media discourse in order to assess the trajectory of European integration. One example is the work of Ulrike Liebert, e.g. U. Liebert, 'Introduction: Structuring Political Conflict about Europe: National Media in Transnational Discourse Analysis' (2007) 8 *Perspectives on European Politics and Society* 235.

if it is – it is in the guise of 'EU migration' and 'EU migrant workers', perceived as a *burden* not a *benefit* of EU membership. But very few of the national reports make reference to any sustained discussion of the idea or implications of EU citizenship at this general level.[378] On the other hand, there was a range of particular issues in which elements of EU citizenship were implicated; some common to a number of States, others indicative of more individualised concerns. As will be discussed in more detail below, the media tend to focus at present on the economic problems stemming from the Eurozone crisis. Where national media *do* cover matters relevant to Union citizenship, they usually focus on issues close to their own national (political, economic or cultural) interests or circumstances. Reporting is often inaccurate, sensationalist, and riddled with loaded terminology; and this is almost always correlated with a generally Euro-sceptic outlook or bias. There are, however, a number of exceptions to this across the Union, where the media have been used to educate and promote a better understanding of the genuine implications of EU citizenship for national political and economic systems.

15.2. Is EU citizenship a salient issue in the national media?

As reported by several national rapporteurs, EU citizenship issues in general seem to attract little media interest in the majority of Member States, with reporting usually focusing on topics that tend to draw more attention or are perceived to have a greater impact on the everyday lives of the general public – such as the EU economic and financial crisis, or political issues relevant to membership negotiations. The under-reporting of EU citizenship is often explained on the basis that the lack of interest in some States stems from the lower number of EU citizens living there (e.g. Greece, Bulgaria, and Hungary) or because of a generally Euro-sceptic approach driven by main political parties (e.g. Finland, and pre-accession Croatia) especially in the aftermath of the Eurozone crisis. Of course, these reasons tend to change over time: both with the constant and progressive transformation of the European Union, and also with the different developments taking place in each Member State. For example, the lack of interest in (and reporting of) EU citizenship issues in Greece was traditionally attributed to the absence of significant numbers of EU citizens living there; however, with the accession of Romania and Bulgaria, this explanation no longer seems applicable.

378. Significant exceptions include the reports for Croatia, Slovenia, and Sweden.

A small number of national reports provide concrete data on media reporting. In Finland, for example, the concept of EU citizenship figures in the mainstream media at least once a fortnight.[379] There are relatively frequent reports within the mainstream media on issues relevant to EU citizens also in Denmark, Sweden, and the UK although these are usually framed in terms of the general 'immigration' debate and tend to be characterised in predominantly negative terms (with the exception of Sweden). The significant outlier here appears to be Croatia, in which the mainstream media began reporting about EU citizenship and its benefits on a near daily basis, unpacking the rights and their meaning, and thus raising awareness of the relevant issues amongst the general public. This, it is thought, had a significant impact in terms of lowering the rate of Euro-scepticism apparent in the country prior to accession. Two further points are apparent from the reports in general: media coverage of EU citizenship issues increases during, first, election periods (both local and European Parliamentary); and, second, immediately following decisions in major cases by the Court of Justice.

15.3. The main issues addressed by the national media

One tendency observed throughout the reports is that, even though EU citizenship and related issues do not have much prominence in the mainstream media in general, each Member State seems to have one hot 'citizenship issue' that figures regularly in the media and political discourse. Some of these are shared and some are specific to individual States. The result is a media discourse on citizenship that is at once disaggregated and nationalised, leaving us with a fragmented picture overall.

As already noted in the analysis of other issues raised in the national reports, countries/governments tend to focus on issues 'close to their hearts' and thus the media reports more regularly and more intensely on these matters rather than on issues that might be equally relevant, but are not perceived as impacting upon the Member State in question in the same way or to the same extent. Some of these more particular issues will be mentioned briefly

379. The report for Finland notes that '[b]y submitting search words 'EU-citizen', 'Union citizen', 'Union citizenship', 'Union citizens' to the data archive (1994 to mid-2013) of the highest circulating Finnish daily newspaper (*Helsingin Sanomat*), some 200 results are returned. That is, on average the concept has been employed less than fortnightly. Some 30 'hits' were published on the opinions pages, focusing mainly on personal accounts or concerns on work, mobility, and family life'.

in the analysis below; however, there are certain topics common to several (or most) Member States that are regularly quoted by the media and thus deserving of special consideration.

15.3.1. Benefit tourism, social dumping, and poverty migration

A group of issues that prevails in the media discourses of the majority of Member States relates to benefit or welfare tourism, social dumping and poverty migration. The notion that these practices are common (and indeed more common than is actually the truth) is generated by the economic inequalities between the Member States, which apparently incentivise individuals to move in order to enjoy a better standard of living elsewhere, perhaps by benefiting from a more generous welfare state. In reality, of course, the figures show that the majority of EU citizens move for work or work-related reasons,[380] but the perception is otherwise as the quotation from Mark Field cited at the conclusion of the discussion on Q13 shows very well. Here, a line dividing the 'new' from the 'old' Member States is palpably clear, especially following the 2004 enlargement and, more currently, in connection with the lifting of transitional restrictions on Romanian and Bulgarian citizens in January 2014. In Denmark, for example, the issue of 'social tourism' has been on the media (and political) radar since before the 2004 enlargement,[381] directed at the 'distinction between 'us' and 'them' where EU-nationals – especially those from the Eastern European countries – are portrayed as people who mainly come to Denmark to benefit from its generous social system, such as family and employment benefits'.

Several reports noted that the letter to the Council Presidency referred to above, on the alleged abuse of welfare systems by Union citizens, caught the attention of quite a few national media organisations across the EU.[382] This group of countries feared ever-increasing and systematic levels of welfare tourism, and applied pressure on the Commission to adopt restrictive measures (in particular, with regard to the then forthcoming lifting of the restrictions on the free movement of workers from Romania and Bulgaria in January 2014). Denmark later associated itself with this initiative and the issue was subsequently reported on regularly in the Danish media. Despite – or

380. Data can to be found in COM(2013) 837 at p. 3 *et seq*.

381. In 2003, the Danish Government published a report on Danish social benefits (*'Danske sociale ydelser I lyset af udvidelsen af EU'*), which was heavily discussed in the media.

382. For examples, see the reports for Denmark, and the Netherlands.

perhaps because of – the lack of quantitative data provided by these Member States in support of their claims, and despite the evidence to the contrary set out in reports by the Commission[383] and other organisations,[384] the prospect of welfare tourism became an important issue in the national (e.g. Denmark) and international media by the end of 2013. The Commission reasoned that 'economically non-active EU mobile citizens account for a very small share of beneficiaries'.[385] Even though it recognised that 'there can be regional or local problems created by a large, sudden influx of people from other EU States into a particular geographical area',[386] it noted that these could be dealt with by different sets of measures[387] rather than by restricting the rights of EU citizens, such as free movement and access to benefits. Moreover, different national media emphasised different elements of the general social dumping problem e.g. 'health tourism' in Andalucía (where EU citizens undergo expensive health treatment free of charge for which they would have to pay in their respective home States), or access to state-funded education in the UK.

383. Immediately upon receipt of the letter, the Commission noted the lack of statistical evidence supporting the claims made, and requested clearer data (see http://www.euractiv.com/socialeurope/commission-gets-cold-feet-push-l-news-519366). It then published, in October 2013, a report it had commissioned into the issue, which provided evidence that challenged the idea that social tourism was, or was likely to become, a significant burden on Member States. See the final report submitted by ICF GHK in association with Milieu Ltd, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, 2013.
384. See, for example, the OECD's International Migration Outlook 2013 (http://www.oecd.org/els/mig/imo2013.htm); Centre for Research and Analysis of Migration, Assessing the Fiscal Costs and Benefits of A8 Migration to the UK (http://www.cream migration.org/publ_uploads/CDP_18_09.pdf); and Centre for European Reform, Is Immigration a reason for Britain to Leave EU? (http://www.cer.org.uk/sites/default/files/publications/pb_imm_uk_27sept13.pdf)
385. According to Commission's report, 'they represent less than 1% of all such beneficiaries (of EU nationality) in six countries studied (Austria, Bulgaria, Estonia, Greece, Malta and Portugal) and between 1% and 5% in five other countries (Germany, Finland, France, The Netherlands and Sweden).' See again, *A fact finding analysis on the impact on the Member States' social security systems*, 2013.
386. László Andor, Commissioner for Employment, Social Affairs and Inclusion, see: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes
387. For example, by using the financial aid of European Social Fund.

The media (and political) discourse in Member States across the 'EU Channel' (central, eastern, and southern Europe), on the other hand, have tended to concern themselves mainly with the other side of the economic aspects of the free-movement coin. The Hungarian media, for instance, have not been particularly concerned with (and thus have not reported on) the social dumping or benefits abuse issues discussed above; here, the major issues featuring regularly in the media relate to the posting of workers and the brain-drain of (in particular, healthcare) professionals.

15.3.2. Criminality and expulsions

The criminality of foreigners, including EU citizens, is another significant subject of media reporting noted in the majority of national reports (in particular, Austria, Bulgaria, Denmark, France, Greece, Italy, the Netherlands, and the UK). This includes the debate on tighter border control measures imposed as a prevention mechanism and the very low threshold of criminal acts for which an EU citizen can be expelled (as discussed in detail earlier in relation to Q6). For example, the ruling of Court of Justice in *Commission v Netherlands*[388] triggered a debate on expulsion of EU citizens in the Netherlands, and, in particular, on 'the connection between criminal conviction and measure of expulsion'.

However, the topic most commonly reported on in terms of alleged criminality and EU citizenship is the situation of the Roma minority and, in particular, the expulsion of EU citizens of Roma origin. In France, this issue has featured regularly on television, in the written press, and on the internet; and the tone of such reporting is generally very negative, highlighting controversial issues that further adversely influence the general discourse on EU citizenship rights and thus perpetuate negative feelings towards certain EU countries as a whole (e.g. recently, towards Romania and Bulgaria, and previously towards Slovakia, the Czech Republic, and Hungary). As a result, the report for France concludes that public opinion is often significantly biased; for example, in a recent survey, '47% of French people considered Roma not to be the same as other European citizens'.[389] The expulsion of Union citizens of Roma origin from Italy was the subject of media reporting in several other Member States (mainly, Denmark, France, Italy, and the Netherlands). In the UK, the centre-right press has branded the Roma minority as 'bad migrants'

388. Case C-50/06 *Commission v Netherlands* [2007] ECR I-4383.
389. See the report for France at note 183, reporting *Sondage Newsring*, 2013.

and the press has been responsible for a negative campaign against Romanians (who are regularly conflated in the popular press with the Roma) by publishing articles under titles such as 'The Roma invasion of Paris ... next stop Britain'.[390]

It is interesting to observe how the media use examples from other countries in order to claim to present an 'objective' picture on a particular issue, often resulting in an outcome which is anything but objective. According to the Danish report, for example, the national media, in order to draw an 'objective' picture on the Roma minority, selects negative examples or problems involving Roma not only in Denmark but also in other Member States. Such negative perceptions and strategic reporting seem to 'fuel public indignation and thereby confirm all the stereotypes around the Roma people.' In contrast, and on a more positive note described in the report for Sweden, one of the major national newspapers – *Dagens Nyheter* – took great care to report objectively and fairly on this topic, considering the issue also from the Roma perspective. As the report for Sweden notes, the coverage explained 'the underlying ideas of the EU citizenship as well as travelling down to Romania to give the readers a broad understanding of the complexity of the EU-solidarity, free movement for persons and the economic incentives to travel to Sweden'.

15.3.3. Acquisition of EU citizenship

Finally, one of the most noteworthy and controversial political issues relevant to Union citizenship that has emerged in recent years concerns the acquisition of citizenship and, in particular, the controversial plans to sell Maltese citizenship and thus EU citizenship to wealthy third country nationals.[391] Not unique to Malta, this issue has also been reported in other States, albeit in a slightly different form. In Bulgaria, for example, the fact that third country nationals (from Macedonia, Moldova, Serbia, Albania, or Ukraine) can receive citizenship via a simplified fast-track procedure (due to various cultural and historic links) is increasingly suspected of being open to abuse in order to obtain Union citizenship, and is thus receiving an increasing amount of media and political attention. The situation is very similar in Spain, where the increased ease with which nationals of Latin American countries can acquire

390. See report for the UK at note 284, quoting *The Daily Telegraph,* 6 October 2013.
391. For more information on this issue, see the analysis under Q8 above.

Italian citizenship and thus Union citizenship prior to migrating for linguistic reasons to Spain has aroused parallel concerns.

15.3.4. Major cases before the Court of Justice

Another notable trend is for media (and political) interest in EU citizenship to increase dramatically whenever the Court of Justice hands down a significant judgment in the field. Many of these decisions are widely discussed, in particular in States that are directly affected by their conclusions. For example, the *LN* case on student workers in Denmark; the *Chen* case on the primary right of residence based on *ius soli* in Ireland (which led, indeed, to a referendum and ultimately constitutional change); or the *Solyom* case[392] on freedom of movement of State representatives in Hungary. Other rulings (such as *Ruiz Zambrano*, *Baumbast*, *Bidar*, *Dereci*, *Teixeira*,[393] *Metock* and *Rottmann*) affect the policies of the majority of Member States and tend to receive more media coverage across the Union – and more direct response from national courts or governments.

15.3.5. Issues particular to certain Member States

The effects, both economic (rising prices of properties and services) and social (integration, language, custom), generated by the residence of citizens from 'richer' EU countries in certain popular tourist regions of 'poorer' EU countries (such as Bulgaria) have been reported as subjects of significant public debate. Furthermore, in the report for Netherlands, for example, language requirements and integration courses for EU citizens were identified as part of national political debate (both driven by and reflected subsequently in the national media). In Greece, a major topic debated in recent years in the media concerned the poor living conditions of foreigners, which would improve significantly if they were given access to social and other State benefits (although, debates on this and other issues were quickly superseded by the onset of the national debt crisis in Greece).

Other topics more particular to the concerns of individual Member States (and thus reflected in their respective national media) are, for example, the verification of the transcripts of working qualifications (Croatia) and national rules or regulations discriminating against EU citizens (such as higher rates

392. Case C-364/10 *Hungary v Slovak Republic*, judgment of 16 October 2012.

393. Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107.

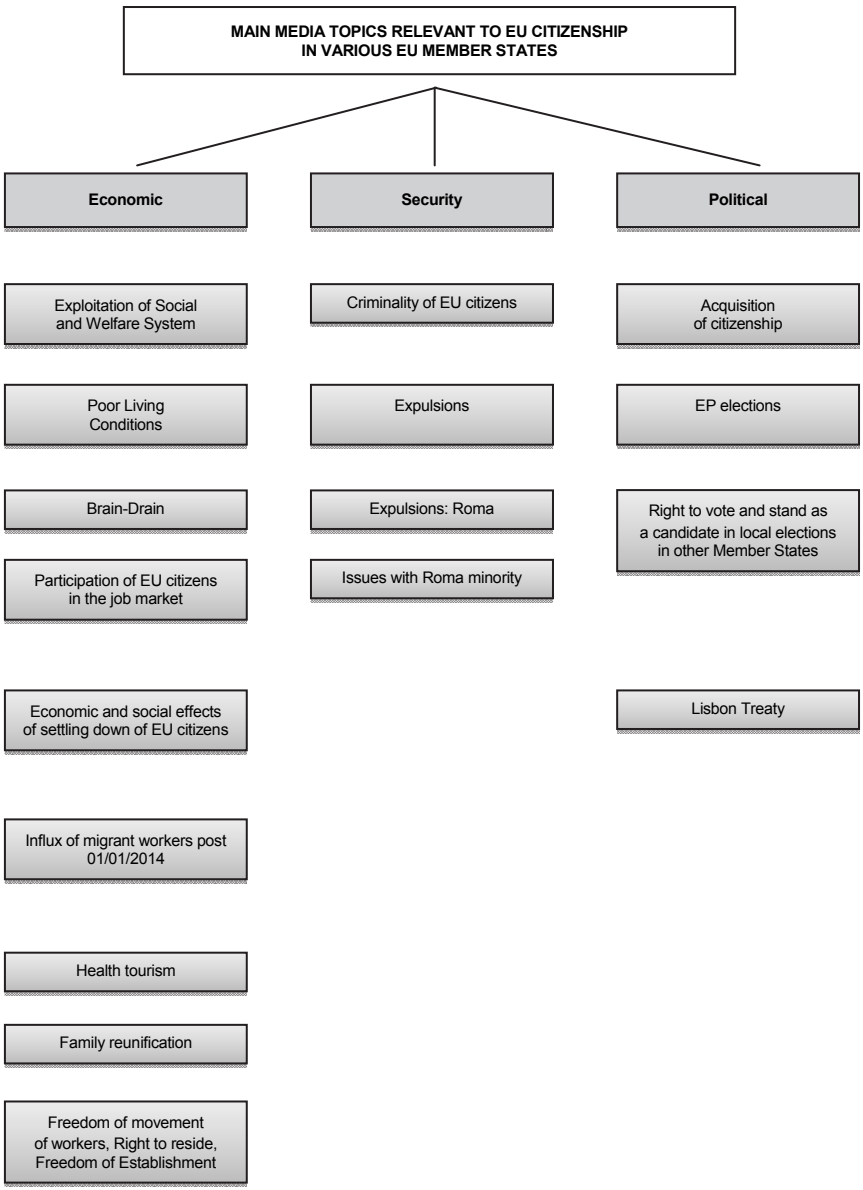
on bus fares or utility bills in Malta). Political issues relating to Union citizenship that can be identified from national reports include active and passive suffrage in local elections, the voting rights of EU citizens in other Member States (from both perspectives, e.g. Slovenian citizens abroad and EU citizens in Slovenia), elections to the European Parliament, and the adoption of the Lisbon Treaty. Below, we present a single figure that brings all of these issues together in a useful visualisation:

15.4. Tenor, accuracy, and influence of reporting

A significant number of the national reports criticise the media for using inaccurate terminology when referring to issues relevant to EU citizenship. This most probably stems from the fact that, in a majority of EU Member States, official government policy assimilates EU citizenship to general immigration issues to a greater or lesser degree. In that respect, the media are simply following and copying this trend and tend to use – instead of the legally correct EU citizenship-related concepts and terms – terms more familiar to their readers such as immigrants, migrants, foreigners, and non-nationals, on a daily basis and without differentiating between, for example, third country nationals and EU citizens.

In Ireland, for example, the terminology used by the media when reporting on any non-Irish nationals tends to be very general, adopting terms like 'immigration', 'immigrants', 'non-nationals', 'foreign-born population', or 'foreign nationals' without specifically distinguishing between EU citizens and third country nationals. A similar situation has been reported in Denmark, where the media, apart from not distinguishing between EU citizens and migrants from third countries, tend to refer to the former by their individual nationalities. Furthermore, many negative and sensationalist terms like 'loophole', 'influx', 'abuse', 'exploitation', 'social dumping', or 'foreign criminals' feature habitually in the rhetoric of media; and even terms like 'tourism' that usually have more positive connotations are often given a negative shading when used in conjunction with EU citizenship issues, such as 'benefits tourism', 'welfare tourism', 'health tourism', and so on.

An example of inaccuracy in media reporting observed in the report for the UK is the confusion between the concept of EU citizenship and the rights attached to it based on instruments adopted at the EU level, on the one hand, and the protection of fundamental human rights based on a different set of



norms, adopted at national, regional (ECHR) or international level (ICCPR): UK reporting is often misleading. For instance, there is still a tendency to conflate EU citizenship rights with the legal framework of rights protection

under the ECHR/Human Rights Act. The UK office of the European Commission publishes official clarifying responses to such instances of misreporting on EU issues on a near daily basis.[394]

There is often, of course, a close connection between the biases of particular media outlets and the accuracy of information or choice of terminology. Much of the tabloid press and some right-wing media tend to use shocking or sensationalist terminology in order to attract audiences and readers, often both driven by and contributing to the negative views of the general public on certain issues. On the other hand, there now exist an abundance of alternative media sources, such as online blogs or rights-focused internet portals that offer a far more balanced analysis of issues relevant to EU citizenship.[395] However, as noted also in the reports for Spain and the UK, these tend to attract a far more limited (and often specialised) audience. There are also fact-checking websites that test the accuracy of politicians' statements or press reports.[396]

On a positive note, there are countries (such as Finland, Slovenia, and Sweden) in which the general view of media reporting on citizenship issues is that it has been relatively accurate, with little bias, aiming at objectivity (i.e. based on factual data and in-depth research of circumstances[397]) and tending to include explanation of the key concepts on which the phenomenon of EU citizenship is based. In Sweden, for example, the media have tried to show objectively 'the tension that the Union citizenship might cause vis-à-vis the national welfare state' without employing overstated terminology in this regard. Similarly, in the UK, some media outlets have started to counter negative claims about the costs of EU migration to UK taxpayers, emphasising instead the rights-enhancing character of decisions such as *Metock*.[398]

394. See also, Shaw *et al*, *Getting to grips with EU citizenship*, at pp. 53-54 and pp. 29-30, and the European Commission Office for the UK blog at http://ec.europa.eu/unitedkingdom/blog/.
395. Examples include the Croatian internet portal 'Danas.hr', which has published a number of newspaper articles informing Croatian nationals on EU citizenship rights and explaining the fundamental terms and their meanings.
396. The first fact-checking website – based on crowd sourcing – which focused specifically on EU affairs was established in early 2014: https://factcheckeu.org/.
397. See, for example, the above mentioned example of Swedish newspaper *Dagens Nyheter*, which published a detailed report on situation of Romanian beggars of Roma origin in Stockholm. The report was based on extensive research into the situation of Roma in Romania and the explanation of related concepts such as free movement of persons, EU solidarity, and the economic incentives for travel to Sweden.
398. See the reports by the *Guardian*, 6 March 2013, available at http://www.theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis, or the BBC, 25 July 2008, at http://news.bbc.co.uk/1/hi/7525472.stm.

It would be interesting to test whether there is a correlation between the accuracy of the data used by the media and the nature of media rhetoric relevant to EU citizenship. Is it the case, for example, that inaccurate data goes hand in hand with negative reporting? Or is the pro-European media just as likely to rely on incorrect factual claims in the pursuit of their editorial agendas? Further research would be required on this issue as the national reports do not contain enough detail to enable any firm conclusions to be drawn across all Member States. This being said, there does appear to be a correlation (observed among the reports that did provide data on the accuracy of reporting and the type of rhetoric used) between the use of inaccurate data and negatively loaded terminology. These tactics are most often employed in the context of media reports seeking to undermine the legitimacy or desirability of EU citizenship and its related rights and freedoms.[399] On the other hand, the few reports that did not find that the media generally resorted to abusive, sensationalist, or negative terminology highlighted that media reporting on EU citizenship was accurate, positive, rights-centred, and focused on technical issues.[400] However, as noted above, much more detailed research is required before any robust or confident conclusions of this sort can be reached.

As most of the national reports conclude, the influence of the media on public opinion in relation to Union citizenship issues cannot readily be denied. Several examples illustrate this phenomenon. In France, the angle of reporting employed by some sectors of the media – by emphasising only the controversial issues attached to the concept of Union citizenship – seem to have an influence on the tone of public debate with regard to the balancing of national interests with EU citizenship rights. Furthermore, as presented in the report for the UK, the media rarely report on the economically active and therefore self-sufficient EU citizens that live and work there. Moreover, even if this does occur, the reporting generally ignores the contribution of these citizens to the national economy, instead playing up the perceived negatives of even these migrants, such as noting the contribution of EU citizens 'to an overall increase in demand for the UK public services' (such as primary school places).[401]

In Ireland, media coverage of the 2004 citizenship referendum (which was related to the *Chen* judgment) and the subsequent constitutional amendment

399. As observed in the reports for Denmark, Ireland, the Netherlands, Spain, and the UK.

400. See e.g. the reports for Croatia, Finland, Slovenia, and Sweden.

401. See BBC News Online, 15 March 2013: *Urgent need for 250,000 school places, spending watchdog warns Daily Mail*; 1 September 2013: *EU influx leaves 3,000 children without primary places for the new term*.

presented a mixed picture: '[w]hile editorial treatment (and opinion pieces) was balanced, the dissemination of unanalysed and unchallenged quotations of politicians, mainly in favour of the referendum, led to a flawed, prejudiced and inadequate debate on the issue. 'Loophole' became part of the normalized vocabulary... 'Loophole' and ''abuse of Irish citizenship' were used in tandem.'[402]

15.5. Good practices in media reporting

There are also several examples of good practices evidenced across the reports. For example, some national media outlets have taken upon themselves the role of 'educator' and have been viewed as actively participating in the general education of the public on the issues relevant to EU citizenship. This has involved various educational campaigns, involving explanatory articles on citizenship rights and the provision of information on the topics that are closest to the interests of the population (although it is clear that the media do not merely react to public interests, but also to a significant degree shape them). Topics covered include the free movement of workers, the right of establishment, the recognition of working qualifications, and voting rights in other Member States. These initiatives can provide the general public with an incentive to travel, to work in other Member States, or simply to take an interest in European political life and discourse.

This theme is, as expected, more apparent in the newer Member States, and in particular in Croatia, Estonia, and Slovenia. In the Estonian media, for example, attention was paid to the participation of EU citizens in the municipal elections in October 2013 (which resulted in the successful election of a UK citizen of African descent). This was portrayed by the media as 'a positive step towards expanding Estonian society, providing recent immigrants with a voice in politics and making the Estonian capital of Tallinn a more cosmopolitan city.' Various initiatives developed in Croatia further illustrate this trend, such as public information campaigns on the citizenship rights; the 'Education for Democratic Citizenship and Human Rights' programme estab-

402. See M. Breen, A. Haynes and E. Devereux, *Citizens, Loopholes and Maternity Tourists: Irish Print Media of the 2004 Citizenship Referendum*, available at http://dspace.mic.ul.ie/bitstream/10395/1300/2/Breen,%20M.J.,%20Haynes,%20A.%20and%20Devereux,%20E.%20(2006),'Citizens,%20Loopholes%20and%20Maternity%20Tourists%3A%20Irish%20Print%20Media%20Framing%20of%20the%202004%20Citizenship%20Referendum'.(Book%20Chapter).pdf.

lished by Platform 112, which included a curriculum for civic education and a number of national programmes on the implementation of European standards on human rights and democratic citizenship;[403] and the production of a 'TV programme called 'EU-classroom' which gathers experts from certain related institutions discussing and analysing the rights emerging from EU citizenship.'

Similarly, in Slovenia, during 2013 – the European Year of Citizens – a range of newspaper articles were published with titles such as 'EU citizenship offers a lot. Take advantage of it'. The media were reported as providing accurate information on various rights stemming from EU citizenship, including on voting rights, especially in connection with the upcoming elections to EP in 2014 – e.g. an online application MyVote2014 – to promote the elections and raise awareness among EU citizens.

15.6. Question 15 – emerging issues and themes

The concept of **EU citizenship is not, at a general level at least, viewed as being of particular importance by the national media across the majority of Member States**. Legal aspects, including the rights attached to Union citizenship, receive for the most part little attention in the media – although there are exceptions. Where attention is paid to the implications of EU citizenship, the analysis tends to focus on the free movement of workers or voting rights (e.g. European Parliamentary elections). Quite often, the emphasis within press reports or analysis is on **challenging the legitimacy of these rights rather than the clarifying how they may benefit the public at large**.

As emerges from a range of reports, the opinions presented by media and the politicians, and their subsequent influence on public opinion, are intricately interlinked, feeding dynamically off each other. Right-wing political parties, in particular, appear to use press campaigns and supportive media outlets in order to create a negative image of EU migrants. This one-sided analysis coupled with negative terminology and inaccurate (or indeed, simply absent) supporting data together have a **powerful influence in shaping public discourse and political agendas**, which then feed back into the political system in terms of popular support for placing restrictions on EU citizenship rights and freedoms and a generally Euro-sceptic outlook, both at the national and

403. See http://gong.hr/en/active-citizens/platform-112/.

the EU levels. In all of this, the media seem to be a powerful ally and often a tool in the hands of politicians.

Finally, like so much else in the current climate, discussions of EU citizenship in the media have been **overshadowed of late by the current economic crisis within the EU**, so that even where citizenship issues are raised, this tends to be filtered through the lens of their impact on or in relation to the crisis. This creates a climate of uncertainty, anxiety even, so that when citizenship issues do come to the fore for whatever reason, whether on the front pages of newspapers or on television, reporting is often negative, sensationalist and inaccurate – and, not infrequently, outright politically biased.

General conclusions

It would be hard to sum up the conclusions to be drawn just from this lengthy General Report, never mind the rich Institutional Report, for which we were very grateful, and the many excellent national reports. In lieu of a single conclusion, what we offer in this final section are some short reflections about where we think the particular pressure points might lie both now and in the future. Our conclusions are more in the way of questions than concluding – and closing off – statements. We intend, in other words, to open the dialogue rather than to close it.

Overall, we found a complex ecology of Union citizenship of densely consisting enmeshed national/Union, as well as legislative/administrative/judicial practices and synergies. Union citizenship *is* a shared EU/Member State competence and it is an 'additional' status vis-à-vis Member State nationality. But the comparative work that this project has enabled suggests that while an awareness of the significance of national context and difference is already visible just from a review of the EU Treaty, the legislative framework, and the case law of the Court of Justice (i.e. the usual materials of the EU law scholar), what we need in reality is a much more *decentralised and differentiated understanding of the application and implementation of Union citizenship* in order to gain a fuller picture.

In that light, the extent to which an immigration or permission-based culture has been superseded by a more 'centralised' sense of citizenship, as a status based on supranational rights, is lower than we might have thought would be the case. We also saw a significant range of regulatory and practice-based diversity. Such variation is sometimes provided for expressly at EU level, recalling, for example, the scope attributed to national legislatures to

determine what practices will be applied with respect to the implementation of Article 3(2) of Directive 2004/38.

However, we also suggested that the allocation of national discretion – both understandable and valuable in several respects – can potentially lead to the compromising of equal treatment for certain Union citizens and their family members. The Institutional Report emphasises that the existence of free movement rights per se and the mere possibility of exercising them are just as critical as the extent to which they have actually been exercised, raising questions about the responsibility of the EU institutions to pioneer substantive change – without waiting for the impetus of individual complaints or litigation. The achievements of EU law in the combating of nationality discrimination have been remarkable. But perhaps tackling discrimination *beyond* nationality is a new frontier?

In a related sense, we also uncovered a transposition, application, and interpretation picture that features *multiple pockets of diverse practices or points of concern*, a fragmented picture that then raises *a different order of enforcement challenge* than outright systemic transposition failure. It is important to realise that accurate transposition does not, in and of itself, guard against problems with the *application* of either EU level or national level measures. The discussion on expulsion provided a stark exposition of this point, and we suggested that the work of the legislatures, at EU and national levels, clearly should not end with adoption/transposition of Directive 2004/38. When principles develop predominantly through case law, and especially where they develop rapidly through that medium, we saw a range of related challenges for national authorities, and for national courts and tribunals in particular. Perhaps the emerging consensus between the European Parliament and the Council of Ministers on a draft directive (COM(2013) 236)) containing new enforcement mechanisms for some aspects of the free movement of workers, including the setting up of bodies to promote those free movement rights offers some hope for a more positive future at least in that restricted field.

We also wish to emphasise a nascent but, we believe, increasingly significant issue that cuts across so many parts of this Report – i.e. the construction of narratives about 'good' and 'bad' citizens: whether in the context of otherness generally, or of economic self-sufficiency particularly; in the context of criminal behaviour, which can be 'punished' by expulsion or through the withholding of deeper citizenship connections such as permanent residence; and through political debates on and media reporting of EU issues. We are interested primarily here in trying to understand how the dynamics of these narratives flow backwards and forwards from the Member States to the EU

level – and vice versa – especially where Member State messages are clearly conservative and *rights-narrowing*.

This phenomenon raises a broader question too: if we accept (and the Treaty does) that Member States control the *acquisition* of Union citizenship through their competence to grant nationality (subject only to a potentially limited review against general principles of EU law), to what extent do – and to what extent *should* – the Member States also control the *broader culture* that shapes the exercise of this supranational status? And what does this tell us about the extent to which Union citizenship really has become a 'fundamental' rights-based status rather than an *increasingly conditional privilege*?

We sought to enter this research process with a minimum of preconceptions about the evolution of Union citizenship right across the EU and its Member States. We knew quite a lot about our own national cases and about developments at the EU level (especially the complex twists and turns of some of the recent case law of the Court of Justice), but there was much that we knew we stood to learn from the national reports. And indeed, this has proved to be the case. Unfortunately, however, much of what we have learned has reinforced a sense that EU citizenship – especially in its 'free movement guise' – is very much under pressure.[404]

This much is clear from the referendum on immigration quotas that was held in Switzerland as we were writing this General Report. Billed as a citizens' initiative 'Against Mass Immigration', the referendum was targeted against EU free movement, a regime by which Switzerland had been bound through bilateral treaties since 2007. Although the majority of mainstream parties opposed it, the initiative was passed on 9 February 2014 by the required combination of popular and cantonal approval, and commits the Federal Government to work towards the implementation of the initiative within three years. Switzerland immediately withdrew from a transitional arrangement opening its labour market to citizens of Croatia and, meanwhile, the European Commission has indicated that Switzerland is no longer participating as it was previously in research funding programmes such as Horizon 2020 and the student mobility scheme ERASMUS+. This is because under the arrangements between Switzerland and the European Union, a package deal approach is used – Switzerland may not pick and choose and it must accept

404. For a recent assessment from the perspective of political science, see R. Barbulescu, 'EU freedom of movement is coming under increasing pressure in the UK and other European states', LSE EUROPP, 20 February 2014, available at: http://blogs.lse.ac.uk/europpblog/2014/02/20/eu-freedom-of-movement-is-coming-under-increasing-pressure-in-the-uk-and-other-european-states/.

free movement if it wants, for example, to benefit from Horizon 2020 funding.

The longer term implications of this vote lie beyond the scope of this Report, but the public hostility to free movement – despite the fact that the Swiss themselves gain from this through their own mobility and also because of the reliance of many of their advanced industries (including universities and finance) and technologies upon mobile EU labour – is clearly a factor that has to be taken into account right across the EU. Euro-sceptic and anti-immigration parties from within the EU reacted with pleasure at the news from Switzerland, seeing it as a harbinger for the future.

We noted earlier that 2013 was designated as the European Year of Citizens. However, in that initiative's closing conference, and worlds away from the conceptualisation of Union citizenship as the fundamental status of Member State nationals, the European Ombudsman stated bluntly: 'we must confront the reality ... that "EU citizenship is now in crisis".'[405] What is particularly concerning about recent migration debates is that, as we have emphasised, the lack of a credible empirical evidence-base that might actually validate concerns about alleged abuse of free movement rights has made little difference. What these debates also show, then, is that political and public discourse on *intra* EU migration has intensified to the point where a basic question needs to be asked very directly: what role does the concept of Union *citizenship* contribute in all of this?

The pan-EU responses provoked by current inflammations of migration fear do remind us that the narrowing of citizenship rights is not the preoccupation of all of the Member States at present.[406] For example, a letter sent in January 2014 to the *Financial Times* in the UK from ministers in Finland, Norway, and Sweden stands out in this context; even its opening line – '[f]ree movement of persons is the essence of European citizenship' – provides welcome relief from the political scaremongering outlined above.[407] The letter goes on to argue that 'the only actual problem is the "widespread belief that

405. The full text of the Ombudsman's speech, delivered on 13 December 2013, is available at http://www.ombudsman.europa.eu/en/activities/speech.faces/en/52763/html.bookmark.

406. See e.g. 'Poland attacks Cameron view on migrants', 23 December 2013, *Financial Times*, available at http://www.ft.com/cms/s/0/21f36df8-6c01-11e3-a216-00144feabdc0.html#axzz2tmI0I8NT; 'Roma are EU citizens too, Romanian President says', 31 January 2014, available at http://euobserver.com/social/122960.

407. 'In times of crisis, we must safeguard free movement', 16 January 2014, *Financial Times*, available at: http://www.ft.com/cms/s/0/c13711ee-7ec6-11e3-8642-00144feabdc0.html#axzz2tmI0I8NT.

EU migrants are a burden". Prejudiced arguments have no place in political debate. EU migrants who work and contribute financially to building our societies should not be made scapegoats for loopholes in national benefit schemes'.

But do the principles established for EEC6 still hold for EU28? This is a difficult question to ask, and a difficult question to discuss in a balanced and sensible way at present, but it is also a question that has to be asked. Commission President Barroso continues to reconfirm the expected response: that the principle of free movement is non-negotiable.[408] And in its response to the April 2013 letter on welfare tourism concerns discussed earlier, the Council responded that free movement is a 'core value of the European Union'.[409] However, it also invited the Commission to issue guidance on fighting abuse of those rules – guidance that, as we have seen, is due to be published in spring 2014.

This example illustrates that rights come with certain responsibilities, and that reflecting on that dimension of things is not inherently reductive of the rights in question. However, as we completed this Report, the Court of Justice delivered its rulings in the *O* and *S* preliminary references; those judgments continue the trend seen in more recent case law to develop the rights-narrowing concepts of citizenship, such as *genuine* residence, limits on rights, and abuse of rights. The 'fundamental status' of Union citizenship is not recited in either judgment.

The trajectory of Union citizenship mapped in this Report shows a range of extraordinary achievements. But it also suggests a worrying note of frailty – and one that is being stretched *because of* rather than against the prevailing political momentum. Will the Member States stand by their own creation, or not?

408. See e.g. http://www.europeanvoice.com/article/2014/february/free-movement-non-negotiable-barroso-tells-swiss/79697.aspx.
409. See the press release at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/137407.pdf.

Institutional report

Presented by Michal Meduna

with contributions by Nathalie Stockwell, Florian Geyer, Chiara Adamo and Paul Nemitz[1]

The topic, as outlined by the General Rapporteurs, is focused primarily on the comparative development and application of EU citizenship rights within the legal orders of the Member States. At the secondary level, the General Report addresses how EU citizenship develops within the culture of national citizenship, and how it influences national citizenship.

The focus is, therefore, on what is happening at national level. This leaves us with a greater degree of freedom as to what should be the focus of our Report, without duplicating the work of national rapporteurs.

We will follow the guidelines provided by the General Rapporteurs to the extent possible, but we will also pursue parallel strands that we deem relevant to the topic.

Although all the authors work in the Commission, the views expressed in this contribution are entirely personal, and do not necessarily reflect the official position of the Commission. While the authors largely share the report's general direction, they do not necessarily agree with all its conclusions.

1. Introduction

The citizenship 'common to nationals of their countries'[2] marks the progress from a state centred community to a citizens' centred European Union. Article 25(2) of the Treaty on the Functioning of the European Union (TFEU) makes it clear that the concept of an EU citizenship, endowed with rights, is open to further dynamic development beyond just the free movement of

1. All authors work in the European Commission's Directorate-General Justice. They wish to thank their colleagues Giancarlo Defazio, Christel Mercade Piqueras, Georgia Georgiadou, Linda Ravo and Francis Svilans for their valuable comments on earlier versions. Any errors are attributable to the authors alone.

2. Recital 10 of the Preamble and Article 9 of the Treaty on the European Union.

workers,[3] secondary law, and the important jurisprudence, all of which have already shaped the substance of EU citizenship rights.

Beyond rights, however, citizenship requires mutual acceptance and readiness to engage with each other. It requires a state which sees citizens as key actors in society, which encourages interaction and cooperation among citizens and with the state, rather than only seeing citizens as subjects of the law. The rule of law as regards citizenship rights cannot, by itself, guarantee full enjoyment citizenship rights – whether national or European.[4]

EU citizenship today competes with a trend in Member States to facilitate access to nationality specifically for citizens of other Member States and with a corresponding specific tolerance of double nationality among Member States. This may be a positive side effect of European integration. It may also simply be linked to a better understanding of the needs of integrating people in an increasingly globalized world, or to the end of the cold war, which made obligatory military service obsolete, and with this a key traditional impetus to avoid double nationality.

Whatever the reason is, we need to understand that EU citizenship is not the only vehicle when it comes to ensuring equal rights. We need to see this competition as positive in terms of opening up choices for individual EU citizens. The fact that in some Member States the nationals of other Member States rank among the top recipients of a new nationality[5] may also give us some indication of the deficiencies of EU citizenship in terms of providing equality of treatment and full integration in the host society.

EU citizenship also suffers from a lack of a coherent narrative on mobility in Europe. There is no real time holistic approach to facilitating and encouraging mobility of people in Europe. Rather, different approaches, grown out of varying perspectives and often portfolio-based, have developed alongside each other – mobility of students through exchanges under the Erasmus, recognition of professional qualifications, workers mobility and related social

3. Wollenschläger, 'Grundfreiheit ohne Markt: Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime' Tübingen: Mohr Siebeck (2007).
4. Höffe, Wirtschaftsbürger, Staatsbürger, Weltbürger: Politische Ethik im Zeitalter der Globalisierung' C.H.Beck (2004).
5. http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Acquisition_of_citizenship_statistics (March 2013 Eurostat data). Looking at top five nationalities which acquired nationality of a Member State in 2012, nationals of at least one other Member States feature in 14 Member States (Belgium, Czech Republic, Germany, Estonia, France, Italy, Cyprus, Luxembourg, Hungary, Malta, Slovenia, Slovakia, Finland and Sweden).

rights, mobility in the context of establishment or provision of services, free movement policies or Schengen, to mention just a few.

While the Commission has in its recent successive reports on EU citizenship[6] addressed key obstacles to the exercise of citizenship rights from many of these fields of EU law, the responsibility for delivering on EU citizenship remains fragmented. The fragmentation makes the holistic approach to EU citizenship rights, demographical developments and mobility within the EU more challenging. It can also hamper the ability to respond to populist challenges to EU citizenship and free movement rights. EU free movement rights are doubly doomed by standing at the intersection of two topics that are sure to animate the general public – immigration and the European Union ...

Challenges such as the sale of EU citizenship[7] or the generalised attempts to restrict free movement rights to EU citizens from Romania and Bulgaria with allegations of misuse of social systems or marriages of convenience, often not underpinned by facts, and sometimes even against facts, can be better answered within a holistic approach to EU citizenship.

These challenges show that the concept of EU citizenship, limited exclusively to Part II of the TFEU on Non-discrimination and Citizenship of the Union, is out of time with the needs of the continent. With decline in population and at the same time ageing above average in the global comparison, an economic crisis with important imbalances in labour markets between Member States, and the resulting negative impacts of lives, families, the young, removing the practical obstacles to mobility is a key prerequisite for Europe.

A comprehensive approach to mobility in Europe is necessary not only to address the obstacles those on the move encounter, but also, most importantly, to explain to those who 'stay home' why increased mobility in Europe is good for them and their communities.

If Europe is to continue to compete in terms of creativity, openness, trade and growth, if it is to continue to provide for happiness of its peoples to the greatest extent possible under a European social model, if it is to maintain and translate even more into daily live the values of enlightenment it has signed up to in the Treaties and the Charter of Fundamental Rights of the European Union (EU Charter), then it needs a coherent explanation why EU citizenship and the related rights, including the rights to free movement, are

6. *Dismantling the obstacles to EU citizen's rights*, COM(2010)603 final of 27 October 2010; *EU Citizenship Report 2013 EU citizens: your rights, your future,* COM(2013) 269 final of 8 May 2013.
7. 'Should Citizenship be for Sale?' EUI Working Paper, RSCAS 2014/1, edited by Shachar and Bauböck.

good for all of Europe and all Europeans, and not only those who make use of them.[8]

Even with increased mobility, the large majority of EU citizens will never leave the Member State where they were born to settle abroad, but the acceptance of the core rights and values of the EU also by those who do not avail themselves of these rights becomes ever more important.

2. Citizenship *within* Directive 2004/38/EC – stability of residence for EU citizens and their family members

EU citizenship may have been born as a weak baby whom majority of academics[9] foresaw to wither quickly,[10] but twenty years after its conception in the Maastricht Treaty, it is alive and kicking and is surprising everyone. Maybe not everyone, as some commentators glimpsed its potential. As O'Keeffe[11] put it – the importance of the EU citizenship provisions lies not in their content, but rather in the promise they hold out for the future.

The new born baby was endowed with several 'talents', the most important one to be able to move and live freely within the EU. Not only as a labourer, not only as a scholar, but just as an EU citizen.

Article 21(1) TFEU stipulates that every EU citizen shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The respective limitations and conditions are to be found in Directive 2004/38/EC.[12]

8. Maas, 'Democratic Citizenship and the Free Movement of People', Martinus Nijhoff (2013).
9. See, in particular, Kostakopoulou, 'European Union Citizenship: Writing the Future' ELJ 2007/13, page 623 seq.
10. Joseph Weiler considered that the introduction of EU citizenship was 'little more than a cynical exercise in public relations' on the part of the Member States, in 'The Selling of Europe: The Discourse of European Citizenship in the IGC 1996', Harvard Law School Cambridge Jean Monet Working Papers No. 3(1996).

    Laurence Gormley considered it a 'flag that fails to cover its cargo', in Kapteyn and VerLoren Van Themaat, 'Introduction to the Law of the EC' Kluwer, 3rd edition (1999), page 174.
11. O'Keeffe, 'Union Citizenship', in O'Keeffe and Twomey, 'Legal Issues of the Maastricht Treaty', Chancery Law Publishing (1994).
12. 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, OJ 2004 L 158, page 77.

The adoption of Directive 2004/38/EC represented an important milestone for EU citizens. It matters for every EU citizen, not only those who have settled abroad. There are currently around 14 million[13] EU citizens residing in a Member State of which they are not a national. EU citizens make more than 1.25 billion intra-EU journeys every year.[14] Even EU citizens who stay at home are affected – there are not many EU citizens who have never met an EU citizen from another Member State.

In addition and independent of this, even the mere *possibility* of using the right to free movement is a right inherent in EU citizenship and as such a manifestation of individual freedom and choice. In fact, one could argue that precisely this 'stand-by mode' is a classic characteristic of any citizenship right inherent in citizenship status. Take, for instance, the right to stand as candidate for national elections. Although only a tiny fraction of those entitled to stand make actual use of it, no one would argue that it would therefore be of no relevance for those citizens who chose not to run for elections. Therefore, *free movement matters* simply because every EU citizen is entitled to activate this right at any moment in time dependent solely on a personal decision to do so.

EU free movement rules affect not only those who have moved, but also those who have not moved. Hence, it is important that it offers protection and guarantees to both groups of EU citizens.

The right to move and reside freely is of a primary importance. According to the 2013 Eurobarometer survey on EU citizenship,[15] almost nine out of ten EU citizens know that they have a right to reside in another Member State.

From this perspective, free movement matters a lot and making sure that EU citizens can exercise this right is of an utmost importance, not only for the EU and its Member States, but also for EU citizens themselves.

It is remarkable that the September 2013 Eurobarometer survey[16] found that EU citizens value this particular right above other rights and achieve-

13. http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/EU_citizenship_ _statistics_on_cross-border_activities, Eurostat data for January 2012.
14. '20 years of the European Single Market – Together for New Growth', European Union (2012), http://ec.europa.eu/internal_market/publications/docs/20years/achievements-web_en.pdf.
15. Flash Eurobarometer 365, http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf.
16. European Parliament Eurobarometer (EB79.5) 'One Year to Go until the 2014 European Elections', http://www.europarl.europa.eu/pdf/eurobarometre/2013/election /synth_finale_en.pdf.

ments of the European integration (56 %, 4 % up since August 2012), with peace coming second (53 %, 3 % up).

It is not surprising that there is a close connection between freedom of movement and peace. John F. Kennedy famously said[17] that peace was a daily, a weekly, a monthly process, gradually changing opinions, slowly eroding old barriers, quietly building new structures.

Just replace peace with free movement in his quote and it still sounds very relevant ... but regardless of how much peace/free movement is treasured, it does not mean that conflict is not brewing in the background. The last several years (including 2013, designated as the European Year of Citizens) have brought the most serious threat to the free movement and its basic principles since its conception.

EU free movement law has been challenged by rhetoric based on perceptions arguing with the economic crisis, high levels of unemployment, and wider anxieties linked to globalisation and continued European integration. The ugly spectre of 'welfare tourism' hangs heavily over intra-EU mobility. It emerges not only in tough economic times, but also, as Groenendijk says, 'each extension of the geographic or personal scope of the rules on free movement appears to provoke the same debate and fears.'[18]

Not only media and public opinions are divided, Member States are as well. Some go as far as asserting that free movement within Europe should be less free[19] and assimilating EU free movement with migration of non-EU nationals,[20] other Member States are voicing their support to the principles of

17. Address to the UN General Assembly on 20 September 20 1963, available at http://www.state.gov/p/io/potusunga/207201.htm.
18. Groenendijk, 'Access for Migrants to Social Assistance: Closing the frontiers or reducing citizenship?', page 19 – in Guild, Carrera and Eisele, 'Social Benefits and Migration – A Contested Relationship and Policy Challenge in the EU' CEPS (2013). Groenendijk also analyses available data on welfare tourism in the Netherlands, Germany and the UK.
19. Article by UK Prime Minister Cameron in the Financial Times, 26 November 2013.
    YouGov, a pollster, found in November 2013 that in the UK 72 % say the rules on immigration from countries inside the EU are not tight enough and should be strengthened. When asked what should be done about immigration from the EU, by far the biggest group, 42 %, want the UK to break EU laws and change the rules. The poll is available at http://yougov.co.uk/news/2013/11/18/putting-europe.
20. Letter to Mr Shatter of 23 April 2013 by the Ministers of Interior of Austria, Germany, the Netherlands and the UK using terms as 'new immigrants' or underlining the importance of promoting the mobility of 'or those European citizens wishing to work, study or set up a business' (no mention of economically non-active EU citizens). For the letter and its analysis, see Pascoau, 'Strong attack against the freedom of move-

free movement,[21] being strongly backed by the Commission[22] and the Parliament.[23]

Directive 2004/38/EC is not the final piece of EU legislation on the right of EU citizens to move and reside freely. It is just merely a last link in the chain which will become a penultimate link at some point in the future.

Neither is it the first EU legislative instrument adopted in this area. Since the beginning of the European integration, there were some legislative rules on intra-EU mobility of nationals of Member States, although they have not yet been EU citizens.[24]

This section of the report opted not to approach the stability of residence – *the thematic concern of the General Report* – from the perspective of the stability of residence of individual EU citizens who have made use of their EU right to move and reside freely. Instead, it will examine the stability of the right of residence in selected EU legislative proposals preceding Directive 2004/38/EC and then Directive 2004/38/EC itself, starting from its legislative proposal, tabled by the Commission on 23 May 2001.[25]

The historical emphasis will not be on legislative proposals brought forward by the Commission that were ultimately adopted by the EU legislator before 2004 (such as Directive 90/364/EEC on the right of residence), but rather on the fate of unsuccessful pre-2004 attempts to bring forward EU free movement legislation which were later abandoned by the Commission for lack of enthusiasm on the part of the Member States.

This approach will enable us to draw lessons for today and tomorrow of the EU free movement law.

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ment of EU citizens: turning back the clock' EPC Commentary (2013), available at http://www.epc.eu/pub_details.php?pub_id=3491.

21. Joint Statement by the Foreign Ministers of the Visegrad countries – Czech Republic, Hungary, Poland and Slovakia – on the free movements of persons, Council document 17395/13.
22. Letter from the Commissioners Reding, Ándor and Malmström to Mr Shatter, 24 May 2013.
23. Resolution on the respect for the fundamental right of free movement in the EU of 16 January 2014 (2013/2960(RSP)).
24. This report will repeatedly commit the sin of careless drafting by using anachronisms, such as referring to nationals of Member States as EU citizens even in relation to periods where the EU citizenship was not yet created or using the term 'European Union' for the pre-Maastricht times. We are guided by the readability of the text rather than by slavish adherence to the historical precision.
25. *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM(2001)257 final of 23 May 2001.

In the above context, this section will place a particular focus on primary materials rather than academic literature.

This section will cover all the issues raised in the first six questions by the General Rapporteurs – rights of family members of EU citizens (question 1), protection of public funds and equal treatment (questions 2 and 5), right to remain (question 3), right of permanent residence (question 4), and enhanced protection against expulsion (question 6). However, the main focus will be on two topical issues – family members (question 1) and access to social benefits by mobile economically non-active EU citizens (questions 2 and 5).

2.1. 1979 proposal on a right of residence for nationals of Member States in the territory of another Member State

Several weeks after the first direct European Parliament elections in 1979, the Commission presented a proposal[26] that would extend the right of free movement to (then not yet existent) EU citizens who were not working or self-employed in the host Member State.

At that point, the EU legislative landscape on free movement consisted of two regulations and six directives[27] which covered only those EU citizens who were employed or self-employed in the host Member State or providing or receiving services there. EU legislation also conferred a right of residence to ex-workers who retired in the host Member State or became permanently incapable to work.

Students or economically non-active persons, in the absence of EU legislation laying down harmonised EU rules, were treated by the host Member States in accordance with their general laws applicable to non-EU nationals.

The Commission made the proposal to fill this gap and to remove the obstacles to the free movement of EU citizens who were not economically active. The Commission also wanted to strengthen the feeling of belonging to the Community for all citizens and to make sure that 'European Union will become for them a discernible reality'.

Under the proposed directive, Member States had to abolish restrictions on movement and residence of EU citizens not falling under any existing in-

26. *Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of another Member State*, COM(1979)215 final of 26 July 1979.

27. Regulations (EEC) No. 1612/68 and No. 1251/70, Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC and 75/35/EEC.

strument of EU free movement law. Restrictions should also be abolished in relation to family members, defined as:

– the spouse;
– relatives in the descending line who are either dependent or under 18 and their spouses;
– the dependent relatives in the ascending line and those of their spouse.

The proposed personal scope should be compared with the personal scope of the most relevant EU legislative instruments applicable in 1979.

Article 10(1)(a) of Regulation (EEC) No. 1612/68 referred to 'descendants who are under the age of 21 years or are dependants', and Articles 1(c) and (d) of Directive 73/148/EEC covered 'children of the EU citizen under twenty-one years of age and dependent relatives of the EU citizen or his/her spouse'.

The 1979 proposal had a stricter different age limit, but also it extended to spouses of relatives in the descending line. This novel approach vis-à-vis spouses of dependent descendants was more generous than anything existing before or adopted afterwards. Even Directive 2004/38/EC does not include spouses of dependent descendants of EU citizens in the personal scope of family member (under certain conditions, they could qualify under Article 3(2)(a) of Directive 2004/38/EC to have their entry and residence facilitated).

The Member States were also obliged to favour the admission of any other family members who were dependent or living under the same roof in the country of origin.

The 1979 proposal in relation to family reunification is pretty much the same as current Articles 2(2) and 3(2) of Directive 2004/38/EC (with the exception of registered and unmarried partners), but it extended the right of residence only to those family members who resided in the host Member State – the first entry of non-EU family members was covered by national law, not by EU law.

Under Article 4 of the proposed directive beneficiaries were to be granted a right of permanent residence provided they had sufficient resources for themselves and their family members to cover their needs.

The unconditional right of permanent residence to reward *'de-facto integration in the host society'* was, however, foreseen only after five years of uninterrupted residence as the first renewal of the residence permit after five years was subject to a check whether the requirement of sufficient resources had been met.

The Explanatory Memorandum accompanying the proposal noted in relation to the condition of means of subsistence that the laws of some Member States automatically granted social security to nationals of other Member States without their own means of subsistence. The Memorandum further stressed that although Member States considered it reasonable to provide economic assistance by way of solidarity to those who have contributed to the economic and social development through their work, they did not consider that such assistance should be granted to others who do not pursue an occupation.

For these reasons, the Commission accepted that Member States can make the right of residence of economically non-active EU citizens subject to having adequate means of subsistence which, to avoid arbitrary decisions, could be the minimum subsistence level laid down for own nationals.

In the context of today's heated discussions in some Member States about the alleged dangers of healthcare tourism, it should be highlighted that the 1979 proposal – unlike Directive 2004/38/EC – did not require economically non-active EU citizens to have any sort of sickness insurance cover.

The Economic and Social Committee (ECOSOC) recognised in its opinion[28] that the requirement of proof of minimum subsistence level might be used to discriminate against the economically weaker groups of society or to implement discriminatory policies of restricting immigration to particular groups. It was, however, 'anxious to ensure that 'unwelcome wanderers' are not admitted, such as those who might go from country to country to secure, for example, better minimum subsistence.'

The notion of 'unwelcome wanderers', however inappropriate, seems almost as a loving word, compared to today's discourse on welfare tourism which uses much more loaded expressions, such as abusers, cheaters, fraudsters or scroungers.

ECOSOC also contemplated how the proposed directive could affect general tendencies in migration movements within the EU. It assumed that some persons would wish to move to another, more economically developed, Member State in order, for example, to take advantage of more progressive social legislation. The Committee stressed that the root cause of such migration movements lies, among other matters, in the grave inadequacies within the EU. If such migration movements are to be reduced, the structurally underdeveloped regions of Europe, where employment opportunities are few and social deprivations are common, must be made more attractive. Being

28. Opinion of 26 March 1980, OJ 1980 C 182, page 10.

part of the EU must also mean an increase of solidarity with citizens of other Member States who have contributed to the economic, social and cultural development of the EU as a whole.[29]

The Parliament welcomed[30] the 1979 proposal as the first step towards the creation of a '*European citizenship*', but requested that the proposal should not grant Member States the power to make the exercise of the right of residence subject to proof that the applicant has sufficient resources. The Parliament believed that such a condition would amount to social discrimination and that differences in the levels of national social assistance should be compensated in other ways.

The Parliament also adopted an amendment that would abolish the requirement of facilitation of entry and residence and that would put on par with core family members any person whom the EU citizen had an obligation to support or who was in practice dependent.

In 1980, the Commission presented its modified proposal[31] which took account of the suggestions made by the ECOSOC and the Parliament.

The Commission expressed its understanding of the amendment of the personal scope of family members that would prevent splitting up of families simply because of the change of domicile of the EU citizen, but, in the light of development of the EU, decided to keep the narrower definition of family members. Nevertheless the Commission stated that it had no doubts that in the future it would be possible to complete EU law in the sense proposed by the Parliament.

Against this background, it is remarkable that the Commission in several months adopted another amended proposal which fully accepted the Parliament request. It is probably not surprising that EU law has not yet been completed, as the Commission foresaw in 1980.

The modified proposal clarified that the requirement of sufficient resources – which has been criticised by the Parliament – explicitly confirmed that the requirement was proposed to avoid 'population migrations being undertaken with the sole aim of obtaining the most favourable social benefits'.

While the Commission in principle agreed with the Parliament and considered that the population movements feared by the Member States would

29. This assessment is to a frightening extent similar to the discussions behind the 2013 Free Movement Report and some actions of the 5-point action plan.
30. Resolution of 17 April 1980, OJ 1980 C 117, page 48.
31. *Amended Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of another Member State,* COM(1980)358 final of 17 June 1980.

not emerge, it decided to retain the requirement of sufficient resources, but made it subject to an assessment after six years since the adoption of the proposal.

This never came to happen as the 1979 proposal and its amendments were not formally approved by the Council that was unable to agree on the personal scope of family members and on whether students would have to provide a proof of sufficient resources.[32]

After *Gravier*,[33] which the Commission interpreted as recognising that students have a right of residence, the Commission excluded students from its proposal by adopting an amended proposal[34] in 1985, but the Council was still unwilling to adopt the proposal.

The Commission finally withdrew the proposal in May 1989, split it up and put forward three new proposals in July 1989, which fared better (maybe also because the legislative procedure – with the exception of Directive 90/364/EEC on the right of residence – no longer required unanimity ...). They were adopted in June 1990.[35]

In many aspects, the 1979 proposal heralded Directive 2004/38/EC. It contained novel provisions which have not been carried in the Directives from the nineties and were introduced only in Directive 2004/38/EC.

Article 5 of the 1979 proposal provided for residence permits to be issued to the beneficiaries of the directive with validity of five years which were to be automatically renewed except where it was proved at the date of expiry that the condition of sufficient resources was no longer satisfied.

The proposal, which provided for a distinctive right of permanent residence, where the condition of sufficient resources had to be met at the beginning of the residence and once again after five years. In the proposal the Commission underlined that a change of residence by economically non-active EU citizens is a sort of *'leap of faith'* on the part of the mobile EU citizen with a number of commitments, some of them of an economic nature,

32. For more on the Council negotiations, see Taschner, 'Free Movement of Students, Retired Persons and other European Citizens – A Difficult Legislative Process' in Schermers and others (eds), 'Free Movement of Persons in Europe' Asser Institute/Martinus Nijhoff (1993).
33. Case 293/83 *Gravier*, judgment of 13 February 1985.
34. *Amended Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of another Member State,* COM(1985)292 final of 10 July 1985.
35. Directives 90/364/EEC, 90/365/EEC and 90/366/EEC which was later replaced by Directive 93/96/EC.

which, as the Proposal put it, *'should be balanced by a minimum guarantee of stability even in the event of a temporary reversal of fortunes.'*

This certain degree of solidarity between the host Member State and EU citizens who were unlucky to cease to meet the requirement of having sufficient resources was later confirmed in *Grzelczyk*[36] and carried over to Articles 14(2) and (3) of Directive 2004/38/EC.

It is worth noting that the 1979 proposal also stated that economically non-active EU citizens 'should be spared from repeated checks on their means of subsistence which would constitute an affront to their dignity'.

Actually, the possibility on the part of the host Member State to check whether the conditions EU law attaches to the right of residence of economically non-active EU citizens continue to be met have been explicitly introduced only in Article 14(2) of Directive 2004/38/EC, upon the amendment tabled by the Council in 2003.

Driven by humanitarian reasons, the 1979 proposal foresaw the possibility to retain the right of residence in the event of the death of the EU citizen. Interestingly enough, there was no provision in the proposal to cater to the event of divorce. Family members had to wait until 2004 to have a right to retain their right of residence when the link with the primary source of the right of residence, the EU citizen, has been severed.

2.2. 1989 proposal amending Regulation (EEC) No. 1612/68 and Directive 68/360/EEC

Ten years after the first doomed proposal by the Commission, two months before its withdrawal and four months before the ultimately successful package on legislative proposals on economically non-active EU citizen, the Commission proposed[37] an amendment of EU legislation applicable to workers.[38]

36. Case C-184/99 *Grzelczyk*, judgment of 20 September 2001.
37. *Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community*, COM(1988)815 final of 29 March 1989.
38. Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community and amendment of Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

The 1989 proposal was made to enhance the protection of mobile workers by, inter alia, extending the personal scope of the notion of family members and, in the context of contracting labour markets, by strengthening the possibility to retain the right of residence for workers who were unemployed or who had accepted short-term employment.

From the perspective of this paper, the 1989 proposal included an amendment of Article 10 of Regulation (EEC) No. 1612/68 in relation to family members of the EU worker. Under the proposed amendment, the requirement of dependence from relatives in direct line was abolished and the extended family members were placed on the same footing as core family members, so they acquired an enforceable right of residence, not only a right to have their admission facilitated.

The Commission considered this change justified on the ground of the endeavours to complete the internal marker as an area without internal borders which demonstrated the will not to restrict the internal market to the purely economic sphere, but to move towards a *'People's Europe'*.

Similarly, as in the 1979 proposal, but this time also covering the loss of the right of residence in the event of divorce, the 1989 proposal provided for a possibility to retain a right of residence for family members in the event of divorce and death, as the Commission put it, to prevent social and moral consequences for family members.

The 1989 proposal also repealed Article 7(2) of Directive 68/360/EEC which, under certain conditions, authorised the host Member State to terminate residence of EU workers who have been involuntarily unemployed at the moment their first 5-year residence card expired.

Given that no re-entry ban could be imposed on such workers, the Commission considered in its 1989 proposal that such unemployed EU citizens should, in the light of their integration in the host society during their residence of more than five years, have the right to remain regardless of the fact that they may even have access to social assistance after the unemployment benefit expired.

The Parliament was consulted on the proposal and asked[39] the Commission to introduce 19 amendments of Regulation (EEC) No. 1612/68 and 14 amendments of Directive 68/360/EEC.

In relation to family members, the Parliament proposed to extend the personal scope of family members with an enforceable right of residence also to

39. Legislative resolution of 14 February 1990, OJ 1990 C 69, page 88.

partners living in a de facto union recognised as such for administrative and legal purposes either by the Member State of origin or the host Member State.

The Parliament also proposed to protect such unmarried partners in the event of the relationship ending and de facto separation of the couple.

An interesting curio from the Parliament's amendments was the request to grant the rights EU citizens enjoyed to political refugees and stateless persons resident in a Member State.

Having regard to the Parliament's resolution, the Commission presented its modified proposal[40] in 1990. The modified proposal accepted most of the requests of the Parliament, but not in relation to family members or refugees.

The 1989 proposal met the same fate as the 1979 proposal – after several years of inactivity on the part of the Council – the Commission withdrew it on 14 October 1998.

2.3. 1998 proposal amending Regulation (EEC) No. 1612/68 and Directive 68/360/EEC

The first genuine attempt to amend EU legislation on free movement in the context of already existing EU citizenship was made by the Commission in July 1998 where it presented a package[41] of two proposals aimed again at workers, job-seekers and trainees – amendment of Regulation (EEC) No. 1612/68 and of Directive 68/360/EEC.

As the 1989 proposal, the 1998 attempt pursued the objective of adapting the legal situation of workers to the progress of the European integration and adjusting it to the new socioeconomic and political conditions of the EU, as Recitals 1 and 3 put it.

The package was presented in tandem with the Commission communication on the follow-up to the recommendations of the High-Level Panel on the

40. *Modified proposal for a Council Regulation (EEC) amending Directive 68/360/EEC on the abolition of restrictions on movement and residence of workers of Member States and their families within the Community* and *Modified proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community*, COM(1990)108 final of 9 April 1990.

41. *Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community* and *Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families*, COM(1998)394 final of 22 July 1998.

Free Movement of Persons[42] which announced the creation of a single set of rules on free movement for all EU citizens and their family members, which was finally made in 2001 and culminated in Directive 2004/38/EC.

The Commission justified the worker-only scope of the 1998 proposal by the need of immediate and targeted action to support Member States' employment policies.

1998 Regulation proposal

The 1998 proposal sought to enhance the family reunification to ensure that the mobile worker's family is not broken up as a result of free movement.

It was again proposed not to make the right of direct relatives in ascending and descending line to join the EU worker conditional upon being dependent. According to the Commission, the requirement of dependence was not compatible with the dual objective of safeguarding the family unit and reunifying families in the host country, a requirement which is part and parcel of the free movement of people.

The Proposal added that the extension of the personal scope to non-dependent family members was consistent with demographic and sociological patterns within the EU. It seemed incompatible with free movement that a family household established by an EU worker in the Member State of origin should disintegrate just because a basic right is claimed, namely that of moving freely within the EU.

The scheme based on dependence of family members (which essentially persists until today) contained, as the Commission considered, some contradictions in that the members of the family who are not dependants and who are therefore less likely to become a burden for the host country, cannot take advantage of family reunification. However, members of the family who are dependent on the worker and who could possibly oblige the worker to claim social assistance from the host country, do benefit from all the advantages offered by family reunification.

As in the modified proposal of 1989, the 1998 proposal placed all other family members who are dependent, or members of the household on the same footing as core family members – thus, no distinction between core family members and extended family members, as it existed under previous Regulation (EEC) No. 1612/68 and as it ultimately exists under Directive 2004/38/EC.

42. *Communication on the follow-up to the recommendations of the High-Level Panel of the Free Movement of Persons*, COM(1998)403 final of 1 July 1998.

As finally adopted in Article 24(1) of Directive 2004/38/EC, the 1998 proposal placed family members at the same level when it comes to the right to equal treatment, as it was proposed already in the 1989 proposal. This means that non-EU family members of EU citizens have the same rights as nationals of the host Member State (and not as non-EU family members of such nationals).

The 1998 proposal also built on the idea of previous proposals to make it possible for family members to retain their right of residence in the event of a divorce. However, this right was granted only after having lived in the host Member State for three years.

Regarding job-seekers, one of the aims of the 1998 proposal was to respond to the criticism by the Court of Justice concerning the unclear scope of the rights of job-seekers to look for work, as the proposal puts it, *'for the length of time this takes, without the need to hold a residence permit'*.

Under a proposed amendment of Article 8(1)(d) of Directive 68/360/EEC, job-seekers had a right of residence without any need to obtain a residence permit. Yet, where they have been seeking employment for longer than six months, the host Member State was entitled to ask the job-seeker to prove that he is actively looking for work and that he has a reasonable chance of being offered employment.

The proposal also envisaged rules on the retention of the status of worker to cater for temporary relocations within the labour market.

The proposal provided for the right of permanent residence after five years of residence. It also heralded the enhanced protection against expulsion, provided for later in Article 28 of Directive 2004/38/EC.

Ultimately, only the Parliament formally considered the proposal. As the Council had yet again failed to follow the Parliament's example, the proposal was withdrawn by the Commission as obsolete[43] in 2004, after Directive 2004/38/EC had been adopted.

43. *Withdrawal of Commission Proposals which are no longer of topical interest*, COM(2004)542 final of 6 August 2004.

2.4. 2001 proposal for a directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

The codification of existing EU legislation on free movement was announced already in 1993 in the Commission's first report on the citizenship of the Union[44] and in the Commission report to the European Council on the adaptation of Community legislation to the subsidiarity principle.[45]

At that time, two regulations and nine directives[46] which covered EU citizens and their family members, regardless of whether in gainful employment or not, constituted the legislative landscape.

In January 1996, the Commission requested the High Level Panel on the free movement of persons to identify the problems still arising in the area of free movement, to evaluate them, and to propose solutions.

The High Level Panel presented its report[47] in March 1997. One of the key findings was to bring free movement rights in line with the new concept of EU citizenship by replacing the piecemeal approach to residence with consolidated legislation treating all EU citizens as equal.

In July 1998, the Commission adopted a communication[48] on the follow-up to the recommendations of the High-Level Panel in which it confirmed that the introduction of EU citizenship generalised, for the benefit of all EU citizens, the right to enter, to reside and to remain in another Member State.

The Commission considered that the free movement rights were becoming an integral part of the legal heritage of every EU citizen and should be formalised in a common legislative corpus to harmonise the legal status of all EU citizens, regardless of whether they work or not.

In the second Commission report on the citizenship of the Union,[49] the Commission reiterated that EU citizenship raised citizens' expectations as to the rights that they expect to see conferred and protected.

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44. *Report on the Citizenship of the Union*, COM(1993)702 final of 21 December 1993.
45. *Report on the Adaptation of Community Legislation to the Subsidiarity Principle,* COM(1993)545 final of 24 November 1993.
46. Regulations (EEC) No. 1612/68 and No. 1251/70, 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/EC.
47. Report of the High Level Panel on the free movement of persons, chaired by Mrs. Simone Veil, presented to the Commission on 18 March 1997.
48. *Communication on the follow-up to the recommendations of the High-Level Panel of the Free Movement of Persons*, COM(1998)403 final of 1 July 1998.
49. *Second report on citizenship of the Union*, COM(1997)230 final of 27 May 1997.

The Commission, when proposing the Directive, was mindful of the wider context of EU citizenship in which EU free movement law exists. The basic starting point for the Commission was that EU citizens should be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country. Additional administrative or legal obligations stemming from the non-nationality should be kept to the bare minimum.

In the words of the proposal, it served several purposes:[50]

to take the form of a single instrument in the interests of reader-friendliness and clarity;
to streamline the arrangements for exercising freedom of movement which, depending on the level of integration in the host Member State, range from extending the right of residence without formalities to six months, to removing any conditions or differential treatment and to putting non-nationals on an equal footing with nationals after four years of residence in the host Member State;
to tighten up the definitions of restrictions on the right of residence; and
to facilitate the right to free movement and residence of family members of an EU citizen, irrespective of nationality.

The legislative procedure unfolded as follows:

– May 2001 – legislative proposal[51] adopted by the Commission;
– January 2002 – the Council concluded the first reading[52];
– February 2002 – the ECOSOC adopted its opinion[53];
– March 2002 – the Committee of Regions adopted its opinion[54];
– June 2002 – the Council concluded the second reading[55];
– February 2003 – the Parliament concluded its first reading[56];

50. For a more detailed summary, see Ana Herrera de la Casa and Michal Meduna, 'The New Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States – What Changes does it bring?' CESifo Dice Report, Volume 4, No. 4 (2006), page 3.
51. *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,* COM(2001)257 final of 23 May 2001.
52. Council document 5758/02 of 30 January 2002.
53. Opinion of 27 February 2002, OJ 2002 C 149, page 46.
54. Opinion of 14 March 2002, OJ 2002 C 192, page 17.
55. Council document 10572/02 of 10 July 2002.

- April 2003 – the Commission presented its amended proposal[57];
- September 2003 - the Council reached the political agreement on the draft proposal by qualified majority;
- December 2003 – the Council adopted common position[58];
- December 2003 – the Commission adopted Communication to the Parliament concerning the common position[59];
- March 2004 – the Parliament concluded the second reading[60] and approved the Council common position;
- April 2004 – Directive 2004/38/EC was finally adopted and published in the Official Journal.

The EU legislature took 1,072 days to consider the proposal, spanning over seven presidencies.

In that time, the Parliament made two formal readings of the proposal, while the Council did three readings. As adopted, Directive 2004/38/EC has 9,300 words which take around 62 minutes to read aloud and 34 minutes to read silently.[61] In the time it took to adopt the proposal, it would be possible to do almost 25,000 loud readings and more than 45,000 silent readings. One could say that it could have been adopted sooner.

However, the political agreement was reached in the Council only after the Italian Presidency threatened that the presented compromise wording of the proposal was its final proposal and that should the compromise fail, it would leave the job for the Irish Presidency (which started on 1 January 2004). The perspective of yet another delay finally forced Member States to conclude the reading in the Council and adopt its Common position. This 'change of gear' was partly due to the fact that more delay was likely to mean that the 1999-2004 Parliament would be unable to adopt the proposal and –

56. Legislative resolution of 11 February 2003, OJ 2003 C 43E, page 42.
57. *Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM(2003)199 final of 15 April 2003.
58. Common Position (EC) No. 6/2004, adopted by the Council on 5 December 2003, OJ 2004 C 54E, page 12.
59. *Communication pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, SEC(2003)1293 final of 30 December 2003.
60. Legislative resolution of 10 March 2004, OJ 2004 C 102E, page 571.
61. http://www.wolframalpha.com/input/?i=9300+words.

maybe more significantly – that the failure to adopt the proposal before the 2004 enlargement would enfranchise new Member States. This would very likely have led to further substantial delays and changes in the substance of proposed EU legislation. After all, the fact that Directive 2004/38/EC was adopted and published just two days before the 2004 enlargement shows the importance EU-15 Member States attached to the possibility to conclude the legislative process before the changes brought by the 2004 enlargement.

2.4.1. Family members

Technically speaking, the EU Treaties do not explicitly refer to the right of family members to move and reside freely in connection with the fundamental right of free movement of EU citizens, but this right intrinsically flows from the right for respect to family life (preserving the family unity), which forms a part of common constitutional traditions of the Member States and is protected by Article 7 of the EU Charter.

2.4.1.1. Legislative process

2001 proposal

The 2001 proposal defined a family member as:

a) the spouse;
b) the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples;
c) the direct descendants and those of the spouse or unmarried partner.

As underlined in the Explanatory Memorandum, the definition of 'family member' was introduced not only to accommodate case-law of the Court of Justice, but also to acknowledge changes in the law of the Member States related to 'de facto' unmarried couples, often with children.

Inspired by the report of the High Level Panel, the proposal dropped the requirement for family members to be dependent, arguing that 'there is no good reason to deny children over 21 who are not dependent on their parents, or relatives in the ascending line who are not dependent on their children, the right to join their family in another Member State'.

The proposal also intended to get rid of the differences between family members of student and non-student EU citizens, but this was in the end requested to be retained by the Council. It makes little sense, as there seems to be nothing in EU law that would prevent EU citizens who are studying in the

host Member State to invoke their rights as economically non-active EU citizens, who have to meet essentially the same conditions.

As the Explanatory Memorandum clearly stated, there was no specifications as to the purpose of the movement or residence in Article 3 of the 2001 proposal.

Directive 2004/38/EC does not exclude that EU citizens can reside in more than one capacity, as confirmed by the Court of Justice in *LN*[62] where the Court of Justice ruled that EU citizens who are working and studying in the host Member State at the same time may not only be considered students (for the purposes of determining whether or not the EU citizen is entitled to maintenance aid under Article 24 of Directive 2004/38/EC).

The Economic and Social Committee

The Committee approved the Commission's decision to enlarge the scope of the definition of family member and considered that a wider definition was more in tune with the realities of the modern world and showed greater sensitivity to circumstances affecting all EU citizens.

The Committee of Regions

The Committee welcomed the extension of the definition of family member to unmarried partners which it considered to respect the crucial principle of family unity, while at the same time respecting the legislative options of those Member States which had not decided to treat unmarried couples as spouses.

The Parliament

In the first reading the Parliament proposed 89 amendments (some of them did not affect all language versions). Three of them were related to the personal scope of the notion of a family member – firstly, to extend the notion of spouse to cover married couples of any sex, secondly, to include registered partners in the personal scope of the 2001 proposal and, thirdly, to include unmarried partners of the same sex.

The Parliament saw the justification for these amendments in the need to widen the definition of family member for all persons entitled to the right of residence so that the diversity of family relationships that exist in the society, whether in the form or marriage, registered partnerships or unmarried partnerships, are recognised and respected. On the grounds of equality and fair

62. Case C-46/12 *LN*, judgment of 21 February 2013.

treatment, the Parliament considered that the fundamental right to family life should not be made dependent on individuals choosing to enter into marriage.

In relation to the Commission's proposal to remove the requirement of dependence for all family members, Mr Santini, the Rapporteur, added his personal opinion in the Explanatory statement accompanying his report[63] on the proposal to remove the conditions related to age and dependence:

'This could generate fears of a massive rise in the numbers of people seeking to join their relatives, with possible financial implications for the Member States. The rapporteur considers that a fair compromise would be to consider direct descendants to be full members of the family of a Community citizen, with no conditions attached, while direct relatives in the ascending line would be subject to the requirement of being dependent, so as to prevent abuses.'

The final text, adopted by the Parliament in the first reading, did not question the Commission's proposal to remove the dependence requirement.

2003 amended proposal

The Commission, however, was disinclined to accept to place same-sex couples on par with different-sex couples as it felt that the Directive should not result in the imposition on Member States of amendments to family law legislation, an area which does not fall within the EU's legislative jurisdiction.

With regard to marriage, the Commission noted that case-law[64] made it quite evident that the notion of spouse should be interpreted as meaning a union between two persons of different sex, given the progress – or, more aptly, a lack of it – of social developments in all Member States in relation to the unions between persons of same sex.

The Council

Same-sex couples

The Council decided to drop all references to formal relationships (i.e. marriages and registered partnerships) being made 'irrespective of sex' and modified the position of registered and unmarried partners.

According to the common position, registered partners should have an automatic right to move and reside freely only in those Member States that treat registered partnership as equivalent to marriage. The Council also demoted

63. Parliament document A5-0009/2003, page 54.
64. Joined cases C-122/99 *D* and C-125/99 *Sweden v the Council*, judgment of 31 May 2001, paragraph 34.

unmarried partners, alongside with registered partners in Member States that do not treat registered partnership on par with marriage, to Article 3(2)(b) of Directive 2004/38/EC, granting them a mere right to have their entry and residence facilitated.

The broader issue of the protection Directive 2004/38/EC should afford to same-sex relationship and unmarried partners was the most divisive issue during the discussions in the Council.

At that time, there was no genuine pan-European possibility of extending 'hard' free movement rights beyond the traditional scope of family, i.e. the union between two persons of the opposite sex. The compromise which divided the Member States in two groups – 'same-sex friendly' countries and the rest – seemed the only possible option for free movement then; a sort of enhanced cooperation approach.

Age and dependence

Regarding the conditions of age and dependence of family members in direct line, the Council refused to follow the proposal made by the Commission and supported by the Parliament to remove these conditions. The refusal was backed by all Member States[65] that wanted to maintain these conditions,[66] as they existed in the legislative instruments replaced by the proposed directive.

Already during the first reading,[67] several Member States have voiced their concerns as regards the social costs which could ensue for the host Member State. During the discussion in the Council Working Party the Commission highlighted[68] that the original proposal omitting the dependence had to be seen together with other provisions which required economically non-active EU citizens to have sufficient resources for all family members.

2.4.1.2. Family members today and tomorrow

In 2003, one of the main arguments against granting of automatic rights to *same-sex couples* was that only two Member States had legislation on same-sex marriages.

65. Apart from Italy in relation to the age limit in the Working Party on Free Movement of Persons. However, all delegations were in favour of reintroducing the age and dependence condition in the Competitiveness Council of 14 November 2002.
66. Council documents 12519/02 (points II.4.4 and II.4.5) and 6147/03 (footnote 18).
67. Council document 15380/01 (footnote 6).
68. Council document 10572/02 (footnote 17).

In relation to the notion of spouse, the Council argued[69] just before reaching political agreement on the text of the Directive that according to the case-law of the Court of Justice, when contained in an EU act, the notion of spouse has to be interpreted by reference to the situation in the *large majority* of Member States, meaning spouse of the opposite sex in the framework of the traditional marriage.

Today however, nine Member States legally recognise same-sex marriages[70] and new law on same-sex marriages will take effect in England and Wales in 2014. Eight Member States provide for same-sex registered partnership.[71] At the same time, constitutions of five Member States define marriage as a union between a man and a woman.[72]

Despite some hiccups (such as the recent December 2013 referendum in Croatia where two-thirds of those who voted approved changes to Croatia's constitution to define marriage as a union between a man and a woman), there is a clear trend towards the recognition of same-sex relationships. Yet, it is not so clear whether the number of Member States supporting same-sex couples has already reached the critical mass to 'switch' the interpretation of the notion of spouse.

This change is likely to be complicated[73] by the fact that Directive 2004/38/EC provides for certain rights same-sex couples can enjoy when exercising their right to move and reside freely in the EU, including full equality in those Member States that consider same-sex relationships as equivalent to marriage for the purposes of Directive 2004/38/EC.

At the practical level of the application of Directive 2004/38/EC on the ground, there seem to be only few problems as the Commission has not received any substantial number of complaints in this respect. Following the intervention by the Commission, Malta amended its legislation transposing Directive 2004/38/EC which made the rights of couples in durable relationship

69. Council document 12218/03 (point III.1).
70. Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.
71. Austria, Czech Republic, Finland, Germany, Hungary, Ireland, Luxembourg and Slovenia.
72. Bulgaria, Croatia, Latvia, Lithuania and Poland.
73. It could be more complicated in the sense that when it comes to the free movement right, Directive 2004/38/EC is not 'everything-or-nothing' in all Member State. It may be easier to argue that the interpretation should be changed against the background of no recognition of free movement rights in EU law on free movement.

conditional upon the relationship not being *'in conflict with the public policy in Malta.'*[74]

Regarding the requirement of *dependence*, the transposition of this concept by Member States has been largely uncontroversial. There were some problems related mostly to the relevance of dependence of the grounds other than material or financial (such as emotional), and to material dependence of adult and able-bodied family members, notably when they are extended family members and come under Article 3(2)(a) of Directive 2004/38/EC.

The Commission provided its interpretation of the notion of dependence in 2009 guidelines[75] for better transposition and application of Directive 2004/38/EC.

Since 2009, two judgments of the Court of Justice provided further guidance as to the notion of dependence.

In relation to the requirement of dependence that must be met before extended family members may invoke the right to have their entry and residence facilitated under Article 3(2)(a) of Directive 2004/38/EC, the Court of Justice ruled in *Rahman*[76] that the Member States may, when exercising the discretion which forms basis of the facilitation rule of Article 3(2), to lay down legislative rules as to the nature and duration of dependence. The justification for this qualification of dependence was, for the Court of Justice, to enable Member States facilitate entry and residence of those extended family members whose dependence was genuine and stable and, at the same time, to guard against family members abusively relying on artificial dependence to obtain the right of residence.

It remains unclear whether the notion of dependence under Article 3(2)(a) of Directive 2004/38/EC, as interpreted in *Rahman*, can actually be applied to dependence of core family members falling under Article 2(2) of Directive 2004/38/EC (i.e. direct relatives in the ascending and descending lines). There is no evidence of such possibility in the case-law on dependence that preceded[77] *Rahman* and which followed[78] it. Furthermore, the fact that the

74. Article 2 of the Free Movement of European Union Nationals and their Family Members Order 2007 (LN 191/07).
75. *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*, COM(2009)313 final of 2 July 2009, section 2.1.4.
76. Case C-83/11 *Rahman*, judgment of 5 September 2012, paragraph 36 (seq).
77. Case 316/85 *Lebon*, judgment of 18 June 1987, paragraph 22, and case C-1/05 *Jia*, judgment of 9 January 2007, paragraphs 36 and 37.
78. Case C-423/12 *Reyes*, judgment of 16 January 2014, paragraph 21 (seq).

Court of Justice in *Rahman* was at pains to diligently refer to the notion of dependence always with reference to Article 3(2)(a) of Directive 2004/38/EC and that fact that this provision of Directive 2004/38/EC – unlike the concept of dependence under Article 2(2) – makes reference to national laws (and thus, a certain margin of discretion) weigh heavily against the possibility to extend *Rahman* to core family members.

In *Reyes*,[79] the Court of Justice emphatically rejected an option that core family members could – in addition to being dependent under the *Jia* interpretation – be required to have tried unsuccessfully to obtain employment or subsistence support from the authorities in the country of origin.

The Court of Justice also ruled that the fact that the family member concerned has to be dependent to acquire a right of residence, but may start working in the host Member State, thus ceasing to be dependent, without affecting the right of residence. This conclusion (which goes well with the right under Article 23 of Directive 2004/38/EC of all family members, dependent or not, to engage in gainful activity in the host Member State) is important against the background of the fact that Directive 2004/38/EC (notably Article 7(2), read in conjunction with Articles 3(1) and 2(2)) could have been interpreted that family members who have to be dependent to fall under the personal scope of Directive 2004/38/EC, would lose any right the moment they stop being dependent.[80]

Another interesting facet of the notion of dependence is whether other types of dependence, such as emotional, may bring the family member concerned under Directive 2004/38/EC.

In relation to core family members falling under Article 2(2) of Directive 2004/38/EC, case-law of the Court of Justice repeatedly refers to material dependence (factual situation characterised by the fact that material support for that family member is provided by the EU citizen). The notion of dependence under Article 3(2) of Directive 2004/38/EC also encompasses physical dependence (Recital 6) which supports the conclusion that the two notions are not exactly the same.

There may even be a third kind of dependence under EU law on free movement, namely in relation to the rights EU citizens have in the Member

79. Case C-423/12 *Reyes*, judgment of 16 January 2014, paragraph 25 (seq).
80. Compare with case C-291/05 *Eind*, judgment of 11 December 2007, where the Court of Justice in paragraph 40 concluded that a dependent daughter may enjoy the right of residence so long as she has not reached the age of 21 years or remains a dependant of her father.

State of their nationality under Article 20 TFEU. In *O and S*,[81] the Court of Justice alluded to legal, financial and emotional dependence. However, at least emotional dependence has been found irrelevant by Advocate General Tizzano in *Zhu and Chen*[82] but, admittedly, not in the context of classical setting of Article 2(2) of Directive 2004/38/EC (i.e. EU citizen and dependent family member), but in the reversed setting where the EU citizen is dependent on the non-EU family member.

The requirement of dependence is likely to stay as a condition for family reunification under Directive 2004/38/EC for the foreseeable future.

The decision to keep the dependence requirement also raises some questions in relation to the way in which Member States want to protect their public funds. It is not far-stretched to consider that the Member States may be fiscally shooting themselves in the leg by preferring family members who are financially dependent on EU citizens (who are granted an automatic right of residence) over family members who are not dependent and are thus more likely to work in the host Member State or be able to work. Independent family members are in a much better position to pay to the public purse in their taxes and insurance contributions.

Previous attempts to abandon this requirement, described above, were not accepted by Member States (i.e. the Council) despite the fact that it could make a lot of sense not to exclude independent family members.

Economic or fiscal arguments will not sell well in the current heated climate with a lot of anxiety about the pressures migration brings on static EU citizens.

The public debate is riddled by inconsistencies – take, for example, the recent article in the Economist[83] which concluded that 'Britons loathe immigration in principle, but quite like immigrants in practice.' The two strongest fears the general public has in relation to free movement is that mobile EU citizens are after jobs and that they are also after social benefits. Those two concerns are largely mutually exclusive – those in work do not get benefits and those on benefits are mostly out of work.

Against the background of such debate, supporters of intra-EU mobility cannot rely on economic arguments on the benefits of free movement. They must also be able to engage with another line of argument against (increased) intra-EU mobility that is not based on GDP per capita, the importance of

81. Joined cases C-356/11 *O and S* and C-357/11 *L*, judgment of 6 December 2012, paragraph 56.
82. Case C-200/02 *Zhu and Chen*, opinion of 18 May 2004, paragraph 84.
83. 'The Polish Paradox', the Economist, 14 December 2013.

growth and the need to do everything to succeed in the globalised world. The non-economic argument has been eloquently formulated in a TV programme about migration[84] by Nigel Farage who said:

'[i]f you said to me, do you want to see another 5 million people come to Britain, and if that happened we would all be slightly richer, I would say, do you know what? I would rather we were not slightly richer ... I do think the social side of this matters more than the pure market economics.'

This again reminds us that people are not mindless automata driven purely by economic considerations. The supporters of free movement must equip themselves with ability to connect with people and their concerns based on cultural and emotional values, such as identity, pride in the history, sense of belonging, or feeling of security.[85]

Free movement may be the fundamental right of EU citizens and an integral part of their legal heritage, but it 'is not hermetically sealed off from broader debates about immigration, and so is affected by policy changes and popular perceptions about immigration and immigrants.'[86]

2.4.2. Sufficient resources and protection of public funds

2.4.2.1. Legislative proposal

2001 proposal

In its first report[87] on the implementation of directives on economically non-active EU citizens (Directives 90/364/EEC, 90/365/EEC and 93/96/EC), the Commission emphasised that the right of residence was extended to EU citizens who were not economically active only after a lengthy process which the Commission attributed to *'the legacy of the past'* when the freedom of movement was managed from an economic perspective.

84. 'The Truth about Immigration', BBC2, 7 January 2014.
85. 'It's not about the money: what Ed Miliband and David Cameron can learn from Nigel Farage', the Guardian, 10 January 2014.
86. Shaw, Miller and Fletcher, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law' Edinburgh Law School Citizenship Studies (2013), page iv – available at http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf.
87. *Report on the implementation of Directives 90/364, 90/365 and 93/96 – (Right of residence)*, COM(1999)127 final of 17 March 1999.

The Commission noted that the transposition process of the three relevant directives was 'long drawn out' and that only three Member States[88] have transposed the directives by the end of the transposition deadline and that infringement proceedings for incorrect transposition *(non-compliance)* had to be launched against fourteen[89] Member States.

Neither the first report on the implementation of the directive on economically non-active EU citizens, not the second,[90] or the third[91] reports mention any particular concerns as to welfare or health-care tourism.

The 2001 proposal stipulated in Article 7 that economically non-active EU citizens have the right to reside in the host Member State for a period of longer than six months if they:

– have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay and that they have sickness insurance covering all risks in the host Member State; or
– are students admitted to a course of vocational training.

The Explanatory Memorandum asserted that making the right of residence subject to having sufficient resources and sickness insurance is to ensure that EU citizens do not have recourse to public funds in the host Member State.

Explanation on Article 7 of the proposal stated that 'while the exercise of this right is to be facilitated, the fact that, at the present stage, social assistance provision is not covered by EU law and is not, as a rule, 'exportable', entails that a completely equal treatment as regards social benefits is not possible without running the risk of certain categories of people entitled to the right of residence, in particular those not engaged in gainful activity, becom-

88. Denmark, the Netherlands and Spain.
89. At the material time, the EU consisted of fifteen Member States so essentially all Member States encountered problems transposing the directives into national laws, an abnormally high number dispute rate, as the Commission noted in its first report. It is interesting that the only Member State with regard to which the infringement proceedings had not been launched was Belgium, which later was subject to infringement proceedings in relation to the source of sufficient resources – see judgment of the Court of 23 March 2006 in case C-408/03 Commission v Belgium (Rec. 2006, p. I-2647).
90. *Second Report on the implementation of Directives 90/364, 90/365 and 93/96 (right of residence)*, COM(2003)101 final of 5 March 2003.
91. *Third Report on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens*, COM(2006)156 final of 5 April 2006.

ing an unreasonable [burden] on the public finances of the host Member State.'

The provision has to be seen in the wider context of the 2001 proposal, notably Article 21(2) which authorised Member States not to confer entitlement to social assistance to resident economically non-active EU citizens before the acquisition of the right of permanent residence (which was obtained after four years of residence).

The Commission announced already in 1999 in its implementation report of the directives on economically non-active EU citizens that it would explore the idea that economically non-active EU citizens could not be obliged to present a proof of sufficient resources or sickness insurance when applying for a residence document. They would be merely required to assure the relevant national authorities by means of a declaration[92] that they meet those conditions, similar to those students could make under Directive 93/96/EC.

This solution was incorporated in the 2001 proposal. Economically non-active EU citizens could only be required to present a proof when actually seeking recourse to public funds, as stated in the Explanatory Memorandum under Article 8(3) of the proposal.[93]

The proposal did not provide for any requirement to have sufficient resources and sickness insurance for students, but foresaw the requirement for students to assure the national authorities at the moment of requesting a residence certificate that they actually have sufficient resources and sickness insurance.

According to the Commission's interpretation made in the context of the first reading[94] in the Council, it wished to go beyond existing law, as interpreted by the Court of Justice,[95] by not making the possession of sickness in-

92. Proving the requirement of sufficient resources can be difficult in practice. The Court of Justice found in its judgment of 10 April 2008 in case C-398/06 *Commission v the Netherlands* that the Dutch requirement that economically non-active EU citizens must show sufficient resources for at least one year was unlawful. The judgment was given in the context of EU law on economically non-active EU citizens (Directives 90/364/EEC and 90/365/EEC), but the conditions of these directives were carried over in Directive 2004/38/EC.
93. Clearly, while this solution may be better than the others, it is far from being perfect. It is not clear how economically non-active EU citizens having recourse to social assistance (i.e. being in need and thus clearly in breach of the conditions attached to the right of residence) should present a proof of sufficient resources.
94. Council document 15380/01 (footnote 23).
95. Case C-424/98 *Commission v Italy*, judgment of 25 May 2000.

surance a condition for exercising the right of residence, but to retain it in the framework of administrative formalities for residence.

In addition, the Commission proposed to take away from the Member States the possibility to put a figure on the amount of resources deemed sufficient for the purposes of having a right of residence. The Commission considered that this would fail to allow for the variety of possible situations.[96]

The Economic and Social Committee

The Committee endorsed the general thrust of the proposal and praised the abolition of the Member States' right to fix the minimum amount of resources economically non-active EU citizens must possess. The Committee considered that establishing minimum resources in each Member State affects freedom of movement and puts some parts of the EU off limits to certain EU citizens just because they lack the means.

The Committee of Regions

The Committee welcomed the self-certification on the part of EU citizens to provide evidence of certain personal circumstances which, according to the Committee, was adopted in many Member States where it was significantly speeding up administrative procedures.

Regarding specific residence arrangements for students and economically non-active EU citizens, the Committee considered that such EU citizens must have sufficient economic resources and health insurance cover. This would safeguard the host Member State's right not to have to support their social or health care expenses.

The Parliament

In the framework of the discussions in the Parliament in the first reading of the proposal, several committees have been consulted. Opinion of the Committee on Legal Affairs and the Internal Market, adopted by 19 votes to one, with one abstention, offers an interesting perspective on the possibility how the rights of economically non-active EU citizens could evolve.

The Committee proposed to fully abolish the requirement to have sufficient resources for economically non-active EU citizens, including when it comes to the conditions attached to the right of residence and to the administrative procedures. These amendments were meant to reflect the develop-

96. However, in the absence of any guidance from individual Member States, it may be difficult in practice for economically non-active EU citizens to ascertain whether they actually meet the condition of having sufficient resources.

ments of the EU legal system towards the area of freedom, security and justice and to do away with the difference in treatment between own nationals and EU citizens, which was, in the eyes of the Committee, discriminatory and incompatible with the principles of EU free movement law.

At the end, these proposals were not included by the Rapporteur in his report. The Parliament did not adopt any amendment on sufficient resources.

2003 amended proposal

The amended proposal partly scaled back in relation to the conditions students must meet to acquire a right of residence and re-introduced the requirement to have comprehensive sickness insurance cover. As for the sufficient resources, this is not required for students to enjoy a right of residence – the declaration should be enough.

The Council

The Council introduced a number of changes to the proposal.

In relation to students, it re-introduced the requirement of comprehensive sickness insurance cover as a condition for having the right of residence.

In the discussions in the Council, Member States were wary to ensure that they are entitled to remove *economically non-active EU citizens who have recourse to public funds*. Already in the second reading[97] some Member States were keen to make it clear that a recourse to social assistance during the initial period of residence could lead to termination of the right of residence and wanted to make it explicit that it was possible to terminate the right of residence where the conditions were not or were no longer met. The Commission at that stage confirmed that this was the purpose of Article 24 of the proposal (later 13a of the proposal and now 14 of Directive 2004/38/EC).

In June 2003, the UK requested[98] adding a condition for the initial right of residence that economically non-active EU citizens should not become an unreasonable charge on public finances.

This was later included in the proposal[99] and formed basis for current Article 14(1) of Directive 2004/38/EC. According to the Council,[100] the condition that economically non-active EU citizens do not become a burden on its social assistance system (note that the original UK request referred to burden on public finances, not only on social assistance) was added to avoid an im-

97. Council document 10572/02 (footnotes 28 and 30).
98. Council document 10945/03 (footnote 25).
99. Council document 11807/03 (Article 6a(1)).
100. Council document 12218/03 (point III.2).

pact on the public finances of the host Member State resulting from the extension of the right of residence without conditions from three to six months. At the end of the legislative process, the condition on the burden was included in the final text while the reason for its inclusion (i.e. the extension of the initial right of residence from three to six months) was ultimately abandoned.

Against this background, the Commission stressed several weeks before the Council reached political agreement on the proposal that should Member States prefer to maintain the three months period, the conditions could be unacceptable, as it would constitute a step backward from existing *acquis*.

The *concept of unreasonable burden* to social assistance was introduced by the Council and developed in Recital 16 of Directive 2004/38/EC.

The Council deliberations contained an interesting provision in Article 13a(1) of the 2001 proposal which was introduced in June 2003,[101] but ultimately dropped in September 2003.[102]

The provision essentially provided that as long as economically non-active EU citizens did not become an unreasonable burden on the public finances,[103] the condition of resources would be considered to be met.

A fairly intensely discussed issue during the Council deliberations was the threshold to consider the requirement of sufficient resources as met. The Commission considered that putting a figure on the amount of resources to be deemed sufficient would fail to allow for the variety of possible situations.

Already in the first reading,[104] several Member States considered that Member States should be able to decide what sufficient resources were. The Commission replied that it could not share their views and added that the concept of 'sufficient resources' depended on numerous factors (free accommodation, benefits arising from links with other people, etc.) and could not be assessed by the EU citizen alone.

There was a big fight on the threshold in the Council without a clear majority.[105] The Commission's proposal was amended only in the very late stages of the discussions in the Council.[106]

101. Council document 10945/03 (footnote 46).
102. Council document 12218/03.
103. Changed from 'public finances' to 'social assistance' in Council document 11807/03 (Article 13a(2)).
104. Council document 15380/01 (footnote 29).
105. Council documents 6147/03 (footnotes 38 and 39) and 10945/03 (footnote 32).
106. Council document 12218/03 (Article 8(5)).

2.4.2.2. Sufficient resources today and tomorrow

According to the Commission's 2009 guidelines,[107] the notion of sufficient resources should be assessed against the national criteria to be granted basic social assistance benefit, not any social assistance benefit Member States may provide for in their national laws.

Admittedly, this is not clearly spelled out anywhere in Directive 2004/38/EC but it can be derived from Article 8(4) which stipulates that the condition of sufficient resources is automatically met when the resources are 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.

All Member States provide for means-tested social assistance benefits. The reference to 'the threshold below which nationals of the host Member State become eligible for social assistance' must not be interpreted as referring to any social assistance benefit, otherwise the alternative condition of Article 8(4) of Directive 2004/38/EC would never apply.

This conclusion is supported by the fact that an interpretation that economically non-active EU citizens must have resources sufficient not to qualify for any social assistance benefit may lead to an effective exclusion of most economically non-active EU citizens by providing for a social benefit with very high resource threshold in national laws.[108]

Regarding *the interplay between the facilitation of free movement and protection of public funds*, Directive 2004/38/EC, as clearly elucidated by the

107. *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*, COM(2009)313 final of 2 July 2009, section 2.3.1.

108. Compare with case C-578/08 *Chakroun*, judgment of 4 March 2010, where the Court of Justice in relation to the Family Reunification Directive (Directive 2003/86/EC) ruled that the Netherlands violated EU law by refusing family reunification on the grounds that the sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs. Article 7(1)(c) of Directive 2003/86/EC requires that the sponsors have resources which are sufficient to maintain themselves and the members of their families, without recourse to social assistance. This provision is similar to that of Directive 2004/38/EC and both follow the same objective – to afford a certain degree of protection to public funds of the host Member State.

Court of Justice,[109] far from pursuing a purely economic objective, aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on EU citizens by the Treaty.

But some consider that EU free movement law benefits the mobile middle class EU citizens at the expense of those who are poor or marginalised, for whom solidarity may be as important as equal treatment.[110]

As the ECOSOC remarked when considering the 2001 proposal – establishing *minimum resources* may put some parts of the EU off limits to certain EU citizens just because they lack the means.

This is a very relevant remark, alarming today even more than in 2002. With the accession of eleven Member States from central and eastern Europe in 2004, 2007 and 2013, there are bigger differences between wages, social protection, labour costs or GDP per capita.

Consider Romanian pensioners, for example. Their average old-age pension in 2012 was 773 lei[111] which was around 175 EUR at 2012 exchange rate. Assuming this is the only income and assuming that the requirement of sufficient resources for the purposes of the right of residence under Directive 2004/38/EC is met when the income is below the threshold under which EU countries grant guaranteed minimum income benefit,[112] such pensioner would meet the requirement of sufficient resources basically in only eight[113] of twenty-seven Member States. The area of free movement, in which such Romanian pensioners may exercise their fundamental right to move and reside freely, shrinks to less than 1/3 of the EU.

Even richer EU countries are not necessarily better off. Czech Republic was sitting 81 % of average EU GDP per capita in 2012. The Czech average

109. Case C-371/08 *Ziebell*, judgment of 8 December 2001, paragraph 69.
110. Shaw, Miller and Fletcher, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law' Edinburgh Law School Citizenship Studies (2013), page 5 – available at http://www.frictionandoverlap.ed.ac.uk/files/1693_fullreportlowres.pdf.
111. Press release 72 of 1 April 2013, National Institute of Statistics, available at http://www.insse.ro/cms/files/statistici/comunicate/com_anuale/nr_pensionari/pensii_2012e.pdf.
112. MISSOC comparative tables on guaranteed minimum resources, situation on 1 July 2013, available at http://ec.europa.eu/social/main.jsp?catId=815&langId=en.
113. Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovakia.

old-age pension[114] in September 2013 was 10 957 Czech crowns, around 425 EUR. Under the same assumptions as above, an average Czech old-age pensioner would not have a right of residence in 11 Member States.[115]

As van der Mei succinctly put it, 'When taken seriously, Union citizenship ought to be developed in such a way both the 'rich' and the 'poor' can enjoy the rights that come with it.'[116]

Protection of public finances

The legislative discussions on the 2001 proposal have been dominated by the efforts to find an acceptable compromise on *the access of economically non-active EU citizens to social assistance* in the host Member State. It should be repeated (with certain simplification) how the approach of the three most important players evolved in time:

2001 – the Commission proposes that economically non-active EU citizens should be excluded from social assistance before the right of permanent residence is acquired (= 4 years in the proposal);

2002 – the Council deliberates on the proposal and, to protect public funds, adds (quite superfluously) that economically non-active EU citizens should also be excluded from social assistance during the initial period of residence which is not subject to any conditions (= 6 months in the proposal);

February 2003 – the Parliament requests that economically non-active EU citizens have unconditional access to social assistance;

April 2003 – the Commission amends its 2001 proposal and follows the Parliament's request;

December 2003 – the Council, without much fight, partly accepts the amended proposal, but authorises Member States to exclude economically non-active EU citizens from social assistance during the initial period of residence which is not subject to any conditions (= 3 months in the final text).

114. http://www.cssz.cz/cz/o-cssz/informace/media/tiskove-zpravy/tiskove-zpravy-2013/2013-10-30-temer-11-tisic-korun-to-byl-prumerny-starobni-duchod-na-koncizari.htm.

115. Austria, Belgium, Cyprus, Denmark, Finland, France, Ireland, Luxembourg, Malta, Netherlands and the United Kingdom.

116. van der Mei, 'Free Movement of Persons within the European Community – Cross-border Access to Public Benefits' Hart Publishing (2003), page 220.

The issue of the protection of public funds was settled in the Council relatively quickly – in an event, it was not one of the four issues on which the final compromise had to be found in the Competitiveness Council of 22 October 2013 (concept of family members, the length of initial period of residence, the length of residence needed for permanent residence and enhanced protection against expulsion).

There was hardly a reference to possible social tourism in the discussions of the Working Party. This is in a clear contrast with current discussion where some Member States are obsessed with the possibility of social tourism and the need to guard against it and request that EU law is amended.

However, it were the Member States that at the end had the final say on the legislative text (the second reading in the Parliament was symbolic rather than on the substance). It were the Member States that introduced the possibility to exclude economically non-active EU citizens from welfare during the first three months – a restriction that is new in the Directive and which the Commission considered as retrograde.

Directive 2004/38/EC offers effective tools to Member States to protect their public funds against social tourism.[117] The existing legal framework makes it possible to tackle abuse and fraud – this view is shared by the Commission,[118] the Council[119] and the Parliament.[120]

There will always be a certain tension between solidarity (based on the social bond that unites all people) and justice (based on the respect for the differences that set every person apart from the others). These two interests need to be balanced by solidaristic communities and, as Habermas puts it, in the Judeo-Christian tradition 'solidarity and justice are two sides of the same

117. For more on social tourism, see van der Mei, 'Free Movement of Persons within the European Community – Cross-border Access to Public Benefits' Hart Publishing (2003) or, more recently, Groenendijk, 'Access for Migrants to Social Assistance: Closing the frontiers or reducing citizenship?' in Guild, Carrera and Eisele, 'Social Benefits and Migration – A Contested Relationship and Policy Challenge in the EU' CEPS (2013). Groenendijk also analyses available data on welfare tourism in the Netherlands, Germany and the UK.
118. *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013)837 final, 25 November 2013.
119. Council document 17342/13 (press release on the Justice and Home Affairs Council of 5 and 6 December 2013).
120. Resolution on the respect for the fundamental right of free movement in the EU of 16 January 2014 (2013/2960(RSP)).

coin: they provide two different perspectives on the same communication structure'.[121]

Against this background, Directive 2004/38/EC and its solution in relation to the right of residence of economically non-active EU citizens has been described as *'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'*.[122]

The balancing act will always be difficult, regardless of whether it is done at the legislative level or in the context of application of the rules in individual cases – the principle of proportionality requires nothing less.[123]

Regarding the requirement of sufficient resources, the only major problem on the ground is related to the social legislation of some Member States that automatically exclude economically non-active EU citizens from social assistance on the strength of assumption that recourse to social assistance by economically non-active EU citizens (whose right of residence is conditional upon having sufficient resources not to become a burden on the social assistance – see Article 7(1)(b) of Directive 2004/38/EC). This was recently addressed in *Brey*,[124] but the real consequences of this judgment will surely have to be further clarified by the Court of Justice in the judgments to come.

121. More on the tension in Habermas, 'The Inclusion of the Other: Studies in Political Theory' Cambridge Polity Press (2002), page 7 (seq).
122. Lenaerts and Heremans, 'Contours of a European social union in the case-law of the European Court of Justice' European Constitutional Law Review (2006), pp. 101-115, cited in Minderhoud, 'Access to social assistance benefits for EU citizens in another Member State' FMW – Online Journal on Free Movement of Workers within the European Union, No. 6 (2013), page 26.
123. For criticism that the use of the principle of proportionality brings into equation administrative costs, legal uncertainty and arbitrariness, see Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' 31 ELRev. (2006), page 615.
124. Case C-140/12 *Brey*, judgment of 19 September 2013. For a perspective on *Brey*, see Cornelissen, 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy', page 82 (seq) – in Guild, Carrera and Eisele, 'Social Benefits and Migration – A Contested Relationship and Policy Challenge in the EU' CEPS (2013).

2.4.3. Derogations from equal treatment

2.4.3.1. Legislative proposal

2001 proposal

The Commission in Article 21(2) of its 2001 proposal laid down the following derogations from the principle of equal treatment on the grounds of nationality:

Until they have acquired the right of permanent residence, the host Member State shall not be obliged to:

- *confer entitlement to social assistance on persons other than those engaged in gainful activity in an employed or self-employed capacity or the members of their families; or*
- *award maintenance grants to persons having the right of residence who have come to the country to study.*

The Explanatory Memorandum made it clear that the derogation was introduced not to entail undue financial burdens on host Member States in relation to EU citizens who were not engaged in gainful activity there.

In the 2001 proposal the Commission stressed that the derogation had to be read in conjunction with Article 7 of the 2001 proposal which stipulated that economically non-active EU citizens must have sufficient resources and sickness insurance. Recourse to social assistance may challenge their right of residence. The Commission explicitly stressed in the proposal that the notion of social assistance also included free medical benefits provided in national legislations for destitute persons.

The Commission further highlighted that, in the same vein, host Member States were not required to provide maintenance grants to EU citizens coming to the country to study as their principal occupation.

Maintenance grants count as social assistance in the broad sense of the term and, therefore, students should not be eligible for it under the terms of the proposal, since they were required to assure the relevant national authorities that they have sufficient resources to avoid being a burden on the public finances of the host Member State.

It should also be underlined that the proposal authorised Member States not to give social assistance to economically non-active EU citizens during the whole period of residence before acquiring a right of permanent residence.

The Economic and Social Committee
The Committee considered that the Commission's proposal authorised Member States to exclude EU citizens from health care during the pre-permanent residence and concluded that the provision violated the fundamental right to health care.

The Parliament
The Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs proposed to the Plenary to shorten this period of disentitlement down to six months (which was linked to the duration of the period of residence without any conditions or formalities – which was further reduced to three months in the final version of the Directive).

The justification invoked by the Committee seems somehow shaky (e.g. by stating that maintenance aid falls outside the scope of the Treaty and then continuing on legislating on the duration during which maintenance aid can be denied to EU students).

However, this proposal was ultimately not adopted by the Plenary and was replaced by an alternative amendment tabled by the Verts/ALE group that fully removed the possibility for Member States to deny social assistance to economically non-active EU citizens.

2003 amended proposal
The Commission, in its amended proposal, agreed with the amendment. The restriction, which the Commission noted was not provided for in EU law that was replaced by the proposed directive, was considered as retrogressive in relation to the *acquis communautaire* as it stood in 2003, notably in the light of *Grzelczyk*, given some six months after the Commission's initial proposal. The Commission considered that *Grzelczyk* confirmed the entitlement to social assistance of legally resident economically non-active EU citizens.

The Council
Discussions in the Council have been affected by the huge difference between the original proposal of May 2001 and the amended proposal of April 2003. The former authorised Member States not to confer social assistance to economically non-active EU citizens essentially during the first four years of residence; the latter obliged Member States to grant social assistance to economically non-active EU citizens without any derogation.

Taking into the account the amendments brought forward by the Parliament and the Commission in its 2003 amended proposal, the Council in the end adopted a compromise solution that reintroduced the derogation from the

principle of equal treatment that authorised the host Member State not to grant entitlement to social assistance to economically non-active EU citizens, but only during the first three months of residence, i.e. during the period of residence which is not subject to any conditions or formalities, as stipulated in Article 6(1) of Directive 2004/38/EC.

There is preciously little explanation for this decision to be found in the documents of the Council. The common position offers little justification for this decision other than stating that the requirement was made 'in line with new Article 6a' which is related to current Articles 6(1) and 14(1) of Directive 2004/38/EC.[125]

The final decision by the Council should be seen against the background of the keenness of the Council in February 2003[126] (i.e. before the first reading in the Parliament) to explicitly reiterate that economically non-active EU citizens had to right to access to social assistance not only before they have acquired a right of permanent residence (as the proposal provided at that time), but also during the initial period of residence which was not subject to any conditions (i.e. not even the requirement to have sufficient resources).

One issue considered by the Council, but ultimately not featuring in the common position is of importance in relation to current discussions on social tourism and the wider relationship between EU law on free movement of EU citizens and EU law on coordination of social security schemes.

As late as on 29 July 2003 (less than two months before the Council reached the political agreement on the proposal), the Council text[127] of the proposal contained Article 33a of the 2001 proposal that stipulated that the Directive should not affect measures on social security taken in accordance with the Treaty. This proposal by the Commission was tabled at the meeting of the Working Party of 23-24 April 2003[128] (meeting document 7) to address Austrian problems with the extent of the right to equal treatment.

In the second reading by the Council, Austria proposed[129] an amendment of Article 21 of the 2001 proposal to expressly provide that the principle of equal treatment established by the Directive shall not apply to social security

125. For more details on the debate in the Council, see Guild, 'The Legal Elements of European Identity: EU Citizenship and Migration Law' Kluwer Law International (2004), page 33.
126. Council document 6147/03 (footnote 73).
127. Council document 11807/03.
128. Council document 10945/03 (footnote 88).
129. Council document 10572/02 – Annex II.

benefits covered by the non-discrimination clause in EU law on coordination of social security schemes.

The Austrian delegation clarified that EU law on coordination of social security schemes contained a wide-ranging non-discrimination clause. Austria considered that Article 21, as proposed, would make for considerable legal uncertainty and that application of the non-discrimination clause in cases not as yet covered by EU law on coordination of social security schemes (e.g. economically non-active EU citizens) must be brought about within the overall regulatory framework of that EU law.

In May 2013, the Greek Presidency informed[130] the Competitiveness Council that the clarification in Article 33a of the 2001 proposal was part of substantial progress achieved on the sensitive issue of equal treatment.

2.4.3.2. Equal treatment today and tomorrow

Being a fundamental principle of the Single Market, the principle of non-discrimination on the grounds of nationality is safe as such.

In the current climate, however, it is being challenged more and more by Member States seeking to inject a new dose of protectionism in their plans, ranging from straightforward unlawful (such as the calls by some UK politicians to extend the application of transitional arrangements on Bulgarian and Romanian workers) to very likely unlawful (UK plans to exclude newcomers from social housing before they are resident for five years) to possible (plans to make use of Article 24(2) of Directive 2004/38/EC and exclude economically non-active EU citizens from social assistance during the first three months of residence).

2.4.4. Right to remain

2.4.4.1. Legislative proposal

2001 proposal

The Commission was mindful of the serious gap in EU free movement law that foresaw no possibility to retain a right of residence for family members who find themselves unable to continue to derive their right of residence in the host Member State from being family members of an EU citizen who is exercising his or her EU right to move and reside freely in the event of death, departure or divorce. This right is doubly important for family members who

130. Council document 8901/03 – point II.7.

are not EU citizens themselves as they cannot rely on their personal right to move and reside freely, guaranteed by EU law.

All three failed proposals of 1979, 1989 and 1998 provided for some sort of protection but they never made it to be adopted.

Articles 12(2) and 13(2) of the 2001 proposal provided the following in relation to non-EU family members:

– *the EU citizen's death or departure from the host Member State shall not entail loss of the right of residence;*
– *divorce shall not entail the loss of the right of residence where:*
  a) prior to the initiation of the divorce proceedings, the marriage has lasted at least five years, including one year in the host Member State; or
  b) by agreement between the spouses or by court order, the spouse has custody of the EU citizen's children; or
  c) this is warranted by particularly difficult circumstances.

Before acquiring the right of permanent residence, the non-EU family members wishing to retain their residence would essentially have to be engaged in gainful activity or have sufficient resources to avoid becoming a burden on the social assistance system for the duration of their stay and have sickness insurance cover covering all risks in the host Member State.

The Explanatory Memorandum stated that the rationale behind the introduction of the right to remain was that under EU law as it stood in 2001 the right of residence might have been taken away from divorced spouses and from children who are no longer minors or dependent on the EU citizen, regardless of their nationality. The Proposal placed emphasis on dignity and prevention of blackmail of non-EU family members with threats of divorce.

The Committee of Regions
The Committee was pleased that non-EU family members would not have their right of residence taken away from them.

The Economic and Social Committee
The Committee regarded the wording of the possibility to retain the right of residence in the event of divorce when 'warranted by particularly difficult circumstances' as ambiguous and imprecise and asked the wording to be made more explicit by referring, inter alia, to family, domestic and gender violence, both psychological and physical in nature.

The Parliament

The Parliament introduced Amendment 45 that provided for a protection on social grounds of all EU citizens and their family members who were no longer meeting the conditions the Directive attaches to the right of residence in the event of serious sickness, accident or other humanitarian reasons.

The 2001 proposal foresaw five years duration of the marriage to prevent marriages of convenience that would get round the residence entitlement rules. The Parliament shortened the period down to two years as it considered five years to be too long.

2003 amended proposal

The Commission in its 2003 amended Proposal did not accept the Parliament's Amendment 45 as inconsistent with the Commission proposal.

The Council

Current Article 14(1) of Directive 2004/38/EC was essentially formally introduced only in 2003 by the Parliament in its first reading. However, already in the first Council reading[131] in 2001, some Member States requested to make it apparent that there is possibility of refusing/terminating the right of residence when the conditions for exercising that right are not or are no longer fulfilled, which the Commission considered as covered by Article 24 of the original 2001 proposal.

The introduction of this right did not represent a difficult issue during the deliberations in the Council and there have only been relatively minor changes introduced by it. Upon a Greek proposal, the Council introduced the possibility to retain the right of residence in the event of divorce where the non-EU spouse or registered partner has the right of access to a minor child in the host Member State by agreement between the spouses or by court order.

The Council also introduced the requirement of one-year residence in the host Member State to retain the right of residence in the event of death and three-year residence in the event of divorce.

2.4.4.2. Right to remain today and tomorrow

The transposition of the right to remain provisions of Directive 2004/38/EC has been mostly free of problems.

This was not the case for the EFTA countries where Directive 2004/38/EC also applies by virtue of the EEA Agreement, being a part of the Single Mar-

131. Council document 15380/01 (footnote 17).

ket. In the process of negotiating the adaptation of the relevant annexes to the EEA Agreement following the adoption of Directive 2004/38/EC, EFTA countries considered that the independent right of residence for non-EU family members goes beyond the Single Market rules and that these rights emanate from EU citizenship which is not covered by the EEA Agreement. Only after the Commission threatened to suspend the whole Agreement, the EFTA countries have agreed not to derogate from these provisions of Directive 2004/38/EC.

The Commission launched infringement proceedings against the Czech Republic[132] that has not fully transposed Article 13(2)(c) of Directive 2004/38/EC by referring to domestic violence only in an administrative circular, and not in the legislation transposing Directive 2004/38/EC. The Commission considered that it is of utmost importance to have explicit rules in national legislation (which, unlike the administrative circular, is public) to inform victims of domestic violence that they do not have to be afraid to initiate divorce proceedings for fear of losing their right of residence.

While the transposition of the right to remain has been fairly smooth (leaving aside the well-known case-law[133] of the Court of Justice on Article 12(3) of Directive 2004/38/EC), there are some problems of practical application.

In the event of divorce where the ex-spouses are not on friendly terms, non-EU family members wishing to rely on Article 13(2)(a) of Directive 2004/38/EC may encounter challenges when having to demonstrate that the EU ex-spouse has been lawfully residing in the host Member State at the day when divorce became final.

Under Article 13(2)(a) of Directive 2004/38/EC, non-EU family members may retain the right of residence where the marriage has lasted at least three years prior to initiation of the divorce proceedings. However, to be able to retain the right of residence at the moment when the family tie is finally severed, it is necessary that the EU citizen has not in the meanwhile stopped to exercise the EU free movement rights in the host Member State, otherwise there would be no right to retain (in the event of departure of the EU citizen from the host Member State, there is no possibility for non-EU family members to retain their right of residence under Article 12(2) of Directive 2004/38/EC).[134]

132. The Commission's press release, http://europa.eu/rapid/press-release_IP-12-75_en.htm.
133. Cases C-310/08 *Ibrahim* and C-480/08 *Teixeira*, judgments of 23 February 2010.
134. This issue was addressed by UK courts – see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552.

As the burden of proof lies on the non-EU family member to provide all the necessary evidence that the conditions of Directive 2004/38/EC have been met, it is sometimes extremely difficult for the non-EU family member concerned to provide the evidence where the EU ex-spouse refuses to cooperate. In such situation, while it may be nigh impossible for the non-EU family member to provide the required evidence, all the necessary evidence may be easily available to the national authorities, (but not necessarily the same as those deciding on whether the right of residence has been retained).

Regardless of whether the procedure aiming to establish whether the right of residence has been retained is adversarial in its nature or not, Member States should not act in a way that would frustrate the aims of Directive 2004/38/EC and try to find a solution. In the UK, for example, the Asylum and Immigration Tribunal (Procedure) Rules 2005 authorise the applicants to seek a direction requiring the national authorities to provide any information necessary for the determination of their appeals.

2.4.5. Right of permanent residence

2.4.5.1. Legislative proposal

2001 proposal

Concerning the right of permanent residence, one of the greatest innovations of the 2001 proposal, Article 14 stipulated that

– *An EU citizen who has resided legally and continuously for four years in the host Member State shall have the right of permanent residence there.*
– *This right shall apply also to non-EU family members who have resided with the EU citizen in the host Member State for four years.*

The Explanatory Memorandum stressed that the right of permanent residence after four years of continuous legal residence there was a new right introduced as a corollary of the fundamental personal right conferred by the Treaty on every EU citizen.

The proposal conceded that there already existed a certain right of permanent residence (right to remain), but this right was narrow and subject to restrictive conditions. The proposal itself labelled the newly introduced right of permanent residence as *'an upgraded right of residence'*.

The original duration of four years was proposed against the background of the proposal for the Long-term Residence Directive[135] that foresaw a right of permanent residence for non-EU nationals after five years of residence. The Commission intended to make the acquisition of the permanent residence easier for EU citizens than to non-EU nationals.

The Committee of Regions
The Committee welcomed the establishment of the right of permanent residence and considered that the four-year qualification period was sufficient to provide an acceptable level of integration in the host Member State.

The Economic and Social Committee
The Committee regarded the introduction of this right as one of the most noteworthy improvements and asked to allow for the possibility to acquire this right without the need to prove a specified period of residence.

The Parliament
The report on the proposal labelled the right of permanent residence as the most important new provision contained in the proposal. In the first reading the Parliament proposed only a minor amendment on the continuity of residence for the purposes of acquiring the right of permanent residence.

The Council
The right of permanent residence, as a new concept, was welcomed by the Council and the discussions revolved mainly around two issues – whether the right of permanent residence should also be offered to students and whether this right should be acquired after four years of residence.

In the first Council reading,[136] Greece, Germany, and Austria wanted to exclude students from the possibility to acquire a right of permanent residence. Denmark, the Netherlands and Finland joined this request in the second reading.[137] Their objections were resolved only at the very end of the

135. Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16, pp. 44-53.
136. Council document 15380/01 (footnote 47).
137. Council document 10572/02 (footnote 65).

process[138] in the Council in September 2003 where the duration of residence was prolonged to five years from the initially proposed four years.

The question of the duration of the residence needed to acquire the right of permanent residence was indeed one of the last issues to be resolved by the Council and was agreed only by the Competitiveness Council that reached the political agreement on the text.[139]

2.4.5.2. Permanent residence today and tomorrow

In a sharp contrast with the way in which the Member States approached the introduction of a new right of permanent residence, there were remarkably many problems in the transposition of Article 16 of Directive 2004/38/EC to EU citizens in non-standard situations.

In *Dias*,[140] the Court of Justice ruled on the right of permanent residence of Ms Dias, a Portuguese national residing in the UK for more than 19 years. The Court of Justice was looking into the periods of residence when Ms Dias was issued with a valid residence document under EU law (Directive 68/360/EEC), but without meeting the conditions attached to the right of residence under EU law. Having considered the question whether residence documents are declaratory in nature or whether they create rights, the Court of Justice analysed its previous case-law on the nature of residence documents, and concluded that residence documents were indeed declaratory.

The Court of Justice added that the declaratory character of residence documents meant that the periods of residence completed without meeting the underlying conditions attached to the right of residence cannot count towards the right of permanent residence (which requires lawful residence – i.e. residence in accordance with the conditions of Directive 2004/38/EC).

This is not a fully satisfactory outcome – valid residence documents issued under EU law must have more value than being merely declaratory. In at least one Member State the competent national authorities consider that the judgment has vindicated their opinion that residence documents issued under Di-

138. Firstly proposed in Council document 12538/03 which included the text of the proposal on which the Council reached the political agreement by qualified majority on 22 September 2003.

139. Compare Council document 12218/03 of 5 September 2003 (according to which a majority of delegations agreed with the 4-year proposal (Denmark, Germany, Luxembourg, the Netherlands and Austria preferred five years) with Council document 12538/03 of 16 September 2003 (in which the Italian presidency proposed to extend the period of residence to five years).

140. Case C-32/09 *Dias*, judgment of 21 July 2011.

rective 2004/38/EC confirm that the right of residence under Directive 2004/38/EC has existed only on the date on which the document was issued (given the declaratory nature of the document, it cannot be assumed that the conditions attached to the right of residence continue to be met in the future).

Such interpretation strips much of the added value of registration certificates under Directive 2004/38/EC. Who would ever apply for it, knowing that the document is next to useless already the next day? Why would ever Member States introduce the registration scheme under Article 8(1) of Directive 2004/38/EC, investing a lot of resources and creating red tape, just to issue registration certificates with effective validity of one day?

Moreover, holders of a valid registration certificate may reside legitimately expecting that their residence is lawful just on strength of a valid and uncontested registration certificate or, like in the case of Ms Dias, residing in the UK for 19 years without her residence ever being contested by the national authorities.

The UK practice of tolerated residence (where EU citizens are allowed to stay and their residence is not contested by the UK immigration authorities, but other authorities – such as authorities responsible for income support, as was the case in *Dias* – refuse to grant any rights stemming from the right of residence) leaves much to be desired, notably in relation to the principle of legitimate expectations.

Report by the Commission on the application of Directive 2004/38/EC[141] flagged, in particular, that some Member States (UK and Belgium) incorrectly took no account of periods of residence acquired by EU citizens before their countries acceded to the EU.

This issue was partly addressed by the Court of Justice in *Lassal*[142] where it was confirmed that periods of residence completed before the date of transposition of Directive 2004/38/EC in accordance with earlier EU law instruments, must be taken into account for the purposes of the acquisition of the right of permanent residence. In *Ziolkowski and Szeja*,[143] the Court of Justice ruled that periods of residence completed before the accession must be taken into account for the purpose of the acquisition of the right of permanent resi-

141. *Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM(2008)840 final of 10 December 2008.
142. Case C-162/09 *Lassal*, judgment of 7 October 2010.
143. Joined cases C-424/10 *Ziolkowski* and C-425/10 *Szeja*, judgment of 21 December 2011.

dence, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of Directive 2004/38/EC.

Another 'edge' of Directive 2004/38/EC was resolved by the Court of Justice in *Alarape*[144] where it held that periods of lawful residence under Article 12 of Regulation (EEC) 1612/68 completed by the parent of a child in education do not count toward the right of permanent residence under Directive 2004/38/EC, despite the ruling in *Lassal* which confirmed relevance of periods of residence under EU legislation instruments. The Court of Justice expanded on this in paragraph 41s seq. of *Alarape* where it stressed that the reference to earlier EU law instruments, used in *Lassal*, must be understood as referring to the instruments which Directive 2004/38/EC codified, revised and repealed.

Alarape is not the final piece of the puzzle of which kind of residence is good for the purposes of permanent residence. One more piece was added in *Onuekwere*[145] which confirmed that the periods of imprisonment in the host Member State of non-EU family members do not count in the context of the acquisition of the right of permanent residence.

Another piece will surely be added in the years to come and answer a tricky question of whether another category of persons could claim permanent residence under Directive 2004/38/EC – notably parent/primary carers of minor EU citizens falling under *Zhu and Chen*[146] ruling. Such parents reside under EU legislation which was replaced by Directive 2004/38/EC (in the operative part of the judgment in *Zhu and Chen* the Court of Justice underlined that Directive 90/364/EEC allows the parent to reside in the host Member State) so *Lassal*, as interpreted in *Alarape*, would appear to apply. Yet, the right of residence of such parents/primary carers is derived from the temporary need to allow the minor EU citizen to reside (as was in *Zhu and Chen*) or to allow the EU student to finish the studies (as was in *Alarape*).

For the future proposals amending Directive 2004/38/EC, it may be possible to shorten the period of residence needed to qualify for permanent residence down to four years. The current situation, where there is no difference between the qualification periods for EU citizens and non-EU nationals under the Long-Term Residence Directive.

144. Case C-529/11 *Alarape*, judgment of 8 May 2013.
145. Case C-378/12 *Onuekwere*, judgment of 16 January 2014.
146. Case C-200/02 *Zhu and Chen*, judgment of 19 October 2004.

2.4.6. Enhanced protection against expulsion

2.4.6.1. Legislative proposal

2001 proposal

Strictly speaking, the 2001 proposal foresaw no enhanced protection of EU citizens against expulsion of the grounds of public policy or public security. Article 26(2) of the 2001 proposal provided for absolute protection against expulsion in relation to the beneficiaries of the right of permanent residence and all family members who were minors. It provided that:

> The host Member State may not take an expulsion decision on grounds of public policy or public security against EU citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory or against family members who are minors.

The Explanatory Memorandum stated that one of the aims of the proposal was to provide a tighter definition of the circumstances under which the right of residence right of EU citizens and their family members may be restricted.

The proposal did not envisage any sort of enhanced protection against expulsion – Member States were entitled to restrict the right to move and reside freely on the grounds of public policy or public security in relation to EU citizens and their non-EU family members who have not yet acquired a right of permanent residence, but were absolutely prohibited from expelling those who had a right of permanent residence or who are minors.

The first group was protected on the strength of their ties with the host Member State where they have integrated. An expulsion was described by the proposal as measure with a very serious impact on the person concerned, destroying the emotional and family ties they have developed in the host country. Minors were protected on humanitarian grounds.

The Committee of Regions

The Committee considered that the protection against expulsion was especially important for minors with family ties in the host Member State.

The Economic and Social Committee

The Committee was concerned about the proposed prohibition of restrictions on the right to move and reside freely taken solely on the grounds of a previous criminal conviction. It considered that some grave crimes (such as terrorism, trafficking in weapons or drugs and crimes against the person) should be sufficient to warrant restrictive measures.

The Parliament

In relation to the Commission's proposal to introduce an absolute ban on the expulsion in some cases, the Rapporteur, in his personal capacity, noted in the Explanatory statement accompanying his report that such a ban puts an end to the historic national sovereignty in this area. He considered this to be a consequence of the creation of a border-free area of freedom, security and justice, in which expulsion is a thing of the past and freedom of movement has become a reality for all.

At the end, the Parliament decided not to introduce any amendments in relation to the enhanced protection against expulsion.

The Council

In the first reading,[147] the Council expressly confirmed that one of the main objectives of the new directive was to restrict the possibility for Member States to restrict right of residence on the grounds of public policy.

However, one right the Member States did not want to see restricted, was the possibility to expel EU citizens on the grounds of public policy or public security. Already in the first reading almost all Member States[148] (with the exception of Italy and even the Italian defence of the Commission's proposal was half-hearted) did not want to abandon the possibility of expelling a person altogether, notably if that person was a non-EU family member.

In October 2002, the Danish presidency proposed[149] to Coreper and then to the Competitiveness Council a compromise proposal that would allow the host Member State to expel those who have acquired permanent residence or were minors only in exceptional circumstances, on particularly serious grounds of public policy or public security.

In the next months, the compromise proposal was further tweaked (some versions offering an absolute protection to minors or those who were born in the host Member State, where they have resided their whole life (apart from absences due to military service and studies, not exceeding six years in total),[150] others adding vocational training to the list[151]).

One noteworthy late proposal did not make it to the adopted text. Council document 12538/03 of 16 September 2002 contained a text of Recital 22, submitted by the German delegation that clarified the concept of 'imperative'

147. Council document 5758/02 of 30 January 2002.
148. Council document 5758/02, footnote 15.
149. Council document 13298/08, part 3.
150. Council document 10945/03 (Article 26(3)).
151. Council document 12218/03 (Article 26(3)).

grounds. According to the proposal, which did not survive in the next Council document, this concept may apply to persons proven to be members of an organisation which supports international terrorism, who support such an organisation, who have committed a crime against peace, a war crime or a crime against humanity, or who have incited racist hatred.

Regarding the question of whether non-EU family members are covered by the enhanced protection against expulsion under Article 29(3) of Directive 2004/38/EC, which – unlike Articles 29(1) and (2) of Directive 2004/38/EC – does not refer to family members, the Council document expressly confirmed[152] that non-EU family members should not be covered.

2.4.6.2. Enhanced protection today and tomorrow

The intersection between fundamental right to move and reside freely, on the one hand, and entitlement on the part of the Member States to restrict that right on the grounds of public policy and public security has been around for decades. There is no shortage of case-law in the area, with many aspects settled and widely accepted.

Against this background, it does not come as a surprise that the developments in case-law concerned mainly the innovations introduced by Directive 2004/38/EC, primarily the enhanced protection against expulsion linked to the duration of residence (five years for the first enhancement and ten years for the second one).

The ability to restrict free movement rights seems to be dear to the Member States. This is not only demonstrated by their almost unanimous rejection of the Commission's proposal introducing absolute protection against expulsion for some categories of EU citizen, but also by the number of cases on the interpretation of this entitlement under Directive 2004/38/EC by the Court of Justice.

There seem to be two major trends emerging from the recent case-law on Directive 2004/38/EC. The first strand comes from the following cases where the Court of Justice found that:

– Directive 2004/38/EC does not preclude national laws that allow for restrictions on exit of own nationals who have previously been repatriated from another Member State on account of their 'illegal residence' there.[153]

152. Case C-249/11 *Byankov*, judgment of 4 October 2012.
153. Case C-33/07 *Jipa*, judgment of 10 July 2008.

– Dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling an EU citizen who has resided in the host Member State for the preceding 10 years.[154]
– It is open to the Member States to regard criminal offences listed in Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security', as long as the manner in which such offences were committed discloses particularly serious characteristics.[155]
– Directive 2004/38/EC does not preclude national laws that permit the restriction on exit of own nationals who have been convicted of narcotic drug trafficking in another Member State.[156]
– Directive 2004/38/EC does not preclude national laws that permit the restriction on exit of own nationals where tax liability of a company of which they are one of the managers has not been settled.[157]
– A period of imprisonment is capable both of interrupting the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38/EC and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment.[158]
– A period of imprisonment breaks the continuity of residence required for the acquisition of the right of permanent residence, and thus also the enhanced protection against expulsion under Article 28(2) of Directive 2004/38/EC.[159]

Admittedly, the Court of Justice was at pains to qualify most of the rules established in the above judgments, but one thing stands out from those rulings – the Court of Justice was meticulously ensuring that it cannot be seen as an insurmountable obstacle to expulsion by interpreting the enhanced protection against expulsion as any sort of an absolute prohibition.

154. Case C-145/09 *Tsakouridis*, judgment of 23 November 2010.
155. Case C-348/09 *P.I.,* judgment of 22 May 2012.
156. Case C-430/10 *Gaydarov*, judgment of 17 November 2011.
157. Case C-434/10 *Aladzhov*, judgment of 17 November 2011.
158. Case C-400/12 *MG*, judgment of 16 January 2014.
159. Case C-378/12 *Onuekwere*, judgment of 16 January 2014.

This willingness is best demonstrated in the last judgment rendered by the Court of Justice in *MG* where it essentially ruled that EU citizens residing for more than ten years in the host Member State may be disqualified from the protection of Article 28(3)(a) of Directive 2004/38/EC (i.e. being able to be removed only on the imperative grounds of public security) just because they were imprisoned after the qualifying period was acquired. Given that imprisonment quite naturally follows any criminal conduct, it would appear that the enhanced protection against expulsion is not so enhanced after all. It may very well be that it is no protection at all ...

This approach should be seen against the background of the case-law on the actual procedural safeguards EU citizen enjoy under Directive 2004/38/EC where the Court of Justice is a strong defender of EU citizens.

In *Byankov*,[160] the Court of Justice emphatically demolished Bulgarian rules that made it impossible to reopen a decision which was adopted in breach of EU free movement law. In *ZZ*,[161] the Court of Justice did the same job in relation to 'secret' court proceedings where the EU citizen was not told about the grounds for restrictive decision because of public security grounds.

The strong attachment of the Member States to the possibility of restricting free movement on the grounds of public policy or public security and the Court of Justice's willingness not to stand as an obstacle to this means that no absolute protection against expulsion is likely for the foreseeable future. However, procedural safeguards of EU citizens that help them fight arbitrary or incorrect decisions restricting their rights are being strengthened by the Court of Justice.

In this forge, between the ever-moving hammer of public interests and the constant anvil of free movement rights and safeguards, the delicate balance between those often competing rights is being made.

3. EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU law

Recent case-law such as *Ruiz Zambrano*[162] and *Rottmann*[163] not only revived the academic debate surrounding EU citizenship and free movement, but also

160. Case C-300/11 *ZZ*, judgment of 4 June 2013.
161. Council document 12218/03 (point III.4).
162. Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011.
163. Case C-135/08 *Rottmann*, judgment of 2 March 2010.

had considerable effects on the work of EU institutions, and namely the Commission as guardian of the Treaties.

The national legal professions swiftly took up this new case-law,[164] and *Ruiz Zambrano* in particular, in view of 'testing' its boundaries and opportunities for counselling and litigation. In this process, also an increasing number of citizens' complaints, petitions and parliamentary questions on the consequences of this new line of jurisprudence were brought to the institutions.

This stimulating effect can be explained by the fact that it appeared to offer a whole new world of EU law-argumentation to long-standing constellations and issues that were considered problematic or unsatisfactory, but for which no EU law remedy seemed traditionally in reach. This is namely the case for issues such as 'purely internal situations', 'reverse discrimination'[165] (see section 3.1 below) and, as far as *Rottmann* is concerned, the question how free Member States actually are when acting within their purely national competence of laying down the conditions of acquisition and loss of their nationality (see section 3.2 below).

164. Case C-434/09 *McCarthy*, judgment of 5 May 2011; case C-256/11 *Dereci*, judgment of 15 November 2011; case C-40/11 *Iida*, judgment of 8 November 2012; joined cases C-356/11 and C-357/11 *O & S*, judgment of 6 December 2012; case C-87/12 *Ymeraga*, judgment of 8 May 2013; case C-86/12 *Alokpa*, judgment of 10 October 2013; Advocate General Sharpston in case C-456/12 *O* and case C-457/12 *S*, opinion of 12 December 2013.

165. See e.g. Oosterom-Staples, 'To what extent has reverse discrimination been reversed?' European Journal of Migration and Law 14 (2012), pp. 151-172.

See also, Opinion of Advocate General Sharpston in case C-456/12 *O* and case C-457/12 *S*, 12 December 2013 at paragraph 86, 87: 'Why a Member State would wish thus to treat its own nationals less favourably than other EU citizens (who, except for their nationality, might very well be in identical or similar circumstances) is curious. So is the fact that, by denying residence, that Member State might be at risk of de facto 'expelling' its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. Such a measure sits oddly with the solidarity that is presumed to underlie the relationship between a Member State and its own nationals. It is also difficult to reconcile with the principle of sincere cooperation that, in my view, applies between Member States just as it does between Member States and the Union. (...). Yet, the written observations and the oral submissions in the present cases show that a considerable number of Member States consider that EU law does not preclude them from doing exactly that.'

3.1. The *Ruiz Zambrano* case line: where do we stand?

It does not come as surprise that the most interesting practical questions of the *Ruiz Zambrano* case line are linked to the status of non-EU national family members of EU citizens. Their situation has been in the overwhelming majority of cases, i.e. in case of *non-mobile* EU citizens, been regulated by purely national migration law and not by EU law, the latter being the case for *mobile* EU citizens and for family reunifications amongst non-EU nationals.

In some Member States purely national migration rules have traditionally been more restrictive than related EU laws which are the result of negotiation and compromise, reflecting different views on and experiences with 'migration management'. Therefore, the emergence of an EU law-avenue in national, entrenched legal battle-zones is always an invigorating experience, for both academia, practitioners and, of course, the concerned individuals: Union light at the end of a national tunnel.

In this respect, it is not without irony to observe that what has been described as the emancipation of EU citizenship '*from the constraints inherent in its free movement origins*'[166] which '*demonstrates the paramount constitutional importance of EU citizenship*'[167] takes it, origin from a classical migration law constellation and that the '*fundamental status of the nationals of the Member States*' is manifested and gains autonomy via case-law that has it most practical implications for rights which are only *'derived'* from EU citizens.[168]

This emancipation of EU citizenship from its free movement origins was not only accompanied with excitement, but also with confusion and uncertainty. Did we witness the beginning of a new era, or was *Ruiz Zambrano* an exceptional *one-off*, unnecessarily constructed around a wider *Überbau*?[169]

166. Lenaerts, 'The concept of EU citizenship in the case law of the European Court of Justice' ERA Forum 13 (2013), pp. 569-583 at p. 570.
167. Ibid. p. 582.
168. With details on this derived rights, see Opinion of Advocate General Sharpston in case C-456/12 *O* and case C-457/12 *S*, 12 December 2013, paragraph 45 (seq).
169. See Oosterom-Staples, 'To what extent has reverse discrimination been reversed?' European Journal of Migration and Law 14 (2012), pp. 151-172 at p. 171: 'Fair enough, the protection of dependent minors is a goal worth pursuing, but if the genuine enjoyment-test was only designed to provide an adequate solution for the Ruiz Zambrano case because it involved young, dependent children, why not spell this out explicitly?'.

Three years into the discovery of EU citizenship as an 'autonomous concept'[170] and a whole series of judgments later, one can safely say that more clarity is gradually emerging.

Indeed, despite several argumentative attempts, the Court of Justice has so far refused to apply the *Ruiz Zambrano* solution to any other constellation than that of minor children who would be forced to leave the territory of the EU '*as a whole*'.[171] The Court of Justice regularly underlines the 'exceptional circumstances'[172] and the 'very specific situations' of its initial finding. As one commentator said, an 'expansionist phase' was quickly succeeded by a 'rationalising phase', criticising '*the Court's reticence in exploring the real potential of the status of Union citizenship*'.[173] However within this frame, the Court of Justice also confirmed that the *Ruiz Zambrano* logic is by no means limited to mere blood relationship between the minor EU citizen and his non-EU national parent(s), nor is it necessary that the family is actually living together under the same roof[174] (patchwork families).

Furthermore, the Court of Justice has also contributed in clarifying how to practically handle a case involving residence rights of non-EU national family members of EU citizens, combining previous case-law with the *Ruiz Zambrano*-line[175] as well as secondary law with a direct application of primary law (Articles 20 and 21 TFEU).

A check of applicability of secondary EU law as laid down in Directive 2004/38/EC is the first step. In doing so, national courts will have to go beyond a literal interpretation of Articles 3 and 7 of Directive 2004/38/EC when ascertaining 'who his dependent of whom?' and who has 'sufficient re-

170. Lenaerts, 'The concept of EU citizenship in the case law of the European Court of Justice' ERA Forum 13 (2013), pp. 569-583 at p. 582.
171. *Dereci*, judgment of 15 November 2011, paragraph 66.
172. Joined cases C-356/11 and C-357/11 *O* & *S*, judgment of 6 December 2012, paragraph 55.
173. Tryfonidou, 'Case Note – (Further) Signs of a Turn of the Tide on the CJEU's Citizenship jurisprudence, Case C-40/11 Iida, judgment of 8 November 2012, not yet reported' Maastricht Journal of European and Comparative Law (2013), pp. 302-320 at p. 320.
174. Joined cases C-356/11 and C-357/11 O & S, judgment of 6 December 2012, paragraphs 54, 55. See on this, Tewocht, 'Von Zambrano bis O. und S. – Zur (Weiter-)entwicklung der Kernbereichsrechtsprechung des EuGH' Zeitschrift für europarechtliche Studien, 16 (2013), pp. 219-237.
175. Case C-86/12 *Alokpa*, judgment of 10 October 2013.

sources' by having due regard to yet another line of important case-law, i.e. *Zhu and Chen*[176] and Article 21 TFEU.

In *Alokpa*, the Court of Justice held

'(...) that a refusal to allow a parent, whether a national of a Member State or of a third country, who is the carer of a minor child who is a Union citizen to reside with that child in the host Member State would deprive the child's right of residence of any useful effect, since enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence (see Zhu and Chen, paragraph 45, and Iida, paragraph 69).

Thus, while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State (see, to that effect, Zhu and Chen, paragraphs 46 and 47).'[177]

Only once the conditions of Directive 2004/38/EC read literally and in light of *Zhu and Chen* are not fulfilled, there is space to consider a direct application of Article 20 TFEU in line with the *Ruiz Zambrano* logic and as illustrated in the *Alokpa* case:

'(...) Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the EU altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.'[178]

It has to be noted that this latest clarification in the *Alokpa* case concerned minor children born and residing in Luxembourg which, however, held French nationality, although they never resided in France. Although this case concerned not a 'purely internal situation' as was the case in *Ruiz Zambrano*, the Court of Justice nevertheless combined and synthesised the different applicable strands of its jurisprudence.

Coming back to where we started: '*Ruiz Zambrano*: where do we stand'? The welcome discovery of EU citizenship as an autonomous concept has ini-

176. Case C-200/02 *Zhu and Chen*, judgment of 19 October 2004.
177. Case C-86/12 *Alokpa*, judgment of 10 October 2013, paragraphs 28 and 29.
178. Case C-86/12 *Alokpa*, judgment of 10 October 2013, paragraph 33.

tially led to excitement and confusion. The growing subsequent case-law has contributed in clarifying issues of substance and of practical application. The achieved state of emancipation of EU citizenship has been defended and upheld, but the Court of Justice, so far, refused to extending it further. There remains room for exploring the depth of the *Ruiz Zambrano* jurisprudence even within its confided boundaries, as illustrated by its application to patchwork families. One can question, for example, whether legal minority is a decisive criterion or whether also grown-up EU citizens that are otherwise 'dependent' on a non-EU national parent (e.g. due to disability) could benefit from the *Ruiz Zambrano* jurisprudence.[179]

Finally, there remains also room for further clarification, in particular, subsequent case-law would benefit from further clarifying the references, introduced in *Dereci*[180] (one of the first follow-up cases to *Ruiz Zambrano*) to the EU Charter and the European Convention on Human Rights, its precise meaning and delineation.[181]

3.2. The *Rottmann* case line: new answers to a recurring issue?

In contrast to litigation and academic debates triggered by *Ruiz Zambrano* which mainly aimed at testing its practical effects and limitations[182] to enhance individual rights, the discussions around *Rottmann* took the debate well beyond the issue of the deprivation of an individual's status as EU citizen and

179. See on this, e.g. Tewocht, 'Von Zambrano bis O. und S. – Zur (Weiter-)entwicklung der Kernbereichsrechtsprechung des EuGH' Zeitschrift für europarechtliche Studien, 16 (2013), pp. 219-237 at p. 236.

180. Case C-256/11 *Dereci*, judgment of 15 November 2011.

181. See, in this respect also Opinion of Advocate General Sharpston in case C-456/12 *O* and case C-457/12 *S*, 12 December 2013, paragraphs 57, 58: '(...) I find that passage puzzling as it might be read as suggesting that there the Court recognised three separate bases under EU law: the right to respect for private and family life (Article 7 of the EU Charter); the right of free movement and residence (Article 21(1) TFEU) and the denial of the genuine enjoyment of the substance of the rights conferred on an EU citizen (Article 20 TFEU). For situations not falling within the scope of EU law, the right to respect for private and family life under Article 8 of the ECHR might form another basis for establishing a right of residence. (...) If that is what the Court intended, the Court has yet to resolve whether one applies the same test in order to determine both whether EU law (and thus also the EU Charter) applies and whether a measure denying residence is contrary to Article 20 or 21 TFEU. (...)'.

182. Case C-40/11 *Iida*, judgment of 8 November 2012, paragraph 71; case C-87/12 *Ymeraga*, judgment of 8 May 2013, paragraph 36.

of the rights attached to it. Findings were used for public policy considerations aimed at challenging the traditional understanding that Member States are free to act autonomously in the field of acquisition of nationality (and thus, EU citizenship).

The most prominent recent example of controversy concerns the so called 'investor citizenship schemes' which offer Member State nationality – and therefore EU citizenship – in return for financial investment alone. These schemes have attracted wide public attention and culminated in a plenary debate in the Parliament in January 2014. The main question posed: is there an EU law case for questioning Member States' autonomy when granting naturalisation?[183]

States have the sovereign right to determine who their nationals are and to define the conditions for the acquisition of their nationality. This principle is enshrined in Article 3 of the European Convention on Nationality[184] and was underlined at the Maastricht negotiations where, as a counterpart to the creation of EU citizenship, Member States declared '*that the question whether an individual possesses the nationality of a Member state shall be settled solely by reference to the national law of the Member State concerned*'.[185]

This principle is fully respected by Article 20 TFEU and the Court of Justice regularly recalls that 'it is for *each Member State, having due regard to EU law, to lay down the conditions for acquisition and loss of nationality*'.[186] The proviso '*having due regard to EU law*' is central to the discussion. By including it in its rulings the Court of Justice makes clear that even when a matter falls within the competence of the Member States, this does not alter the fact that, where there is a nexus with EU law, the national rules concerned must have due regard to the latter.

In *Rottmann*, the Court of Justice indicated that, in respect of EU citizens, the exercise by Member States of their power to lay down the conditions for the acquisition and loss of nationality, in so far as it affects the rights conferred and protected by the legal order of the European Union (as is in particular the case of a decision effectively resulting in loss of EU citizenship), is amenable to judicial review carried out in the light of EU law.

183. 'Should Citizenship be for Sale?' EUI Working Paper, RSCAS 2014/1, edited by Shachar and Bauböck, and in particular Shaw, 'Citizenship for sale: could and should the EU intervene?', page 33 seq.
184. European Convention on Nationality, Strasbourg, 6 November 1997.
185. Declaration n°2 annexed to the Treaty of Maastricht.
186. See case C-369/90 *Micheletti*, judgment of 7 July 1992, case C-192/99 *Kaur*, judgment of 20 February 2001 and case C-135/08 *Rottmann,* judgment of 2 March 2010.

Although *Rottmann* concerned a withdrawal of a national citizenship acquired by deception, it is however interpreted by part of the literature[187] as paving the way for further aspects of Member States' nationality laws to be potentially considered as falling by reason of their nature and consequences within the ambit of EU law.

It is notably argued that the Court's approach could potentially also apply to refusals to grant nationality of a Member State to non-EU nationals in the first place, preventing for instance refusals for disproportionate reasons. It is contended, in particular, that to the extent that it implies that a refusal by Austria to re-instate Mr Rottmann's original nationality might be challengeable under EU law, this judgment suggests that it is not just the act of withdrawal of nationality that is governed by EU law. Others[188] even go a step further and support the view that national measures determining the scope of national citizenship, such as could be the case for naturalisation conditions, also affect the scope of EU citizenship and of EU rights.

Since the *Rottmann* judgment brings under judicial review in the light of EU law the exercise by Member States of their power to lay down the conditions for *the acquisition* and loss of nationality in general, it seems to leave open the above possibilities and it cannot be excluded that the Court of Justice might extend its reasoning to aspects relating to access to national citizenship in the future.

However, the Court of Justice took care to circumscribe the scope of its approach: it made a point of distinguishing this case from *Kaur*, an earlier case in which a refusal to grant full British nationality was challenged.[189] It indicated that Mr Rottmann was deprived of EU citizenship and the rights attaching thereto which he had previously enjoyed, whereas in *Kaur* the applicant had never enjoyed such rights and therefore 'could not be deprived of

187. See contributions by De Groot and Seling, Shaw, Kochenov and Davies, published on the EUDO Forum following the Rottmann judgment http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law.

188. See in particular Davies, 'The entirely conventional supremacy of Union citizenship and rights' (EUDO Forum) http://eudo-citizenship.eu/citizenship-forum/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?start=2. He argues that Member States have the primary competence to determine their own laws concerning access to national citizenship, but nevertheless subject to the principle that where this competence impacts on EU law rights – which it does, since every national citizen is an EU citizen – they must respect EU law and its rules and principles.

189. Case C-192/99 *Kaur*, judgment of 20 February 2001.

them'. It made clear that it is only the deprivation of EU citizenship rights which in its view can bring the situation within the scope of EU law.

Even though the *Rottmann* jurisprudence alone may not constitute a sufficient basis for contesting the compatibility with EU law of controversial naturalisation schemes, such as those offering EU citizenship in return for financial investment, by imposing on national courts the task of following a strict scrutiny of proportionality, *Rottmann* may nevertheless have marked a turning point in nationality matters, also at national level. In the years to come we might witness a shift from loose to strict judicial scrutiny in nationality matters at domestic level.

3.3. The principle of sincere cooperation in matters of EU citizenship

In light of their impact on EU citizenship and given the strong EU rights attached to that status, naturalisation decisions taken by a Member State might no longer be regarded as neutral with regards to other Member States and to the EU as a whole.[190] The assumption made in the *Nottebohm* case in 1955 that '*nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system conferring it*' is no longer valid, at least not within the EU. As mentioned by Advocate General Poiares Maduro in *Rottmann*: 'Tel est le miracle de la citoyenneté de l'Union: elle renforce les liens qui nous unissent à nos Etats (dans la mesure où nous sommes à présent des citoyens européens précisément parce que nous sommes des nationaux de nos Etats) et, en même temps, elle nous en émancipe (dans la mesure où nous sommes à présent des citoyens au-delà de nos Etats)'.[191]

Given the diversity of nationality laws in the Member States and the absence of harmonisation and cooperation on these questions, decisions by Member States in this field can lead to tensions as shown not only in the controversies surrounding the citizenship investor schemes, but also in other instances such as that of the naturalisation of certain groups by Member States (e.g. Moldovan or Ukrainian citizens in Bulgaria and Moldovan citizens in Romania).

In an EU based on trust, solidarity and cooperation between the Member States, there is a case for arguing that there is need for having rules and prin-

190. Pascouau 'La politique migratoire de l'Union européenne. De Schengen à Lisbonne', LGDJ, Fondation Varenne (2011).

191. Paragraph 23.

ciples in place regulating potential conflicts between them.[192] One of the principles which can perform this important task is the principle of sincere cooperation enshrined in Article 4(3) TEU which provides that *'Member States shall refrain from any measure which could jeopardise the attainment of the Union's objectives.'*

The most important area in which the principle of sincere cooperation displays its full impact is the securing of the unity of the European legal order.[193] This unity can be challenged by the autonomy of the Member States. The political and legal conflicts between the Member States arising from the tension created by the need for unity – and thus the need for cooperation – and the need to respect their respective autonomy require mechanisms for the resolution of these disputes. Mutually ensuring each other's autonomy obliges the involved actors to take the competencies of the other actors into account.

In the absence of harmonisation of nationality laws of the Member States, this principle could serve as a basis for questioning Member States' practices which would clearly go against the norms and obligations by which they are bound under international law.[194] This for instance lead to the resolution of the Maltese issue where the *Investors Scheme* was eventually aligned – through the introduction of an effective residence condition – with the criteria upon which Member States traditionally build their nationality laws, namely the existence of a bond, a genuine link[195] with the country or its nationals.

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192. See Kochenov, 'Rounding up the circle: the mutation of Member States' nationalities under pressure from EU citizenship' EUI RSCAS Paper 2010/23, p. 20: 'Precisely because EU citizenship is ultimately a secondary status, the power of the Member States is severely weakened, since while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the naturalisation regimes are not harmonised, at least to some extent. Huge disparities between the citizenship laws of all the Member States all lead to the multiplication of the routes to acquisition of the same status of European citizenship which, as has been demonstrated above, has effectively overtaken the majority of the main attributes of nationality from national level'.
193. Neframi 'Le principe de coopération loyale comme fondemant identitaire de l'Union européenne' Revue de l'Union européenne, n° 556, mars 2012, pp. 198 and 201; Huomo-Kettunen, 'Heterarchical constitutional structures in the European legal space', European Journal of Legal Studies, Volume 6, Issue 1 (Spring/Summer 2013), pp. 47-65.
194. Which, as reminded by Advocate General Poiares Maduro in *Rottmann*, form part of the EU legal order – paragraph 29.
195. The principle of a bond/genuine connection with relation to nationality was expressed by the International Court of Justice in its judgement of 6 April 1955, *Nottebohm*, The Court held that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the ex-

This principle can also serve as a common ground to foster cooperation in a domain which impacts on different legal orders. Such cooperation between the Member States is advocated by a number of academics which see this as a way to move forward in an area of Member State competence.[196]

The *Rottmann* judgment also points to the need for Member States to work more closely together in the area of nationality. The call to the national courts and authorities to examine whether it is possible for Mr Rottmann to recover the original nationality, and whether he should be afforded a reasonable period of time in order to try to recover it, indeed implies a certain degree of cooperation and coordination between the Member States concerned.

Increased cooperation would also enable to balance the conclusions which can be drawn from *Micheletti* or *Garcia Avello*.[197] The impossibility for a Member State to restrict the effects of the granting of nationality by another Member State by imposing additional conditions for recognition of that nationality indeed calls for exchanges between the Member States on the wider implications of their decisions in the field of nationality.[198]

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istence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.

The European Convention on Nationality provides in its Article 2 (definitions) that nationality means the legal bond between a person and a state. Further articles also point to the fact that states should take into account the existence of a bond when designing their nationality laws.

The Court of Justice highlighted in the *Rottmann* case that 'solidarity and good faith between it [the Member State] and its nationals and also the reciprocity of rights and duties [...] form the bedrock of the bond of nationality'. The importance of a tie/bond was further underlined by the European Parliament in its Resolution of 16 January 2014 'EU citizenship implies the holding of a stake with the Union and depends on a person's ties with Europe, its Member States or on personal ties with EU citizens. It should never become a tradable commodity.'

196. de Groot, 'Towards a European nationality law', Electronic Journal of Comparative Law, Vol.8.3 (October 2004); Vonk, 'Dual nationality in the EU' (2012), p. 334.
197. Case C-148/02 *Garcia Avello,* judgment of 2 October 2003.
198. Wollenschläger, 'Grundfreiheit ohne Markt: Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime' Tübingen: Mohr Siebeck (2007), p. 147. See also de Groot, op. cit., p. 12. He argues that the principle of sincere cooperation could be used if a Member State were for example to grant its nationality to an important part of the population of a non EU-Member State, without prior consultation with the EU (e.g. the Netherlands to the entire population of Surinam). This approach was also supported by Advocate-General Poiares Maduro in the *Rottmann* case where he saw grounds for applying the sincere cooperation principle in such cases (para. 30).

Although, for the reasons cited above, EU action to harmonise nationality laws would not be possible under the current Treaties, it would be in the Member States' own interest to achieve greater synergy in this area. A first step could be to mutually share knowledge and experience on conditions and procedures for obtaining Member States' nationality. The expertise of the Council of Europe can be called upon, as it is the forum where relevant international conventions are adopted and such issues are regularly discussed.

4. Political rights of EU citizens

The *political rights of EU citizens* under the Treaties include the possibility for EU citizens to express their political will by exercising their right to stand as a candidate and vote in the European and local elections in the Member States where they reside, under the same conditions as nationals of that State.[199]

The political rights, firstly introduced in the Maastricht Treaty as one of the fundamental set of rights substantiating the status of EU citizenship, contribute to the very construction of *democracy* upon which the EU is founded and are defined in secondary law instruments as '*an instance of the application of the principle of equality and non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely*'.[200]

As described above, the very essence of EU citizenship is to ensure that *EU citizens feel at home wherever they are in the EU*. Further, the enfranchisement of EU citizens in their State of residence is typically seen as part of a process contributing to creating an even closer Union among the peoples of Europe[201] and a *means to enable EU citizens to better integrate in the host society*.

199. Article 22 TFEU.

200. Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals OJ 1993 L 329, page 34; Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ 1994 L 368, page 38.

201. Preamble of the Treaty on European Union.

4.1. Derogations to the principle of equal treatment in the EU acquis

Regarding *derogations from the principle of equal treatment*, some conditions and derogations to the equality of treatment subsist in EU secondary law. They have been justified as covering circumstances linked to national specificities (for example, the linguistic situation in Belgium) or to avoid 'any polarisation between lists of nationals and non-nationals' (in Luxembourg, where non-nationals form more than 20 % of the electorate and where, for this reason, a minimum period of prior residence is allowed).[202]

Other differences in treatment regard the possibility for Member States to restrict access by non-nationals to public offices, such as the position of mayor or member of the local government. The latter have been justified on grounds that 'the duties of the leadership of basic local government units may involve taking part in the exercise of the official authority and in the safeguarding of the general interest'.[203]

While remaining legally compatible with the Treaties and related case-law, such derogations seem at odds with the very objectives of EU citizenship and are likely to be eroded in the future, particularly with regard to the evolution of increasingly multi-cultural societies and the gradual deepening of European integration, including through the exercise of free movement.

These derogations originate from the traditional citizenship-based approach whereby 'nationality', based on the *Staatsvolk* (state people),[204] remains the indispensable condition for fully-fledged political rights. The underlying assumption is that only citizens holding the nationality of a given Member State can possess the necessary bond and allegiance to ensure that 'general interests of the state' would not be put at risk.

It has been argued that a change in policy in this area would logically derive from a deepening of EU integration toward a federalist approach. Independently from the future path of European integration, it might also simply be destined to become a natural process in Member States, due to the gradual

202. Article 14 of Directive 93/109/EC; Article 12 of Directive 94/80/EC.

203. Article 5 and Preamble of Directive 94/80/EC.

204. Lansbergen and Shaw, 'National membership models in a multilevel Europe' Oxford University Press and New York University School of Law (2010). German Constitutional Court BVerfG 63, 37 (Schleswig-Holstein); BVerfG 63;60 (Hamburg) – decisions of 31 October 1990; Austrian Constitutional Court VfGH G218/03 – decision of 20 June 2004.

multi-cultural change and intertwining of societies and peoples; a process which is encouraged by the freedom of movement itself.

In this context, it will be crucial to observe new trends of national laws and practices in the Member States. For example, in Luxembourg – a Member State which can be considered as a laboratory in this field given the important percentage of non-nationals residing there – the residence conditions imposed to EU citizens from other countries to be entitled to vote and to stand as candidates in elections to Parliament and in local elections were recently lowered and the access to public offices, namely the restriction to the post of mayor and member of the executive local government provided by the Luxembourgish legislation, lifted.

4.2. European Parliament elections

Directive 93/109/EC lays down detailed arrangements for EU citizens residing in an EU country of which they are not nationals to exercise the right to vote and to stand as a candidate in European Parliament elections in that country.

Regarding its *implementation*, Member States were obliged to transpose Directive 93/109/EC into national law by 1 February 1994 so that it would be in force by the June 1994 EP elections, as stipulated in Article 17 of Directive 93/109/EC.

The compatibility of national legislation with Directive 93/109/EC in the States that were members of the EU on 1 May 2004 has been assessed by the Commission in its reports of 1998 and 2000 on the application of Directive 93/109/EC.[205]

All twelve States which were members of the EU at the time of the adoption of Directive 93/109/EC[206] had implemented its provisions of within the prescribed deadline (national implementing legislation was adopted between

205. *Report on the application of Directive 93/109/EC – Voting rights of EU citizens living in a Member State of which they are not nationals in European Parliament elections*, COM(97)731 final of 7 January 1998 and *Communication on the application of Directive 93/109/EC to the June 1999 elections to the European Parliament – Right of Union citizens residing in a Member State of which they are not nationals to vote and stand in elections to the European Parliament*, COM(2000) 843 final of 18 December 2000.

206. Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

22 December 1993 and 11 April 1994) and in time to apply them to the June 1994 EP elections, although in many cases the date of implementation was very close to the elections.

Sweden, Austria and Finland, which subsequently acceded to the EU, adopted the necessary provisions by 1996 and applied them in their first EP elections held in the course of 1995 and 1996.

To tackle the main application issues regarded as unsatisfactory by the Commission in its 2000 report[207] (such as unsatisfactory operation of the information exchange system), various infringement proceedings were launched which led to correct transposition and implementation of EU law by Member States (Austria, Belgium, Germany, Spain, Italy, Luxembourg, the Netherlands, and Sweden).

Member States that acceded to the EU in 2004 and 2007 put in place legal rules transposing Directive 93/109/EC at the date of their accession.

On the whole, the legal conditions allowing EU citizens to exercise their right to vote and to stand as a candidate in their Member State of residence were fulfilled.[208]

Certain obstacles to EU citizens' political participation however existed, namely on the occasion of the 2009 EP elections, such as disproportionate residence requirements (Slovenia),[209] administrative formalities discriminating against EU citizens (Malta),[210] additional requirements for EU citizens seeking to be enrolled to vote or to stand as a candidate, such as the requirement to provide a registration document for proving residence or the obligation to renew registration for each European election (Bulgaria, Czech Re-

207. *Communication on the application of Directive 93/109/EC to the June 1999 elections to the European Parliament – Right of Union citizens residing in a Member State of which they are not nationals to vote and stand in elections to the European Parliament*, COM(2000) 843 final of 18 December 2000.

208. *Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC)*, COM(2010)605 final of 27 October.

209. According to previous Slovenian legislation in place at the time, EU citizens from other Member States were granted the right to vote and to stand in European elections only after a minimum of five years' residence in that Member State.

210. Malta's legislation initially provided that for registering on the electoral roll EU citizens from other Member States had to present a 'Maltese ID card'. Furthermore, the electoral authority, 'whenever it deems necessary', could require EU citizens to renew their declaration made when registering on the electoral roll. As a consequence, EU citizens from other Member States might be excluded from participating in the elections in Malta even if already enrolled on the electoral lists.

public, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia).

In most cases, irregular limitations were subsequently amended and the national legislations of the Member States concerned were brought in line with EU law.[211] Three cases remain to be definitely solved.[212]

In addition, the Commission reported that a number of Member States[213] seemed to have failed to correctly transpose the obligation to provide information to citizens on the detailed arrangements for exercising their right to vote and to stand in elections, contributing to determine low participation in the elections. All these cases were solved thanks to the measures taken and clarifications provided by the Member States concerned.

As regards Croatia, the legislative framework for transposing Directive 93/109/EC, applicable on the date of Croatian accession to the EU (1 July 2013), seems in principle to be in line with its provisions.

Directive 93/109/EC permits the introduction of exceptions to the principle of equal treatment between national and non-national voters where this is justified by problems specific to a Member State. Article 14(1) of Directive 93/109/EC provides that if, in a given EU country, the proportion of non-national resident EU citizens of voting age exceeds 20 % of the total number of EU citizens of voting age residing there, that EU country may apply for derogation.

The only Member State that has availed itself of such derogation is Luxembourg. Luxembourg restricts the right to vote to non-national EU citizens who have resided in its territory two years before registration. Regarding the right to stand as a candidate, Luxembourg requires non-national EU citizens to have their legal domicile in the territory of Luxembourg and to have resided there for five years before submitting the application.[214] The previous legislative framework provided for more restrictive conditions of residence.[215]

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211. For example, Maltese legislation was amended in November 2012, when the Electoral Commission reformed the registration system for EU citizen residents in Malta following a complaint filed to the Commission and a petition received by the Parliament in 2011.
212. Slovenia, Slovakia and Czech Republic announced legislative measures to address the problem of compliance with EU law.
213. All the 12 Member States acceding in 2004 and 2007 with the exception of Cyprus, Czech Republic, Estonia and Lithuania.
214. Law of 18 February 2003, as modified by law of 13 February 2011.
215. Article 1, Act of 25 February 1979 on the direct election of the representatives of the Grand Duchy of Luxembourg to the European Parliament, amended by Act of 28 January 1994 laying down the arrangements for the election of the representatives of

The reasons for granting the derogation to Luxembourg were verified by the Commission ahead of both the 2004 and the 2009 EP elections by the Commission which concluded that the circumstances warranting the granting to Luxembourg of such derogation still applied (the proportion of non-national EU citizens of voting age residing in Luxembourg was almost 38 % of the total number of EU citizens of voting age residing there at 1 January 2007[216]). According to an update ahead of the 2014 EP elections, this proportion was more than 39 %.[217]

In addition, Article 14(2) of Directive 93/109/EC provides for another derogation, which allows Member States to refrain from applying Articles 6 to 13 of Directive 93/109/EC and dispense from registration formalities nationals of another Member State who reside in the Member State concerned and have the right to vote for the national parliament there.

The UK took advantage of such derogation with respect of Irish nationals, as the citizens of this Member State were already able to take part in national elections in the UK and so were already on the electoral register on account of the special arrangements for Irish citizens living in the UK who are permitted to vote in all forms of elections.

4.2.1. Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)?

Regarding additional conditions imposed on EU citizens compared to national citizens, there are several conditions that Member States require EU citizens to meet. These conditions may directly or indirectly disfavour EU citizens with respect to nationals.

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the Grand Duchy of Luxembourg to the European Parliament. It required to non-nationals five of the last six years of residence to exercise the right to vote and ten of the last twelve to stand as candidates.

216. *Report on granting a derogation pursuant to Article 19(2) of the EC Treaty, presented under Article 14(3) of Directive 93/109/EC on the right to vote and to stand as a candidate in elections to the European Parliament*, COM(2003)31 final of 27 January 2003 and *Report on granting a derogation pursuant to Article 19(2) of the EC Treaty, presented under Article 14(3) of Directive 93/109/EC on the right to vote and to stand as a candidate in elections to the European Parliament*, COM(2007)846 final of 20 December 2007.
217. *Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct*, COM(2013)126 final of 12 March 2013.

4.2.1.1. Proof of identity

Articles 9(3) and 10(3) of Directive 93/109/EC allow Member States to introduce the option of requesting the production of a valid identity document for enrolment of voters and application for candidates.

The concern of the Commission was geared toward ensuring that EU citizens were effectively allowed to enter in the electoral roll simply by producing a valid identity document issued by their own national authorities. An example of the above is the adoption by Spain of Royal Decree 157/1996 that removed the obligation for EU citizens to produce a Spanish residence permit to gain entry on the electoral roll.

In September 2012, the Maltese authorities amended their national legislation[218] and removed the obligation for EU citizens to present a valid identity card issued by the Maltese authorities for being registered on the electoral rolls.

4.2.1.2. Registration requirements

It should be noted that the requirement imposed by Member States to apply for registration on the electoral rolls constitutes a measure of implementation of Article 9(1) of Directive 93/109/EC, according to which Member States are under an obligation to take the necessary measures to enable an EU voter *who has expressed the wish for such* to be entered on the electoral roll sufficiently in advance of the polling day.

Even where such obligation is not imposed to nationals, as the latter are automatically entered into the electoral registry (as it happens for instance in Austria, Belgium, the Netherlands, Slovenia, and Spain), it cannot be considered discriminatory as in fact it safeguards the EU citizen's freedom to choose whether or not to participate in the electoral process of his/her Member State of residence.

4.2.1.3. Residence requirements

In the absence of a definition of residence either in the Treaty or in Directive 93/109/EC, it is up to Member States themselves to apply, in a non-discriminatory way, to their nationals and to EU citizens alike, the residence concept as it flows from their own national legislation.

218. 'Identity Card and other Identity Documents Act Order' (LN 308/12), published on 28 September 2012.

According to a recent study,[219] in the Netherlands a special regime was in force until 2008, according to which EU citizens must, unlike Dutch nationals, have been resident in the European part of the Netherlands on the day of nomination. EU citizens living in non-European parts of the Netherlands were not allowed to participate in the Dutch election of the European Parliament, as residence in the non-European parts of the Netherlands was not presumed to be residence 'in a Member State of which he is not a national' that would give entitlement to participate in elections to the European Parliament under the same conditions as Dutch nationals.

This regime was amended in 2008 following a judgement of the Court of Justice in *Eman and Sevinger*.[220]

Residence requirements may also apply to EU citizens willing to stand as candidates for EP elections in the home Member State. A recent study[221] reports that in Poland, for example, running in European Parliament elections is conditioned for Polish citizens on the residence requirement according to which the candidate needs to reside in Poland and to document five year residence within the EU prior to elections. EU citizens must only prove their residence in Poland.

4.2.1.4. Language skills

Some Member States also impose language requirements. According to recent studies,[222] Greece requires elementary or sufficient knowledge of Greek language for voters and candidates respectively; nevertheless, the law does not foresee any formal procedure for testing the linguistic skills of the candidates. Belgium requires that candidates speak the language of the constituency in which they stand as candidates (Dutch, French, and German).

4.2.1.5. Participation in political parties

In addition to the criteria above, the Commission already had the occasion to identify another obstacle to EU citizens' enjoyment of their right to partici-

219. Schrauwen, 'Access to Electoral Rights – The Netherlands', EUDO Citizenship Observatory, June 2013.
220. Case C-300/04 *Eman and Sevinger*, judgment of 12 September 2006.
221. Korzec and Pudzianowska, 'Access to Electoral Rights – Poland', EUDO Citizenship Observatory, June 2013.
222. Christopoulos, 'Access to Electoral Rights – Greece', EUDO Citizenship Observatory, June 2013 and Lafleur, 'Access to Electoral Rights – Belgium', EUDO Citizenship Observatory, June 2013.

pate in the European elections,[223] which is linked to discriminatory *restrictions regarding membership of political parties and the conditions for founding political parties*.

Member States' laws restricting membership of political parties to their own nationals prevent other EU citizens from running in the European Parliament elections as members of political parties; furthermore, if non-national EU citizens do not have the right to found political parties, but can only join existing ones, they are denied the chance of representing platforms not represented by the existing parties.

The assessment of the national laws conducted by the Commission in 2010 shows that in the Czech Republic, Lithuania, Poland and Slovakia, EU citizens from other Member States do not have the right to found political parties nor to become members of the existing parties.

In the Czech Republic and Lithuania the political parties can also put forward on their lists independent candidates. In Poland, apart from the political parties, a group of voters have the right to put forward candidates. Nonetheless, this possibility does not remedy the discrimination against EU citizens from other Member States who are prevented under such legislation from exercising their right to stand as a candidate under the same conditions as nationals. In Greece, Latvia and Spain, EU citizens from other Member States have the right to become members of the existing parties, but do not have the right to found a party.

The Commission launched infringement procedures against all seven abovementioned Member States.[224]

In Finland a quota of national citizens is fixed for founding a political party and thus non-national EU citizens can only found new political parties when acting together with nationals of these two Member States. Following the action of the Commission, Finland amended its legislation in 2012 and removed such quota.

223. *Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC)*, COM(2010)605 final of 27 October 2010, p. 9.

224. This Report takes account of the situation at the time of writing (early 2014). A swift evolution in some of the Member States' laws and practice is likely to occur.

4.2.2. What additional changes will be required by the December 2012 amendments to Directive 93/109/EC?

Directive 93/109/EC was amended by Council Directive 2013/1/EU,[225] which provides for detailed arrangements concerning the right to stand as a candidate. The deadline for the transposition of the Directive was 28 January 2014, with a view of the 2014 EP elections. At that date, roughly half of the Member States had notified transposition in its national law.

The amending Directive concentrates on alleviating some of the burden placed on national authorities in verifying whether or not somebody has been disbarred from standing as a candidate in their own state, in order to simplify the procedure and abolish those formalities acting as a barrier to the exercise of the right to stand as a candidate and contributing to the low number of EU citizens standing as candidates in EP elections in their Member State of residence. The main changes are the following:

- The requirement for EU citizens submitting their application to stand as candidates to the European Parliament in a Member State of which they are not a national to produce an attestation from the competent administrative authorities of the home Member State certifying that the person concerned has not been deprived of the right to stand as a candidate in the home Member State or that no such disqualification is known to them, which was imposed by Article 10(2) of Directive 93/109/EC, is abolished. Article 1(2) of Directive 2013/1/EU replaces it by a statement confirming that the person concerned has not been deprived of the right to stand in the elections to the European Parliament to be included in the formal declaration that those citizens are required to produce as part of their application.
- In order to verify whether the EU citizen has in fact been deprived of the right to stand in elections to the European Parliament in the home Member State, Article 1(1) of Directive 2013/1/EU amends Article 6 of the Directive providing that the Member State of residence shall check whether the EU citizens who have expressed a desire to exercise their right to stand as a candidate there have not been deprived of that right in the home Member State through an individual judicial decision or an administrative decision provided that the latter can be subject to judicial remedies.

225. Directive 2013/1/EU amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ 2013 L 26, page 27.

For that purpose, such Member State shall notify the home Member State of the declaration referred above. Relevant information available from the home Member State shall be provided in any appropriate manner within five working days from the reception of the notification or, where possible, within a shorter time-limit, if so requested by the Member State of residence.

– In order to facilitate transmission and reception of such information, Member States are required to designate contact points whose list will be made available by the Commission to the Member States. It is provided that, if the information is not received by the Member State of residence within the time-limit, the candidate shall none the less be admitted. If the information provided invalidates the content of the declaration, the Member State of residence, irrespective of whether it receives the information within the time-limit or at a later stage, shall take the appropriate steps in accordance with its national law to prevent the person concerned from standing as a candidate, or where this is not possible, to prevent this person either from being elected or from exercising the mandate.

4.3. Disenfranchisement and enfranchisement issues

EU citizenship adds to national citizenship and does not replace it.[226]

This very concept emancipates the exercise of the EU citizenship status – destined to become the fundamental status of EU citizens[227] – from a strict citizenship-based logic. This status is additional since the set of rights deriving from it are characteristic to it. Interestingly, these rights are currently not all limited to EU citizens, but in some instances are also 'derived rights', meaning that they extend to the family members, whose inclusion proves necessary for the EU citizens – primary beneficiaries of the rights – to be able to enjoy their rights *in concreto*.[228] In addition, it can be noted that all citizens who reside in a given territory – and not only those possessing the nationality of a given Member State – are naturally destined to integrate and contribute

226. Article 20 TFEU.

227. See for instance case C-184/99 *Grzelczyk*, judgment of 20 September 2001, paragraph 31.

228. See Directive 2004/38/EC (cited supra). See also *Proposal for a directive on consular protection for citizens of the Union abroad*, COM(2011)881 final of 14 December 2011.

to that society and public life in an equal way (when such possibilities are granted to them).

Ironically, a more inclusive 'residence-based approach' seems to be involuntarily justified by the reasoning behind *disenfranchisement policies* existing in several Member States for own nationals. The rationale of disenfranchising own nationals, who either never resided there or exercised their right of free movement and residence to live abroad, is predominantly that that person's ties with the society of origin loosens with time. However, this also means that the integration ties with the host society gradually strengthen.

It is interesting to note that if the political rights granted by EU citizenship under the Treaties are a means to *encourage integration in the host society*, maintaining *integration in the society of origin* is the condition to keep political rights back home.

Most Member States have rules in place depriving their citizens of their voting rights based on criminal convictions for serious offences or on grounds of loss of the legal capacity linked to mental health problems and intellectual disabilities.

Also, some Member States disenfranchise their citizens depriving them from the right to vote in national elections on the grounds that they have been residing abroad *for a certain period of time*[229] – while others if they do not *demonstrate that they have maintained ties* with the society of origin.[230]

More specifically, the Member States which automatically disenfranchise their citizens on the grounds that they have been residing abroad for a certain period of time are currently Cyprus, Denmark, Ireland, Malta and the United Kingdom). Two Member States impose certain conditions for maintaining the right to vote in national elections: Germany, where citizens must show that they have become familiar, personally and directly, with the political situation in Germany and are affected by it; and Austria, which requires citizens residing abroad to apply before leaving the country to remain registered on the electoral rolls, and to renew this application every ten years – a renewal which can be done by electronic means).

The European Court of Human Rights has maintained that automatic disenfranchisement of citizens who reside abroad for a certain period of time is not, in principle, an arbitrary restriction of the right to vote enshrined in Article 3 of Protocol No. 1, outlining a series of factors which may justify such conditions. It is interesting to note, however, that European Court of Human

229. Cyprus, Denmark, Ireland, Malta and the United Kingdom.
230. Austria and Germany.

Rights recently reviewed Member States' practices in allowing non-resident citizens to vote, concluding that, even though no common European approach exists yet, there is a clear trend in favour of allowing voting by non-resident citizens.

In the current state of EU law, as the Court of Justice had the occasion to clarify, the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State in compliance with EU law, since the Treaty contains no rule defining expressly and precisely who are to be entitled to the right to vote and to stand as a candidate.

Within the EU context, the issue may be examined, in particular, for the negative impact that national disenfranchisement policies may have on the exercise by EU citizens of their right to free movement, enshrined both in Article 21 TFEU and in Article 45 of the EU Charter, and of their right to participate in the democratic life of the EU, enshrined in Article 10(3) TEU.

Whilst EU law does not detract from the powers of the Member States in areas falling under their competence, according to settled case-law of the Court of Justice, in situations covered by EU law, national rules must have due regard to EU law where the exercise of this competence impacts on rights conferred by EU law.[231]

As regards disenfranchisement, this means that, although the personal scope of the right to vote in national elections is a matter for each Member State to determine, national competence in this area should not be exercised in a way which negatively impacts the exercise of rights conferred by EU law or which results in violation of the general principles of EU law.[232]

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231. This principle has notably been affirmed regarding national rules in the sphere of criminal legislation and procedure (case C-274/96 *Bickel and Franz,* judgement of 24 November 1998), governing a person's name (case C-148/02 *Garcia Avello*, judgement of 2 October 2003), direct taxation (case C-403/03 *Schempp,* judgement of 12 July 2005), the content and the organisation of education systems (case C-76/05 *Schwarz and Gootjes-Schwarz*, judgement of 10 September 2007) and nationality (case C-135/08 *Rottmann,* judgement of 2 March 2010). See also the previous section of this paper.

232. The Court of Justice has already maintained this principle as regards national rules determining the persons entitled to vote and to stand as candidates in elections to the European Parliament in the case C-145/04 *Spain v United Kingdom*, judgment of 12 September 2006: whilst acknowledging Member States' competence in determining criteria for establishing who has the right to vote and stand as candidate in European elections, it has made clear that the application of such a criterion should not result in violation of the general principles of EU law, in particular of the principle of non-discrimination (paragraph 66).

In this respect, some scholars and the Commission have argued that deprivation of political rights of EU citizens in the Member States of origin may influence in a negative way the willingness of EU citizens to exercise the right of free movement. It can also be argued that disenfranchisement policies put mobile EU citizens in a less favourable situation compared to nationals who did not exercise this right.

In January 2014, the Commission presented a Communication[233] and Recommendation[234] building on three main arguments:

a) the consequences of national policies restricting the right to vote are out of keeping with the founding premises of EU citizenship. If Article 20 TFEU introduces an additional set of rights, one would not expect that the exercise of such rights result in the loss of the right to vote in national elections;
b) national disenfranchisement policies may create difficulties in practice for EU citizens exercising their right to freely move and reside with the territory of the member States;
c) disenfranchising policies lead to a gap in the political rights of the EU citizens concerned that is inconsistent with the efforts to promote citizens' participation in the democratic life of the EU. Disenfranchised EU citizens do not have the right to participate in national processes leading to the composition of national governments, the members of which compose the Council, the EU's other co-legislator, which conflicts with the general objective of enhancing citizens' involvement in the national and European public sphere.

In this context, the Commission recommends the Member States concerned to 'explore inclusive and proportionate approaches to their disenfranchisement practices in the general elections'. It namely suggests empowering EU citizens to determine for themselves whether they maintain a strong interest in the political life of the home country.

The Austrian practice could be taken as a model; each citizen can demonstrate his/her continuing interest in the political process of the Member State

233. *Addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014)33 final of 29 January 2014.
234. *Recommendation on Addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement*, C(2014)391 final of 29 January 2014.

of origin by applying to remain registered on the electoral roll at appropriate intervals.[235]

By proposing this approach the Commission endorses the logic that *the citizen needs to be 'at the centre-stage'*. The Commission approach also seems to be based on the conviction that *the concept of 'integration' in a society is not a static one*, which can be easily predetermined.

Similar considerations could underpin the debate around *'enfranchisement'*. The possibility to enable EU citizens to be enfranchised in their country of residence as regards national and regional elections is put forward in current debates and in particular in the European Citizens' Initiative 'Let me/us vote', which aimed at collecting one million signatures calling for extending the electoral rights of EU citizens residing in another Member State than their own to national and regional elections there, by using Article 25 TFEU.[236]

In that respect, the Commission announced in the 2013 EU Citizenship Report[237] that the issue of enfranchisement would be examined in the context of the upcoming reflections on the shape of the future of the EU as part of a long-term reflection on *fostering inclusive political participation across the EU and remedying the gap in political participation for EU citizens living in another Member State* as regards important levels of political participation, i.e. the national and, where applicable, the regional level.

Enfranchisement is a much broader issue than disenfranchisement. It would not only have the potential to remedy the current gaps in participation for EU citizens living in another Member State. Enfranchisement would be a *logical next step in the evolution of the current set of EU citizenship rights and would give full effect* to the right of every citizen to participate in the democratic life of the EU. If the political rights of EU citizens' in the country of residence are an instance of the application of the *principle of equality and non-discrimination*, the completion of such rights is a pre-condition to give full meaning to the status of EU citizenship and ensure that citizens truly feel at home wherever they are in the EU.

Many scholars take a 'citizenship-based approach' and argue that *naturalisation and enfranchisement* should go hand in hand. But *naturalisation*

235. In the Austrian system, the re-application takes place every ten years.

236. According to http://www.letmevote.eu/en, the time period for the collections of signatures ended on the 28 January 2014 without succeeding to collect the necessary 1 million signatures.

237. *Report 2013 EU citizens: your rights, your future,* COM(2013)269 final of 8 May 2013.

should no longer be seen as the *necessary* condition to obtaining voting rights. Promoting naturalisation as the only means to achieve enfranchisement would in fact be *disproportionate* and cumbersome, as well as *at odds with the role of EU citizenship* as the primary vehicle for promoting respect for national identity and diversity, and ensuring equality of treatment irrespective of nationality. There is a strong case for EU citizens to enjoy the fundamental status.

Moreover, enfranchisement by naturalisation fails to take into full consideration the *fluidity of possibilities and movements in modern societies* where citizens can successively settle in different Member States in the course of their life. Also, in principle the 'bond and allegiance' of a person towards a society can be equally felt for the country of origin (the motherland) than the host country (country of adoption).

Since national and regional elections currently fall outside the realm of EU law, such an evolution would require the use of the *passerelle clause of Article 25 TFEU* (which allows adding to the current rights) or, given the complexity and constitutional nature of such procedure, the modification of the EU citizenship part of the Treaties in the next reform. The achievement of this policy objective is arduous, since it would be submitted to unanimous consensus and constitutional modifications. It should, however, not be excluded, particularly in the present state of European integration, where bridging the democratic deficit and bringing citizens closer to the EU and its decision-making should be the key priority, alongside the deepening of the fiscal and banking union.

A first issue to examine is whether EU citizens should be required to operate *a choice*.

Voting in both the Member State of nationality and residence would amount to double representation in the Council. On the other hand, EU citizens could legitimately maintain ties and be affected by the acts of national legislatures in both countries.

Considering the current EU rules on enfranchisement, participating in the European elections in both countries is prohibited and double voting actively fought. Voting for the European elections twice would in fact mean to cast two votes for a same assembly. For the local elections, where the vote influences the composition of two different assemblies, it is theoretically possible under EU law to cast two votes.

For the national elections, in case it was opted for imposing a choice, a second issue is whether enfranchisement should be granted under the same conditions as nationals.

Considering that this is the case for the European and local elections under the Treaty, it could be argued that introducing conditions for the enfranchisement to national and regional elections would not be in line within the rationale of the political rights already granted by the Treaty.

Fully and automatically enfranchising EU citizens in their Member State of residence, i.e. granting them the right to vote in national elections under the same conditions as nationals, would be an important step towards the realisation of equality of treatment, whilst at the same time promoting the full integration of EU citizens in their Member State of residence and enhance the value of EU citizenship.

It is also true, that certain caution with a view *to ensuring and safeguarding the 'bond and allegiance' provided by residence* as described above would be necessary. A reference criterion to determine as of how and/or when EU citizens would have acquired sufficient and genuine ties with the host society where they cast their vote should be considered.

In this context, a positive action by the *EU citizen to demonstrate his/her interest and acquired integration in the political process of the host Member State,* such as a declaration, in a similar way to the disenfranchisement reasoning presented above, could be evaluated.

It can also be argued that, differently from the disenfranchisement approach, in the enfranchisement context a person does not only have to prove that he/she has kept existing integration ties, but that he/she has acquired such ties in a host society *ex novo*. This would *a fortiori* require an additional safeguard, *a specific timeframe* which – while bearing certain arbitrariness – could be considered as an *indication of a certain degree of integration in the host Member State.*

A *ten year threshold* could be invoked by some as an appropriate cut-off point, as a ten years period of residence can generally be considered as enabling a high degree of integration in the host Member State.[238] For example, Directive 2004/38/EC reserves the highest degree of protection against expulsion to EU citizens who have resided in another Member State then their own for ten years: they may be expelled solely on the basis of imperative grounds of public security.[239] However, after a ten year period of residence in another Member State than their own, the EU citizens concerned can usually apply to obtain the nationality – and thus also the right to vote in national elections –

238. See also the Austrian model in the context of the disenfranchisement section.
239. Articles 28(3) and Recital 24 of Directive 2004/38/EC.

of the host Member State.[240] Yet, enfranchisement with this threshold would bear little added value in case of long-term residence in a Member State and completely ignore the current realities of fluidity of movements within the EU.

The *five year residence* period required by Directive 2004/38/EC for the acquisition of the *status of permanent resident*[241] might serve as an appropriate threshold in this context. Indeed, this 'privileged' status conferred on EU citizens residing for at least five years in another Member State than their own is meant to exempt them from the initially applicable conditions of residence and to guarantee their *equal treatment* with nationals as regards any matter falling within the scope of EU law. Granting those who obtain permanent resident status the right to vote in national elections would similarly both attest and contribute to their integration in the host Member State. In the same vein, Directive 2003/109/EC provides that, after a five year period of residence in a Member State, non-EU nationals can acquire long-term resident status and enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters.

Another possibility that could be envisaged as part of an *incremental approach* towards full enfranchisement would be to grant, as a first step, voting rights in *regional elections*, rather than moving on directly to national ones.

In some of the Member States where regions are vested with legislative capacities domestic law actually permits, in one way or another, the participation of foreign residents. Nevertheless, in some Member States this would prove constitutionally as problematic as granting the right to participate in the national elections and such a partial extension would only have limited impact.

240. A 10 year period of residence is required in Spain, Italy, Slovenia, Austria and Lithuania. In the remaining Member States, the length of this period varies between nine in Denmark and three in Belgium (the European University Institute in Florence http://eudo-citizenship.eu/docitizens/policy_brief_naturalisation.pdf).

241. Articles 16 and 24 of Directive 2004/38/EC.

5. Culture(s) of citizenship

5.1. Implementation of EU citizenship

Since 2006, the Commission has pursued a rigorous enforcement policy in order to ensure the full implementation by Member States of EU citizens' rights, and in particular free movement rules.

It has reported on these activities regularly[242] with statistics on the nature of complaints received, description of specific issues taken up with Member States and the action taken.

It is fair to say that many of the issues encountered were stemming from a lack of understanding of national administrations of the fundamental difference between the subjective rights of EU citizens stemming directly from the Treaty, and the broad discretion national administrations traditionally have in the area of migration law relating to non-EU nationals.

At the same time, it was possible to solve most cases by way of dialogue. Only in a minority of cases pursued was it eventually necessary to launch infringement proceedings under the Treaty.

Against this background, we cannot detect a generalized unwillingness of front-line administrations or judiciaries in Member States to grant EU citizens in effect the rights which are provided for by the Treaties and secondary law.

As to the implementation of the secondary law pertaining to EU citizen's rights in national legislation, Member States make more effort to clearly separate, either through different acts, or at least through different chapters, provisions on substantial rights and procedures relating to EU citizens, on the one hand, and provisions relating to non-EU immigrants, on the other hand.

In some Member States where own nationals have to register with the administration the change of their residence, the administrations responsible for registration of nationals have been made responsible for contacts with EU citi-

242. For recent reports, see *2012 Report on the Application of the EU Charter of Fundamental Rights*, European Union (2013), pages 14 (France, Malta) 78, 83 (the Netherlands, Denmark, Sweden, and Belgium); *2011 Report on the Application of the EU Charter of Fundamental Rights*, European Union (2012), page 12 (France and Denmark), page 70. More details also in the Commission's press releases IP 11/981 of 25 August 2011 and IP 12/646 of 21 June 2012.

zens rather than administrations dealing with aliens and immigration, even if these remain competent on the substance.[243]

And also in the teaching of the law, the clear difference between the subjective rights created for EU citizens, and the broad discretion of public administrations relating to immigration from non-EU countries, is clearly recognized.[244]

5.2. The EU Charter and national courts

While the Commission is following the systematic analysis of national jurisprudence applying or referring to the EU Charter carried out by the Association of the Councils of State and the Supreme administrative jurisdictions of the EU,[245] no specific impact on the interpretation of citizen's rights of the binding effect of the EU Charter has been identified in national jurisprudence so far.

5.3. EU citizens in national media

Already before the special focus on free movement of EU citizens from Bulgaria and Romania in the discourse of some political parties and even governments of some Member States, there have been media campaigns by governments and political parties, often in the same Member States, criticizing certain aspects of free movement of EU citizens and 'othering' this group of persons.[246]

Some of these campaigns went beyond the tolerable in democratic societies who signed up to the values of enlightenment and tolerance as they are

243. See, for Germany, Article 5(2)(2) of the 'Gesetz über die allgemeine Freizügigkeit von Unionsbürgern' (Law on the general free movement of EU citizens) of 30 July 2004 (BGBl I p. 1950, 1968), last modified by Article 8 of the law of 17. June 2013 (BGBl. I, p. 1555).

244. For a detailed analysis see Thym, 'Migrationsverwaltungsrecht' Mohr Siebeck (2010), pp. 84-89; specifically relating to expulsions see pp. 231.

245. *2012 Report on the Application of the EU Charter of Fundamental Rights*, European Union (2013), chapter 3.2., page 14 and footnote 25.

246. For the UK, by the way of example, see the 2012 Lord Leveson Inquiry into the Culture, Practice and Ethics of the Press, available at http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp.

enshrined in the Treaties and the EU Charter.[247] All of them were largely devoid of factual underpinning.

For years the Commission worked with Member States to try to establish facts on alleged large scale misuse of free movement rights combined with family unification in the form of marriage of convenience. Only very few cases were eventually reported by Member States.[248] A similar process was conducted in relation to alleged abuse of free movement rights in order to make fraudulent use of national social benefit systems.

What is new in today's campaigns is that some governments, or in some cases certain ministers, in particular Ministers of Interior, are actually drivers of these campaigns. Government in these cases does not try to fulfil the public policy function of educating the public on facts, calming down popular and contra-factual excitement, and pleading for respect of commitments made under EU law, as one would expect.

Rather, in some cases, it was ministers themselves who started, or at least further fuelled, demagogic, beer table discourse around unproven allegations and stereotyped prejudice relating to EU citizens, in particular from Poland, Romania and Bulgaria.

These campaigns by governments and political parties certainly had an impact on the public debate. It can also not be excluded that they had an impact on the readiness of government front line services to treat EU citizens concerned fairly and according to the law. And it cannot be excluded that they incite people to violence against people from other countries.

On a more positive note, within all countries in which these phenomena occur, there are also important voices, often from within the same government, and certainly from the public and important groups of civil society and business, who recall the benefits for the polity of EU citizenship, free movement, and more generally, tolerance and a welcoming openness towards people from other countries.

The Commission has demonstrated that a proper implementation of the rights of EU citizens is not only in the interest of those EU citizens that avail themselves of these rights, in particular the free movement rights, but, more importantly, it is also in the interest of the large majority of EU citizens who never make use of these rights.

247. Wilders' campaign in the Netherlands, which opened a website to complain against Poles; statement of Vice-President Reding in the Parliament on 13 March 2012.

248. See footnote 43 of *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013)837 final, 25 November 2013.

Indeed, as a recent study of the Commission shows, those cities in Europe which are investing into not only granting the rights EU law provides for, but indeed go further in terms of establishing a real welcome and friendly integration culture for new arrivals, are among the most successful in terms of attractiveness for their inhabitants and economic prosperity.[249]

Equally, the macroeconomic benefits of mobility of people in Europe accrue to all of the population in Europe.[250] Increasing mobility of people in Europe is key to compensate for the negative economic impacts and the social consequences of the decline of population in Europe due to low birth rates, the ageing of population and the imbalances in the labour market.

Looking beyond Europe, and beyond EU Citizenship, the benefits for a polity of investing in the welcoming culture towards people from other countries, has been best documented in relation to the 'melting pot' of the United States.

In his bestseller 'Arrival City'[251] Saunders recalls the success story of cities all over the world which welcome immigrants and provide them with opportunities to be integrated, for their own good and for that of the community. He emphasizes the important positive example the United Kingdom gives in this respect, moving on from racial tensions to full and productive integration of populations from Bangladesh and other parts of the world. Still today, the United Kingdom sets an example of openness and successful integration for EU citizens from many Member States and for people from around the world, and this not only in the City of London. Indeed, the UK leads EU statistics when it comes to conferring national citizenship – and thus also EU citizenship.[252] This shows that the UK understands that citizenship rights are key to integration.

It should be normal that any Member State which confers national citizenship in great numbers, and thus EU citizenship, should also respect the law relating to citizenship – whether national or European.

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249. 'Evaluation of the impact of the free movement of EU citizens at local level', EY for the Commission (2014) – http://ec.europa.eu/justice/citizen/files/dg_just_eva_free_mov_final_report_27.01.14.pdf.
250. *Free movement of EU citizens and their families: Five actions to make a difference*, COM(2013)837 final, 25 November 2013, p. 1-3.
251. Saunders, 'Arrival City – How the Largest Migration in the History is Reshaping Our World' First Vintage Books Edition (2012) - http://arrivalcity.net.
252. In 2011, most new citizenships were granted by the United Kingdom (177 565 = 23 % of the EU), http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Acquisition_of_citizenship_statistics (March 2013 Eurostat data).

Governments have the obligation to ensure the respect of the law, preserve public order and peace in the land. The recent public discourses relating to alleged abuse of free movement rules by EU citizens with slogans such as 'Wer betrügt der fliegt' ('Fraudsters will be fired' meaning: sent out of the country)[253] has been considered by some commentators as the underlying cause for acts of violence against foreign populations.[254] While these may be overstatements, all who carry responsibility in Europe, whether on local, regional, national or EU level, should keep in mind that Europe needs to be careful not to fuel resentment and prejudice against people who are different, whether EU citizens or others.[255]

6. Conclusion

The way Member States apply the rules on EU Citizenship, and the way the discourse in Member States is fertilized by governments and political actors on the rights of EU citizens, may be one of the decisive questions for the future of European integration.

In this public discourse, it will be important to remember that the quest for homogeneity, combined with the denial of citizenship rights and human rights to groups of people, was at the outset of the great catastrophe of the 20th century. And it will be important to remember that the strength of Europe is to bring together its diversity of cultures, languages, and backgrounds, combined with the tolerance for difference and a respect for fundamental rights, democracy and the rule of law. It is within these parameters, and with the recognition that the individual is at the centre of all politics, that a responsible discourse on the shaping of the reality of EU citizenship based on citizenship rights combined with positive measures of governments should proceed.

In fine, the question remains as to what is the royal way to full integration and equal treatment in all Member States – a further development of EU citizenship rights, based on Article 25(2) TFEU, or a more systematic facilitation of acquisition of nationality, combined with acceptance of double nationality, among Member States for citizens of another Member State, based on EU citi-

253. Germany – http://www.faz.net/aktuell/politik/klausurtagung-in-kreuth-csu-verteidigt-wer-betruegt-der-fliegt-12742612.html.
254. Süddeutsche Zeitung, 13 January 2014, page 24.
255. Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 2008 L 328, page 55.

zens-friendly development of national laws, whether fully autonomously or based on a dialogue for coordination (which presently does not exist yet).

This competition of systems and approaches on the way to equal rights is good, and in an ideal case, the individual is granted the freedom to choose the preferred path.

Article 25(2) TFEU also invites reflection beyond just equal treatment. Could EU citizenship in the future grant more rights and more protection than national citizenship, even in the Member State of one's own nationality?[256]

The perspective of Europe that can give more to its citizens than nation states alone should drive our reflections on the citizenship, in general, and on how to make the best of Article 25(2) TFEU, in particular.

256. Armin Von Bogdandy and others, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' Common Market Law Review 49 (2012), pp. 489-520.

National reports

AUSTRIA

Mathias Vogl[1]

Unionsbürgerschaft *im Rahmen* der Richtlinie 2004/38/EG – Beständigkeit des Aufenthalts von Unionsbürgern und ihren Familienangehörigen

Frage 1

Allgemein ist anzumerken, dass die Richtlinie 2004/38/EG ihre Umsetzung in Österreich aus aufenthaltsrechtlicher Sicht im Niederlassungs- und Aufenthaltsgesetz,[2] einem Gesetz, welches ausschließlich die Bestimmungen über die Aufenthaltsrechte von Personen mit nichtösterreichischer Staatsangehörigkeit beinhaltet, und im Fremdenpolizeigesetz 2005,[3] einem Gesetz, welches vorwiegend Bestimmungen über die Überwachung der Einreise und die Beendigung des rechtswidrigen Aufenthaltes von Personen mit nichtösterreichischer Staatsangehörigkeit trifft, erfahren hat.

So wurde die Begriffsbestimmung des Familienangehörigen gemäß Art. 2 der Richtlinie in § 52 Abs. 1 NAG umgesetzt, der dazu dient, das Aufenthaltsrecht von Unionsbürgern,[4] die Angehörige eines Unionsbürgers sind. festzulegen. Für drittstaatszugehörige Familienangehörige wird in § 54 NAG,

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1. Mag. Dr., Leiter der Sektion III – Recht im Bundesministerium für Inneres.
   Ich danke Jeanette Benndorf, Ass. Iur., Mag. Elisabeth Graff, Mag. Doris Petz, Dr. Eva Pfleger, Mag. Carina Royer, Mag. Robert Stein, Mag. Tamara Völker, Mag. Gregor Wenda MBA, MMag. Dr. Stephan Wiener LL.M., alle Bundesministerium für Inneres, für die umfassende Mitwirkung und Unterstützung bei der Abfassung des nationalen Reports für Österreich zum Generalthema 2.
2. Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG), BGBl. I Nr. 100/2005).
3. Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln (Fremdenpolizeigesetz 2005 – FPG), BGBl. I Nr. 100/2005).
4. Soweit auf natürliche Personen bezogene Bezeichnungen nur in männlicher Form angeführt sind, bezichen sie sich auf Männer und Frauen in gleicher Weise.

der das Aufenthaltsrecht von diesen Familienangehörigen regelt, auf die Definition des § 52 NAG zurückgegriffen.

Der Begriff des Berechtigten gemäß Art. 3 der Richtlinie findet hauptsächlich im 4. Hauptstück des NAG (§§ 51 bis 57 NAG) Niederschlag, welches sich gänzlich dem Aufenthaltsrecht von Unionsbürgern widmet, die ihr Freizügigkeitsrecht ausgeübt haben, und erstreckt sich auch auf deren Angehörigen. So wurde in § 52 NAG das Aufenthaltsrecht von Angehörigen eines Unionsbürgers normiert, die selbst Unionsbürger sind sowie in § 54 NAG das Aufenthaltsrecht von Angehörigen eines EWR-Bürgers, die Drittstaatsangehörige sind.

Das Recht auf Einreise gemäß Art. 5 der Richtlinie in Bezug auf Familienangehörige wurde mit § 15 Abs. 1 und 2 FPG und § 32 FPG umgesetzt, zwei Bestimmungen, die die Voraussetzungen für die rechtmäßige Einreise und den rechtmäßigen Aufenthalt regeln. Im Hinblick auf den Umgang der nationalen Gerichte und Rechtsinstanzen mit Verwandtschaftsgraden ist anzumerken, dass laut Judikatur des österreichischen Verwaltungsgerichtshofes (vgl. VwGH vom 25. März 2010, Zl. 2008/21/0362), einem Höchstgericht, unter den Personenkreis des § 52 Z 2 NAG (Verwandte des EWR-Bürgers, seines Ehegatten oder eingetragenen Partners in gerader absteigender Linie bis zur Vollendung des 21. Lebensjahres und darüber hinaus, sofern ihnen von diesen Unterhalt tatsächlich gewährt wird) jedenfalls auch Enkelkinder fallen. Diese Auslegung sei auch vor dem Hintergrund der RL 2004/38/EG geboten (Hinweis E 13. März 2007, 2006/18/0010; E 13. Dezember 2007, 2007/09/0228).

Die Verfahrensvorschriften des Art. 5 der Richtlinie haben sich in der Praxis als wertvoll und angemessen erwiesen und bieten damit einen wirksamen Schutz.

Frage 2

Die Möglichkeit der Ausweisung eines Unionsbürgers wurde im FPG unter Einhaltung der strengen Vorgaben der Richtlinie wortlautgetreu umgesetzt. Derzeit sind weder eine Ausweisungsentscheidung, die sich ausschließlich auf die finanzielle Situation des Unionsbürgers stützt, noch innerstaatliche Judikatur zu dieser Thematik bekannt.

Frage 3

In Umsetzung der Art. 12 und 13 der Richtlinie wurde mit §§ 52 Abs. 2 und 54 Abs. 4 NAG normiert, dass sowohl der Tod oder Wegzug des Unionsbür-

gers als auch die Scheidung, Aufhebung der Ehe und Auflösung der eingetragenen Partnerschaft von diesem nicht das Aufenthaltsrecht des Familienangehörigen berührt.

Die Voraussetzungen für die Aufrechterhaltung des Aufenthaltsrechtes gemäß Art. 14 der Richtlinie wurden mit den §§ 51 Abs. 1, 53 und 55 NAG umgesetzt, die Tatbestände für die Beibehaltung des Aufenthaltsrechtes normieren und auf diese Bezug nehmen.

Die Verfahrensgarantien des Art. 15 der Richtlinie wurden mit den §§ 66 bis 69 FPG umgesetzt, aus denen hervorgeht, dass aufenthaltsbeendende Maßnahmen in einer bescheidmäßigen Erledigung mit Rechtsmittelbelehrung erfolgen. In dieser wird über die Möglichkeit der Einlegung eines Rechtsmittels bei einem Tribunal belehrt. Seit dem 1. Jänner 2014 erfolgt der Rechtszug zu einem Verwaltungsgericht.[5]

Verfahren in Bezug auf die Auslegung von Art. 12 bis 15 der Richlinie vor den nationalen Gerichten oder Rechtsinstanzen sind nicht bekannt.

Frage 4

Das Recht auf Daueraufenthalt des Kapitels 4 der Richtlinie (Art. 16 bis 21) wurde in den §§ 53a und 54a NAG umgesetzt. § 53a NAG betrifft dabei das Daueraufenthaltsrecht von Unionsbürgern und deren Familienangehörigen, die ebenfalls Unionsbürger sind und § 54a NAG das Daueraufenthaltsrecht für drittstaatszugehörige Familienangehörige von Unionsbürgern. Eine gesetzliche Aufzählung, auf welche Art die Kontinuität des Aufenthaltes (Art. 21 der Richtlinie) nachgewiesen werden kann, ist nicht vorhanden, sodass die herkömmlichen Beweismittel, wie beispielsweise Melderegisterbestätigungen, Arbeitsverträge, Mietverträge oder Erklärungen als Nachweis dienen können.

Verfahren in Bezug auf die Auslegung dieser Bestimmungen vor nationalen Gerichten oder Rechtsinstanzen sind nicht bekannt.

5. Siehe dazu insbesondere die Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl. I Nr. 51/2012, mit der eine Verwaltungsgerichtsbarkeit erster Instanz bestehend aus einem Bundesverwaltungsgericht, einem Bundesfinanzgericht und neun Landesverwaltungsgerichten bei gleichzeitigem Entfall der administrativen Instanzen und gleichzeitiger Auflösung verschiedener Tribunale und sonstiger weisungsfreier Sonderbehörden eingerichtet wurde.

Frage 5

Im Bereich der Sozialhilfe sind die Mindestsicherungs- bzw. die Sozialhilfegesetze der einzelnen Bundesländer der Republik Österreich ausschlaggebend.

Diese Gesetze folgen grundsätzlich den Unterscheidungen in Art. 24 Abs. 2 der Richtlinie und nehmen Arbeitssuchende in den anspruchsberechtigten Personenkreis unter Bezugnahme auf das NAG auf. § 51 Abs. 2 NAG regelt, dass die Erwerbstätigeneigenschaft als Arbeitnehmer oder Selbständiger unter bestimmten Vorrausetzungen auch für Arbeitssuchende erhalten bleibt.

Frage 6

Die österreichische Rechtsprechung orientiert sich eng an den vom Gerichtshof der Europäischen Gemeinschaften (EuGH) aufgestellten Grundsätzen. Eine Einzelfallprüfung muss ergeben, dass das persönliche Verhalten eine tatsächliche, gegenwärtige und erhebliche Gefahr darstellt, die ein Grundinteresse der Gesellschaft berührt, um eine Ausweisung rechtfertigen zu können. Strafrechtliche Verurteilungen allein können nicht ohne weiteres diese Maßnahmen begründen. Vom Einzelfall losgelöste oder auf Generalprävention verweisende Begründungen sind somit nicht zulässig.

Betreffend das Konzept der Gefährdung der öffentlichen Ordnung, Sicherheit und Gesundheit ist es nach der Rechtsprechung nicht ausreichend, auf das Bestehen einer strafrechtlichen Verurteilung hinzuweisen, sondern muss vielmehr auf das zu Grunde liegende Verhalten Bezug genommen werden.

Schwerwiegende Gründe der öffentlichen Ordnung und Sicherheit stellen zumeist strafrechtliche Verurteilungen mit einem hohen Strafmaß dar. Zu diesem Themenbereich gibt es jedoch nur wenig Rechtsprechung.

Auch bei der Umschreibung zwingender Gründe der öffentlichen Sicherheit wird auf die Rechtsprechung des EuGH abgestellt. Dementsprechend umfasst der Begriff öffentliche Sicherheit zunächst die Gefährdung des Funktionierens der Einrichtungen des Staates und seiner wichtigen öffentlichen Dienste sowie das Überleben der Bevölkerung; ebenso wird die Gefahr einer erheblichen Störung der auswärtigen Beziehungen oder des friedlichen Zusammenlebens der Völker oder eine Beeinträchtigung der militärischen Interessen darunter verstanden. Darüber hinaus kann ein Aufenthaltsverbot im Einzelfall aber auch auf Grund schwerwiegender Straftaten – etwa banden-

mäßiger Suchtmittelhandel (vgl VwGH 13. Dezember 2012, 2012/21/0181) oder sexueller Missbrauch von Minderjährigen – gerechtfertigt sein.

Dem Grundsatz der Verhältnismäßigkeit wird mehrfach Rechnung getragen. Zunächst ist er bei der Frage der Zulässigkeit der aufenthaltsbeendenden Maßnahme iZm der Prüfung des Rechts auf Privat- und Familienleben zu beachten. Auch für die Frage der Dauer eines Aufenthaltsverbotes ist die Frage der Verhältnismäßigkeit der Maßnahme zu berücksichtigen. Hier sind die Interessen des Fremden gegen die öffentlichen Interessen abzuwägen.

Die in der Richtlinie genannten Umstände, wie Aufenthaltsdauer, Alter etc. wurden wortlautgetreu in einer demonstrativen Aufzählung im FPG abgebildet. Daher werden diese im Rahmen der zwingend vorzunehmenden Einzelfallprüfung durch die zuständige Behörde bei Erlassung der Ausweisung bzw des Aufenthaltsverbots umfassend berücksichtigt. Diese Prüfung ist ein grundlegender Teil der Entscheidung. Droht eine Verletzung der Rechte bzw. führt die Einzelfallprüfung zu einem Überwiegen der zu berücksichtigenden Umstände, wird von einer Ausweisung bzw. einem Aufenthaltsverbot Abstand genommen.

Unionsbürgerschaft *außerhalb* der Richtlinie 2004/38/EG – Untersuchung der nationalen Anwendung von primärem EU-Recht

Frage 7

Nationale Gerichte und Rechtsinstanzen lagern der Beurteilung des zu prüfenden Einzelfalles stets die Frage vor, ob die vorliegende Konstellation in den Anwendungsbereich des Unionsrechtes fällt. Ist dies zu verneinen, werden Argumente in diese Richtung nicht weiter verfolgt.

Statistiken zum Ausmaß dieser Entscheidungen wurden vom Bundesminister für Inneres, welches bis zum 31. Dezember 2013 in Angelegenheiten des NAG in zweiter Instanz entschied, nicht geführt. Seit 1. Jänner 2014 entscheiden Verwaltungsgerichte (siehe Fn. 4).

Die nationale Rechtsprechung und nationale Rechtsinstanzen entscheiden anhand der Judikatur des EuGH zu den Vorschriften des AEUV[6] über die Unionsbürgerschaft (z.B. Rechtssachen *Chen*, *Ruiz Zambrano* und Folgeur-

6. Vertrag über die Arbeitsweise der Europäischen Union, Abl. C 236/47 2012.

teile), sofern die gesetzlichen Voraussetzungen bzw. die von der Judikatur vorgegebenen Kriterien dafür vorliegen.

Seitens des Bundesministeriums für Inneres werden die diesem administrativ untergeordneten erstinstanzlichen Niederlassungs- und Aufenthaltsbehörden in Form von Rundschreiben und Erlässen laufend informiert und angewiesen, sodass sich der Vollzug u.a. des Niederlassungs- und Aufenthaltsrechtes an der genannten Judikatur des EuGH orientiert.

Die nationale Rechtsprechung unterscheidet strikt zwischen Rechten gemäß der Freizügigkeitsrichtlinie und jenen, welche aus Art. 20 oder 21 AEUV ableitbar sind. Dies erschließt sich aus der ständigen Rechtsprechung des VwGH, der bis dato ausschließlich zu Sachverhalten bezüglich des Aufenthaltsrechtes von mit österreichischen Staatsbürgern verwandten Drittstaatsangehörigen abgesprochen hat, wobei die österreichischen Staatsbürger jeweils ihr Recht auf Freizügigkeit nicht in Anspruch genommen haben.

Aus dieser Judikatur ist ableitbar, dass auch in Konstellationen, in denen die Freizügigkeitsrichtlinie nicht zur Anwendung gelangt, die nationalen Rechtsinstanzen zu prüfen haben, ob für die Partei des Verfahrens Rechte aus Art. 20 oder 21 AEUV ableitbar sind, da gewisse Fallkonstellationen nicht einer rein internen Situation gleichgestellt werden dürfen.

Der VwGH entschied nach der Verkündung des EuGH-Urteils in der Rechtssache *Dereci* u.a. mehrere Beschwerden von Drittstaatsangehörigen, die entweder eine Familienzusammenführung mit ihrem nicht gewanderten, die österreichische Staatsbürgerschaft besitzenden Ehepartner begehrten oder eine aufenthaltsbeendigende Maßnahme bekämpften:

1.) Beispiel

VwGH vom 26. Februar 2013, Zl. 2012/22/0224 (ein serbischer Staatsangehöriger bekämpft im Instanzenzug das gegen ihn nach dem FPG erlassene Aufenthaltsverbot):

(...) Letztlich hat zwar der Gerichtshof der Europäischen Union (EuGH) – aufbauend auf dem Urteil vom 8. März 2011, C-34/09 »Zambrano« – im Urteil vom 15. November 2011, C-256/11 »Dereci u.a.«, ausgesprochen, dass Art. 20 AEUV nationalen Maßnahmen entgegensteht, die bewirken, dass den Unionsbürgern der tatsächliche Genuss des Kernbestands der Rechte, die ihnen dieser Status verleiht, verwehrt wird. Das Kriterium der Verwehrung des Kernbestands der Rechte, die der Unionsbürgerstatus verleiht, bezieht sich auf Sachverhalte, die dadurch gekennzeichnet sind, dass sich der Unionsbürger de facto gezwungen sieht, nicht nur das Gebiet des Mitgliedstaates, dem er angehört, zu verlassen, sondern das Gebiet der Union als Ganzes. Es betrifft Sachverhalte, in denen – obwohl das das Aufenthaltsrecht von Drittstaatsangehörigen betreffende aus der RL 2004/38/EG abgeleitete Recht nicht anwendbar ist – einem Drittstaatsangehörigen, der Familienangehöriger

eines Staatsbürgers eines Mitgliedstaates ist, ein Aufenthaltsrecht ausnahmsweise nicht verweigert werden darf, weil sonst die Unionsbürgerschaft der letztgenannten Person ihrer praktischen Wirksamkeit beraubt würde (...)

2.) Beispiel

VwGH vom 21. Dezember 2011, Zl. 2009/22/0054 (ein Staatsangehöriger aus Bangladesch begehrt die Familienzusammenführung mit seiner die österreichische Staatsbürgerschaft besitzenden Ehefrau im Rahmen eines Verfahrens nach dem NAG):

(...) Da der Beschwerdeführer jedoch mit einer österreichischen Staatsbürgerin und nicht mit einer sonstigen Unionsbürgerin verheiratet ist, weiters keine Anhaltspunkte dafür vorliegen, dass die österreichische Ehefrau des Beschwerdeführers einen Freizügigkeitssachverhalt verwirklicht hätte und letztlich der Verfassungsgerichtshof im Urteil vom 16. Dezember 2009, G 244/09 u.a., gleichheitsrechtliche Bedenken in Bezug auf § 57 NAG nicht geteilt hat, vermag der Beschwerdeführer Rechte nach §§ 52 ff NAG[7] nicht geltend zu machen.

Der EuGH hat im Urteil vom 15. November 2011, Rechtssache C- 256/11, *Dereci* u.a., unter Hinweis auf das Urteil vom 8. März 2011, Rechtssache C-34/09, *Zambrano*, ausgesprochen, dass Art. 20 AEUV nationalen Maßnahmen entgegensteht, die bewirken, dass den Unionsbürgern der tatsächliche Genuss des Kernbestands der Rechte, die ihnen dieser Status verleiht, verwehrt wird (Randnummer 64). Das Kriterium der Verwehrung des Kernbestands der Rechte, die der Unionsbürgerstatus verleiht, bezieht sich auf Sachverhalte, die dadurch gekennzeichnet sind, dass sich der Unionsbürger de facto gezwungen sieht, nicht nur das Gebiet des Mitgliedstaats, dem er angehört, zu verlassen, sondern das Gebiet der Union als Ganzes (Randnummer 66). Es betrifft Sachverhalte, in denen – obwohl das das Aufenthaltsrecht von Drittstaatsangehörigen betreffende abgeleitete Recht nicht anwendbar ist – einem Drittstaatsangehörigen, der Familienangehöriger eines Staatsbürgers eines Mitgliedstaats ist, ein Aufenthaltsrecht ausnahmsweise nicht verweigert werden darf, da sonst die Unionsbürgerschaft der letztgenannten Person ihrer praktischen Wirksamkeit beraubt würde (Randnummer 67). Konkretisierend hat der EuGH dargelegt, die bloße Tatsache, dass es für einen Staatsbürger eines Mitgliedstaats aus wirtschaftlichen Gründen oder zur Aufrechterhaltung der Familiengemeinschaft im Gebiet der Union wünschenswert erscheinen könnte, dass sich Familienangehörige, die nicht die Staatsbürgerschaft eines Mitgliedstaats besitzen, mit ihm zusammen im Gebiet der Union aufhalten können, rechtfertige für sich genommen nicht die Annahme, dass der Unionsbürger gezwungen wäre, das Gebiet der Union zu verlassen, wenn kein Aufenthaltsrecht gewährt würde (Randnummer 68).

Angesichts dieses unionsrechtlichen Maßstabs ist festzuhalten, dass die belangte Behörde in Verkennung der Rechtslage nicht geprüft hat, ob der vorliegende Fall einen sol-

7. Durch die Bestimmungen der §§ 51 ff NAG, die das unionsrechtliche Aufenthaltsrecht von EWR-Bürgern, Schweizer Bürgern und deren Familienangehörigen regeln, wurde die Freizügigkeitsrichtlinie umgesetzt.

cherart beschriebenen Ausnahmefall darstellt. Sie wird dazu im fortzusetzenden Verfahren nach Einräumung von Parteiengehör – diese Frage war bisher nicht Gegenstand des behördlichen Verfahrens – entsprechende Feststellungen zu treffen haben (...).

3.) Beispiel

VwGH vom 26. Juni 2012, Zl. 2008/22/0775 (ein afghanischer Staatsangehöriger begehrt erfolglos die Ausstellung einer Daueraufenthaltskarte im Hinblick auf seine nicht gewanderten, österreichischen Wahleltern):

(...) Soweit der Beschwerdeführer die Freizügigkeitsrichtlinie 2004/38/EG anspricht, gesteht er selbst in seiner Beschwerde zu, dass kein Anhaltspunkt dafür besteht, dass seine Wahleltern ihr Freizügigkeitsrecht in Anspruch genommen hätten; eine Anwendbarkeit dieser Richtlinie im Beschwerdefall ist daher ausgeschlossen (vgl. dazu schon die Urteile des Gerichtshofes der Europäischen Union vom 8. März 2011, Rechtssache C-34/09, *Zambrano*, Randnummer 39, und vom 15. November 2011, Rechtssache C-256/11, *Dereci* u.a., Randnummer 52 ff.), sodass sich der Beschwerdeführer nicht darauf berufen kann, um die Anwendbarkeit des NAG zu begründen.

Auch der Unionsbürgerstatus der Wahleltern des Beschwerdeführers macht den angefochtenen Bescheid noch nicht rechtswidrig. Da nämlich der Beschwerdeführer als subsidiär Schutzberechtigter ein asylrechtliches befristetes (nicht: »vorläufiges«) und bei Vorliegen der maßgeblichen Voraussetzungen stets verlängerbares Aufenthaltsrecht gemäß § 8 Abs. 4 Asylgesetz 2005[8] innehat, wird jedenfalls nicht in den Kernbestand der Rechte, die der Unionsbürgerstatus verleiht, eingegriffen, weil sich die Unionsbürger (konkret: die Wahleltern des Beschwerdeführers) in solchen Konstellationen nicht de facto gezwungen sehen, das Gebiet der Union zu verlassen (vgl. dazu die hg. Erkenntnisse vom 19. Jänner 2012, Zl. 2008/22/0837, und vom 26. Jänner 2012, Zl. 2008/21/0162). (...)

Mittelbar erschließt sich die vom VwGH vorgenommene Unterscheidung zwischen Rechten aus der Richtlinie und jenen aus Art. 20 und 21 AEUV auch aus jenen Kriterien, die nach Auffassung des VwGH eine Verweigerung eines Aufenthaltsrechtes selbst dann rechtfertigen, wenn die Partei zwar keine Rechte aus der Freizügigkeitsrichtlinie selbst, wohl aber aus Art 20 bzw. 21 AEUV ableiten kann:

8. Bundesgesetz über die Gewährung von Asyl (Asylgesetz 2005 – AsylG 2005), BGBl. I Nr. 100/2005.

4.) Beispiel

VwGH vom 15. Mai 2012, Zl. 2011/18/0147 (ein kosovarischer Staatsangehöriger begehrt erfolglos die Aufhebung eines gegen ihn gemäß § 65 FPG erlassenen Aufenthaltsverbotes):

(...) Im Anwendungsbereich der Unionsbürgerrichtlinie ist es zulässig, gegenüber einem Fremden, auch einem Unionsbürger – weil er durch sein persönliches Verhalten eine tatsächliche, gegenwärtige und erhebliche Gefahr darstellt, die ein Grundinteresse der Gesellschaft berührt (vgl. § 86 Abs. 1 FrPolG 2005) – ein Aufenthaltsverbot zu erlassen. Derselbe Maßstab ist für die Beurteilung, ob der Fremde die Trennung von seiner die österreichische Staatsbürgerschaft besitzenden Familie oder jene die Beeinträchtigung der mit der Unionsbürgerschaft verbundenen Rechte hinnehmen muss, anzuwenden, wenn dem Fremden unter dem Blickwinkel des Art. 20 AEUV grundsätzlich ein Aufenthaltsrecht einzuräumen wäre (vgl. E 28. März 2012, 2008/22/0140, zu der Frage, unter welchen Voraussetzungen einem Fremden, der mit einer österreichischen Staatsbürgerin, die ihr Recht auf Freizügigkeit nicht in Anspruch genommen hat, verheiratet ist, sich auf Art. 20 AEUV berufen kann, demnach ein Aufenthaltstitel aus Gründen der Gefährdung der öffentlichen Ordnung und Sicherheit verweigert werden kann). (...)

5.) Beispiel

VwGH vom 28. März 2012, Zl. 2008/22/0140 (eine nigerianische Staatsangehörige begehrt die Erteilung eines Aufenthaltstitels nach dem NAG zum Zweck der Aufrechterhaltung der Familiengemeinschaft mit ihrem die österreichische Staatsbürgerschaft besitzenden, nicht gewanderten Ehemann):

(...) Die belangte Behörde wird jedenfalls für den Fall, dass Gründe im soeben genannten Sinn vorliegen sollten, bei ihrer Beurteilung, ob der Aufenthalt der Beschwerdeführerin eine Gefahr für die öffentliche Ordnung oder Sicherheit darstellen könnte, zu beachten haben, dass die Verweigerung des Aufenthaltstitels an die Beschwerdeführerin nur dann zulässig wäre, wenn die Trennung der Beschwerdeführerin von ihrem die österreichische Staatsbürgerschaft – und somit auch die Unionsbürgerschaft – besitzenden Ehemann hinzunehmen wäre. Da es sich hiebei um die Einschränkung von aus der Unionsbürgerschaft herrührender Rechte handelt, ist es nunmehr unzweifelhaft, dass bei der Beurteilung kein geringerer Maßstab angelegt werden kann, als es das Unionsrecht auch im Fall eines Angehörigen eines sonstigen (»gewanderten«) Unionsbürgers vorgibt, unter denen auch dieser die Trennung von seinen Angehörigen und somit allenfalls damit verbunden die Einschränkung der Rechte aus der Unionsbürgerschaft – etwa weil dem Unionsbürger durch Weigerung des Mitgliedstaates, seinem Angehörigen den Aufenthalt (weiterhin) zu gewähren, die (weitere) Inanspruchnahme seines Rechtes auf Freizügigkeit erschwert oder verunmöglicht wird – hinzunehmen hat. (...)

Es wurden keine rechtlichen Veränderungen eingeführt. Die erstinstanzlichen Niederlassungs- und Aufenthaltsbehörden wurden in Form von Rundschreiben angewiesen, die maßgebliche Judikatur zu beachten, sofern die gesetzlichen Voraussetzungen dafür vorliegen.

Nationale Gerichte entscheiden – bei Vorliegen der gesetzlichen Voraussetzungen – anhand der Rechtsprechung des EuGH.

Der VwGH hatte sich bis dato jedoch noch nie mit einem Sachverhalt zu befassen, der unter dem Blickwinkel der Art. 20 oder 21 AEUV ein von dort ableitbares Aufenthaltsrecht beinhaltete.

Der VwGH verneint die Anwendbarkeit der sich aus Art. 20 oder 21 AEUV ergebenden Maßstäbe, wenn der Partei des Niederlassungs- und Aufenthaltsverfahrens ohnehin bereits ein Aufenthaltsrecht zukommt.[9]

Der VwGH behebt Entscheidungen der nationalen Rechtsinstanz, wenn sich diese mit den Fragen des Vorliegens eines aus Art. 21 oder 21 AEUV ableitbaren Rechts gar nicht oder zu wenig befasst hat.[10]

Der VwGH lässt es in bestimmten Konstellationen überhaupt dahingestellt, ob ein direkt etwa aus Art. 20 AEUV ableitbares Aufenthaltsrecht vorliegt, sofern das Fehlverhalten des Fremden gemessen an einem unionsrechtlichen Maßstab ohnehin von so großem Gewicht ist, dass dieser eine Trennung von seinem österreichischen Ehegatten hinzunehmen und selbst ein nichtösterreichischer Unionsbürger die (allfällige) Beeinträchtigung der aus der Unionsbürgerschaft herrührenden Rechte zu gewärtigen hätte.

In einer solchen Konstellation ist eine aufenthaltsbeendigende Maßnahme auch nicht unter dem Blickwinkel des Art. 20 AEUV aufzuheben.[11]

9. VwGH vom 26. Juni 2012, Zl. 2008/22/0775: Das Höchstgericht bestätigte die Rechtsansicht des Bundesministeriums für Inneres als nationale Rechtsinstanz, wonach der Antrag eines Drittstaatsangehörigen auf Ausstellung einer Daueraufenthaltskarte im Hinblick auf seine österreichischen, nicht gewanderten Wahleltern deswegen zurückgewiesen wurde, weil das NAG gemäß § 1 Abs. 2 Z 1 nicht für Fremde gilt, die nach dem Asylgesetz oder nach vorigen asylgesetzlichen Bestimmungen zum Aufenthalt berechtigt sind.
10. VwGH vom 19. Jänner 2012, Zl. 2011/22/0313; Zl. 2011/22/0309; Zl. 2011/22/0311; Zl. 2011/22/0312, Zl. 2011/22/0310; Ausweisung: VwGH vom 23. Februar 2012, Zl. 2009/22/0158 (in diesen Fällen ergingen die Entscheidungen der nationalen Rechtsinstanzen zeitlich vor Verkündung des Urteiles Dereci u.a.).
11. VwGH vom 15. Mai 2012, Zl. 2011/18/0147; 26. Februar 2013, Zl. 2012/22/0224.

Frage 8

Ein Österreicher, der eine andere Staatsangehörigkeit erhält, verliert schon mit der Annahme der fremden Staatsangehörigkeit die Staatsbürgerschaft (§ 27 Staatsbürgerschaftsgesetz[12]), außer ihm wurde zuvor die Beibehaltung seiner Staatsbürgerschaft von der Landesregierung mit schriftlichem Bescheid nach § 28 StbG bewilligt.

Voraussetzungen für die Bewilligung der Beibehaltung der österreichischen Staatsbürgerschaft nach § 28 StbG ist, dass einerseits sowohl das Vorliegen der Zustimmung des anderen Staates als auch die Unbescholtenheit des Antragstellers gegeben sein müssen. Im Fall von Minderjährigen ist das Kindeswohl entscheidend. In allen anderen Fällen wird das Interesse der Republik Österreich an der Beibehaltung der Staatsbürgerschaft geprüft. Erfolgte der Erwerb der Staatsbürgerschaft durch Abstammung und liegen für die Beibehaltung besonders berücksichtigungswürdige Gründe im Privat- und Familienleben vor, so stellt dies eine taugliche Begründung für die Bewilligung der Beibehaltung dar.

Bei der Entscheidung über die Beibehaltung der Staatsbürgerschaft kommt es nunmehr zu einer zwingend vorzunehmenden unionsrechtlichen Verhältnismäßigkeitsprüfung für die Statuierung von Verlusttatbeständen im nationalen Staatsbürgerschaftsrecht aufgrund der Rechtsprechung des EuGH im Urteil vom 2. März 2010 in der Rechtssache *Rottmann*, C 135/08: Wenn eine Entscheidung über die Rücknahme der Einbürgerung zur Folge hat, dass der Betroffene neben der Staatsangehörigkeit des Mitgliedstaates der Einbürgerung die Unionsbürgerschaft verliert, ist zu prüfen, ob die Rücknahmeentscheidung hinsichtlich ihrer Auswirkungen auf die unionsrechtliche Stellung des Betroffenen den Grundsatz der Verhältnismäßigkeit wahrt (Randnummern 54, 55 und 59).

Bei der Prüfung einer Entscheidung über die Rücknahme der Einbürgerung sind die möglichen Folgen zu berücksichtigen, die diese Entscheidung für den Betroffenen und gegebenenfalls für seine Familienangehörigen in Bezug auf den Verlust der Rechte, die jeder Unionsbürger genießt, mit sich bringt. Hierbei ist insbesondere zu prüfen, ob dieser Verlust im Verhältnis zur Schwere des vom Betroffenen begangenen Verstoßes zur Zeit, die zwischen der Einbürgerungsentscheidung und der Rücknahmeentscheidung vergangen ist, und zur Möglichkeit für den Betroffenen, seine ursprüngliche Staatsange-

12. Bundesgesetz über die österreichische Staatsbürgerschaft (Staatsbürgerschaftsgesetz 1985 – StbG), BGBl. Nr. 311/1985 (Wiederverlautbarung).

hörigkeit wieder zu erlangen, gerechtfertigt ist (Randnummer 56 EuGH Rechtssache *Rottmann*).

Ein Mitgliedstaat, dessen Staatsangehörigkeit durch Täuschung erschlichen wurde, kann nicht nach Art. 17 EG[13] verpflichtet sein, von der Rücknahme der Einbürgerung allein deshalb abzusehen, weil der Betroffene die Staatsangehörigkeit seines Herkunftsstaats nicht wieder erlangt hat (Randnummer 57 EuGH Rechtssache *Rottmann*). Jedoch ist zu beurteilen, ob die Beachtung des Grundsatzes der Verhältnismäßigkeit es unter Berücksichtigung sämtlicher relevanter Umstände verlangt, dass dem Betroffenen vor Wirksamwerden einer derartigen Entscheidung über die Rücknahme der Einbürgerung eine angemessene Frist eingeräumt wird, damit er versuchen kann, die Staatsangehörigkeit seines Herkunftsmitgliedstaats wieder zu erlangen (Randnummer 58 EuGH Rechtssache *Rottmann*).

Politische Rechte von Unionsbürgern

Frage 9

Die Richtlinie 93/109/EG über Wahlen zum Europäischen Parlament ist in Österreich noch vor seinem Beitritt vollständig umgesetzt worden. Österreich hatte den Vorteil, im Jahr 1993 in die Entwicklungsphase der Richtlinie bereits eingebunden gewesen zu sein. Mit dem neu zu schaffenden Europa-Wählerevidenzgesetz[14] ist es Österreich leichter gefallen, die Richtlinie vollinhaltlich umzusetzen, als dies in Mitgliedstaaten der Fall war, in denen die Durchführung von Europawahlen schon zuvor in der Rechtsordnung implementiert war.

Für Auslandsösterreicher mit Hauptwohnsitz in der Europäischen Union wie für Unionsbürger im Inland ist richtlinienbedingt insofern eine von den Regelungen für Österreicherinnen und Österreichern mit Hauptwohnsitz im Inland abweichende Regelung in der Rechtsordnung verankert, als für die Eintragung in die Europa-Wählerevidenz die Abgabe einer förmlichen Erklä-

13. Art 17 des Vertrages zur Gründung der Europäischen Gemeinschaft, ABl. 1997 C 340/1 1997, behandelte die Unionsbürgerschaft; siehe nunmehr Art 20 AEUV.
14. Bundesgesetz über die Führung ständiger Evidenzen der Wahl- und Stimmberechtigten bei Wahlen zum Europäischen Parlament (Europa-Wählerevidenzgesetz – EuWEG), BGBl. Nr. 118/1996.

rung vorgesehen ist.[15] Mangels Meldepflicht für Auslandsösterreicher ist es für diesen Personenkreis notwendig, diese Eintragung alle zehn Jahre zu erneuern,[16] in gleicher Weise, wie bei der Eintragung in die Wählerevidenz, die zur Teilnahme an anderen bundesweiten Wahlereignissen berechtigt.

Die Änderungen der Richtlinie 93/109/EG vom Dezember 2012 wurden annähernd fristgerecht umgesetzt.[17] Die sich aus den neuen Regelungen für Bewerber aus einem nicht-österreichischen Herkunfts-Mitgliedstaat ergebenden Vorteile wurden in der Praxis bei den zurückliegenden Europawahlen durch das Bundesministerium für Inneres auf freiwilliger Basis gegebenenfalls ohnedies schon gewährt.[18] So hat die Fachabteilung des Bundesministeriums für Inneres die Kontaktaufnahme zur Erlangung der Bestätigung über die Wahlberechtigung im Herkunfts-Mitgliedsstaat nicht dem betroffenen Bewerber überantwortet; vielmehr ist das Bundesministerium von sich aus auf die Ansprechpartner in anderen Mitgliedstaaten zugegangen, um die erforderlichen Bestätigungen übermittelt zu bekommen.

Frage 10

Die Richtlinie 94/80/EG über Kommunalwahlen (»Kommunalwahl-Richtlinie«) ist an sich von Anfang an vollständig umgesetzt worden. Bezüglich des Zweifelfalls der Zulässigkeit des Erfordernisses einer speziellen Registrierung dieses Personenkreises wurde ein möglicher Kritikpunkt insofern gegenstandslos, als man mittlerweile in allen Wahlrechtskodifikationen der Länder dazu übergegangen ist, Unionsbürgern automatisch für eine Stimmabgabe auf der Ebene der lokalen Gebietskörperschaften der Grundstufe (grundsätzlich für den Gemeinderat, in Wien für die Bezirksvertretung) zu ermöglichen. Zuständig ist für die diesbezüglichen innerstaatlichen Regelungen das jeweilige Land, der zentrale Ansprechpartner für die Europäische Union in dieser Rechtsfrage ist das Bundeskanzleramt. Unabhängig davon hat das Bundesministerium für Inneres stets eine koordinierende Funktion wahrgenommen.

Einschlägige Urteile nationaler Gerichte sind nicht bekannt.

15. § 2 Abs. 4 sowie § 5 Abs. 2 EuWEG.
16. § 4 Abs. 4 EuWEG.
17. Siehe die Änderung der EuWO mit BGBl. I Nr. 9/2014, in Kraft getreten mit 18. Februar 2014.
18. Vgl. Art. 7 der Richtlinie 93/109/EG in der alten sowie in der geltenden Fassung sowie § 31 Abs. 3 und 4 des Bundesgesetzes über die Wahl der Mitglieder des Europäischen Parlaments (Europawahlordnung – EuWO).

Frage 11

In Bezug auf das Wahlrecht für Gebietskörperschaften besteht in Österreich für Unionsbürger ausschließlich das Wahlrecht zum Europäischen Parlament und das Wahlrecht für die Vertretung auf der Ebene der lokalen Gebietskörperschaften der Grundstufe (an sich die Ebene der Gemeinde, in Wien die Ebene der Bezirke). Darüber hinausgehende Möglichkeiten gibt es in Österreich nicht.

Für eine Implementierung des Wahlrechts auf nationaler Ebene (für den Nationalrat oder auf Ebene der Länder für die Landtage) müsste, da es sich bei den gewählten Gremien um gesetzgebende Körperschaften handelt, nicht nur Artikel 1 Bundes-Verfassungsgesetz[19] geändert werden, allgemein vertretener Auffassung wäre für so eine solche Anpassung sogar eine Änderung des B-VG durch Volksabstimmung unabdingbar, weil Artikel 1 B-VG ein Element der Bauprinzipien der österreichischen Bundesverfassung ist.[20]

Frage 12

Mit den Änderungen, die sich aus dem Wahlrechtsänderungsgesetz 2011[21] ergeben haben, sollten Konflikte mit der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte (EGMR) weitestgehend ausgeräumt sein. Bei zu einer Strafe in einer bestimmten Höhe verurteilten Rechtsbrechern ist für einen Ausschluss vom Wahlrecht nunmehr unbedingt der Ausspruch eines Gerichtes erforderlich. Eine solche Einzelfallentscheidung kann nur bei Verurteilung zu einer unbedingten Freiheitsstrafe von mehr als 5 Jahren erfolgen. Bei bestimmten Delikten, die sich in einer gewissen Form gegen den Staat richten, ist die Grenze schon mit einer unbedingten Strafe von einem Jahr festgelegt worden. Bei diesen Delikten handelt es sich insbesondere um Delikte im Bereich des Wahlrechts sowie um die Wiederbetätigung nach dem Verbotsgesetz 1947.[22] [23]

19. Bundes-Verfassungsgesetz (B-VG), BGBl. Nr. 1/1930 (Wiederverlautbarung).
20. Art. 1 B-VG: »Österreich ist eine demokratische Republik. Ihr Recht geht vom Volk aus.«
21. BGBl. I Nr. 43/2011.
22. Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP (Verbotsgesetz 1947), BGBl Nr. 13/1945.
23. Vgl. § 22 des Bundesgesetzes über die Wahl des Nationalrats (Nationalrats-Wahlordnung 1992 – NRWO), BGBl. Nr. 471/1992, sowie § 3 EuWEG.

Kultur(en) der Staatsbürgerschaft

Frage 13

Die Unionsbürgerschaft und die damit einhergehenden Freizügigkeitsrechte werden durchaus kontrovers behandelt. Grundsätzlich wird die Freizügigkeit von Unionsbürgern inklusive der Ausübung von Freizügigkeitsrechten von österreichischen Staatsbürgern in anderen EU-Mitgliedstaaten als Errungenschaft der Mitgliedschaft Österreichs in der Europäischen Union gesehen. Im Gegensatz dazu wird sie jedoch im politischen Diskurs mitunter auch als zusätzliche Schiene im österreichischen Zuwanderungssystem gesehen und somit auch als Einwanderungsmöglichkeit verstanden.

Frage 14

Die bindende Wirkung der EU-Grundrechtecharta[24] wurde von den österreichischen Höchstgerichten anerkannt. Aus dem richtungsweisenden Erkenntnis des österreichischen Verfassungsgerichtshofes (VfGH) vom 14. März 2012, U 466/11, sowie weiteren Folgejudikaten erschließt sich, dass der VfGH in bestimmten Konstellationen nunmehr die EU-GRC in ihrem Anwendungsbereich als Maßstab für die »Verfassungskonformität« von nationalem Recht heranzieht und entgegenstehende Normen aufhebt.[25]

Der VfGH hat seinen Prüfungsmaßstab sowohl im Bescheidprüfungsverfahren als auch im Normenkontrollverfahren um die Garantien der EU-GRC erweitert, wobei die Einschränkung der Anwendung durch die Charta selbst erfolgt, da diese »ausschließlich bei der Durchführung des Rechts der Union« gilt, wonach sich auch ihr Anwendungsbereich bestimmt.[26] Die Garantien der EU-GRC können nach dem VfGH als verfassungsgesetzlich gewährleistete Rechte demnach nur im »Anwendungsbereich des Unionsrechts« geltend gemacht werden.[27]

In Konstellationen des österreichischen Fremdenrechts, in denen u.a. »gewanderte Unionsbürger« Rechte aus der Freizügigkeitsrichtlinie geltend ma-

24. Charta der Grundrechte der Europäischen Union (im Folgenden EU-GRC), ABl. C 326/391 2012.
25. VfGH vom 14. März 2012, U 466/11, RZ 47 zu Art. 47 Abs. 2 GRC; VfGH vom 29.06.2013, U 2465/2012-14, unter Hinweis auf Art. 24 Abs. 2 GRC.
26. VfGH vom 14. März 2012, U 466/11, RZ 35.
27. VfGH vom 14. März 2012, U 466/11, RZ 47.

chen,[28] entschied bis 31. Dezember 2013 im Instanzenzug grundsätzlich ein Tribunal (Unabhängiger Verwaltungssenat [UVS] des jeweiligen Bundeslandes),[29] seit 1. Jänner 2014 entscheiden Verwaltungsgerichte.

Bis dato ist nicht bekannt, dass Entscheidungen dieser Tribunale zu Rechten von Unionsbürgern unter dem Blickwinkel der EU-GRC vor dem VwGH beleuchtet worden wären.

Der VwGH überprüft jedoch Verfahren zu aufenthaltsbeendigenden Maßnahmen betreffend Drittstaatsangehöriger, wenn die belangte Behörde in Durchführung des Rechts der Union im Sinn des Art. 51 Abs. 1 EU-GRC gehandelt hat, am Maßstab der EU-GRC.

1.) Beispiel

VwGH vom 19. März 2013, Zl. 2011/21/0267 (der VwGH behebt den Bescheid des UVS des Landes Oberösterreich unter Hinweis auf Art. 47 Abs. 2 EU-Grundrechtecharta. Der UVS bestätigte eine von einer erstinstanzlichen Behörde erlassene Rückkehrentscheidung bezüglich eines vietnamesischen Staatsangehörigen ohne vorhergehende Abhaltung einer mündlichen Berufungsverhandlung. Der Beschwerdeführer brachte vor, dass die belangte Behörde sich ein persönliches Bild von ihm im Rahmen der Durchführung einer mündlichen Berufungsverhandlung hätte machen müssen):

(...) Nach Art. 3 Z 4 der Richtlinie 2008/115/EG (Rückführungsrichtlinie) ist eine »Rückkehrentscheidung« die behördliche oder richterliche Entscheidung oder Maßnahme, mit der der illegale Aufenthalt von Drittstaatsangehörigen festgestellt und eine Rückkehrverpflichtung auferlegt oder festgestellt wird. Gemäß Art. 6 Abs. 1 der genannten Richtlinie haben die Mitgliedstaaten – abgesehen von hier nicht in Betracht kommenden Ausnahmefällen – gegen alle illegal in ihrem Hoheitsgebiet aufhältigen Drittstaatsangehörigen eine Rückkehrentscheidung zu erlassen. Dem entsprechend ordnet der erste Satz des geltenden § 52 Abs. 1 FPG in Umsetzung der genannten Richtlinienbestimmungen an, dass gegen einen Drittstaatsangehörigen mit Bescheid eine Rückkehrentscheidung zu erlassen ist, wenn er sich nicht rechtmäßig im Bundesgebiet aufhält.

Dem zufolge hat die belangte Behörde in »Durchführung des Rechts der Union« im Sinn des Art. 51 Abs. 1 der Grundrechte-Charta (GRC) gehandelt, weil die Vollziehung von durch die Mitgliedstaaten in innerstaatliches Recht umgesetztem Richtlinienrecht zweifellos zum zentralen Teil des Anwendungsbereichs des Unionsrechts gehört (siehe das hg. Erkenntnis vom 23. Jänner 2013, Zl. 2010/15/0196, mit Hinweisen auf die Rechtspre-

28. NAG: siehe § 51 ff, welche in Umsetzung der Freizügigkeitsrichtlinie ergangen sind.
29. UVS der Länder entscheiden auch über Berufungen von begünstigten Drittstaatsangehörigen gegen Entscheidungen nach dem FPG sowie über Berufungen gegen Rückkehrentscheidungen nach dem FPG (§ 9 FPG).

chung des EuGH; vgl. dazu auch das Erkenntnis des Verfassungsgerichtshofes vom 14. März 2012, U 466/11 u.a., Punkt II. 6. der Entscheidungsgründe mit weiteren Nachweisen). Daher wäre von der belangten Behörde insbesondere auf Art. 47 Abs. 2 GRC Bedacht zu nehmen gewesen, nach dessen ersten Satz »jede Person ein Recht darauf hat, dass ihre Sache von einem unabhängigen, unparteiischen und zuvor durch Gesetz errichteten Gericht in einem fairen Verfahren, öffentlich und innerhalb angemessener Frist verhandelt wird.«(...)

(...) Das Unterbleiben der nach dem Gesagten gebotenen Durchführung einer Berufungsverhandlung belastet den bekämpften Bescheid mit Rechtswidrigkeit infolge Verletzung von Verfahrensvorschriften (vgl. in diesem Sinn zuletzt auch das schon genannte hg. Erkenntnis vom 23. Jänner 2013, Zl. 2010/15/0196). Er war daher gemäß § 42 Abs. 2 Z 3 lit b und c VwGG aufzuheben.

2.) Beispiel

VwGH vom 14. Juni 2012, Zl. 2011/21/0278 (ein ukrainischer Staatsangehöriger bekämpft ein gegen ihn im Instanzenzug erlassenes Aufenthaltsverbot und begehrt die Durchführung einer mündlichen Berufungsverhandlung; der VwGH folgt diesem Argument unter Hinweis auf Art. 47 Abs. 2 EU-Grundrechtecharta und behebt den Bescheid des UVS des Landes Oberösterreich):

(...) Im gegebenen Zusammenhang ist unter nochmaliger Bezugnahme auf das schon erwähnte hg. Erkenntnis Zl. 2011/22/0097 ergänzend darauf hinzuweisen, dass die Verhängung des gegenständlichen Aufenthaltsverbotes als Maßnahme im Sinn der Richtlinie 2008/115/EG (Rückführungs-RL) – und außerdem auch als eine solche nach der Richtlinie 2003/109/EG – zu verstehen ist. Damit hat die belangte Behörde jedenfalls in »Durchführung des Rechts der Union« im Sinn des Art. 51 Abs. 1 der Grundrechte-Charta (GRC) gehandelt, weshalb auch auf die Verbürgungen der GRC Bedacht zu nehmen ist. Konkret ist damit Art. 47 Abs. 2 GRC angesprochen, wonach – so der erste Satz dieser Bestimmung – jede Person ein Recht darauf hat, dass ihre Sache von einem unabhängigen, unparteiischen und zuvor durch Gesetz errichteten Gericht in einem fairen Verfahren, öffentlich und innerhalb angemessener Frist verhandelt wird. Grundsätzlich besteht daher in fremdenpolizeilichen Berufungsverfahren der vorliegenden Art – jedenfalls nach Maßgabe des § 67d AVG und allenfalls auch des § 9 Abs. 7 FPG (zur Unbedenklichkeit der ähnlich formulierten Bestimmung des § 41 Abs. 7 AsylG 2005 vgl. das Erkenntnis des Verfassungsgerichtshofes vom 14. März 2012, U 466/11-18 und U 1836/11-13) – ein Anspruch auf Durchführung einer öffentlichen mündlichen Berufungsverhandlung (so der Sache nach schon das hg. Erkenntnis vom 20. März 2012, Zl. 2011/21/0298).

Im Einzelnen muss hier im Hinblick auf das Vorgesagte nicht näher auf die Auslegung von Art. 47 Abs. 2 GRC eingegangen werden. Festgehalten sei nur, dass Art. 47 Abs. 2 GRC im Anwendungsbereich von Art. 6 EMRK die gleiche Tragweite und Bedeutung wie die genannte Konventionsbestimmung hat. Jenseits dessen gelten die Garantien des Art. 6 EMRK für den Anwendungsbereich des Art. 47 Abs. 2 GRC entsprechend (vgl. das eben erwähnte Erkenntnis des Verfassungsgerichtshofes, Punkt II.7.2. der Entscheidungs-

gründe). Was das Verhandlungsgebot anlangt, ist davon ausgehend darauf hinzuweisen, dass auch im Anwendungsbereich des Art. 47 Abs. 2 GRC bei einer unvertretenen Partei nur dann vom Vorliegen eines schlüssigen Verzichts auf die Durchführung einer Verhandlung ausgegangen werden kann, wenn sie über die ihr nach § 67d Abs. 1 AVG eingeräumte Möglichkeit einer Antragstellung auf Durchführung einer solchen Verhandlung belehrt wurde oder wenn Anhaltspunkte dafür bestehen, dass sie von dieser Möglichkeit hätte wissen müssen (so vor dem Hintergrund des Art. 6 EMRK in einer Streitigkeit betreffend Zivilrechte das hg. Erkenntnis vom 12. August 2010, Zl. 2008/10/0315). Im vorliegenden Fall des im Berufungsverfahren noch unvertretenen Beschwerdeführers ist weder das eine noch das andere ersichtlich.

Vorliegend ergibt sich aber schon aus den obigen Ausführungen, dass die belangte Behörde ihr Verfahren mit einem wesentlichen Mangel belastet hat, weshalb der bekämpfte Bescheid gemäß § 42 Abs. 2 Z 3 VwGG wegen Rechtswidrigkeit infolge Verletzung von Verfahrensvorschriften aufzuheben war. (...)

Im Niederlassungs- und Aufenthaltsverfahren betreffend Drittstaatsangehöriger, welchen kein unionsrechtliches Aufenthaltsrecht zukommt, bei denen vielmehr das Aufenthaltsrecht erst durch rechtsbegründende Erteilung eines Aufenthaltstitels eingeräumt wird, entschied bis 31. Dezember 2013 der Bundesminister für Inneres als zweite Rechtsinstanz. Dessen Entscheidungen konnten einer Überprüfung durch die Gerichtshöfe des öffentlichen Rechts (VfGH und VwGH) zugeführt werden.

In Überprüfung derartiger Entscheidungen des Bundesministers für Inneres in Angelegenheiten des Niederlassungs- und Aufenthaltsrechtes begegnet der VwGH bis dato Vorbringen drittstaatszugehöriger Beschwerdeführer in Hinblick auf Rechte aus der EU-GRC bereits im Vorfeld seiner Entscheidungen.[30] Das Höchstgericht verweist dabei entweder auf die verfassungs- und unionsrechtliche Unbedenklichkeit der Entscheidungen des Bundesministers für Inneres oder behebt den zu prüfenden Bescheid wegen eines anderen Mangels.

Seit 1. Jänner 2014 ist der administrative Instanzenzug abgeschafft. Nunmehr entscheidet ein Verwaltungsgericht erster Instanz (siehe Fn. 4) unter Beibehaltung der Beschwerdemöglichkeiten an den VfGH und VwGH. Damit ändert sich zwar die Rechtsmittelinstanz im Niederlassungs- und Aufenthaltswesen, die volle Beachtung der EU-GRC ist dadurch aber umso mehr sichergestellt. Die EU-GRC findet somit volle Beachtung in der innerstaatlichen Rechtsprechung, in der Rechtssetzung durch den österreichischen Gesetzgeber und verordnungserlassende Stellen sowie in der Rechtsausübung durch Behörden und Gerichte.

30. VwGH vom 13. November 2012, Zl. 2011/22/0231; VwGH vom 3. Dezember 2011, Zl. 2008/22/0223.

Frage 15

Grundsätzlich sind Fragen rund um die Freizügigkeit von Unionsbürgern Teil der Berichterstattung der österreichischen Medien. Diese wird jedoch eher dominiert durch Themen wie etwa die Teilnahme von Unionsbürgern am österreichischen Arbeitsmarkt, die Delinquenz von Unionsbürgern oder »Sozialmissbrauch« durch diese. Oftmals erfolgt eine anlassbezogene Reaktion der Medien auf richtungsweisende EuGH-Urteile, die als Schlagzeilen in den aktuellen politischen Diskurs einfließen (z.B. in der Rechtssache Zambrano zur Ableitung des Aufenthaltsrechtes für Drittstaatsangehörige). In diesem Zusammenhang ist erkennbar, dass die Protagonisten der österreichischen Medienlandschaft aufgrund ihrer Berichterstattung einem »pro« oder »contra Europa«-Lager zuordenbar sind und somit zumindest indirekt auf die Meinungsbildung der Gesellschaft Einfluss zu nehmen versuchen. Ansonsten erscheint die mediale Auseinandersetzung im Besonderen mit der Unionsbürgerschaft eher als gering einzustufen zu sein. Ebenso findet keine breite wissenschaftliche Auseinandersetzung mit einschlägigen rechtlichen Themenstellungen statt. Zusammenfassend kann festgestellt werden, dass Themenstellungen rund um die Unionsbürgerschaft und den Freizügigkeitsrechten in der Vergangenheit nicht im besonderen Fokus der Medien Österreichs gestanden haben, sondern thematisch von der europäischen Wirtschafts- und Finanzkrise überlagert wurden.

BULGARIA

Alexander Kornezov[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

The question of how and to what extent Directive 2004/38/EC has been transposed into Bulgarian law has caused a great deal of confusion in national administrative and judicial authorities. Generally speaking, the Directive was transposed with the adoption of the Entry, Residence and Exit of EU Citizens, and Members of Their Families Act (hereafter the 'EU Citizens Act').[2] However, the scope of application of this Act is restricted only to Union citizens and their family members, who are not Bulgarian citizens.[3] Apparently, the national legislator's understanding of the Directive was that the latter did not apply to nationals with regard to their own Member State. This understanding turned out to be wrong in the light of the Court of Justice's subsequent case-law, according to which the Directive is also applicable to nationals wishing to leave their own Member State.[4] The legal framework governing the right of free movement of Bulgarian citizens is laid down in the Constitution[5] and a number of legislative acts, in particular the Bulgarian Identity Documents Act (hereafter 'ZBLD').[6] In addition, the right of free movement of a Bulgarian citizen's family members who are third country nationals is governed by

1. Dr, Référendaire at the Court of Justice of the EU. The views expressed in this report are personal.
2. Закон за влизането, пребиваването и напускането на Република България на гражданите на Европейския съюз и членовете на техните семейства (ДВ, бр. 80, 30.10.2006, последно изм. и доп. бр. 21, 13.03.2012).
3. See e.g. order No. 2414 from 11 November 2010 of the Sofia City Administrative Court in case No. 6758/2009.
4. E.g. case C-33/07, Jipa, ECR I-5157.
5. See, in particular, Art 35.
6. Закон за българските лични документи (ДВ, бр. 93, 11.08.1998, последно изм. и доп. бр. 70 от 9.08.2013).

the Foreigners Act.[7] Neither the Constitution, nor these acts have however been drafted with the Directive in mind. Therefore it appears that the Directive, in so far as it is applicable to nationals wishing to exercise their right to free movement, has not been transposed into national law. This matter in particular has generated a substantial body of case-law (see, in particular, the reply to Question 6).

The following analysis will mainly focus on the Union Citizens Act, unless it is otherwise stated. Paragraph 1 of its additional provisions contains the definition of a 'member of the family of a EU citizen'. This definition is broader than the one provided for under Art 2 of the Directive in so far as:

– it generally covers the dependant 'descendants', as well as 'relatives in the ascending order'[8] and not only, as required under Art 2(2)(c) and d), the *direct* descendants and relatives in the ascending line;
– it covers persons in 'factual cohabitation' with a Union citizen.[9] According to Art 2(2)(b) of the Directive, partners in 'registered partnerships' are to be considered as members of the family of a Union citizen, 'if the legislation of the host Member State treats registered partnerships as equivalent to marriage'. In Bulgaria registered partnerships, other than marriage, are not formally recognised[10] and are certainly not considered as 'equivalent' to marriage. Moreover, the term 'factual cohabitation' appears broader than a 'registered partnership'.

Art 3 of the Directive has also been transposed in broader terms. Whereas Art 3(2) of the Directive requires Member States only to 'facilitate' entry and residence for the persons defined therein, Art 5 of the Union Citizens Act provides that these persons 'have the right' to enter and reside in Bulgaria. This, together with the broad definition of a Union citizen's family member mentioned above, practically eliminates the different status of the persons mentioned, respectively, in Arts 2 and 3 of the Directive. Bulgarian law thus seems to provide, as a whole, a much more liberal legal framework for family members of Union citizens than the one required under the Directive. By vir-

7. Закон за чужденците в Република България (ДВ, бр. 153 от 23.12.1998, последно изм. и доп. бр. 70 от 9.08.2013).
8. §1(1)(b) and (c) of the Union Citizens Act.
9. §1(1)(a) of the Union Citizens Act.
10. Even though national law sporadically attaches certain legal consequences to the so-called 'factual cohabitation', there is no formal definition thereof, nor a possibility to formally register it.

tue of Art 37 of the Directive, the latter does not affect more favourable national provisions.

As far as Art 5 of the Directive is concerned, it has been almost literally transposed into the Union Citizens Act.[11]

No relevant case-law of the domestic courts regarding the aforementioned legal provisions could be identified.

Question 2

There is no such evidence in the decisions of national courts and tribunals.

Question 3

The national provisions that are meant to transpose Arts 12-15 of the Directive have been placed in different parts of the Union Citizens Act. This technique makes it difficult to evaluate to what extent Arts 12-15 of the Directive have been correctly transposed into national law. Even if it seems that, overall, most of the rules laid down in Arts 12-15 have been properly reflected into national law, some inconsistencies remain, namely:

– Art 12(3) of the Directive has been transposed incorrectly. Art 15(2) of the Union Citizens Act, read in conjunction with paragraph 4 of the same article, suggests that the Union citizen's children or the parent who has actual custody of the children retain the right of residence in Bulgaria after the Union citizen's departure or death, if they are enrolled in an education establishment, *and* if 'they are able to show that they are workers or self-employed persons or 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, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements'. This results from an ill-placed *renvoi* which seems to suggest that the above-mentioned requirement is applicable to all family members finding themselves in one of the situations described in Arts 12(2) and (3), and 13(2) of the Directive. This looks like a legislative error given that, first, Art 12(3) of the Directive imposes no such requirement and, second, the rationale behind the right of

11. Art 4.

residence of the Union citizen's children or of the parent having actual custody rights manifestly stands at odds with the aforementioned requirement.

– The requirement, under Art 14(2) of the Directive, that the verifications, by national authorities, of whether the conditions set out in Arts 7, 12, and 13 of the Directive are satisfied, shall not be carried systematically, does not appear as such in the Union Citizens Act. Still, the general scheme of the Act suggests that such systematic verifications should not occur in practice. Indeed, pursuant to Art 9(8) of the Act, national authorities may verify whether the said conditions are satisfied when 'a reasoned conclusion may be made that the rules on the right of residence have been breached'. Nonetheless, a clear prohibition of systematic verifications might have been preferable.
– The Bulgarian legislator has merged the requirements of Arts 14(3) and (4)(b), 15(2) and the last sentence of Art 27(1) of the Directive into one single provision of the Union Citizens Act.[12] Such an approach, while justifiable for reasons of legislative economy, is questionable since it blurs the differences between the abovementioned articles of the Directive and their respective scope. In addition, there is no explicit transposition of Arts 14(4)(a) and 15(3) of the Directive.

No relevant case-law of the domestic courts on the above-mentioned provisions could be identified.

Question 4

Arts 16-18 of the Directive have been almost literally transposed into the Union Citizens Act. With respect to the administrative formalities laid down in Arts 19 and 20 of the Directive, the Union Citizens Act has put into place a more rapid procedure that the one required under the Directive. Indeed, a permanent residence card is issued the same day for Union citizens and within one month for family members who are not Union citizens.[13] The Act does not lay down specific sanctions for failing to apply for a permanent residence card, but stipulates instead, in general terms, that 'minor' violations of the

12. Art 23(4).
13. Arts 16(5) and 19(3) of the Union Citizens Act. Compare with Arts 19(2) and 20(1) of the Directive, which require that the document be issued 'as soon as possible' for Union citizens and 'within six months of the submission of the application' for family members who are not Union citizens.

Act shall be subject to a fine of 20 BGL.[14] Finally, Art 21 of the Directive has not been explicitly transposed into national law.

No relevant case-law of the domestic courts concerning the above-mentioned provisions could be identified.

Question 5

The Union Citizens Act contains no provision similar to Art 24(2) of the Directive. In order to evaluate whether and to what extent Bulgaria has made use of that derogation, one has to examine the national legislation governing social assistance and aid for studies, which is scattered between various laws and regulations. The national legislator, as will be demonstrated below, has not followed a common approach to the matter, but has rather dealt with it in a fragmentary fashion.

Thus, Bulgarian and Union citizens are entitled to student scholarships[15] and loans[16] subject to the same conditions. There is no requirement in that regard for Union citizens to have acquired the right of permanent residence or, for that matter, of any residence whatsoever. The Bulgarian legislator has entitled Union citizens to the respective benefit, irrespective of the length of their residence in the country.

As far as entitlement to social assistance is concerned, the Social Assistance Act provides that foreigners are entitled to social assistance, if, in particular, they have acquired the right of 'durable or permanent residence'.[17] That same provision also stipulates that are entitled to social assistance 'the individuals who are so entitled under an international treaty, to which Bulgaria is a party'. This latter category of beneficiaries is not clearly defined; in particular, it is uncertain whether Union citizens come within this category or not, especially in the light of Art 24(2) of the Directive. Alternatively, if the condition of 'durable or permanent residence' is to be considered as applicable to Union citizens, and given that the right of 'durable' residence for Union citizens is acquired after a period of 3 months, it can be deduced that they cannot obtain social assistance during their first 3 months of residence in

14. Approx. 10 EUR, see Art 33 of the Union Citizens Act. This seems in line with Art 20(2) of the Directive.
15. § 6b of Regulation No. 90 of the Council of Ministers (Наредба №90 на МС) of 26th May 2000, as modified ДВ, бр. 70 от 2006.
16. Art 3 of the Student and Doctoral Loans Act (Закон за кредитиране на студенти и докторанти, обн., ДВ, бр. 69 от 5.08.2008 г.).
17. Art 2(6) (Закон за социално подпомагане, обн., ДВ, бр. 56 от 19.05.1998 г.).

Bulgaria. In this respect, it may be argued that Bulgaria has implicitly made use of Art 24(2) of the Directive. It is a different matter that, as a rule, if Member States wish to make use of a derogation, they should do so explicitly.

There are also a number of other more specific national laws governing various particular social benefits, such as, for example, the Family Assistance for Children Act, which lays down the rules on social (non-contributive) benefits during pregnancy, birth, and for raising children. This Act provides that foreigners may claim such benefits, if they have acquired the right of *permanent* residence and 'if the right to such a benefit results from an international treaty to which Bulgaria is a party'.[18] The requirement for permanent residence seems however, in any event, incompatible with Art 24(2) of the Directive.

No relevant case-law of the domestic courts concerning Union citizens could be identified.

Question 6

1.

There is a substantial body of case-law concerning the concept of 'public policy' and the application of the principle of proportionality within the context of Art 27 of the Directive. Most of the case law concerns Bulgarian citizens who were banned from leaving the country on one of the following grounds:

i) the person concerned had committed an offence, while residing in another State;[19] or
ii) the person concerned had a tax or a social security liability of more than 5000 BGN;[20] or
iii) the person concerned had a private debt of the same amount.[21]

The legality of these grounds has been challenged as being contrary to the Constitution, to the ECHR and to EU law (Directive 2004/38). However, it is noteworthy that the right to free movement is not guaranteed in identical terms under these three instruments. In particular:

18. Art 3(5) (Закон за семейни помощи за деца, обн., ДВ, бр. 32 от 29.03.2002 г.).
19. Art 76(5) ZBLD.
20. Approx. 2500 EUR; Art 75(5) ZBLD.
21. Art 76(3) ZBLD, later replaced by Art 75(6) of the same law.

– According to the Constitution, the freedom of movement may be restricted 'for the protection of constitutionally recognised values, such as national security, public health and the rights and freedoms of other citizens' (Art 35);
– Pursuant to Art 2 of Protocol 4 of the ECHR, which Bulgaria has signed and ratified, 'no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

It follows, first, that unlike Art 27 of the Directive, Art 35 of the Constitution makes no mention of 'public policy', but instead allows restrictions for the protection of the 'rights and freedoms of other citizens'. The interesting query here is whether the two concepts overlap or whether they are different. Secondly, Art 27 of the Directive expressly provides that the grounds mentioned in that article cannot be invoked 'to serve economic ends'. Such a condition is absent from the Constitution. Thirdly, the list of grounds on which the freedom of movement may be restricted under Art 35 of the Constitution, seems not to be exhaustive, which is illustrated by the use of 'such as'. The contrast here with Art 27 of the Directive is manifest. Similarly, Art 2 of Protocol 4 of the ECHR provides, like the Constitution, that the freedom of movement may be restricted for the protection of the rights and freedoms of others, and adds as possible grounds the prevention of crime and the protection of morals. There is no equivalent of the prohibition to restrict the freedom of movement on economic grounds either.

Thus Bulgarian courts had the difficult task of distinguishing between, or as the case may be, conciliating these different legal instruments and their subtle differences. The matter was eventually brought before the Supreme Administrative Court (hereafter the 'SAC'), the Constitutional Court (hereafter the 'CC'), the European Court of Human Rights (hereafter the 'ECtHR'), and the Court of Justice.[22]

22. For a comprehensive overview of these developments, see N. Angelova, Freedom of Movement of Bulgarian Citizens as Citizens of the European Union and Measures for Its Restriction, Evropeiksi praven pregled, vol. II (2012), pp. 163-193 and pp.317-319.

2.

The first query that had to be resolved was whether EU law and, in particular, Art 27 of the Directive, was applicable to nationals in respect of their own State of origin. The query gave rise to the preliminary reference in *Gaydarov*,[23] which concerned a ban imposed on a Bulgarian citizen following an offence committed in a third state. The Court of Justice held, first, that the Directive was applicable in such a situation, and second, that national law seemed to allow the imposition of such bans solely on the basis of a previous offence without further evaluating whether the person concerned represented a genuine, present, and sufficiently serious threat affecting a fundamental interest of society.

3.

Secondly, national courts wondered whether the failure to pay a public or a private debt could at all serve as a ground to restrict the right to free movement of Union citizens. After having initially confirmed the legality of such bans, the matter was brought to the ECtHR in *Riener v Bulgaria*. The Strasbourg court held that a ban on leaving the country as a consequence of a failure to pay a *public* debt of 5000 BGN or more (tax or social security liabilities) pursued a legitimate aim, namely, maintaining the *ordre public* and the protection of the rights of others within the meaning of Art 2 of Protocol 4 of the ECHR, without further elaborating on the matter.[24] Later, in *Ignatov v Bulgaria*, the ECtHR held that banning a person who had failed to pay a *private* debt from leaving the country also pursued a legitimate aim, namely, the protection of the rights of others.[25] In both cases, the ban was found to be disproportionate, given that it did not provide for periodic reassessment in the light of factors such as whether or not reasonable efforts to collect the debt had been made and whether the debtor's leaving the country was likely to undermine the chances to collect the money. The ECtHR also pointed out that the ban had an automatic character and could thus remain in force over lengthy periods of time without taking into consideration the debtor's personal conduct.

The matter was also considered by the CC. It found that a ban on leaving the country as a consequence of a failure to pay a *public* debt was, in princi-

23. Case C-430/10, nyr.
24. Appl. No. 46343/99.
25. Appl. No. 50/02.

ple, justified on grounds pertaining to the 'protection of the rights and freedoms of other citizens' within the meaning of Art 35 of the Constitution.[26] It pointed out that such a failure 'undermines the economic foundations of the State, creates a risk for the timely and effective payments and services, necessary for guaranteeing some constitutionally recognised fundamental rights, such as the right to social security and social assistance, medical insurance and free medical care, education, healthy and favourable environment, etc.' A ban on leaving the country on grounds of a failure to pay a *private* debt was, according to the CC, also justified in the name of the 'protection of the rights and freedoms of other citizens', since such a failure breached the creditor's right to private property. Nevertheless, the CC declared both bans unconstitutional, because, in substance, they took no account of the debtor's personal behaviour (e.g. whether he or she cooperated with the authorities or obstructed the reimbursement of the debt),[27] nor did they conform with the principle of proportionality, given that, according to the Bulgarian penal code, only certain serious and intentional failures to pay a public liability, amounting to a criminal offence, may be punished by a ban on leaving the country. It is noteworthy that the CC reasoned exclusively on the basis of Art 35 of the Constitution. It did mention, in a sort of an *obiter dicta*, some of the differences between the text of that provision and Art 27 of the Directive, but drew no conclusion from this, other than stating that the declaration of unconstitutionality would facilitate the transposition of Art 27. In a dissenting opinion, three of the judges added that the bans in question should not be considered as serving economic ends within the meaning of Art 27(1) of the Directive, because they contributed to the 'stability of the public order and legal certainty, given that they are based on a final national judgement or a definitve injunction to pay'.[28]

4.

Therefore it was because of their failure to respect the principle of proportionality that these bans were found to violate the ECHR and the Constitution. The case-law discussed above did not address the question of whether the imposition of such bans is compatible with EU law and, in particular, whether they can be justified on grounds of 'public policy' within the mean-

26. Judgment No. 2 in case No. 2/2011.
27. See also the opinion of judges P. Kirov and S. Stoeva, who underline the automatic character of the ban.
28. See the dissenting opinion of judges D. Tokushev, K. Stoichev and V. Angusheva.

ing of Art 27 of the Directive. That question remained relevant since, if the bans could not be justified on that ground, they were illegal *per se*. By contrast, if they were only disproportionate, they could be maintained as such, subject to certain legislative amendments allowing for the particularities of each case to be taken into consideration.

In that regard, national courts considered that a ban following a failure to pay a *public* debt pursued a 'just objective', underlining the public interest involved in the responsibility of the authorities to ensure budgetary revenue.[29] The question was eventually referred to the Court of Justice in *Aladzhov*.[30] The Court pointed out that 'the possibility cannot be ruled out as a matter of principle' that non-recovery of tax liabilities may fall within the scope of 'public policy' within the meaning of Article 27(1) of the Directive, and that the resulting ban cannot be considered, as a matter of principle, to serve exclusively economic ends.[31] The Court hemphasised that the concept of public policy presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a 'genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society', related, for example, to the amount of the sums at stake, or to what is required to combat tax fraud.[32] The Court also addressed the issue of the differences between Art 27(1) of the Directive and Art 35 of the Constitution, pointing out that these differences were 'of no relevance' since 'all that matters' was whether the ban was based on a ground which could be regarded as within the scope of public policy, within the meaning of EU law.[33] As regards the proportionality of the measure, the Court noted that such measures are founded solely on the existence of the tax liability without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy. It also invited the national court to verify whether there existed other less intrusive measures, suggesting strongly that, even if the ban at issue were to be considered as adopted under the conditions laid down in Art 27(1) of the Directive, it looked like it failed to satisfy the conditions of the second paragraph thereof.

29. E.g. judgment No. 15760 in case No. 9700/2012 of the SAC; judgment No. 15087 in case No. 12509/2011 of the SAC.
30. C-434/10.
31. Paras 37 and 38, ibid.
32. Paras 35 and 37, ibid.
33. Para. 33, ibid.

With regard to bans imposed as a consequence of a failure to pay a *private* debt, however, national courts were much more hesitant. Parts of the case-law considered that such bans cannot be justified on grounds of public policy within the meaning of Art 27(1) of the Directive, but served purely economic ends.[34] In one case, such a ban was even held to be of a sufficiently serious nature as to give rise to State liability.[35] Yet, another part of the case-law yet seems to suggest that a failure to pay a private debt can, in principle, constitute a ground of public policy, 'if the financial interest at issue amounts to a fundamental interest of society'.[36] The contradictions in the case-law gave rise to an interpretative judgment of the SAC,[37] where it held that such a ban was contrary to the Directive, because of the automatic and disproportionate character of the measure. The judgment did not address the issue of whether such a ban was to be considered as pursuing one of the grounds spelled out in Art 27 of the Directive. This was noted in two dissenting opinions, one of which argued that the matter should have been referred to the Court of Justice in order for the latter to assess whether a ban for a failure to pay a private debt can be justified on grounds of public policy.

The matter was indeed eventually brought to the attention of the Court of Justice by a lower court in *Byankov*.[38] The Court appeared rather sceptical about whether a failure to pay a private debt was a matter of public policy, noting that 'even if the view could reasonably be taken that some notion of safeguarding the requirements of public policy underlies such an objective, it cannot be ruled out (...), that the prohibition on leaving the territory at issue in the main proceedings pursues an exclusively economic objective, (which) Article 27(1) of Directive 2004/38 expressly excludes (...)'.[39] As regards the requirement of taking into consideration the personal conduct and the proportionality of the measure, the Court's considerations were analogous to those spelled out in *Aladzhov*.

5.

What conclusions can be drawn from the different currents of case-law outlined above? Whereas the assessment of the principle of proportionality car-

34. E.g. judgment No. 7776 in case No. 8814/2012 of the SAC.
35. Ibid.
36. Judgment No. 11100 in case No. 4890/2011 of the SAC.
37. Interpretative judgment No. 2/2011 of the SAC.
38. Case C-249/11.
39. Para. 39.

ried out by the SAC, CC, ECtHR, and the Court of Justice was not dissimilar, this was not necessarily the case with regard to the notion of 'public policy'. While the CC and the ECtHR had no problem concluding that a ban on leaving the country in the event of a failure to pay a public and/or a private debt of a certain amount can be justified on grounds of maintaining the public order (ECtHR) or of protecting the rights and freedoms of others (ECtHR and the CC), the Court of Justice was much less affirmative and manifestly dubious in that regard.

More generally, national courts seemed confused as to the respective scope of application of the Constitution, the ECtHR and EU law, and their underlying principles and rationale. Given the importance of free movement in Union law, it is only logical that the Directive be less permissive of restrictions on the freedom of movement than international treaties, or, as the case may be, national constitutions. This consideration may become even more relevant after EU's accession to the ECHR.

6.

As far as Art 28 of the Directive is concerned, the Bulgarian legislator has not transposed it verbatim. Art 25 of the Union Citizens Act distinguishes only between two categories of Union citizens – those who have resided in Bulgaria for 10 or more years and all other Union citizens, irrespective of whether they have acquired the right of permanent residence or not. With regard to the first category, expulsion may be ordered 'only in exceptional circumstances on grounds of national security'.[40] This seems to reflect, albeit in different terms, the 'imperative grounds of public security' of Art 28(3) of the Directive. With regard to the second category, expulsion is allowed where the Union citizen 'represents a genuine, present, and serious threat to national security or public order'.[41] Thus, the same – *higher* – threshold pertaining to the *serious* character of the threat to public order or national security is applicable to all Union citizens having resided in the country for less than 10 years, irrespective of whether they have acquired the right of permanent residence or not. Therefore it appears that the Union Citizens Acts lays down a more favourable régime, at least with regard to Union citizens who have not yet acquired the right of permanent residence. By virtue of Art 37 of the Directive, the latter does not affect more favourable national provisions.

40. Art 25(2) of the Union Citizens Act.
41. Art 25(1) of the Union Citizens Act.

There is little domestic case-law on expulsion of Union citizens or their family members. In one case, the national court interpreted the notions of serious and imperative grounds of public policy and public security.[42] Confronted with difficulties in establishing the precise length of time of the person's residence in the country, the court decided to examine whether the facts of the case amounted both to serious and imperative grounds of public policy and public security capable of justifying his expulsion. In that regard the court took into consideration the following circumstances: the person was sentenced to more than 5 years in prison for drug trafficking in an organised group, has been presenting himself with a false identity over a long period of time, has resided illegally in the country, and has not culturally and socially integrated into Bulgarian society. It concluded, after quoting the Court's judgment in *Tsakouridis*, that the abovementioned facts suffice to consider that the grounds on which the expulsion decision had been taken amount both to serious *and* imperative grounds of national security.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

The analysis of the existent case-law suggests, first, that national courts do not distinguish clearly between rights acquired under Directive 2004/38 and under Arts 20 and/or 21 TFEU; secondly, that they do not fully apprehend the Court's case-law; thirdly, that there is a general unease when having to address 'purely internal situations': national courts either make no mention of Arts 20 and 21 TFEU at all, or, conversely, refer quasi-automatically to this provision or to Art 21 TEUF without fully taking into account the conditions for their application as spelled out by the Court of Justice in its case-law.

The following examples illustrate this. In *Nalbandian,* an Armenian adult, legally residing in Bulgaria for many years, was ordered to leave the country, because of the expiry of the duration of his residence permit. Mr. Nalbandi-

42. Judgment No. 13042 in case No. 6600/2012 of the SAC. Interestingly, the person whose expulsion was ordered was a Turkish national and it was not alleged that he was a family member of a Union citizen. Yet, probably because there were doubts about his true identity, the court decided to examine, in any event, whether the requirements of the Directive were met.

an's mother, who was suffering from a serious disease which required daily care, had in the meantime acquired Bulgarian citizenship. Mr. Nalbandian challenged the order before the administrative court in Dobrich. The latter rejected the action, pointing out that the applicant's right to family life within the meaning of Art 8 ECHR was not breached since the contested order was imposed by law, was justified by the 'need to protect the rights and freedoms of the others', and was proportionate in that Mr. Nalbandian's father was residing in Bulgaria and could therefore take care of his wife.[43] In its judgment the administrative court made no mention of EU law whatsoever. On appeal, the SAC annulled that judgment on a number of grounds, one of which concerned the failure of the lower court to take account of the applicable Union law.[44] It noted that the applicant has a continuous link with Bulgaria, where his parents live, has property in the country, has had recourse to medical services in the context of his mother's treatment, is culturally and socially integrated and is unlikely to become a burden for the Bulgarian social assistance system. The SAC also mentioned that the applicant's father was suffered from a heart disease. Further, it held that although the applicant's mother, a Union citizen, has never exercised her freedom of movement, that circumstance 'had no bearing on the applicability of Directive 2004/38 and Arts 20 and 21 TFEU', a conclusion it supported by referring to the Court's judgments in *Zhu and Chen45* and *Carpenter*.[46] In its opinion, by virtue of Art 3(2)(a) of the Directive, 'as interpreted in the light of para. 45 of the Court's judgment in *Chen*', the Directive was applicable to Mr. Nalbandian's situation. After mentioning that Mr. Nalbandian's expulsion would affect 'unfavourably' his mother's family relations with her son and would also 'interfere' with her right to a life of dignity and independence within the meaning of Art 25 of the Charter, the SAC concluded that Mr. Nalbandian's removal would deprive his mother of the 'genuine enjoyment of the substance' of her rights as Union citizen. On the basis of these considerations, the SAC found that the contested order breached Art 7 of the Charter, Arts 20 and 21 TFEU, Directive 2004/38 and Art 8 ECHR and, consequently, annulled it.

The SAC's judgment in *Nalbandian* is a good example of the difficulties national courts have experienced in the application of EU rules on citizenship. First, it shows a general misunderstanding of the scope of application of Directive 2004/38. Contrary to what was held in that judgment, the Directive

43. Judgment n° 210 from 08.12.2009 in case n° 447/2009.
44. Judgment n° 15906 from 23.12.2010 in case n° 3284/2010.
45. Case C-200/02.
46. Case C-60/00.

is not applicable to a third country national who is a family member of a Union citizen that has never exercised his or her right to free movement and that has always resided in the Member State of which he or she is a national.[47] Secondly, the judgment in *Nalbandian* demonstrates the practical difficulties in understanding and applying the 'denial of the genuine enjoyment of the substance of a Union citizen's rights' test. In particular, the SAC did not examine the question of whether Mr. Nalbandian's removal would lead to a situation where his mother would have to leave the territory of the Union.[48] In that respect, the SAC did not examine whether Mr. Nalbandian was personally taking care of his sick mother, whether she was economically dependent on him, etc. Thirdly, the judgment in *Nalbandian* also shows the difficulties national courts face when having to apply the Court of Justice's citizenship case-law. SAC's referral to *Zhu and Chen* and *Carpenter* appears ill-placed. Last, but not least, it is unclear what relevance the SAC attached to Mr. Nalbandian's degree of integration into Bulgarian society or to the fact that he was unlikely to become a burden to the social assistance system. These circumstances are generally relevant in the context of Directive 2004/38, but not for the purposes of applying Art 20 TFUE.

Another example of the national courts' misapprehension of the Court of Justice's citizenship case-law can be found in the *Singh* case. Mr. Singh, an Indian national, was ordered to leave the national territory and was banned from re-entering for a period of 5 years on the ground that he was illegally residing in the country. Mr. Singh argued that he had a durable relationship with a Bulgarian citizen for over four years and had a son, who was a Bulgarian citizen himself. Mr. Singh successfully sought the annulment of the order in front of the Administrative court in the region of Sofia, which pointed out, referring to the Court's judgment in *Zambrano*,[49] that the contested order was not sufficiently motivated in that it failed to take account of the applicable Union law.[50] It did not however further discuss the exact application of Union law in the situation at hand. The judgment was however subsequently quashed on appeal by the SAC, which pointed out, first, that the Court's judgment in *Zambrano* was irrelevant, since, unlike Mr. Singh, the third country national in *Zambrano* had legally entered the territory of the Union.[51] Secondly, it held that Mr. Singh cannot be considered a member of a

47. E.g. case C-256/11, Dereci, paras 50-58.
48. Ibid., para. 66.
49. Case C-34/09.
50. Judgment n° 56 from 27.01.2012 in case n° 1152/2011.
51. Judgment n° 5699 from 20.04.2012 in case n° 2713/2012.

Union citizen's family since there was no evidence of his relationship with a Bulgarian citizen, nor did it credit the mother's notary declaration that Mr. Singh was the father of her son since the said declaration did not respect the form required by law. Putting aside the question of whether there was sufficient evidence of Mr. Singh being a Union citizen's family member, the interesting aspect of this judgment is the way the SAC interpreted the Court's judgment in *Zambrano*. The SAC seemed to suggest that what was decisive in that case was the fact that Mr. Zambrano had legally entered the territory of the Union and that the Court's solution would be inapplicable in a situation where the third country national had illegally entered the EU. This understanding does not find support in the Court's subsequent case-law.[52]

There is also evidence of cases where national courts did not at all discuss whether Art 20 TFEU was applicable in a 'purely internal situation'. The *Shishich* case concerned a Bosnian national who had been living in Bulgaria for about 15 years, had a durable relationship with a Bulgarian citizen and was the father of a Bulgarian citizen. Mr. Shishich, whose family members had apparently not exercised their rights of free movement, was ordered to leave the country because he was found to be residing there illegally. The *Hashani* case concerned another 'purely internal situation' where a Kosovo national was ordered to leave the country, despite the fact that he had a durable relationship with a Bulgarian citizen, with whom he had three minor children, also Bulgarian citizens. In neither of these cases did the SAC refer to Art 20 TFEU. Instead, in *Shishich* it relied exclusively on Directive 2008/115[53] and annulled, on that ground, the contested order.[54] In *Hashani*, it annulled the order on the basis of Art 8 ECHR, because it failed to take into account all the relevant circumstances of the case and was, in any event, disproportionate.[55]

Question 8

Where Bulgarian citizenship has been acquired by naturalisation, it may be revoked if, in particular, the naturalised person has withheld any data or facts

52. See for example, the judgment in Dereci, cited at note 47 supra, para. 23 read in conjunction with paras 59-69.
53. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98-107.
54. Judgment n° 11056 from 05.08.2011 in case n° 13868/2010.
55. Judgment n° 13422 from 19.10.2011 in case n° 14875/2010.

which, had they been known, would have served as grounds to refuse acquisition of Bulgarian citizenship.[56] However, the decision to grant Bulgarian citizenship can be revoked no later than ten years after it has been granted and only if the person does not, as a result of the revocation, become stateless. The latter condition was added in February 2012,[57] i.e. after the Court's judgment in *Rottmann*.[58] It is unclear whether this amendment sought to give effect to the Court's judgment. In addition, Art 24 of the said Act stipulates that any person who has acquired Bulgarian citizenship by naturalisation may be deprived thereof, if sentenced by an enforceable conviction for a serious offence against the Republic, subject to the condition that the said person is abroad, and does not become stateless. It thus seems that a situation like the one in *Rottmann* cannot arise under Bulgarian law.

Political rights of EU citizens

Question 9

Directive 93/109/EC was first transposed in national law in March 2007 (3 months after accession) through the adoption of the Election of Members of the European Parliament from the Republic of Bulgaria Act.[59] In 2011, the relevant provisions were merged into the Electoral Code[60] which governs all matters related to the organisation of elections in Bulgaria. The latter has not made use of any of the derogations provided for under Arts 14 and 15 of the Directive.

With regard to the conditions imposed on EU citizens, they are mostly identical with those imposed on national citizens: age requirements (18 years by polling day for the right to vote and 21 years for the right to be elected); absence of indictment and ongoing custodial sentence; residence in Bulgaria or in another EU Member State at least during the last 3 months (for the right to vote) or 6 months (for the right to be elected); lack of citizenship of any State which is not a EU Member State (for the right to be elected). EU citi-

56. Art 22 of the Bulgarian Citizenship Act [Закон за българското гражданство (ДВ, бр. 136, 18.11.1998, последно изм. бр. 68, 02.08.2013)].
57. ДВ, бр. 11, 07.02.2012.
58. Case C-135/08, ECR I-1449.
59. ДВ, бр. 20, 06.03.2007.
60. ДВ, бр. 9, 28.01.2011.

zens' electoral franchise has also been subjected to three additional conditions, two of which result from the Directive (i.e. that he or she is not deprived of his or her electoral franchise in the home Member State and that he or she has stated in advance, in a written declaration, his or her desire to exercise his or her voting rights or to run as candidate in Bulgaria).[61] The third condition, specific to EU citizens, is the requirement that they enjoy a 'durable or permanent residence status' in Bulgaria.[62]

With regard to the latter requirement, the European Commission noted in its 2010 report on the election of MEPs that the 'requirement [for EU citizens] to provide a registration document for proving residence' is contrary to the Directive.[63] In the meantime, the Commission initiated infringement proceedings against Bulgaria concerning the implementation of the Directive.[64] It is interesting to note that the 'durable or permanent residence' requirement applicable to Union citizens only, seems to complement the condition – also applicable to Bulgarian citizens – that, in order to vote, they must have resided in 'Bulgaria or another EU Member State' at least during the last three months prior to polling day. These two conditions, read together, recall the legal framework laid down by Directive 2004/38, whereby Member States may require Union citizens to register with the local authorities for periods of residence longer than three months.[65] Yet, the 'durable or permanent residence' requirement applicable only to Union citizens seems problematic at least from two angles. First, whereas Union citizens residing in Bulgaria for periods longer than three months may indeed be expected to have registered with the local authorities, failure to do so may, according to Directive 2004/38, give rise to 'proportionate and non-discriminatory sanctions'.[66] The query here would be whether depriving the Union citizen of his electoral franchise is a proportionate and non-discriminatory sanction for failing to

61. Arts 8, 9 and 10 of the Directive.
62. Art 3(3) of the Electoral Code.
63. Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC), 27.10.2010, COM(2010) 605 final.
64. http://ec.europa.eu/eu_law/eulaw/decisions/dec_20121024.htm. The complaints put forward by the Commission in this letter have however not been publicly disclosed.
65. Art 8(1) of the Citizen Directive.
66. Art 8(2) of the Citizen Directive.

produce a residence card.[67] Second, a Union citizen who has only recently settled in Bulgaria – for example one month before polling day – and who has therefore had no obligation to apply for a residence card, will be unable to vote, even though he had resided for the last three and more months in another EU Member State, thus fulfilling the requirement of Art 5 of Directive 93/109. By contrast, a Bulgarian citizen in a similar situation would be eligible to vote.

In its 2010 report, the European Commission also noted that Bulgaria had failed to correctly transpose the obligation to provide information to Union citizens on the detailed arrangements for exercising their right to vote and stand in elections.[68]

The December 2012 amendments to Directive 93/109/EC may require certain amendments to the Electoral Code. Art 118, para. 2, point 7, of the latter provides that an EU citizen who is not a Bulgarian citizen and who wishes to run for MEP, shall produce an attestation from the competent authorities in the home MS certifying that that person has not been deprived of the right to stand as a candidate in the home MS or that no such disqualification is known to them; however, if he or she is unable to produce such an attestation, it suffices that he or she declares that he or she has not been deprived of the right to be elected in his or her home MS.[69] While this second option seems to be already in compliance with the latest amendments of Directive 93/109/EC, the first proviso (the attestation requirement) should eventually be deleted in order to remove potential administrative hurdles.

No relevant case-law of domestic courts could be identified.

Question 10

Directive 94/80/EC was first transposed in national law in October 2007 (10 months after accession) through the adoption of the Municipal Elections Act.[70] In 2011, the relevant provisions were merged into the Electoral Code. Bulgaria has made use of the derogation provided for under Art 5(3) of the

67. According to the instructions of the Central electoral committee, EU citizens must produce a residence card in order to be able to exercise their electoral franchise: www.europe.bg/htmls/page.php?id=21089&category=354.
68. See note 64 supra.
69. For the 2009 EP elections that second option was inexistent : see Decision No. 11 of 7 April 2009 of the Central Electoral Commission which expressly requires that EU citizens produce such an attestation (Part II, point 1 (d)): http://izboriep.bta.bg/.
70. ДВ, бр. 78, 28.09.2007.

Directive by allowing Union citizens to stand only for municipal councillors, but not for mayors.

The Electoral Code imposes some additional conditions on EU citizens in order to vote or be elected in municipal elections, which are analogous to those mentioned in the reply to the previous question.[71] The European Commission has also initiated infringement proceedings against Bulgaria concerning the implementation of Directive 94/80.[72]

No relevant case-law of domestic courts could be identified.

Question 11

There is no franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law.

Question 12

Persons serving a custodial sentence or interdicted are deprived of electoral franchise. To our knowledge, the question of whether such limitations are compatible with EU law, and in particular with the Charter, has not so far been raised in domestic courts. For other possible tensions with EU law, please refer to the reply to Question 9.

Culture(s) of citizenship

Question 13

Given the relatively limited scope of the issues so far considered by national administrative and judicial authorities, it would be premature to evaluate whether the implementation of EU citizenship in Bulgaria is understood as part of a rights-based EU culture or as an adjunct to national immigration systems. It could nonetheless be noted that parts of the case-law and most recent

71. Arts 3(4)(5) and 4(5)(6) of the Electoral Code. In addition to the conditions mentioned in the reply to Question 9, Bulgarian and Union citizens are also required, in the context of municipal elections, to have resided in the respective municipal electoral territory at least during the last 6 months.

72. http://ec.europa.eu/eu_law/eulaw/decisions/dec_20121024.htm. The complaints put forward by the Commission in this letter have however not been publicly disclosed.

administrative practice have shown a clear preference for a 'rights-based' approach, in particular in cases where Bulgarian citizens have relied on their rights as Union citizens. By contrast, as far as third country nationals, members of the family of a Union citizen are concerned, the 'immigration'-based approach appears dominant. For examples, please refer to the replies to Questions 6 and 7.

Question 14

The Charter has not had a notable effect on how the rights of EU citizens are being interpreted by national courts. The latter have referred to the Charter in more general terms in a couple of judgments concerning EU citizenship, but do not seem to have drawn particular legal consequences from it. The case-law is still marred by confusion with regard to the scope of application of the Charter and that of the ECHR, whose Art 8 has been systematically quoted alongside Art 7 of the Charter, without distinguishing between the two. In that regard, the Court's judgment in *Dereci*[73] does not appear to have been fully understood by domestic courts.

Question 15

Issues connected to EU citizenship have not been a particularly salient issue in the national media. This is probably mainly due to the fact that immigration from other EU Member States has so far been limited. That being said, several themes directly or indirectly linked with Union citizenship have recurrently appeared in local media. A common feature of most of these reports is that they generally pay little attention to the legal aspects of Union citizenship.

One such recurring theme is the ongoing trend of Union citizens, mainly from the UK, settling down in certain regions of the country. Media reports on the matter have mainly focused either on the economic (e.g. how the prices of local real estate and services have been affected) or social (integration, language, customs, etc.) aspects of this trend, without necessarily taking account of Union citizenship as such.

Another frequently reported theme concerns the periodic group expulsions from France and occasionally from other EU Member States of Bulgarian citizens of Roma origin. These group expulsions have been condemned as con-

73. Cited note 47 supra.

trary to EU law by the European Commission[74] and the European Parliament.[75] The former even initiated infringement proceedings against France.[76] However, media reports in Bulgaria have paid little attention to the illegality of such expulsions and the associated aspects of Union citizenship.[77] Some have, instead, either exposed the 'hypocrisy' of the 'old' EU Member States (who call for the integration of the Roma minority, while at the same time subjecting them to group expulsions)[78] or emphasised the fact that such incidents generate negative coverage for Bulgaria as a whole.[79]

There have also been a number of media reports on the ever-increasing number of citizens of third States (mostly Macedonia, Moldova, Serbia, Albania, and the Ukraine), who have acquired Bulgarian citizenship in a fast-track simplified procedure. This procedure is available for citizens of third States of Bulgarian origin and has been designed with a view to reintegrating the Bulgarian minorities living – for historical reasons – abroad.[80] Media reports have suggested that some applicants have sought not so much to

74. http://europa.eu/rapid/press-release_MEMO-10-384_en.htm. In that regard, commissioner Reding declared: 'I personally have been appalled by a situation which gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority. This is a situation I had thought Europe would not have to witness again after the Second World War', see http://www.europeanvoice.com/article/2010/09/reding-slams-france-on-roma-expulsions/68855.aspx.
75. http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100907IPR81450.
76. See Viviane Reding's speech at the XXV Congress of FIDE, 31 May 2012, Tallinn, http://europa.eu/rapid/press-release_SPEECH-12-403_en.htm.
77. E.g. 'Френската сага с ромите', в. 'Монитор', 13.09.2012, 'Франция е депортирала 9800 румънски и български роми', http://dnes.dir.bg/news/frantzia-romi-deportirane-6944046, 20.08.2010, 'Европа се гаври с България заради шушумигите', в. 'Сега', 16.08.2012. For an exception however, see 'Франция наруши антирасистките директиви на ЕС', в. 'Сега', 02.09.2010.
78. E.g. 'Ромите ни заразиха с лицемерие Европа', сп. 'Тема', http://www.tema news.com/index.php?p=tema&iid=620&aid=14643, 'Комунизма ли да върнем заради ромите?', в. 'Сега', 17.08.2010.
79. E.g. '620 000 000 печелят ромските кланове', в. '24 часа', 10.09.2010.
80. For more details on this procedure and some statistical data, see V. Paskalev, Naturalisation Procedures for Immigrants, Bulgaria, and D. Smilov and E. Jileva, Country Report: Bulgaria, both available on the EUDO Citizenship Observatory's website.

reestablish their link with the Bulgarian state, but rather to take advantage of the Union citizenship that comes along with it.[81]

Local media have also reported on some of the infamous campaigns that certain Member States have launched in the context of a presumed influx of Bulgarian and Romanian migrant workers after the end of the transitional period (1 January 2014). These reports have rarely touched upon the legal aspects of free movement within the Union.[82]

It is not clear whether the media has had any influence on national public discourse. However, the absence of condemnation in the media of the group expulsions mentioned above might have had a certain impact on the rather passive stance of the Bulgarian government on this matter. Similarly, the fact that local media have not been particularly critical of certain Member States' campaigns aiming at discouraging or even restricting the rights of Bulgarian migrant workers might also have contributed to the government's very low profile approach to the matter as well as lack of official reaction.

81. E.g., 'Седем хиляди македонци са получили българско гражданство само за месец', в. 'Капитал', 30.12.2011, 'Македонците стават българи по икономически причини', в. 'Преса', 07.12.2012.

82. 'Заплаха ли са българите за Албиона?', в. 'Монитор', 09.03.2013, 'Холандия ни спира от работа в ЕС', в. 'Стандарт', 19.08.2013, 'Холандия иска да удължи забраната за работа на българи на нейна територия', http://pik.bg/.

CROATIA

Snježana Vasiljević[1] *and Tina Oršolić Dalessio*[2]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

With respect to family members of Union citizens, Articles 2 and 3 of the Directive 2004/38 have been transposed into the Croatian legislation through Article 162 of the Aliens Act.[3] This provision came into force on the date of Croatia's entry into the EU, July 1, 2013, along with the other provisions of the Aliens Act implementing the Directive 2004/38. For the most part, the national implementing provisions are identical to the provisions of the Directive in question. There are, however, some clarifications in the Aliens Act regarding Articles 2 and 3 of the Directive worth mentioning.

In implementing Article 2(2)(b) of the Citizens' Rights Directive, Article 162(2) of the Aliens Act list as family members 'the common law partner, in line with Croatian legislation, and persons in a durable relationship which can be demonstrated by shared residence at the same address in the duration of at least three years, and if the intention of continuing to live together is evident'. Thus, unlike Article 2(2)(b) of the Directive 2004/38, which makes reference to partners in a registered partnership, the Croatian legislation lists as family members common law partners, as well as those in a durable relationship under the stated conditions. This difference between the Directive and the na-

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3. Zakon o strancima, *Official Gazette* 130/11 and 74/13 (hereinafter 'the Aliens Act'). English text is available at http://ec.europa.eu/ewsi/UDRW/images/items/docl_36590_190259219.pdf. It is worth noting that unlike the Directive 2004/38, which refers to Union citizens and their family members, the Aliens Act in the part that implements this Directive refers to nationals of the member states of the European Economic Area (EEA) and their family members. This terminology will thus be used in the follow up.

tional implementing legislation can be explained by the fact that there are no registers provided for the partners under the current Croatian laws.[4] Yet, while the source of this distinction is rather clear, the legal consequences that it may produce are not. Namely, the chosen formulation in Article 162(2) causes uncertainty regarding the status of registered partners, especially same-sex partners, of nationals of EEA member states in Croatia. It is not clear from Article 162(2) whether such partners should be treated as family members in the context of application of the Croatian Aliens Act. What especially causes concern in this regard are paragraphs 3 to 6 of Article 162 of the Aliens Act, which in implementing Article 2(2)(c) and (d) of Directive 2004/38 make reference to descendants, adopted children, step-children, and dependants in the ascending line *only* of spouses or common law partners. This essentially excludes the possibility of granting the status of family member to these categories of descendants or dependants of same-sex partners, or heterosexual partners who do not satisfy conditions for a common law marriage.[5]

On the bright side, in implementing Article 3(2)(a) of Directive 2004/38, the Croatian legislator opted for a more inclusive national provision. In Article 162(7) of the Aliens Act, it listed as 'family members' persons who are listed as 'beneficiaries' in Article 3(2)(a) of Directive 2004/38. It could be inferred that beneficiaries listed in Article 3(2)(b) of Directive 2004/38 are covered as 'family members' under Article 162(2) – since in addition to common law partners this Article recognizes as family members 'persons in a durable relationship' under the previously mentioned conditions. Such a reading could leave room for the recognition of same-sex partners in durable relationships (registered or unregistered), as well as their descendants and dependants, as 'family members'. Since the date of Croatia's entry into the EU, there has not yet been any case law dealing with different types of family relationships outlined in Articles 2 and 3 of the Directive 2004/38.

4. On September 6, 2012, the Parliamnetary Committee for the preparation of the Law on Registered Partnerships has started with its work. See http://www.vlada.hr/hr/naslovnica/novosti_i_najave/2012/rujan/radna_skupina_za_izradu_zakona_o_registriranom_partnerstvu_zapocela_s_radom. A public debate on this Law is expected to be held at the end of the year.

5. A common law marriage according to Article 56(5) of the Aliens Act constitutes 'the union of life of an unmarried *woman* and an unmarried *man* at least three years in duration or shorter if a child was born into such union.' Emphasis added. This corresponds to the indirect definition of common law marriage as stated in Croatian Family Act. See Article 3 of the Family Act, *Official Gazette* 116/03, 17/04, 136/04, 107/07, 57/11, 61/11.

As far as the transposition of Article 5 of the Directive 2004/38 is concerned, this provision was implemented into the national legislation through Articles 154, 166, 167, 183, and 221 of the Aliens Act. The only apparent specifications come in relation to Article 5(5) of the Citizens' Directive. Namely, Article 183(5) of the Aliens Act provides that an EEA member state national and a member of his/her family have to 'register their address, temporary residence, or permanent residence at the latest eight days from the date of arrival to the Republic of Croatia or from the change of address, temporary residence, or permanent residence.' Article 221(2) of the Aliens Act prescribes that 'A fine in the amount of HRK 100,00 shall be issued against a national of an EEA Member State and a member of his family' who fails to comply with the Article 183(5) requirement. The required period of time for registration seems reasonable and the sanction proportionate. It is yet to be seen how effective the procedural safeguards provided by Article 5 of the Directive will prove in practice.

Question 2

To this date, there has been no evidence of the expulsion of EU citizens and/or their family members on purely economic grounds.

Question 3

Article 12 of the Directive 2004/38 has been fully transposed into the national law through paragraphs 1, 2 and 3, of Article 171 of the Aliens Act. Paragraphs 4 and 5 of Article 171 of the Aliens Act implement Article 13 of the Directive 2004/38 in the part that concerns marital partners. Article 171(6) adds that 'The provisions of this Article shall apply accordingly to common-law partners and persons in a durable relationship.' The chosen formulation again raises some doubts regarding the personal scope of this provision. That is to say, it is not clear whether homosexual partners in durable relationships (registered or unregistered) can rely on the guarantees provided for by Article 171 of the Aliens Act. So far, no disputes on the interpretation and application of these provisions have been addressed within national courts or tribunals.

As far as Article 14 is concerned, paragraph 1 does not seem to be implemented into the national legislation. Article 155 of the Aliens Act merely prescribes that 'A national of an EEA Member State shall have the right to stay in the Republic of Croatia for a period which shall not exceed three months from the day of entry into the Republic of Croatia, provided that he holds a

valid travel document or personal identity card.' Neither this nor the other provisions of the Aliens Act mention the Article 14(1) requirement of not becoming 'an unreasonable burden on the social assistance system' of Croatia during the first three months of residence. This requirement does, however, exist in relation to a temporary stay of nationals of EEA Member States (that is, a stay for more than three months). Specifically, Article 156(1) of the Aliens Act which implements Article 14(2) of the Directive 2004/38 prescribes that 'A national of an EEA Member State is entitled to stay in the Republic of Croatia for more than three months of the day of entry into the Republic of Croatia, provided that: 1. he is employed or self-employed, 2. he has sufficient resources to maintain himself and members of his family, so that during their stay in the Republic of Croatia they would not become a burden to the social welfare system, and he has health insurance, 3. he is enrolled as a university student or occupational trainee and has adequate health insurance, and by issuing a statement proves that he has sufficient resources to support himself and members of his family, so that during their stay in the Republic of Croatia they would not become a burden to the social welfare system, 4. he is a member of a family joining a national of an EEA Member State who meets the criteria referred to in items 1, 2, and 3 of this paragraph.' Paragraph 2 of Article 156 adds that 'At the time of an evaluation whether the funds for supporting oneself referred to in paragraph 1, items 2 and 3 of this Article are sufficient, the personal position of a national of an EEA Member State and his family members shall be taken into account and they shall not be required to amount to more than the amount of funds required for the realisation of rights under the social welfare system in the Republic of Croatia in accordance with special regulations.' Paragraph 3 of Article 14 of the Directive 2004/38 has not been explicitly transposed in the Aliens Act. Yet, the requirement contained in it can be inferred from the fact that none of the provisions of this Act regulating the expulsion of EEA member states nationals or their family members list recourse to the social assistance system of Croatia as one of the reasons for expulsion. Finally, paragraph 4 of Article 14 of the Directive is partially implemented through the provision of Article 165(3), which provides that 'Temporary stay of a national of an EEA Member State and of a member of his family shall not terminate if he does not have sufficient funds for supporting himself during his stay in the Republic of Croatia, provided that the national of such EEA Member State is employed or self-employed or provided that he arrived with the intention of employment, and proves that he continues to actively seek a job, and it can reasonably be expected that he will find employment.' It is worth noting that Article 165(3) makes no mention of other conditions for temporary residence of EEA mem-

ber states nationals in Croatia, such as the requirement to have health insurance. This omission by the legislator could be interpreted as a requirement to terminate a temporary stay of the categories of people covered by Article 165(3) who do not have health insurance in accordance with Article 156 of the Aliens Act. This, in turn, would be contrary to the Directive 2004/38.

Finally, the various procedural safeguards provided for by Article 15 of the Directive are either directly transposed or can be inferred from the provisions of the Aliens Act contained in Articles 180, 181, 183, and Title VI to which Article 182 refers. The only provision that does not seem to be transposed is that of Article 15(3) of the Directive 2004/38. There has not yet been any case law within the national courts or tribunals regarding the interpretation or application of these provisions.

Question 4

Article 16 of the Directive 2004/38 has been fully transposed into national legislation. Paragraph 1 of Article 16 is implemented in Article 173(1) of the Aliens Act in the part that concerns an EEA member state national, while paragraph 2 is implemented in Article 176(1) of the same Act in the part that concerns a family member who is not a national of an EEA member state. In the same manner, paragraph 3 of Article 16 of the Directive is implemented in Articles 173(2) and 176(2) of the Aliens Act, while paragraph 4 is implemented in Articles 175(1) and 179(1) of the same Act. In addition to prescribing that a permanent stay will be terminated in case of absences from Croatia exceeding two consecutive years, Articles 175(1) and 179(1) stipulate another reason for its termination. They prescribe that a permanent stay of a national of an EEA Member State or his family member will be terminated if 'he is barred by the prohibition of entry and stay'. As far as Article 17 of the Directive 2004/38 is concerned, its paragraphs 1 and 2 are implemented in Article 174 of the Aliens Act.

With regards to the implementation of Article 17(2) of the Directive in Article 174(4) of the Aliens Act, we again witness certain issues regarding the personal scope of these provisions. Specifically, Article 174(4) of the Aliens Act grants the right to permanent stay before the completion of the 5 year residence requirement only to an EEA member state national whose 'spouse or common-law partner with whom he is staying in the Republic of Croatia holds Croatian nationality or whose Croatian nationality terminated after conclusion of marriage'. This would seem to deprive from the enjoyment of the right in question those partners who are in durable relationships (mainly same-sex unions) with Croatian nationals in Croatia, where such relationships

do not qualify as common law partnerships. As far as the remaining paragraphs 3 and 4 of Article 17 are concerned, the national implementing provisions can be found in Article 177 of the Croatian Aliens Act.

Articles 19, 20, and 21 are fully implemented through provisions of Article 173, 176, and 178 of the Aliens Act. Article 18 of the Directive 2004/38, however, does not seem to be implemented in the national legislation. It does not even seem possible to infer the right contained in it from the general provision of the right to permanent stay of family members who are not EEA member states nationals, that is, Article 176 of the Aliens Act. This follows from the wording of Article 176(1), which provides the right to permanent stay only to those family members who have been legally residing in the Republic of Croatia *with* a national of an EEA Member State for at least five years without interruptions. Such a wording would seem to exclude family members covered by Articles 12(2) and 13(2) of the Directive as potential beneficiaries of the right to permanent stay and could thus lead to unfortunate consequences. National court or tribunals have so far not addressed any disputes regarding the application or interpretation of these provisions, so it is yet to be seen how Croatian judges and officials will deal the identified problems.

Question 5

Article 24(1) of the Directive 2004/38 has been transposed into national law through Article 153(1) of the Aliens Act which provides: 'A national of an EEA Member State and members of his family, regardless whether they are nationals of an EEA Member State or not, provided that they are entitled to stay in the Republic of Croatia, shall have equal rights as nationals of the Republic of Croatia in accordance with the Treaty on of Functioning of the European Union.'

Article 24(2) of the Directive has not been explicitly implemented into national legislation. Yet, in defining potential beneficiaries of social assistance benefits, the provisions of the Croatian Social Welfare Act implicitly seem to open the door for its application in Croatia. In particular, Article 29 of the Social Welfare Act prescribes that the right to social assistance benefits have Croatian citizens with a residence in Croatia as well as foreigners and stateless persons with a permanent residence. Regarding foreigners with an approved temporary residence (as well as some other specified groups of foreigners such as asylees etc.) and their family members, it is provided that they

can also acquire benefits from the Croatian social assistance system under the conditions specified in the Social Welfare Act and other laws.[6] Other foreigners (e.g. those on a short stay of up to 3 months) could be approved of temporary use of social assistance benefits only if their living circumstances so require. This would seem to suggest that, while Article 24(2) of the Directive has not been explicitly transposed, the derogation to the equal treatment guarantee provided in it would seem to be possible under the current Croatian laws. Since Croatia's entry into the EU, there has not been any relevant national case law in this regard.

Question 6

Since Croatia's entry into the EU, there has not yet been any relevant national case law in this respect.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

To our best knowledge, no legislative or specific administrative changes were introduced in Croatia pursuant to *Chen*, *Ruiz Zambrano*, and subsequent decisions of the Court of Justice of the European Union. This does not seem to cause any difficulties in terms of potential enjoyment of EU citizenship rights, since Croatian legislation is already inclusive enough not to give rise to the kinds of issues witnesses in the mentioned CJEU's case law. According to Article 55 of the Aliens Act, 'temporary stay for the purpose of family reunification may be granted to an alien who is a member of the immediate family of: 1. a Croatian national, 2. an alien having approved permanent stay, 3. an alien having approved temporary stay, 4. an alien granted protection under the Asylum Act.'

Pursuant to Article 56(1) of the Aliens Act, '(1) Members of the immediate family within the meaning of this Act are the following: 1. spouse, 2. common law partners, 3. the underage children of married couples and com-

6. See Article 29 of the Croatian Welfare Act (Zakon o socijalnoj skrbi), *Official Gazette* 33/12, 46/13, 49/13.

mon law partners, their underage adopted children, and the underage children of each of them, who have not formed families of their own, 4. *parents or adoptive parents of underage children*.'[7] Furthermore, according to Article 56(2) and 'By way of derogation from paragraph 1 of this Article, some other relatives may also be regarded as a member of the immediate family of a Croatian national, an alien granted temporary or permanent stay and an alien holding asylee status, provided that there are special *personal* or serious humanitarian grounds for family reunification in the Republic of Croatia.'[8]

Finally, Article 61 of the Aliens Act prescribes that an alien granted temporary stay for the purpose of family reunification shall exercise his/her right to education, professional development, work; and self-employment in accordance with the provisions of this Act. In all, taken together, these provisions of the Aliens Act seem to provide immediate family members of EU citizens (including parents of underage children) not only with the right to temporary residence, but also with the right to work and pursue education within the Croatian territory. Alternatively, even if these provisions happen to provide insufficient guarantees, there is also the previously discussed Article 162(7) of the Aliens Act. As mentioned before, this provision lists as family members of EEA Member States nationals: 'other members of the family of a national of an EEA Member State for whom an individual assessment showed that in view of their material and social position in the country from which they arrived they are dependent on the national of an EEA Member State in terms of providing for their basic needs, *or are members of his household*, or for whom in view of serious health-related reasons special personal care of the national of an EEA Member State is required.'[9] According to Article 169 of the Aliens Act, such family members are entitled to stay in the territory of the Republic of Croatia for a period over three months of the date of entry if they are accompanying a national of an EEA Member State or joining such national of an EEA Member State, provided that the national of an EEA Member State meets the residence requirements. Pursuant to Article 153(4) of the Aliens Act, the provisions relating to the family members of a national of an EEA Member State also apply to aliens-family members of Croatian nationals. This would seem to entitle EU citizens' family members who are third country nationals with the right to temporary residence, *even in purely internal situations*. Since Croatia's entry into the EU, there was no relevant na-

7. Emphasis added.
8. Emphasis added.
9. Emphasis added.

tional case law in this regard, so it is yet to be seen how the national courts will approach these matters.

Question 8

In the context of the judgment *Rottmann*, two main issues were discussed. The first one concerns the possibility of withdrawal of nationality, when fraudulently obtained in the naturalization procedure. The second one concerns the possibility of recovery of the original nationality – in order to prevent statelessness and a consequent loss of EU citizenship – in cases where the newly acquired nationality is withdrawn. As it now stands, the Croatian legislation would seem to give rise to neither of these issues. This derives from the constitutional guarantee providing that a citizen of the Republic of Croatia may not be deprived of his/her citizenship status.[10] This means that (unlike in Germany), once acquired, Croatian citizenship cannot be withdrawn even if obtained by fraud.[11] Moreover, this means that (unlike in Austria) the acquisition of another country's citizenship does not imply the loss of Croatian citizenship. Thus, unless a Croatian citizen voluntarily requests a dismissal from Croatian citizenship for the purpose of the acquisition of another country's citizenship,[12] he/she will retain Croatian citizenship. Even in

10. See Article 9 of the Constitution of the Republic of Croatia, *Official Gazette* 85/2010 (hereinafter 'the Croatian Constitution'). English text of the Croatian Constitution is available at http://www.sabor.hr/fgs.axd?id=17074. Also see the judgment of the Croatian Constitutional Court U-III / 2914 / 2002, from May 16, 2007, available at http://sljeme.usud.hr/usud/praksaw.nsf/Ustav/C12570D30061CE53C12572DF002EC577?OpenDocument.
11. See Gerard René de Groot and Maarten Vink and Iseult Honohan, 'Loss of Citizneship', EUDO CITIZENSHIP Policy Brief No. 3, available at http://eudo-citizenship.eu/docs/policy_brief_loss.pdf, p. 3.
12. A Croatian citizen can request a dismissal from Croatian citizenship provided that the following requirements are fulfilled: '1. he is at least 18 years old; 2. there are no impediments for dismissal from the citizenship by reason of military conscription; 3. he has paid taxes due, fees, and other public charges, and has fulfilled obligations towards legal entities and natural persons in the Republic of Croatia that have been imposed by an executive body; 4. he has fulfilled any such financial obligations that he might have towards his spouse, parents, and children who are Croatian citizens, and towards persons who remain to live in the Republic of Croatia; 5. he is a foreign citizen, or that he has proved that he will acquire foreign citizenship'. See Article 18 of the Law on Croatian Citizenship, *Official Gazette* 53/91., 70/91., 28/92., 113/93., 4/94., 130/11. Emphasis added. English text of the Law on Croatian Citizneship is available at http://eudo-

the case of voluntary dismissal, the Law on Croatian Citizenship provides for certain guarantees that enable the recovery of Croatian citizenship. According to Article 19 of the Law on Croatian Citizneship, 'The decision on dismissal from Croatian citizenship will be repudiated upon the request of the person who has acquired the dismissal if he does not acquire foreign citizenship within three years, and has informed a diplomatic mission or consular office of the Republic of Croatia abroad, or a body directly competent to enact a decision on the dismissal within three years about this.' In addition, Article 15 of the Law on Croatian Citizenship provides that 'A Croatian citizen who has requested and received dismissal from Croatian citizenship in order to acquire foreign citizenship, which was imposed on him as a requirement in order to be able to exercise a profession or activity by the foreign state wherein he has a domicile, may again acquire Croatian citizenship, even if he does not fulfil the requirements of Article 8, Paragraph 1, Points 1-4 of this Act, and if he lives in the Republic of Croatia and has been granted residence.' These provisions, at least up until a certain point, prevent statelessness and consequently the loss of the EU citizenship status in cases of voluntary dismissal from Croatian citizenship.

Political rights of EU citizens

In the process of preparation for the EU membership, Croatia has recently introduced a number of legal reforms in order to fulfill the membership criteria. One of these concerns the amendments made to the Croatian Constitution in June 2010.[13] These amendments include, amongst others, Article 146 of the Croatian Constitution on EU citizenship rights. Essentially, this provision represents a domestic counterpart of one of the fundamental provisions of primary EU law, Article 20(2) of the Treaty on the Functioning of the European Union, which provides a number of rights to EU citizens. Croatia is the first State to adopt a provision concerning European citizenship in its Constitution – none of the current Member States' Constitutions include such an article.

citizenship.eu/admin/?p=file&appl=currentCitizenshipLaws&f=CRO%20Law%20on%20Croatian%20Citizenship_consolidated%2028_10_2011_ENGLISH.pdf.

13. Constitution of the Republic of Croatia, *Official Gazette* 85/10.

Question 9

The right of every citizen of the Union to vote and to stand as a candidate in elections to the European Parliament in his/her Member State of residence is recognised under Article 20(2)(b) of the Treaty on the Functioning of the European Union and under Article 39(1) of the Charter of Fundamental Rights of the EU. In the accession process, one of the obligations within the context of European citizenship was to adjust the Croatian legislation with the Council Directive 93/109 which regards the exercise of the right to vote and stand as candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. In 2008, the Croatian government suggested the '*Action Plan for Adjustment of National Law with EU law in 2008*',[14] which corresponds with the rights stated in the Directive 93/109/EC.[15] In parliamentary sitting in March 2008, the Croatian Parliament adopted the previous governmental suggestion and drafted the two electoral laws. In order to fulfill its future obligations set out in the European Treaties, in July 2010 the Croatian Parliament adopted two laws: the Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections and the Act on Elections of MEPs from Croatia. The first act entered into force on the date of Croatian accession to the EU, while the second act entered into force on 1 March 2013.

The Croatian Parliament, at its session held on 15 July 2010 passed the Act on Election of Croatian Members of the European Parliament,[16] which sets out the procedure and method of electing representatives to the European Parliament. The law is in full compliance with the Directive in prescribing active and passive voting rights equally for national and other EU citizens. The directive lays down detailed arrangements under which EU citizens residing in an EU country of which they are not nationals may exercise the right to vote and to stand as a candidate in European Parliament elections in that country. These arrangements are fully incorporated into Croatian Act on Election of Croatian Members of the European Parliament. The Directive does not affect the rights of an EU country's nationals at elections to the European Parliament in their own country, whether or not those nationals reside in that country. According to the requirement set by the Directive, the Croatian Act

14. Action Plan for Adjustment of national law with EU law in 2008, *Official Gazette 30/08*.
15. More info is available at: http://www.cpi.hr/download/links/hr/11608.pdf.
16. Law on Election of Croatian Members of the European Parliament, Official Gazette 92/10 and 23/13.

on Election of Croatian Members of the European Parliament defines the requirements a national of another EU country must satisfy to vote or to stand as a candidate in his/her country of residence. Such a person must: be a citizen of the Union; be resident in the EU country in which s/he proposed to vote or to stand as a candidate; satisfy the same conditions as a national of that EU country who wishes to vote or to stand as a candidate (the principle of equality between national and non-national voters). EU citizens may exercise their right to vote and to stand as a candidate either in the EU country of residence or in their home country. Accordingly, the Croatian Act on the Election of Croatian Members of the European Parliament prescribes that no one may vote more than once or stand as a candidate in more than one EU country. To prevent double voting and double candidacy, EU countries must exchange information on citizens registered to vote or to stand as a candidate.[17]

Furthermore, the Act on the Election of Croatian Members of the European Parliament from 2013, introduced for the first time in Croatia's election practice 'open slates', which means that apart from voting for the slate of their favorite party, voters can allocate their preferential vote. The elections of Croatian representatives in the European Parliament were held on 15 April 2013, according to general, secret, and equal voting rights which are held by all Croatian citizens with the right to vote. Under Croatia's Treaty of Accession to the European Union, Croatia elected its 12 members in the European Parliament upon entering the bloc. Members of the European Parliament are elected according to the proportional model and the preferential voting system. It is important to emphasise that the whole territory of the Republic of Croatia, including voting stations abroad (Diaspora), formed one constituency. Voters could only allocate one vote for one list of candidates. A voter may use the method of preferential vote, which means that the Croatian citizen can indicate one candidate who has preference over other candidates on the voting list. Preferential voting in this election showed it to be rather incomplete and without proper purpose because the allocation of seats takes into account preferential votes only with candidates that have received a minimum of 10 percent of the list's votes. The list of candidates for the European Parliament elections had to pass a 5 percent threshold, in order to participate in the distribution of parliamentary seats. It is currently uncertain whether the government will advocate changes to these problems in election laws. In the

17. Article 5 of the Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Pariament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329, 30.12.1993, p. 34-38.

current system, leaders of political parties have the final word in the ranking of candidates, in which case the preferential vote is of secondary importance.

During the negotiation process between Croatia and the EU, under Chapter 34, it was decided that 12 seats will be allocated in the European Parliament for representatives from Croatia. The first elections for the European Parliament will be remembered by the low turnout. Some of the reasons were that the campaigning was too short and not organised in a structured way; the citizens did not have enough time to properly inform themselves, public media did not live up to its duty to inform citizens seriously, and the majority of the parties did not take this election seriously enough. The government's argument for separating the dates of European and local elections came as a consequence of their desire to separate European and local political issues. The experience of other countries demonstrates that this is nearly impossible.

The Act on Election of Croatian Members of the European Parliament imposes one additional condition to citizens of the Union who are not Croatian nationals in Article 4 of the Act: 'Under the same conditions which apply to Croatian citizens, members of the European Parliament may be elected by the citizens of other member states of the European Union who have registered domicile or temporary residence in the Republic of Croatia in compliance with the Aliens Act (hereinafter: citizens of other European Union member states), in as much as they submit a request to the relevant authority which maintains the voter rolls no later than 30 days prior to the election date.'

However, the current Act on the Election of Croatian Members of the European Parliament is not completely in accordance with the Directive 2013/1/EU.[18] By the end of November 2013, the Croatian Parliament will adopt changes to the current Act on the Election of Croatian Members of the European Parliament in order to secure its full compliance with the new Directive. Following the interpretation of the Directive 2013/1/EU proclaimed in its Preamble that 'imposing the requirement on citizens of the Union to produce an attestation from the competent administrative authorities of the home Member State certifying that the person concerned has not been deprived of the right to stand as a candidate in the home Member State or that no such disqualification is known to them, acts as a barrier to the exercise of the right to stand as a candidate and contribute to the low number of citizens of the Union standing as candidates in elections to the European Parliament in their

18. Directive 2013/1/EU of 20 December 2012 amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [2013], OJ L 26/27.

Member State of residence', the new amendment to the Croatian the Act on the Election of Croatian Members of the European Parliament is added in the Article 4.[19] By adopting this new amendment, the requirement for those citizens to submit such an attestation is abolished and replaced by a statement confirming that the person concerned has not been deprived of the right to stand in elections to the European Parliament thorough an individual judicial decision or an administrative decision provided that the latter can be subject to judicial remedies, which has to be included in the formal declaration that those citizens are required to produce as part of their application.

The Member State of residence should be required to notify the home Member State of such declarations, in order to verify whether the citizen of the Union has in fact been deprived of the right to stand in elections to the European Parliament in the home Member State. In the Croatian case, according to the Draft Act on the Election of Croatian Members of the European Parliament, the relevant authority for delivering the notification is the State Election Commission acting through the Ministry of Public Administration. Failure by the home Member State to provide that information on time should not result in the deprivation of the right to stand as a candidate in the Member State of residence. If the State Election Commission receives 21 days before elections, the notification of the home Member State which is opposite to the declaration given by the candidate, political parties or electors who nominated the registered candidate can nominate another candidate. If the State Election Commission receives the notification in the period less than 21 days before elections, the candidate list shall be considered valid without the nominated candidate (Article 16 of Act on the Election of Croatian Members of the European Parliament). In other words, if the information provided invalidates the content of the declaration, the Member State of residence, irrespective of whether it receives the information within the time limit or at later stage, shall take the appropriate steps in accordance with its national law to prevent the person concerned from standing as a candidate or where this is not possible, to prevent this person either from being elected or from exercising mandate. To ensure a more efficient identification of candidates registered both on the list of their home Member State and that of the Member State of residence, the list of data to be required from citizens of the Union when submitting an application to stand as candidates in the Member State of residence should include their nationality, date and place of birth, and the last

19. The Draft Law amending the Act on the Election of Croatian Members of the European Parliament. Available at: http://www.sabor.hr.

address of residence in their home Member State (Article 16, Para. 1 of Act on the Election of Croatian Members of the European Parliament).

There are some additional changes to the existing Act on the Election of Croatian Members of the European Parliament. The Article 20, Para. 1, says: 'if one of the candidates for the election of members of the European Parliament dies after the date of publication duly proposed candidate lists, political parties, or electors who have proposed that candidate, may instead propose a new candidate without special conditions for the validity of nomination under this Act until 21 days before election day.' The proposed period of 21 days is longer than in the existing Act (which is now 10 days).

Furthermore, instead of using the ballot with Braille letters (which is rather inconvenient), blind people have the right to vote with the help of another person (personal assistant) to be at his instructions who will circle the number of the candidate according to the his/her instructions. The voting period in the diplomatic services is limited to the same conditions as in the Republic Croatia, instead of the existing provision providing the possibility of two voting days (Article 46).

Since Croatia's entry into the EU, there has not yet been any national case in this regard.

Question 10

The Directive 94/80/EC[20] has been fully implemented since 15 July 2010 by adopting the Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections.[21] The new Act on Local Elections,[22] adopted in December 2012, inter alia implemented the electoral rights of EU citizens at the local level. During the negotiation process (corresponding to Negotiation Chapter 23), the Constitution, the Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections and the Act on Electoral Registers have been amended in order to implement this Directive. Unfortunately, during the last local elections in May 2013, there were too many examples of playing dirty, growing number of irregularities at polling stations, the problem of unregistered voters, and

20. Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368/38.
21. Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections, Official Gazette 92/10.
22. Act on Local Elections, Official Gazette 144/12.

violations of electoral science. According to Directive 94/80/EC, the Member States have the possibility to restrict a number of offices in the local administration to its own nationals, namely those related to the executive of the municipality (head, deputy, or member of the governing college of the executive of a basic local government unit). Such restrictions would be in line with EU law if they are appropriate, necessary, and proportionate. In Croatia, EU citizens cannot exercise their electoral rights on local mayoral and regional presidential elections or local referenda. On the other hand, third country nationals still not enjoy any electoral rights in the Republic of Croatia.

The Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections does not provide for derogations for the reasons set by the Directive 94/80/EC, but imposes an additional condition for citizens of other Member States provided in Article 3:'Nationals of other Member States that are temporarily or permanently residing in Croatia have the right to vote and stand as candidates in municipal elections. However, they are obliged to submit a request to the relevant authority which maintains the voter rolls by the place of their residing not later than 30 days prior to the election date.'

According to Directive 94/80/EC, the Act on Electoral Rights of Citizens of Other EU Member States in Regional and Local Legislative Elections imposes the restrictions on the right to stand as a candidate. Pursuant to Article 6 of the Act, Community citizens may be refused the right to stand as a candidate if they have lost the right to stand as a candidate under the law of their Member State of origin as a result of an individual decision under civil or criminal law or cannot produce a declaration as referred to in Article 9 of the Directive (nationality and residence declaration, declaration of non-deprivation of the right to stand as a candidate and, in certain cases, an attestation from the competent administrative authorities, production of an identity document, etc.).

Since Croatia's entry into the EU, there has not yet been any national case in this regard.

Question 11

According to the new Council Directive 2013/19/EU of 13 May 2013,[23] pursuant to Article 50 of the Act of Accession to Croatia,[24] 'Member States shall

23. Directive 2013/19/EU of 13 May 2013 adapting Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidtate in municipal elections by citizens of the Union residing in a Member State of which

adopt and publish, by the date of accession of Croatia to the Union at latest, the laws, regulations, and administrative provisions necessary to comply with this Directive. They shall apply those provisions from the date of accession of Croatia to the Union.'

Since Croatia is a new member state, municipal elections based on new regulations have only been held in 'Općina Karlobag'and 'Općina Ivanska i Skopje'on 13 October 2013.[25]

According to the Act on electoral rights of citizens of other EU Member States in regional and local legislative elections, after joining the EU, 'an EU citizen shall have the right to vote and stand as a candidate for local or regional legislative bodies if he or she is a resident of a particular municipality or region (Article 2). EU citizens who wish to vote on local and regional elections will have to go through a one-off registration process, which will remain valid for future elections. The request for registration should be submitted at least 30 days before the elections (Article 3).'[26] The statement which is declaring the applicant's citizenship and address in Croatia and stating that the applicant is not deprived of the right to vote in his/her country of origin should be enclosed to the request for registration and verified by a public notary (Article 3 of the Act on electoral rights of citizens of other EU Member States in regional and local legislative elections). According to the principle of non-discrimination, if EU citizens wish to exercise their active electoral right, they should be able to do so under the same conditions as Croatian citizens. European citizens should also enclose a similar statement as the one required for the right to vote, together with the evidence of not being deprived of the right to run as a candidate in their country of origin (Articles 6 and 7 of the Act on electoral rights of citizens of other EU Member States in regional and local legislative elections). A residence requirement applies to candidates for local and regional legislative bodies.

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they are not nationals, by reason of the accession oft he Republic of Croatia, [2013] OJ L 158/231.

24. The Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Treaty eastablishing the European Atomic Energy Community of 24 April 2012, OJ L 112/21.
25. More info available at: http://www.izbori.hr/izbori/dip_ws.nsf/0/98A7B1D8AA037F88C1257BDD004A9A3D/$File/Priopcenje_1.pdf.
26. Sajfert, J. 2013. *EUDO Citizenship Observatory: Access to Electoral Rights Croatia.* European University Institute & Robert Schuman Centre for Advanced Studies.

After more than 20 years, Croatia is modernising its electoral law. Some of the old issues of Croatian elections, such as the outdated electoral register, have been resolved. The Ministry of Public Administration created the online system of registered voters according to the Act on the Register of Voters.[27] In addition, the active registration of citizens abroad might diminish the possibility of manipulating the ballots which are kept away from observers and public scrutiny in Croatian diplomatic services. There is still some place for improvement of the current electoral system. More should be done in terms of modernising the existing technical system of voting by adopting proxy voting or e-voting.

Question 12

For this question it is relevant to stress out that Croatian citizens residing on the Croatian territory are representing the first and broadest category of enfranchised persons. All such persons over eighteen years of age have the right to vote and stand as a candidate in all types of elections (subject to the residence criteria on local elections).

According to the EUDO Citizenship Observatory data 'mentally disabled persons were disenfranchised, but only if they were deprived of their full legal capacity.'[28] In 2011, the Croatian CSO's initiative (Platforma 112)[29] called for amendments to the procedure of full legal capacity deprivation and a wider franchise for mentally disabled persons, in accordance with the UN Convention on the Rights of Persons with Disabilities.[30] In December 2012, the Act on the Register of Voters enfranchised this group of citizens as well.[31]

Prisoners and persons convicted of criminal offences enjoy full electoral rights without any restriction.

27. Act on the Register of Voters, *Official Gazette* 144/2012.
28. Sajfert, J. 2013. *EUDO Citizenship Observatory.* Ibid. 6.
29. The Platform of human rights organisations in Croatia: for Croatia governed by the rule of law. Their 112 demands can be retrieved at: http://kucaljudskihprava.hr/system/attachment/file/5/Platforma_112_za_Hrvatsku__vladavine_prava.pdf.
30. UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: http://www.refworld.org/docid/45f973632.html [accessed 5 November 2013].
31. Sajfert, J. 2013. *EUDO Citizenship Observatory.* Ibid. 7.

Culture(s) of citizenship

Question 13

The implementation of EU citizenship in legislation of Croatia is understood more as part of a rights-based EU 'free movement' and 'constitutional' culture than as an adjunct to the national immigration systems based on 'permission' for non-nationals to be present in the territory. The 'free-movement approach' is regulated through the *Aliens Act*[32] and is not an adjunct to national immigration systems. EU citizenship rights are directly implemented in and guaranteed by the Croatian Constitution which gives them an adjective of a 'constitutional' culture.[33] Article 146 of the Croatian Constitution starts by listing a number of rights guaranteed by EU law to Croatian Nationals once they become EU citizens. Under equality principle, only the last paragraph of this Article provides that Union citizens will enjoy these same rights in the territory of the Republic of Croatia. The guarantee of an efficient exercise of EU citizens' rights in Croatia seems to have represented only a secondary concern. Orsolic Dalessio and Rodin argue that there are three principal and intertwined reasons for introducing this provision. The first is purely educational, in that the provision aims to inform Croatian nationals about the rights that they will gain with Croatia's entry into the EU. The second has to do with achieving political symmetry. To be precise, it was considered unacceptable to simply declare that EU citizens will acquire certain rights in Croatia's territory upon entry to the EU, without clarifying that equivalent rights would equally be granted to Croatian nationals in other EU Member States. This relates to the final reason, which can be described as creating 'carrot on a stick' with a primary purpose of educating Croatian nationals about their future status as EU citizens and, in that sense, creating an impetus for them to vote in favour of joining the EU at the referendum held last January.'[34]

The European citizenship is a revolutionary concept from a Croatian historical and cultural perspective. Throughout the conflict and post-conflict period, Croatia developed its own conception of national belonging, which confirmed ethnic Croats as the primary bearers of the right to citizenship status. At the same time, the Croatian accession to the EU immediately created sev-

32. Aliens Act, *Official Gazette* 130/11.
33. Constitution of the Republic of Croatia, Article 141.
34. Orsolic Dalessio, T. 2013. *The Constitutional Provision on EU Citizenship: the Case of Croatia.* CITSEE Studies Blog. Available at: http://www.citsee.eu/node/87.

eral hundred thousand new EU citizens, residing outside the borders of the EU. This includes not only Croatian citizens in Bosnia and Herzegovina (the number of which exceeds the number of ethnic Croats living there) and the Croatian Diaspora, but also at least 200,000 former Serbian refugees who settled in neighbouring republics after the war, but kept Croatian citizenship. Today, the building of Croatian identity is inextricably linked to Europe.[35]

Question 14

The binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, has not yet played any role in how the rights of EU citizens are being interpreted by the national courts/tribunals.

Question 15

Through the process of EU membership negotiations and the process of entry into the EU, the Croatian media has dealt more with political issues than with issues regarding the EU citizenship and related rights. There was a lack of information during first elections for the European Parliament. Namely, there was no comprehensive, quality campaigns on the importance of the European Parliament, the role of MPs and the system of voting, which could contribute to a better voter turnout. One gets the impression that people were for the most part denied information about the competencies of the European Parliament and the role of MPs in it.

Yet, there are some activities and initiatives worth mentioning. First, there is an interesting ongoing media project which is funded by the EU from the Programme IPA INFO 2011 and organised under the Croatian Legal Center called 'Towards European Citizenship'.[36] GONG is another CSO whose purpose is primarily educational in terms of informing the public about their citizenship rights. Croatia, under CSO's initiatives for active citizenship, is undergoing a trial curriculum of Education for Democratic Citizenship and Human Rights which should become an integral part of the school curricu-

35. Topic, M., Rodin, S., & Vasiljevic, S. 2011. 'Consolidation of the Croatian case study', *Identities and Modernities in Europe (IME),* European Commission & Seventh Framework Programme.
36. Croatian Law Centre, 2013. *Towards European Citizenship.* Avalable at: http://www.hpc.hr/news.aspx?newsID=9&pageID=41.

lum.[37] Also, 'the Education for Democratic Citizenship and Human Rights' is one of the major advocacy activities of Platform 112 – a coalition of civil society organizations which has for many years engaged in the protection of human rights, democratization, and peace-building.[38] It is important to note that the curriculum of civic education in the educational system integrated a number of implementing measures of national programs for human rights and democratic citizenship, and ensures the implementation of European standards, in particular the Council of Europe Charter on Education for Education for Democratic Citizenship and Human Rights (CoE Charter on EDC/HRE, CM/Rec (2010) and the implementation of Europe's Growth Strategy 2020. There is still ongoing debate over how civic education is taught in the classroom. There is a clash between left and right wing parties in terms of misunderstanding necessity for improvement of the current concept of education.

In addition to media participation in civic education on democratic citizenship, newspaper articles informing Croatian nationals on EU citizenship rights and issues are constantly posted on the internet portal 'Danas.hr'.[39] The national media information on EU citizenship rights is mainly based on explaining fundamental terms and their meanings so that the lay person can understand them. Moreover, the media is trying to educate people and introduce the current EU citizenship issues and rights deriving from the concept of EU citizenship.[40] One of the dominant themes in the media is free movement of workers[41] and verification of transcripts for working qualifications.[42] The

37. In particular, the Law on Upbringing and Education in Elementary and Secondary School stipulates that schools should educate students in line with human rights and the rights of the child, and that they should prepare them for a multicultural world, as well as for active and responsible participation. The Law on Scientific Work and Higher Education proclaims that respect for, and affirmation of human rights as well as of social responsibility of the academic community, are the foundations of higher education in Croatia. Similarly, the Law on Adult Education (2007) requires that adult education in Croatia prepares adults for active citizenship.
38. GONG, 2013. *Defence of education for democratic citizenship and human rights.* Available at: http://gong.hr/en/active-citizens/citizen-education/defence-of-education-for-democratic-citizenship-an/.
39. http://www.hpc.hr/news.aspx?newsID=9&pageID=41.
40. Written article available at: http://danas.net.hr/hrvatska/bugarska-iskustva-o-slobodi-kretanja-u-eu.
41. Written article available at: http://danas.net.hr/hrvatska/s-kojim-se-to-zanimanjima-odmah-mozete-zaposliti-u-eu.
42. Written article available at: http://danas.net.hr/hrvatska/vrijede-li-kvalifikacije-stecene-u-hrvatskoj-u-nekoj-od-zemlja-eu.

media is also covering the topic of the freedom of establishment.[43] This essentially means that the media is informing on demand, what the people are most interested in. By informing on the European Citizens' Initiative,[44] explaining how it works, and providing information on the initiatives that have been started, the media is trying to encourage people to get involved in European political life. Finally, there is TV programme called 'EU-classroom' which gathers experts from certain related institutions discussing and analysing the rights emerging from EU citizenship.[45]

Overall, the national media is engaged in informing citizens about their rights on an everyday basis. Although Euroscepticism was strongly felt in the media before Croatia formally became a Member State, today it seems that the main subject of the national media is no longer criticism of the EU, but information on EU rights and how to exercise them. In other words, the media is now more focused on the benefits of the EU membership than on criticising the EU as a whole. Bearing this in mind, one can conclude that this process affected the public discourse in such a way that it lowered the rate of Euroscepticism. Consequently, informed citizens increasingly understand that they have a role to play in the European project.

43. Written article available at: http://danas.net.hr/hrvatska/gdje-i-kako-otvoriti-posao-u-eu-kako-se-priznaju-strucne-kvalifikacije.
44. Written article available at: http://danas.net.hr/hrvatska/iako-barroso-baca-gradjanske-inicijative-u-smece-evo-zasto-se-treba-ukljuciti.
45. Educational TV show 'EU Classroom' available at: http://www.24sata.tv/vijesti/eucionica-zene-u-eu-70667.

CYPRUS

Constantinos Kombos[1]

Introduction

The concept of European citizenship has proved to be inherently controversial, yet constantly dynamic and transformative in nature.[2] The study of the establishment of European citizenship and of its subsequent evolution must take place in a methodological framework that acknowledges the interdependency between European citizenship and National citizenship.[3] Therefore, it is considered to be useful for enhancing the clarity and coherence of the present report to clarify from the outset certain methodological and substantively specific issues that relate to the concept of citizenship and also to the legal system of the Republic of Cyprus.

In terms of methodology, the present report aims to describe and critically reflect on the status and quality of protection that the legal order of the Republic of Cyprus[4] reserves for rights that are specifically related to Union citizen-

1. Dr. Constantinos Kombos, Assistant Professor of Public Law, Law Department, University of Cyprus.
2. Carrera, S. and Faure-Atger, A., 'Implementation of Directive 2004/38 in the Context of EU Enlargement: A Proliferation of Different Forms of Citizenship?', Centre for European Policy Studies (CEPS) Special *Report*/April 2009, available at http://www.ceps.be/book/implementation-directive-200438-context-eu-enlargement-proliferation-different-forms-citizenshi, p. 1.
3. Shaw, J., 'Citizenship within and across the Boundaries of the European Union' (2011) *Transitions* Vol 51 pp. 43-57; Shaw, J., 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism', in Craig, P. and De Burca, G., (eds), *The Evolution of EU Law*, (Oxford: Oxford University Press, 2011), pp. 575-609; Shaw, J., Bellamy, R. and Castiglione, D., 'Introduction: From National to Transnational Citizenship', in Jo Shaw, Richard Bellamy and Dario Castiglione (eds), *Making European Citizens* (Palgrave, 2006), pp. 1-28.
4. On the legal system of the Republic of Cyprus, see in general: Papasavvas, S., *La justice constitutionnelle à Chypre,* (Economica, 1998); Tornaritis, C, *Cyprus and its Constitutional and Other Problems,* (Nicosia, 2nd ed., 1980); Kyriakides, S. *Cyprus: Constitutionalism and Crisis Government*, (University of Pennsylvania Press, 1969); P. Polyviou, *Cyprus: The Tragedy and the Challenge*, (Washington D.C.: American Hellenic Institute, 1975); Kombos, C., 'The Judiciary in Federal Systems', in Krispi

ship. The approach adopted is founded on the acknowledgment and subsequent adoption of the concept of *overlapping citizenship statuses* (citizenship coins/currency) that result from the plurality[5] of types of citizenships in the European legal sphere. In this sense, the organisational idea of overlapping citizenship[6] statuses is reflective of the symbiotic relationship of participating legal systems,[7] both national and supranational in origin. There are certain significant parameters and characteristics of the preceding symbiotic relationship.

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and Constantinides, *The Cypriot Problem in Evolution,* (Athens: Sakkoulas: 2010), pp. 81-113; Loizou, A., *The Constitution of the Republic of Cyprus*, (in Greek), (Nicosia, Cyprus, 2001); Nicolaou, I., *The Control of the Constitutionality of the Laws and the Separation of Powers of the State Institutions of Cyprus-Constitutional Regulation and the Evolution of the Law of Necessity* (in Greek), (Athens: Ant. Sakkoulas, 2000); Evriviades, M., 'The Legal Dimension of the Cyprus Conflict', (1975) 10 Texas International Law Journal 227.

5. On Pluralism: Avbelj, A., and Komárek, J., 'Symposium: Four Visions of Constitutional Pluralism (Conference Report)', European University Institute, 2008, EUI LAW 2008/21, available at http://cadmus.eui.eu/dspace/bitstream/1814/10154/1/EJLS_2008_2_1_11.pdf; Maduro, M.P., 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker, N., *Sovereignty in Transition*, (Oxford, Hart, 2003), pp. 501-537; Kumm, M., 'Who is the Final Arbiter of Constitutionality in Europe?', (1999) *Common Market Law Review* 356; Komarek, J., 'European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', Jean Monnet Working Paper No. 10/05; Walker, N., 'The Idea of Constitutional Pluralism', (2002) *Modern Law Review* 317; Shaw, J., 'One or Many Constitutions? The Constitutional Future of the European Union in the 2000s from a Legal Perspective' (2007) 52 *Scandinavian Studies in Law* pp. 393-408.
6. Guild, E., 'Citizens without a Constitution, Borders without a State: EU free Movement of Persons', in Baldaccini, A., Guild, E. and Toner, H., (eds), *Whose Freedom Security and Justice? EU Immigration and Asylum Law and Policy,* (Oxford: Hart Publishing, 2007), pp. 25-55; Jacobs, F.G., 'Citizenship of the European Union – A Legal Analysis', (2007) *European Law Journal*, Special Issue on EU Citizenship, Vol. 13, Issue 5, pp. 591-622; Kostakopoulou, T., 'European Citizenship: Writing the Future', (2007) *European Law Journal*, Special Issue on EU Citizenship, Vol. 13, Issue 5, pp. 623-646.
7. Kombos, C., 'The Esoteric Dimension of Constitutional Pluralism: EU's Internal Constitutional Sub-Units and the Non-Symbolic Cumulative Constitution', in Birkinshaw, P. and Varney, M. (ed.), *The End of the 1992 Legal Order*, (Kluwer, 2010), pp. 291-323; Birkinshaw, P. and Kombos, C., 'The UK Approach to the Emergence of European Constitutionalism – Repositioning the Debate: Departure from Constitutional Ontology and the Introduction of the Typological Discussion', Arnold, R., *The Emergence of European Constitututional Law,* (Athens: Sakkoulas and Brussels: Bruylant, 2009), p. 35.

Firstly, the National citizenship predates and is an essential prerequisite for the emergence of the European citizenship.[8] Secondly, the concept of citizenship is not value neutral, but rather has a significant ethnocentric weight and specific symbolism that is the derivative of the highly contentious and constitutionally heated dogma of sovereignty.[9] On this basis, the national legal orders have seen the formation of immigration law as an automatic extension and expression of national sovereignty. [10] Thirdly, the relationship between citizenships seems to have been intended to be a 'long distance relationship', whereby the two coins of citizenship would exist in parallel and with safe distance between them so that no crossover point would arise, apart from situations of where the European citizenship would be adding rights to the already existing ones under National citizenship. This complementary one way relationship, alas idealistic and impractical, could have prevented friction and tension between the two coins of citizenship.[11] In other words, the approach to the European citizenship is, at least in the early stages, one of differentiated indifference. This means as an approach similar to the traditional national approach to 'any other citizenship', yet with a slight differentiation and added sensitivity due to the partly complementary nature of European citizenship. This bundle of factors result in a distorted perception: National citizenship is perceived as hierarchically superior to European citizenship, which

8. Coutu, M., 'Citoyenneté et légitimité : le patriotisme constitutionnel comme fondement de la référence identitaire', (1998) 40 Droit et Société 631-646; Shaw, J. and Miller, N., 'When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law' (2013) 38 *European Law Review* 137-166; Stiks, I. and Shaw, J., 'Introduction: what do we talk about when we talk about citizenship rights?', in Igor Stiks and Jo Shaw, *Citizenship Rights* (Ashgate, 2013), pp.xi-xxv.
9. Shaw, J., 'Sovereignty at the Boundaries of the Polity', in Walker, N., *Sovereignty in Transition* (Hart Publishing, 2003), 461-500;
10. Mahnig, H. and Wimmer, W., 'Country-Specific or Convergent? A Typology of Immigrant Policies in Western Europe', (2000) 1(2) *Journal of International Migration and Integration* 177; A. Geddes, 'Getting the best of both worlds? Britain, the EU and migration policy', (2005) 81(4) *International Affairs* 723; Pajnik, M., 'Integration Policies in Migration between Nationalising States and Transnational Citizenship, with reference to the Slovenian case' (2007) 33 (5) Journal of Ethnic and Migration Studies 849-865; Kostakapoulou, T., Citizenship, Identity, and Immigration in the European Union: Between Past and Future, (Manchester: Manchester University Press, 2001).
11. Kochenov, D., 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe', (2011) 18 Columbia Journal of European Law 55-109.

is just attributive of additional rights to the nationals of a State when they are in another Member State.

Therefore, the complexity of the relationship between European and National citizenship is deeply rooted in history, emotion, constitutional patriotism, and inherent hierarchy. This uneasy relationship has had a profound impact on the effective exercise of a fundamental human right, namely the right to family life.[12] This has been the case, since the limitations associated with the nationally centred immigration policy[13] are bound to have an impact on the unification of family members, especially when the European citizenship element promotes the unhindered exercise of free movement.[14] The consequent welfare cost renders the unknotting of the bungled citizenships extremely difficult.[15]

Surmising, the methodological approach adopted approaches the concept of citizenship as constitutionally sensitive and the coexistence of the National and the European citizenship is forming *overlapping citizenship statuses* (citizenship coins/currency). The demarcation between those statuses is unclear, complex, and influenced by existing preconceptions that impact on the effectiveness of exercise of the resulting from citizenships rights: an uneasy rela-

12. Cholewinski, R., 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right', (2002) 4 *European Journal of Migration and Law* 271; Perruchoud, R., 'Family Reunification', (1998) 27 (4) *International Migration* 509; Boeles, P., 'Directive on Family Reunification: Are the Dilemmas Resolved?', (2001) 3 *European Journal of Migration and Law* 61; John, A., 'Family Reunification for Migrants and Refugees: A forgotten Human Right? A Comparative Analysis of Family Reunification under Domestic Law and Jurisprudence, International and Regional Instruments, ECHR Case law and the EU 2003 Family Reunification Directive', University of Coimbra Human Rights Center Working Paper, pp. 1-66, http://www.fd.uc.pt/igc/pdf/papers/arturojohn.pdf.
13. See for example Carrera, S. and F. Geyer, 'The reform treaty and justice and home affairs: implications for the common area of freedom, security and justice' in Guild, E. and Geyer, F. (Eds), *Security versus justice? Police and judicial cooperation in the European Union* (Hampshire: Ashgate, 2008), pp. 289-307.
14. Carlier, J.Y. and Guild, E. (Eds), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L'Homme de l'Université Catholique de Louvain, (Brussels: Bruylant, 2006); Carrera, S., 'What does free movement mean in theory and practice in an enlarged EU?', (2005) 11 (6) *European Law Journal*, pp. 699-721.
15. Minderhoud, P., 'Access to Social Assistance Benefits and Directive 2004/38', in E. Guild, K. Groenendijk and S. Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, (Ashgate Publishing, 2009), pp. 221-241.

tionship. The task must therefore be to ensure that citizenship rights are brought home.

Accordingly, the Cypriot constitutional order is examined under the scope of the preceding methodological approach, thus perceived as another paradigm of a national constitutional approach to citizenships that result from the entanglement with other national and supranational constitutional/legal orders. In terms of substantive issues that need to be clarified, it is useful to offer a brief exegesis of those specific characteristics of the legal order of the Republic of Cyprus that impact on the perceptions and approach to citizenships.

Historically, the presence of migrants in Cyprus has been linked with the impetus for economic growth whereby the overall restrictive approach to immigration is at certain periods relaxed with reference to specific classes of economically contributing migrants.[16] In terms of general background pro-accession to the EU, 'immigrant workers were employed in manual, unskilled, low-paid, and low-prestige jobs',[17] with the origins of the workers being varied and with their integration in the society being limited.[18] The source of the problems in fully implementing EU law provisions on free movement of workers and their families that are analysed *infra* is to be found in the pre-existing formation of a perception that saw immigration as a 'temporary phenomenon'.[19] Therefore, the immigration policies originally seemed to make an incomplete attempt to differentiate positively between EU citizens and third country citizens. This results in the *general position* where the 'immigration employment policy continues to be characterised by impermanence and elasticity'.[20] On a more critical line of reasoning, Trimiklioniotis argues that the gaps in the implementation of Directive 2004/38 (hereafter, *the Directive*)[21] can be fully appreciated only after understanding the *specific posi-*

16. Georgiades, O., 'National Report for Cyprus', in Comparative study of the laws in the 25 EU Member States for legal immigration including an assessment of the conditions and formalities imposed by each Member State for newcomers (2008), International Organisation for Migration/ European Parliament, pp. 169-181, at p. 169.
17. *Ibid*.
18. Trimikliniotis, N., 'Migrant workers and industrial relations' (2003) Industrial Relations *Observatory on-line, http://www.eurofound.europa.eu/eiro/2003/11/feature/cy 0311103f.htm.*
19. Georgiades, *op. cit.,* n. 16, at p. 169.
20. *Ibid*.
21. OJ, L 158/77, 29 April 2004, <http://eur-lex.europa.eu/LexUriServ/LexUri Serv.do?uri=OJ:L:2004:158:0077:0123:EN:PDF>.

tion flowing from the partition of the island.[22] Therefore, the notion of reverse discrimination that is to be found in the implementation of the Directive in relation to the exclusion of Cypriot citizens and their third country family members from the scope of the Directive (analysed *infra*) is to approached from the scope of the specific political and constitutional concerns of the Republic of Cyprus that relate to the Cypriot problem. Specifically, the concern relates to the real possibility of members of the Turkish-Cypriot community, that on the basis of art. 2 of the Constitution are citizens of the Republic, being able to move and reside in the areas under the control of the Government accompanied by their family members that are often Turkish citizens. The validity of such a concern is considerable, yet the blanket exclusion of all Cypriot citizens is perhaps a heavy-handed measure. Another element of the specific position that is unjustifiable, relates to the discriminatory approach towards members of the Lesbian and Gay Community (LBC) and their family members, as well as against EU citizens that have entered in a cohabitation agreement with their partners. The explanation for this unsatisfactory approach is one that is founded on the margin of appreciation and the existence of specific religious and moral values that each Member States is possible to pursue.[23] Nonetheless, such an approach is in violation of the spirit and the letter of not only the Directive, but also of provisions on fundamental human rights.[24]

In conclusion, the European experience shows that the symbiosis of the citizenships has been affected by pre-existing perceptions about citizenship being the outcome of the concluded social contract between the State and its subjects, from which the State attracts legitimacy to govern and the subject is transformed to citizen. In the rather complex Cypriot constitutional setting, the concept of citizenship even has specific symbolic significance that is re-

22. Trimikliniotis., N., 'Free Movement of Workers in Cyprus and the EU' *Critical Studies on Fundamental Rights in Cyprus, the EU and Beyond* 1.1 (2010): pp. 1-192, http://www.prio.no/Global/upload/Cyprus/Publications/Free%20Movement%20of%20Workers%20in%20Cyprus%20and%20the%20EU%20series%2012010.pdf, at p. 31.
23. See generally with discussion to 'state of exception' Trimikliniotis, N., 'Migration and Freedom of Movement of Workers: EU Law, Crisis and the Cypriot States of Exception', (2013) *Laws* 2, no. 4: 440-468, available at http://www.mdpi.com/2075-471X/2/4/440.
24. *Ibid.* See also Report by the Ombudsman 2007. < http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/index_gr/index_gr?OpenDocument#.
And also Report by the Ombudsman 2009, http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/46CF076D8EE29A4C88257607005B6176/$file/1064-1623.08-060509.doc?OpenElement.

lated to the sovereignty issue. On this basis, the complexity of the symbiotic relationship between the European and National citizenship becomes highly sensitive and the degree of effective compliance with the provisions of the Directive has not remained unaffected. The response to the specific questions set by the questionnaire follows.

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

General Legislative Framework: Characteristics and Shortcomings

Prior to the entry into force of Directive 38/2004, the legislative framework in Cyprus relating to matters of immigration in general was **the Aliens and Immigration Law, Chapter 105 (as amended)**.[25] The legislation distinguishes between third country nationals and third country nationals who are family members of EU nationals.

In addition, the free movement principle was applied though **Law 92 (I)/2003 on the free movement and residence of EU nationals and their families**. This primary legislative measure was supplemented by the **Administrative Directive 460/2004** concerning the free movement and stay of EU nationals and their families, which entered into force simultaneously with the accession of the Republic to the Union and which provided for the administrative forms that had been submitted by the residence applicants. The framework was later amended through **Law 126 (I)/2004** for the free movement and residence of EU nationals and their family members (amendments).

At the moment, the relevant framework in force consists of **Law 7(I)/2007 (as amended)**[26] that transposed Directive 38/2004. The implementation,

25. For analysis see Georgiades *op. cit.,* n. 16.
26. Legal act: *Νόμος*, number: *N.7(I)/2007*; Official Journal: *Cyprus Gazette*, number: *4110*, Publication date: *09/02/2007*, Page: *00109-00167*, Entry into force: *09/02/2007*; Reference: *(MNE(2007)51431)*. The legislation has been amended since as follows: Ο Περί του Δικαιώματος των Πολιτών της Ένωσης και των Μελών των Οικογενειών τους να Κυκλοφορούν και να Διαμένουν Ελεύθερα στη Δημοκρατία (Τροποποιητικός) Νόμος του 2011.

therefore, took place via primary legislation that was voted unanimously by the House of Representative and which in general terms follows the Greek translation of the Directive. The general approach to implementation of the provisions of the Directive has been mixed, with certain significant discrepancies from the aims of the Directive and with certain other per verbatim transfers of the text in the **Law 7 (I)/2007**. In specific, the legislation transposed verbatim the provisions of the Directive as regards: article 7 (1a) of the Directive through section 9 (1) of the Law, article 7 (3a-d) through section 9(4) (a-d), article 8 (3a) through section 10 (4), article 14 (4a-b) through section 27 (4a-b), article 17 through section 15, and article 24 (2) through section 22 (2).[27]

The implementation of the Directive has been perceived to be gradually improved, yet with a number of significant problems remaining. Firstly, there have been considerable backlogs as a result of the implementation of the Directive that manifested in delays in administrative procedures relating to appointments to obtain a registration certificate, with delays being close to 12 months.[28] Moreover, there has been, at least in the initial stages, an overall of procedures whereby Union citizens who had obtained a permit issued under the previous regime of **Law 92 (I)/2003** and **Law 126 (I)/2004**, were unnecessarily required to reapply under the new comprehensive **Law 7 (I)/2007** for a registration certificate. According to the views of the trade unions the con-

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Legal act: *Νόμος*, number: *N.181(I)/2011*; Official Journal: *Cyprus Gazette*, number: *4313*, Publication date: *23/12/2011*, Page: *01507-01514*; Reference: *(MNE(2012) 51399)*.

Ο περί του Δικαιώματος των Πολιτών της της Ένωσης και των Μελών των Οικογενειών τους να Κυκλοφορούν και να Διαμένουν Ελεύθερα στη Δημοκρατία (Τροποποιητικός) Νόμος του 2013.

Legal act: *Νόμος*, number: *N. 8(I)/2013*; Official Journal: *Cyprus Gazette*, number: *4377*, Publication date: *01/02/2013*, Page: *00015-00017*, Entry into force: *01/02/2013*; Reference: *(MNE(2013)51330)*. Ο περί του Δικαιώματος των Πολιτών της Ένωσης και των Μελών των Οικογενειών τους να Κυκλοφορούν και να Διαμένουν Ελεύθερα στη Δημοκρατία (Τροποποιητικός) (Αρ.2) Νόμος του 2013.

Legal act: *Νόμος*, number: *N. 67(I)/2013*; Official Journal: *Cyprus Gazette*, number: *4399*, Publication date: *15/07/2013*, Page: *00573-00574*, Entry into force: *15/07/2013*; Reference: *(MNE(2013)56757)*.

27. Trimikliniotis, N., 'Report on the Free Movement of Workers in Cyprus in 2010-2011', 2011, available at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&cad=rja&ved=0CDgQFjAC&url=http%3A%2F%2Fwww.ru.nl%2Fpublish%2Fpages%2F608499%2Fcyprus_2011-12_def.pdf&ei=CXvbUuXbNonEtQak2oDIAw&usg=AFQjCNH2jIl04IUObjXrHoGlILa_AIfZWQ, p. 6.
28. Trimikliniotis., *op. cit.,* n. 22, at p. 4.

sequent delays resulted in forms of discrimination that disrupted the ability to move freely and take up employment.[29]

Moreover, the implementation created a problem of reverse discrimination against Cypriot citizens and their third country family members by imposing on them the more stringent conditions of **the Aliens and Immigration Law, Chapter 105 (as amended)**. This issue is analysed fully *infra*, as is the unsatisfactory approach of the Supreme Court that endorsed after several inconsistent decisions the approach favoured by the Republic.

In addition, there is the issue of territoriality whereby the application of **Law 7 (I)/2007** is, in the view of the reporter, by necessity limited to the areas under the control of the government.

The situation arises out of the unfortunate reality in Cyprus where the ceasefire line (Green line) separates the island in the southern area under the effective control of the Government, and the illegally occupied under international law northern areas that have no international status.[30] Therefore, the Green line creates a complex situation where a non border in the international law sense has been accepted as the practical separating line between areas under the control of the Government in which the **acquis communautaire** applies on the basis of article 1 of Protocol 10 attached to the Treaty of Accession of Cyprus to the EU.[31] The provision in article 1 (1) stipulates that 'The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control'. From this situation arise certain issues relating to the exercise of the rights of free movement of workers who are Union citizens and reside in the northern territories, where the Republic of Cyprus Government exercises no effective control. In specific, the combined effect of articles 2, 20, 22 of **Law 7 (I)/2007** limit the scope of application of the implementation of the Directive to the areas under the effective control of the Government. Therefore, according to Trimiklioniotis,[32] this results in an ex-

29. *Ibid*.
30. See the policy statement of the European Parliament, 25/1/2005 http://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/553/553930/553930en.pdf.
31. Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Protocol No. 10 on Cyprus, *OJ L 236, 23.9.2003, p. 955-95,* available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX: 12003T/PRO/10:EN:NOT.
32. Trimikliniotis., *op. cit.,* n. 27, p. 42.

pansion of the discretionary powers of the administrative authorities that are able to refuse the application of the protective scope of the Directive to EU citizens and their families that are residing in the occupied areas.[33] In practice, it has been argued that 'applications for a registration certificate submitted by Union citizens not residing in the areas under the effective control of the Republic are routinely rejected ... [and] the practice as regards partners of Union citizens residing in the northern part of Cyprus is to allow them to travel or use the legal ports and airports the first time they enter the country, but to subsequently enter them on the 'stop list' once they have entered the territories of the Republic of Cyprus.' [34]

This approach, if it can be conclusively documented, could result in discrimination against EU citizens residing in the occupied areas and EU citizens residing in the areas under the effective control of the Republic's authorities.[35]

This creates certain gaps in the application of the Directive, as EU citizens residing in the northern occupied areas are in effect excluded from the scope of protection for the free movement under the Directive. This has resulted, according to some commentators, in the creation of a dual system of applicability for the Directive and concerns have been expressed[36] as regards the improper implementation of article 22 of the Directive since there is no express reference in **Law 7 (I)/2007** to the derogation provisions of the Directive (articles 27-33) and which relate to grounds of public policy in general. It is submitted that by necessity arising out of the political situation in Cyprus and in order to protect the public interest and maintain public order, the derogatory approach adopted under **Law 7 (I)/2007** is justifiable. Yet, the process of justification could have been clearer and more complete if reference was made to the available exceptional provisions of the Directive (articles 27-33).

In terms of the definition of the term 'Union citizen', article 2 **Law 7 (I)/2007** states: 'that that any person that is citizen of a Member State of the Union, other than the Republic of Cyprus, in accordance with art. 17 of the Treaty, as well as any person that is citizen of a State that is party to the EEA'. In addition, in the same article, 'Treaty' is defined as the Treaty on the Establishment of the European Community. This approach was perhaps justifiable in 2007 when the Law was adopted, but at this moment it is incomplete as re-

33. *Ibid*.
34. *Ibid*.
35. *Ibid*.
36. *Ibid.;* also Trimikliniotis., *op. cit.,* n. 27, pp. 43-44.

gards the effects that the Treaty of Lisbon has had on the Treaties. For example, from the above outdated definition/reference there seems to result an exclusion of the various provisions contained in the TEU and which relate to the concept of citizenship.[37] Therefore, reference can be made to art. 3 (2) (ex art. 2 TEU); essentially article 9 TEU; art. 10 TEU (on democracy, representation, and political rights); art. 11 TEU (citizens' initiative).

The exclusion is perhaps merely technical, yet symbolic in effect and given the subsequent amendments to **Law 7 (I)/2007**, with the most recent taking place in 2013, it is argued that there was opportunity for addressing the issue. It is also interesting to note that even in the pre Lisbon situation, the TEU made references of a symbolic importance to the concept of citizenship and/or citizens.

Returning to the definitions that **Law 7 (I)/2007** makes, art. 2 states that family members of an EU citizen include the spouse, the direct descendants who are under the age of 21 or are dependants and those of the spouse; the dependent direct relatives in the ascending line, and those of the spouse. It is notable that the definition is per verbatim adopting the wording of article 2 of the Directive, yet with one significant exclusion: that of article 2 (2) (b) Directive that refers 'to the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State'.

The rationale is founded on the room for discretion that the Directive grants to Member States when implementing the relevant provision and which imposes an obligation to include in the definition of family registered partnerships, but only if these are legally recognised under national law. In Cyprus there is no such legal recognition for registered partnerships, hence **Law 7 (I)/2007** excludes art. 2 (2) (b) and subsequently all the inclusions that art. 2 Directive adopts in relation to registered partnerships in articles 2 (2) (c) and 2 (2) (d).

Nonetheless, the analysis must surely take into account article 4 (2) of **Law 7 (I)/2007** that states: 'Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the Republic

37. Art. 3 (2) (ex art. 2 TEU); essentially article 9; art. 10 (on democracy, representation, and political rights); art. 11 (citizens initiative).

facilitates entry and residence on the basis of **the Aliens and Immigration Law, Chapter 105 (as amended)** for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition of 'family member' under article 2, provided that they are dependants of the Union citizen having the primary right of residence, or cohabitates in the same household with the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; and
(b) the partner with whom the Union citizen has a durable relationship, duly attested'.

Hence, there is at the first level exclusion of registered partnerships and on second level a broadening of the term 'family member' in order to afford protection to individuals living under the partnership regime, provided that the said relationship is adequately documented (per article 4 (2) (b)).

In connection to the 'adequately documented requirement', article 4 (3) and (4) provide that the responsible administrative authority shall undertake an extensive examination of the personal circumstances of the interested parties, including personal interviews where necessary and shall justify any denial of entry or residence to these people. The primary concern in this case is documented with reference to article 2 where it is clearly stated that 'spouse' excludes a party to a marriage of convenience (sham marriage). The approach to implementation reflects a concern that the immigration authorities of Cyprus have had for decades and which refers to the high number of marriages of convenience that have taken place in the past. The problem with this approach is that although a legitimate aim of protecting the public interest is pursued, the result could be unsatisfactory. This is the case since there is a risk when assessing the term 'family members' of approaching relationships that fall outside the narrow margin of marriage as being *prima facie* suspect. Such an approach would be a direct reflection of a pre-existing dominance among immigration officials of the perception about the elevated danger resulting from marriages of convenience. Thus, there is a risk that in the application of the legislation the immigration officials, that are granted a wide margin of discretion when applying certain provisions of **Law 7 (I)/2007**, will exercise their discretion on the basis of the traditional problems that immigration officials have faced. This would result in the application of a specifically sceptic and stricter approach towards registered partnerships that are not legally recognised in the Cypriot legal order. Needless to say, the attain-

ment of the goal of protecting the public interest is paramount, yet while pursuing that legitimate aim priority must be given to the aims of the Directive, especially as regards classes of potential applicants that are excluded from the full protection of the provisions of **Law 7 (I)/2007**.

The issues relating to same sex couples that fall within article 3(2) of the Directive and their implementation in **Law 7(I)/2007** was one of the matters for which the Republic was questioned about by the European Commission. In this context, the problems in the implementation method have been highlighted in the letter dated 22.3.2012 that the European Commission addressed to the Cypriot Government regarding the incorrect general transposition and implementation of Directive 2004/37/EC. This step was the last in a series of previous measures that intended to raise questions about the implementation's completeness. In specific, there were the previous letters of 22.09.2009 and 20.05.2011, which had been responded to by the Cypriot government on 27.01.2011 and 25.07.2011, respectively.[38] The first warning letter to the Republic of Cyprus by the Commission (20/5/2011) noted 14 matters alleging violations of the principles underpinning free movement. One of the matters raised related to same sex couples, with the European Commission arguing that the formal transposition of article 3(2) of the Directive by articles 2 and 5 (now relevant is also article 4, after amendment by **Law 18 (I)/2011**) of **Law 7(I)/2007**, was not supported by adequate administrative practices. In effect, the European Commission inquired as to the adopted procedures of 'facilitation' of family members that art. 3 (2) of the Directive requires.

The Cypriot Government responded by stating that certain factors must be taken into account when assessing the effectiveness of the administrative practices intending to facilitate the free movement of family members. In specific, one such factor is the existing national legal framework that does not recognise registered partnerships and given that the Directive expressly allows for such legislative frameworks (article 2 (b)), there is no *prima facie* violation. In addition, the Government argued that the existing administrative procedures are facilitative in the sense that art. 3 (2) of the Directive requires. This argument was based on an interpretation of the Directive whereby 'the Directive does not clarify whether a third country national needs a visa in the host state'.[39] It is therefore possible to impose such requirement since 'Regulation 265/2010 (amending the Schengen Treaty and Regulation 562/2006) comes into play'.[40] Thus, in the event that no visa was acquired before arrival

38. Trimikliniotis., *op. cit.,* n. 22, at p. 1.
39. Trimikliniotis., *op. cit.,* n. 22, at p. 22.
40. *Ibid*.

to the point of entry, by way of exception and as a facilitative measure, in accordance with the circular of 18.07.2011 the visa requirements are partly qualified on the basis of accepting an unrecognised marriage or registered partnership certificate as evidence of a stable and permanent relationship. This 'facilitation' is subject to two conditions: '(a) the certificate is duly apostilled and (b) a visa is acquired via the consular point or at point of entry if this allowed by Regulation 810/2009'.[41] The visa requirement is maintained, but its discharge is by way of exception facilitated by accepting under conditions the existence of evidence of a stable and permanent relationship. Naturally, this approach grants broad discretionary powers to the immigration officer at the point of entry, which is in a way problematic.

Moreover, it can be argued that by the preceding administrative process an identical approach is applied when there is no recognised marriage and that unified approach applies equally to same sex partners and heterosexual partners. In that way, the discrimination on the basis of sexual orientation is attempted to be avoided. However, there are views that see this attempt as partly successful at best.[42] This conclusion is based on two grounds. Firstly, there is possibly discrimination and disproportionate treatment on the grounds on nationality, in the form of demanding standards applying to EU citizens that could form an important preventive and pre-emptive barrier to the exercise of free movement due to the requirements that apply to family members that are of third country origin. Nonetheless, this argument is surprisingly inaccurate on the basis that the nationality criterion is not favouring Cypriot nationals, since they are expressly excluded from the scope of **Law 7 (I)/2007** altogether. This reverse discrimination has the unwelcome effect of weakening the nationality discrimination argument in relation to EU citizens simply because the overall approach to same sex couples is problematic to start with.[43]

Secondly, there have been important findings by the *Cypriot Equality Body* that found discrimination on the basis of sexual orientation and nationality and which findings are linked to the umbrella problem of non recognition of registered partnerships. In specific, those reports conclude that the discriminatory effect of the approach of the immigration authorities has a direct

41. *Ibid*.
42. *Ibid*., at p. 23.
43. See Trimikliniotis, N. and Demetriou, C., 'Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation', (2008), http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/08/FRA-hdgso-NR_CY.pdf.

negative and pre-emptive impact on the effective exercise of free movement and on the proper enjoyment of family rights.[44]

A notable example of the approach of the *Cypriot Equality Body* is to be found in the first ever complaint that it examined on grounds of sexual orientation discrimination.[45] The complaint concerned the approach of the immigration authorities to an application for enforcement of the rights of movement and residence afforded to partners of EU citizens under Directive 2004/38/EC. The application by a third country national who had registered a civil partnership in the U.K. with a U.K. national was rejected by the immigration authorities. The main reason justifying the rejection was that the national legislative framework does not recognise same sex marriages. In its Report the *Cypriot Equality Body*[46] stated that an unqualified obligation exists to secure enjoyment of legally guaranteed rights without discrimination, in accordance with article 14 of the ECHR and article 28 of the Cypriot Constitution (principle of equality). The *Cypriot Equality Body* cited ECtHR case law to state that the principle of equality is violated when there is differential treatment of similar cases, which is not justified objectively and logically, or where the means used are disproportionate to the aim pursued.[47] The extensive analysis of the Strasbourg Court's case-law on the evolving notion and meaning of 'family' and 'marriage' and on same-sex couples was supported by the specific reference to Recommendation No. 1470 (2000) of the Parliamentary Assembly of the Council of Europe (PACE).[48]

Therefore, the decision of the immigration authority was found to be unjustified discrimination on the ground of sexual orientation. Moreover, this finding was adopted despite the fact that the report acknowledged that Directive 2004/38/EC grants a considerable margin of appreciation to Member States (article 2 (b)) to decide whether to recognise same sex marriages and registered partnerships. It was stated that the non-discrimination principle is broader than the scope of the Directive and its content is formulated by the

44. Trimikliniotis., *op. cit.,* n. 22, at p. 23.
45. Case Ref. No. A.K.R. 68/2008, dated 23.04.08. For analysis see http://www.nodiscrimination.ombudsman.gov.cy/sites/default/files/017_fleeing_homophobia_seeking_safety_in_europe_-_asylum_on_the_basis_of_sexual_orientation_and_gender_identity.doc.
46. Which is in effect the Office of the Ombudsman.
47. Trimikliniotis., *op. cit.,* n. 22, at p. 23, note 61.
48. 'Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe', adopted on 30th June 2000.

ECHR, the ECtHR case law, EU law general principles, primary provisions of EU law, and the case law of the CJEU. The application of **Law 7 (I)/2007** is to be governed by those broader considerations that bridge over the provisions of the Directive. In addition, according to the Ombudsman, the adverse implications of such discrimination on the private and family life of same-sex couples did not seem to accord with the principle of proportionality. She expressed the view that the introduction of same-sex partnerships in the legal order of Cyprus should become a matter for public debate and study in the light of international and European practice and expressed her intention to issue a Recommendation to the competent authorities to that effect. She also forwarded her Report to the Director of the CRMD, the Minister of Interior, and the Attorney-General of the Republic.[49]

The Ombudsman's report was followed by a complaint filed in July 2008 by Mr. S.S., a Cypriot citizen, on behalf of his Canadian spouse, Mr. T.C.[50] The couple had gotten married in Ontario, Canada in July 2006 and moved permanently to Cyprus in July 2007. T.C. requested a residence permit as a 'family member' of S.S. in accordance with Directive 2004/38/EC. His request was rejected by the CRMD on the ground that he was not considered a family member of a Cypriot citizen because their marriage was not recognized by Cypriot legislation. Both S.S. and T.C. filed an application before the Supreme Court, which is examined in paragraph 13.3.2.3.

T.C. was granted a temporary residence permit as a visitor for one year. On 21st October 2008, S.S. filed a fresh complaint on behalf of T.C. concerning the latter's visitor's permit.[51] As a visitor, T.C. did not have the right to work or open his own bank account (he could only have a special bank account for visitors), which was a source of numerous problems in his daily life.

The Ombudsman's report of 10th December 2008 referred to the EC rules on discrimination against homosexuals, including the Proposal for a Directive of 2nd July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation

49. Konstantinides, A. and Drosos, S., 'The Legal Situation of Same Sex Couples in Greece and Cyprus', in Gallo, D., Paladini, L., and Pustorino, P., *Same-Sex Couples before National, Supranational and International Jurisdictions*, (Springer, 2014), p. 319. The relevant subsection relies on the work by Aristotelis Konstantinides in relation to Cyprus after permission of the author.
50. Complaint No. 159/2008. It is noteworthy that the facts and legal issues raised in the complaint were virtually identical to the case of Tadeucci and McCall v Italy.
51. Complaint No. 213/2008.

(which has however remained a Proposal at the time of writing).[52] She also referred to the comparative legal analysis of homophobia, transphobia, and discrimination on grounds of sexual orientation and gender identity published by the EU Fundamental Rights Agency in June 2008, and emphasized that 18 out of the 27 EU Member States had introduced measures that went beyond the minimum standard required under EU legislation on combating discrimination on the ground of sexual orientation in labor, access to goods and services, housing, and social benefits. She finally referred to the conclusions of the study that the rights and privileges accorded to married couples, including those rights relating to freedom of movement and family reunification, should be extended to same-sex couples.

In her own conclusions, the Ombudsman felt the need to clarify that regulation of same-sex marriage in Cyprus fell within the exclusive competence of the legislature. That said, she held the view that the complainant did not receive equal treatment because his right to work was directly linked with the non-recognition of same-sex marriage under Cyprus law. She added that the Cypriot legal order, as part of the EU legal order, should grant full protection to homosexuals; a blanket exclusion of same-sex partners from the rights granted to different-sex spouses of EU citizens as 'family members' was an unjustified discrimination on the grounds of sexual orientation and a clear discrimination against same-sex couples. Consequently, the Ombudsman held that the denial of Mr. T.C.'s right to work was an unjustified adverse treatment that was directly linked to his sexual orientation and recommended that the CMRD re-examine his request with a view to granting him the right to work.

Similar arguments and conclusions were reiterated in a third report dated 3rd August 2009, which was triggered by two fresh complaints and by the negative reaction of the CMRD to the Ombudsman's previous reports. In particular, the CMRD insisted that their interpretation of the Directive was correct and that they had acted within the law; hence, the Ombudsman should have refrained from addressing any recommendation to the Department to act in a different way. The CMRD also invoked a Legal Opinion issued by the Law Office of the Republic of Cyprus in July 2008, which had similarly concluded that the Republic had no legal obligation, but mere discretion to receive the (non-EU nationals) same-sex partners of persons legally residing in Cyprus.

52. COM(2008) 426.

In the third report, the Ombudsman remained firm in her reading of the Directive within the broader legal framework, as articulated in her previous reports. In addition, she referred to the European Parliament Resolution of 2nd April 2009 on the application of Directive 2004/38/EC,[53] which, *inter alia*, call[ed] on member states to fully implement the rights granted under [the Directive] not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life and call[ed] on member states to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages.[54]

In line with this Resolution, the Ombudsman reiterated that the CMRD's restrictive interpretation of all relevant provisions was to the detriment of EU citizens who had registered partnerships – especially same-sex ones – in their country of origin. Such restrictive interpretation would make it virtually impossible for this category of EU citizens to exercise their freedom of movement and establishment. She concluded that the blanket exclusion of same-sex partners of EU citizens from the rights deriving from the EU *acquis* on the mere ground that same-sex marriage was not recognized in Cyprus amounted to an unjustified discrimination and was incompatible with the spirit of the Directive and basic principles of EU Law; at the very least, there should have been some examination of the individual circumstances surrounding each case.

Reports of the Ombudsman: recommending the introduction of civil partnership for both opposite-sex and same-sex couples

The first three reports aimed at urging the State to adopt measures towards equal treatment of same-sex couples and full respect of their right to private life, but fell short of linking such measures to recognition of same-sex marriage or partnership in the legal order of Cyprus. The Ombudsman was indeed cautious to keep the two issues apart. However, in a fourth report dated 31st March 2010 she moved a step further towards recommending that Par-

53. P6_TA(2009)0203.
54. Art. 2.

liament introduce civil or registered partnerships for both opposite-sex and same-sex couples. The report was triggered by two complaints concerning the legislative gap on the civil marriage or registered partnership of same-sex couples.[55] One of the complainants had received a clear reply by the Ministry of Interior informing him that the Cypriot law only provided for marriage between persons of different sex; since same-sex marriage was not recognized, any such marriage celebrated abroad had no legal basis in Cyprus.

The Ombudsman identified a gap in the law of Cyprus since cohabitation outside of marriage of either different-sex or same-sex couples, even if long and stable, did not give rise to any rights for the partners and was not subject to any regulation whatsoever. She stressed that new types of living together and cohabitation between such couples were a reality that required revisiting the traditional concept of marriage and the introduction of legal rules that would fill in the gap. The Ombudsman was cognizant that societal consensus would be broader for the legal recognition of different-sex partnerships outside of marriage than for same-sex ones, but she was also mindful of everyone's right not to be subjected to discrimination on the ground of sexual orientation. In her view, the continuing legal non-recognition of the social reality of same-sex partnerships reinforced negative stereotypes and prejudices against homosexuals and deprived them of the possibility to claim their rights. On the other hand, legal recognition would be a realistic response to an existing social need and essential for the realization of equal treatment. It would also bring Cyprus fully in line with the fundamental EU principle of free movement of people.

The Ombudsman also underlined that legal regulation of civil unions would not undermine traditional marriage, which would continue to be the prevalent basis for establishing a family. In any case, the legitimate aim of protecting traditional marriage and family should not be achieved by ignoring or refusing to regulate existent (same-sex) partnerships. The State should secure the same respect and protection to all citizens irrespective of their sexual orientation. It thus fell on Parliament to introduce relevant legislation. In doing so, Parliament could be guided by the legislative provisions of other European countries as well as by the obligations of states under European and international law to eliminate any form of discrimination.

These views were reiterated in a Position Paper issued on 22nd December 2011 in the Ombudsman's capacity as Equality Authority. The Ombudsman once again stressed that there was a legal gap in regulating cohabitation out-

55. No. 142/2009 of 15th December 2009 and No. 16/2010 of 29th January 2010.

side marriage of both different-sex and same-sex couples, and that Cyprus was one of the few EU Member States that had not introduced civil partnerships. She also noted that there was no constitutional obstacle for doing so since this was an issue to be regulated by the legislature. Finally, she pointed out that legal recognition of civil partnerships would have a positive impact on public attitudes towards same-sex couples and would contribute to eliminating negative stereotypes against them, as experience in other countries has shown.

The publicity given to this series of reports in the local press and media, as well as the growing number of other initiatives and public debates in mass and social media have raised some public awareness in an issue that was considered taboo until less than a decade ago. Such initiatives and the on-going integration of Cyprus in the EU seem quite likely to counterweight – to some extent at least – deeply embedded negative public attitudes and stereotypes, including sporadic homophobic statements by prominent figures of public life. This improved climate has made it easier for a small group of parliamentarians stemming from various political parties to initiate informal discussions within Parliament with a view to introducing civil partnerships, including for same-sex couples. It is noteworthy, however, that neither the Ombudsman nor any other public figure has suggested the extension of marriage to same-sex couples; they have invariably called for introducing civil partnership/union for both opposite-sex and same-sex couples and keeping marriage for opposite-sex couples. Indeed, any other proposal would be extremely unlikely to find wider public support.

The Supreme Court's Approach

The approach of the Supreme Court to the Directive and to **Law 7 (I)/2007**, specifically as regards the scope of application, the key definitions of EU national and family members, and finally the effectiveness of the granted protection has been mixed. In specific, the case law focused primarily on the matter of reverse discrimination for Cypriot citizens and also on the definition of family members. It must be noted that the jurisprudence has shown a remarkable inconsistency as regards the reverse discrimination issue. The evolution of the case law has been summarised in the case of **Irina Levacheva v Republic**.[56] The case concerned a Russian citizen that married a Cypriot citi-

56. Case 170/2011, Irina Levacheva v Republic, 15 April 2013. Available in Greek at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-170-2011.htm&qstring=irina and levacheva.

zen in 2009 and was granted visitor status in 2010. After carefully scrutiny of the nature of the relationship, it was concluded that the marriage was genuine, hence the permit/status as visitor was subsequently supplemented with the granting of a status of employee. This was subject to the express statement that 'such a status is granted for the purpose of staying in Cyprus with the Cypriot spouse and for the specified employment'. Upon further visits by the immigration authorities, it transpired that the couple were no longer living together and that the Cypriot husband filed for divorce in November 2010. Subsequently, the Immigration Authority revoked the stay and work permit on the basis that it was granted exclusively on the basis of the marriage that was no longer a consideration and also asked her to immediately depart from the Republic. Against this administrative decision, the affected party Mrs Levacheva filed an action for annulment under article 146 Constitution relying primarily on the Directive and **Law 7 (I)/2007**.

Judge Erotokritou described the inconsistency in the case law by stating that 'After accession of the Republic to the EU, Directive 2004/38/EC was implemented, initially, through **Law 92(I)/2003**. In the application of the Law, there were decisions of judges at first instance,[57] where it was held that **Law 92(I)/2003** applies also to family members of Cypriot citizens'.[58] Examples of such instances were cited and included ***Saiedi v Republic***,[59] ***Petrosian v. Republic***,[60] ***Shalaeva v Republic (first instance)***,[61] and on appeal the decision of the majority in ***Shalaeva v Republic***.[62]

The unifying thread that connects the preceding decisions is the argument that was subtly put by Judge Nicolaides in ***Shalaeva v Republic (first instance)***[63] where it was held that 'it is self-evident that the same rights afforded to citizens of other Member States of the Union, are afforded also to Cypriot citizens. We would be led to unreasonable results if the Greek-Cypriot spouse of the applicant could live with her in any other Member State of the EU, but could not do the same in his own country. Despite the filing for divorce or even the separation of the couple, until a final decision as to the di-

57. Note that the cases concerned actions for annulment under article 146 Constitution, hence those were decisions by Judges of the Supreme Court.
58. Translation by the author, at page 5 of Judgment available in Greek at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-170-2011.htm&qstring=irina and levacheva.
59. Case Number 1241/06, 28.7.2006 (Nicolaides, J.).
60. Case Number 453/2006, 22.10.2007.
61. Case Number 824/05, 7.4.2008 (Nicolaides, J.).
62. Shalaeva v Republic *(2010) 3 ΑΑΔ 184*.
63. Case Number 824/05, 7.4.2008 (Nicolaides, J.).

vorce is being made, they remain married'.[64] Therefore, the application of an approach that would amount to reverse discrimination was initially held to be unreasonable and would as such result to a protection founded on double standards.

Interestingly enough, that approach was endorsed by the majority of the Supreme Court (3:2) in the appeal in ***Shalaeva v Republic***,[65] which was a decision of an extended panel of five judges instead of the normal composition of three judges hearing appeals under article 146 Constitution. It must be clarified that the appeal was based on a different setting than that of the first instance decision that concerned the revocation of the permit to stay and work in Cyprus, whereas the appeal concerned a different action for annulment that concerned the decision of the Secretary of State for Interior to re-examine her application. In the appeal, in which Judge Nicolaides gave the decision of the majority, the identical argument that was cited above was repeated[66] and was supplemented by the argument the principle of equality requires identical handling of such cases with cases involving family members of citizens of other Member States of the EU.[67] In addition, it was held that 'the Directive's purpose is obvious and it includes the protection of the right to family and its provisions assist in preserving the unity of the family ... and since the provisions of the implementing Law are reflecting the aims of the Directive, any opposing interpretation would violate the right in question for Cypriot citizens'.[68] Without question, this approach is closer to giving effective and fuller application of not only the provisions of the Directive, but also of its spirit and purposes.

The view of the minority adopted *per verbatim* the rationale of the earlier decision in ***Sari Tekin v. Republic***,[69] where Judge Konstantinides held that 'The matter of the right of residence of a third country national that is the spouse of a Cypriot citizen is a matter that comes within the scope of the regulation of the internal state of affairs of a Member State of the Union ... It has no community element and the question as to whether such internal regulations violate other principles is a different matter ... The Law does not create such a right of residence as it expressly states in articles 4 and 15 that it concerns the right to free movement and residence in the Republic ... It requires

64. Translation by the author.
65. Shalaeva v Republic *(2010) 3 ΑΑΔ 184*.
66. At p. 188 Judgment.
67. *Ibid*.
68. *Ibid.,* at p. 189 (translation by the author).
69. Sari Tekin v Republic, Case Number 290/06, 27/7/07.

movement of such citizen to Cyprus and it does not concern Cypriots and their right to reside in his country. In accordance, that approach is extended to the family members of such a citizen, but dependent on the existence of a right by the Union citizen ... Since there is no movement by the Union citizen, there can be no independent right of residence of the members of his/her family.'[70]

Moreover, the minority view cited the decision of the CJEU in ***Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform***,[71] with specific, yet mere citation of the relevant paragraphs 73 and 74 of the judgment of the CJEU. Although the citation is proper and correct, the lack of any other comment by the Supreme Court (minority decision) is lacking the necessary emphasis, and thus resulted in the majority view completely ignoring the judgment and its relevancy. In specific, the minority view cited the following:

'On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are family members, within the meaning of point 2 of Article 2 of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Second, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. Under Chapter VI of that directive, Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a refusal will be based on an individual examination of the particular case'.[72]

However, the part of the ***Blaise Baheten Metock*** decision that would have been extremely useful for the Supreme Court was neither cited nor commented upon and that part was paragraph 78: 'Any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law'.[73]

The saga continued, with the Supreme Court in full panel again revisiting the issue of reverse discrimination in another appeal relating to ***Republic v.***

70. *Shalaeva v Republic* (2010) 3 ΑΑΔ 184, as cited at p. 189 Judgment (translation by the author).
71. Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
72. *Ibid*., paragraphs 73 and 74.
73. *Ibid*.

Shalaeva[74] and indicated that there was disagreement with the majority decision discussed *supra*, yet without further examining the matter. The whole situation was finally concluded with the adoption of **Law 7 (I)/2007** that in terms of the definition of the term 'Union citizen', article 2 **Law 7 (I)/2007** states: 'that any person who is citizen of a Member State of the Union, other than the Republic of Cyprus, in accordance with art. 17 of the Treaty, as well as any person who is citizen of a State that is party to the EEA'. Also, article 4 (1) states that 'the Law applies to any Union citizen, who arrives or resides in the Republic as well as to members of his family, irrespective of nationality, that accompany him during his arrival to the Republic or that arrive at the Republic to meet him'.

Accordingly, Judge Nicolaides who earlier supported a different view, held in ***Majed v Republic***[75] that from the now combined meaning of the provisions of **Law 7 (I)/2007**, the provisions of the Law and of the Directive are not applicable in instances where a third country national of a Cypriot moves to reside in Cyprus. This is now the position that the Supreme Court applies and it has been summarised in the case of **Irina Levacheva v Republic**.[76] There Judge Erotokritou reiterated the above approach and cited as authority Case C-127/08, ***Blaise Baheten Metock and Others v Minister for Justice, Equality, and Law Reform.*** Nonetheless, the Judge also cited the earlier Case C-109/01, ***Secretary of State for the Home Department v Hacene Akrich*** as setting the exact precedent. At this point, one must distinguish the difference in approach between the two judgments of the CJEU as regards at least the issue of legal and illegal entry into a Member State of the Union; however this useful distinction was omitted.

It must be noted that in the preceding decisions there was no examination of the possibility to submit a preliminary reference on the matter, despite the fact that the key to interpreting the national legislation was to be found in the provisions of the Directive. Moreover, no justification was given as to the clarity of the provisions of the Directive in accordance with the doctrine of *acte claire*[77] in the instances where the Supreme Court was examining appeals from first instance decisions, thus acting as court of last resort. Finally, there was also no examination as to the criteria for direct effect of the Di-

74. *Republic v Shalaeva* (2010) 3 ΑΑΔ 598, at p. 606.
75. *Majed v Republic,* Case Number 1099/09, 7.2.2011.
76. Case 170/2011, Irina Levacheva v Republic, 15 April 2013. Available in Greek at http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201304-170-2011.htm&qstring=irina and levacheva.
77. *Case 283/81*, *CILFIT*.

rective,[78] nor was there any reference to the doctrine of indirect effect that requires the harmonious interpretation of the national implementing measure with the Directive.[79] In effect, the decisions whether in favour of including or excluding Cypriots from the scope of the Directive were based on national perceptions and interpretation techniques. This, in the opinion of the author represents the most serious problem in applying effectively the provisions of the Directive, irrespective of the correctness of the approach of the Supreme Court in the sense of finding the provisions of the Law as coming within the margin of discretion that the Directive grants. Finally, the reference to the guiding authority which is the relevant case law of the CJEU was either absent or merely sporadic and laconic.

Finally, reference must be made to the very interesting decision in **Teresa Amayuwon v Republic**.[80] It must be stated that the decision by Judge Nicolatos in effect applied the protective effect of article 12 the Directive, as implemented by article 25 of **Law 7(I)/2007**, despite the fact that the interested party (a citizen of the Philippines) was the spouse of a deceased Cypriot citizen. In effect, the shift in the approach of the Supreme Court, discussed *supra*, that applies the principle of exclusion of Cypriots from the scope of the Directive, was not applied in this instance. Therefore, issues about consistency of the case law arise.

In this case, the applicant legally entered into Cyprus in 2007 and in 2010 married a Cypriot citizen who passed away in 2013. The applicant had applied for a temporary residence permit in 2010, yet a final decision was made in 2013 whereby the application was rejected on the basis that her spouse was now diseased. Shortly after the applicant was arrested and detained pending expulsion. It must be noted that the applicant also had inheritance rights that were contented by other relatives of the diseased on the basis, among other reasons, that the applicant was bigamous. The Court relied expressly on article 25 (2) of **Law 7(I)/2007** on the retention of the right of residence by family members in the event of death or departure of the Union citizen. More importantly, in the second from last paragraph of the judgment it was stated that 'the applicant in the specific case, derives rights from **Law 7(I)/2007** that implemented [the Directive] and which *has superior effect over national law, including the Constitution.*' Consequently, it is striking that this otherwise

78. *Case 41/74, Van Duyn.*
79. *Case 14/83 Von Colson* [1984] ECR 1891*; Case C-106/89 Marleasing SA v La Comercial* [1990] ECR I- 4135.
80. Teresa Amayuwon v Republic, Case Number 802/2013. 17.10.2013.

positive conclusion was reached despite the earlier decisions on the matter of reverse discrimination[81] and which followed the amendment of article 2 of **Law 7(I)/2007**. It is also interesting that Judge Nicolatos emphasised the application of the principle of supremacy of EU law, thus seeming to imply that the Directive does not permit reverse discrimination, and as such its provisions have overriding effect in relation to conflicting national provisions such as article 2 of the **Law 7(I)/2007**. Unfortunately, this line of reasoning was not stated, and we are unable to draw specific conclusions as to whether this case marks the departure from the interpretation favouring reverse discrimination or is a mere misapplication of the preceding provision. The lack of reference to the concepts of direct effect and indirect effect, as well as to any case law of the CJEU is also not helpful in guiding the analysis of this otherwise significant case.

On the equally problematic approach to the matter of homosexual couples, the Supreme Court also examined the situation by adopting a narrow reading to the provisions of the Directive and in isolation from the broader principles of EU law. Indicative is the decision in ***Correia and Or v Republic***[82]

This case was a follow-up to Complaint No. 159/2008 examined by the Ombudsman and mentioned in paragraph 13.3.2.1. The petitioners, the Cypriot Savvas Savva and his Canadian spouse Thadd Correia, claimed that the CMRD letter/reply of 25th July 2008 (stating that Mr Correia was not considered a family member of a Cypriot citizen because his marriage with Mr Savva in Canada was not recognized by Cypriot legislation) was null and void, illegal, and without legal effect, for being contrary to the EU Law, the ECHR, as well as art. 15 (right to private life), 22 (right to marry), and 28 (right to equal treatment) of the Cyprus Constitution. The petition was rejected on procedural grounds,[83] mainly because under Cypriot administrative case-law the impugned act – the CMRD letter of 25th July 2008 – was held to be of an informative nature and not an enforceable act of administration. Nonetheless, the Court went on to discuss the merits of the petitioners' claim (albeit not as fully as it would have done had the petition not been dismissed).

The Court rejected the arguments of the petitioners and held as follows: a) Directive 2004/38/EC and national implementing legislation did not apply to EU nationals who wished to reside in an EU Member State of which they

81. *Majed v Republic,* Case Number 1099/09, 7.2.2011; Case 170/2011, Irina Levacheva v Republic, 15 April 2013.
82. Case nr 1582/2008, 22/07/2010.
83. Judgment of 22nd July 2010, Case No. 1582/2008.

were a national, such as Mr Savva who wished to reside in his native Cyprus; b) facilitation of entry and residence could take many forms, but did not amount to recognition of marriage celebrated abroad; c) there was no question of violating art. 22 and 28 of the Constitution since the law in Cyprus did not provide for same-sex marriage, but only for marriage between persons of different-sex; d) the Strasbourg case-law has not advanced to the point of ruling that non-recognition of same-sex marriage was in violation of the right to private and family life; on the contrary, it has acknowledged that the right to marry and regulation of same-sex marriage fell within the discretion of the ECHR States parties, which could decide on the meaning of marriage in accordance with their own legislation and social views; the fact that some States decided to extent the right to marry to persons of same-sex reflected their own views on the role of marriage in their societies and did not give rise to any legal principle or interpretation of the Convention that could affect the traditional concept of marriage; e) the Strasbourg case-law on the right of transsexuals to marry could point to an extension of that right to persons of same-sex in the future; f) the Strasbourg jurisprudence on the right of same-sex couples to private life did not help the petitioners in the instant case; the protection of traditional family was a valid ground for justifying distinctions in treatment.[84]

This was a narrow reading of the same legal provisions that were construed more liberally by the Ombudsman. Admittedly, the Ombudsman had more leeway to make extensive use of non-binding instruments such as the relevant PACE recommendations and resolutions of the European Parliament. This was among the factors that led to different legal determinations and conclusions than the Supreme Court.

The legal issues raised in this case were virtually identical to the ones in *Tadeucci and McCall v Italy*,[85] which was brought before the Strasbourg Court and was pending at the moment of writing. The outcome of this case as well as the cases against Greece[86] is hopefully expected to influence related developments in Cyprus.

84. Reference was made to *Mata Estevez v Spain*, No. 56501/00, decision of 10th May 2001; Kerhoven and Hinke v Netherlands, No. 15666/89, decision of 19th May 1992; Kozak v Poland, No. 13102/02, judgment of 2nd March 2010.
85. App. No. 51362/09.
86. Vallianatos and Mylonas v Greece and C.S. and Others v Greece, No. 29381/09 and 32684/09.

Interim Conclusion

The approach of the legislation that intended to implement the Directive has been overall satisfactory, but with certain specific problems that are yet to be resolved on the basis of a broader reading of the general purposes of the Directive and of the overarching principles of equality and non-discrimination. The narrow approach that insists on exploding to the full the margin of discretion that the Directive allows to Member States in terms of reverse discrimination and also in terms of recognising registered partnerships, remains in full force that undermining the full effectiveness of the free movement principle. Nonetheless, the relevant case law of the CJEU seems to some degree to allow such a narrow reading, yet the Supreme Court's approach has found it difficult to reach a conclusion as to the matters involved and also failed to fully utilise the reasoning of the CJEU. This has been the case due to the adopted 'national interpretative approach' that sidelined the CJEU's jurisprudence as a mere binding authority without elaborating on the full meaning of those decisions. Notable in the above respect is the difference in approach by the Ombudsman when examining identical issues.

Question 2

The implementation of article 7 (1) (a) of the Directive concerning sufficient resources is transposed verbatim by article 9 (1) **Law 7 (I)/2007**.

Accordingly, article 9 (1) **Law 7 (I)/2007** states that EU citizens who wish to stay in Cyprus for more than three months must either be in paid or unpaid employment, art. 9 (1); or have sufficient financial means so as not to become a burden on the social security system of the country, Art. 9 (1) (a); have a comprehensive medical insurance cover in the Republic of Cyprus, 9 (1) (b); or be enrolled in a private or educational institution approved by or registered with the Government to undertake studies or specialist training courses and have full medical insurance and sufficient financial means so that they and their family members will not become a burden on the social security system of the country, Art. 9 (1) (c); or, finally, be family members accompanying/ joining an EU citizen who satisfies the above-mentioned criteria.

Moreover, as Trimiklioniotis summarises the national provisions relating to the deprivation of status[87]:

'Article 9(4) of Law 7/2007 provides that a national of a Member State cannot be deprived of his/her status as a worker in paid or unpaid employment simply because he/she is no longer employed because: he/she is temporarily unable to work as a result of illness or accident (para. a); or has been registered as involuntarily unemployed after being employed for more than 12 months and is classified as a person in search of employment with the Department of Labour (para. b). If a worker has been registered as involuntarily unemployed on the basis of a contract for less than one year, or became unemployed within the first 12 months (on the basis of testimony to that effect by the Department of Labour), he/she retains the status of a worker for not more than six months. The status of a worker in paid or unpaid employment is retained if a worker has become involuntarily unemployed and is pursuing a professional education course of study that is relevant to his/her previous employment, Art. 9(4)(d). The law provides that it is the Department of Labour that will decide whether a worker has been made 'involuntarily unemployed' and is 'in search of employment,' Art. 9(5). However, it should be noted here that it is by no means clear how the phrase 'involuntarily unemployed' is to be interpreted.'[88]

Finally, the competent authority (Social Welfare Services of the Ministry of Labour and Social Insurance) will take into consideration the personal situation of each individual and that type of assessment will not be carried out systematically (per article 10 (5) of the Law).

With reference to the case law applying the preceding provisions, it must be noted that there is limited or even no evidence of expulsion decisions being taken on the ground of non-fulfilment of the conditions imposed by the Directive and transposed into national law. Instead, there is a plethora of decisions by the Supreme Court examining the legality of expulsion that resulted from the deprival of the status due to public safety reasons[89] and/or evidence of marriages of convenience[90] and /or public health grounds.[91] In this respect, the case law is reflective of the traditional issues that have preoccupied the immigration authorities and the majority of the cases come within the scope of **the Aliens and Immigration Law, Chapter 105 (as amended**

87. Trimiklioniotis, *op. cit*., n. 22, at p. 12.
88. *Ibid*.
89. Borislav Borisov v Republic, Case Number 213/2013, 29.06.2013; Anghel Viorel v Republic, Case Number 1064/2012, 02.08.2012; re Marta Ayredin Mohammed, Case Number 79/2012, 28.05.2012.
90. Asif Muhammad and Picioroaga Elena Alexandrina v Republic, Case Number 6296/2013, 2.12.2013; Abdulkader Majed v Republic, Case Number 1099/2009, 07.02.2011.
91. OFU v Republic, Case Number 857/2010, 24.04.2013.

by Law 8(I)/2007). Once the case is disconnected from the scope of the Directive due to the lack of legally valid marriage, then the examination of expulsion comes within normal immigration rules. Article 18 of **the Aliens and Immigration Law, Chapter 105 (as amended by Law 8(I)/2007)** provides for a sufficient resources criterion that is by analogy similar to article 9 (1) **Law 7 (I)/2007** on sufficient resources for persons coming within the scope of Directive. It is therefore in this context that analysis of the case law can be made, in the absence of decisions on 9 (1) **Law 7 (I)/2007** directly.

The two important cases where reference was made either directly or indirectly to the criteria for having sufficient financial means are **Lien Thi Ha v Republic**[92] and **Richard Dugan v Republic.**[93]

The applicant was a Vietnamese citizen who arrived in Cyprus in 2008 with an entry permit in order to be employed as household assistant (au pair) and remained legally in the country until marrying a Cypriot citizen in 2010. Then, the authorities granted her a temporary residence permit that was renewed until 2014. In 2012 the applicant gave birth to and subsequently applied for family reunification permit in relation to her other three underage children residing in Vietnam. The application was rejected in 2011 on the basis that the financial resources of her spouse were insufficient for providing for such an extended family, since the only source of income was the monthly salary of €1.340. The applicant proceeded to an action for annulment against the administrative decision on the basis that she was currently also employed and that the couple had an improved financial status that enabled it, after the issuing of the administrative decision, to purchase an apartment in 2012. The Court held that the material time is when the administrative decision was taken and also took into account the fact that the applicant calculated in the family income the social assistance/benefit that would have been available (**Law 95(I)/2006**) subject to the arrival of the three children.

Two points must be made as to this ruling. Firstly, the decision is unfortunately not examining the scope of application of the Directive since the spouse of the applicant is Cypriot and as such excluded, thus raising the reverse discrimination problem analysed previously. Secondly, the case is illustrative of the approach of the Supreme Court towards the sufficient resources criterion by analogy. That means that judicial approach to the provision of Article 18 of **the Aliens and Immigration Law, Chapter 105 (as amended by Law 8(I)/2007)** that provides for a sufficient resources criterion is useful

92. Lien Thi Ha v Republic, Case 1023/2011, 20.07.2017.
93. Richard Dugan v Republic, Case Number 1498/2008, 03.09.2009.

for establishing an understanding as to the approach of the Court in general towards such type of quantitative criteria. This is the case because there are no cases on the Directive's sufficient resources test, partly due to the restrictive and exclusionary scope of **Law 7 (I)/2007**. Since Article 18 of **the Aliens and Immigration Law, Chapter 105 (as amended by Law 8(I)/2007)** is by analogy similar to article 9 (1) **Law 7 (I)/2007** on sufficient resources for persons coming within the scope of Directive, the judgment above is indirectly useful. Hence, it is reasonable to conclude that the Court adopts a narrow reading on the meaning of the requirements for sufficient resources with specific caution towards the availability of the social benefits and the burdening of the public purse.

In **Richard Dugan v Republic**,[94] the applicant who was a citizen of the U.S.A, arrived in Cyprus in June 2000 with his Cypriot wife, whom he married in 1989, and their three children. The applicant resided continually in Cyprus on the basis of residence permits, the last of which was issued on 5/8/04 and remained valid until 5/8/09. In the meantime, the applicant and his wife filed for divorce which was dully issued in October 2005. Under the terms of the divorce, the applicant had certain specific visit rights and specified contact with the three children. Therefore, the applicant filed to the immigration authorities for recognition of residence rights, seeking to rely on article 13 of the Directive (duly implemented via article 26 of **Law 7 (I)/2007)** that provides for retention of the right of residence in the event that there is a court order on the matter of access to a minor child. The application was rejected on the basis that **Law 7 (I)/2007** is not applicable since the spouse of the applicant is Cypriot, thus applying the reverse discrimination approach provided for in article 2 of **Law 7 (I)/2007**. Instead, the application should be examined under the **Aliens and Immigration Law, Chapter 105 (as amended)**. The claimant challenged the legality of the administrative decision and the Supreme Court held that his case falls within the scope of the Directive since the preamble of the Directive and the general aims that it pursues could not be taken as to exclude Cypriot citizens. This judgment was delivered prior to the amendment in the Law and to the subsequent shift in the approach of the Supreme Court. It is nonetheless useful, since the Supreme Court (Judge Fotiou) went on to examine whether the applicant had sufficient financial resources as required under article 13 of the Directive. The Court held that the applicant satisfied the criterion since at the time was paying alimony and half of the tuition fees for the education of the children in a private

94. Richard Dugan v Republic, Case Number 1498/2008, 03.09.2009.

school, while at the same time had a documented and steady employment. Moreover, the Court considered as important factor the length of duration of the marriage.

The case is indicative of the willingness to examine the criterion for sufficient resources in an ad hoc manner by taking into account the specific details of each case. Important in such consideration seems to be the length of duration of the marriage. Nonetheless, the case is not strictly speaking dealing with expulsion, but since there is lack off specific case law on the matter, the methodology applied in the specific case is of indirect interest. Needless to say, the same case if examined today would have excluded the applicant from the protective scope of the Directive and would have applied the **Aliens and Immigration Law, Chapter 105**.

On the administrative level, the interpretation of sufficient means is governed by the overall objective of preventing the creation of an 'unreasonable burden' on the social welfare system. Therefore, the issue becomes the administrative interpretation of the meaning of 'sufficient resources' and the delimitation of the starting points where a 'burden' arises. Article 4.1(5) of **Law 7(I)/20**07 designates the Social Welfare Services as the competent authority to determine what constitutes 'burden on the social assistance system of Cyprus'.

The European Commission letters of 22.09.2009 and 20.05.2011, which had been responded to by the Cypriot government on 27.01.2011 and 25.07.2011 respectively,[95] raised issues regarding the deportation and no-entry ban under articles 30 and 31 of the free movement Directive. The letters that the European Commission addressed to the Cypriot Government claimed that although **Law 7(I)/2007** correctly transposed the provision of article 7 and 8 (3) of the Directive, administrative practice deviates from that by requiring that the workers demonstrate certain incomes for themselves and their families to recognise their right to residence under art. 7(1).

As Trimikliniotis states,[96] the prerequisites are set out in the circular issued by the immigration authorities[97] which 'requires a number of formalities to ensure that Union citizen applicants are in possession of 'the appropriate

95. Trimikliniotis., *op. cit.,* n. 22, at p. 1.
96. Trimiklioniotis, N., 'Report on the Free Movement of Workers in Cyprus in 2011-2012', 2012, available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.ru.nl%2Fpublish%2Fpages%2F608499%2Fcyprus_2011-12_def.pdf&ei=CUrvUtS1OMmFyAPanIGoCg&usg=AFQjCNH2jIl04IUObjXrHoGlILa_AIfZWQ, at pp. 11-12.
97. File No. 30/2004/IV, 29.9.2008.

means'.' The circular provides guidelines for the determination of 'sufficient means' for EU nationals who are not employees, but who state that they have sufficient means. The circular lists the following as minimum amounts: €600 for himself; €400 for his wife; €300 for each child over 12 years old; €200 for each child under 12 years old. Pensioners and aged persons must have a bank account and statements proving that their pension is paid to them from abroad and is banked to their bank account in Cyprus (or statements that they withdraw money from their bank account abroad through their cards). They must also submit a certificate of health insurance and a rental agreement, or a sales contract evidencing that they have purchased a place to stay in Cyprus. The circular requires that the minimum pension from abroad is at least €600. Union citizens who are students and also employed on a part-time basis will not be considered workers; their application will be processed on the basis of criteria applicable for students.

Moreover, in response to the Commission's concerns, Cypriot authorities produced a circular[98] which 'reiterates the content of the law transposing the Directive as follows:

(2) In the case of a worker who is a Union citizen and his/her family, irrespective of their nationality, the immigration authorities do not check in any way the sufficiency of their means. Registration is granted with the submission of the relevant documents as required by the application guidelines MEU1A and MEU2A.

(3) Notwithstanding the fact that section 10(4)(a) of law 7(I)/2007 does not comply with art. 8(3) of Directive 2004/38/EC, in the case of any other than worker Union citizens and his/her family, self-employment can be demonstrated by the registration with the Social insurance Services or other proof that they are such, e.g. European documents E101/A1'.[99]

Accordingly, it has been argued 'that the guidelines contained in the circular regarding the minimum income necessary in order to obtain a Certificate of registration was never a condition precedent, but a mere guide. The new circular, no. 15/2006/III, issued on 18.07.2011, clarifies matters and sets the procedure in line with the Directive'.[100] Therefore, the European Commission in its letter dated 22.3.2012, considered the matter as resolved.

98. No. 15/2006/III, 18/07/2011.
99. Trimikliniotis, *ibid.,* p. 13.
100. *Ibid*.

Question 3

The provisions of the Directive (articles 12-15) on the retention of the right of residence by family members in the event of death or departure of the Union citizen, on the retention of the right of residence by family members in the event of divorce, on the annulment of marriage or termination of registered partnership, on the retention of the right of residence, and on the procedural safeguards, have been transposed effectively in the Cypriot law. In specific, **Law 7(I)/2007** in articles 25-28 makes provision in verbatim of the respective provisions of the Directive with two exceptions. Firstly, in relation to article 13 of the Directive that makes reference also to the termination of a registered partnership, article 26 of **Law 7(I)/2007** excludes such reference. Secondly, in article 27 (3) **Law 7(I)/2007** that transposes article 14 (3) of the Directive, there is an additional reference to reads as follows: '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. The responsible authority shall in such a case examine if this is an instance of temporary hardship and take into account the length of time of the interested party in the Republic, his personal situation, and the amount of assistance that has been granted in order to assess whether the person constitutes an unduly burden for the system of social welfare and then proceed to take action for his expulsion'. Two comments must be made. In relation to the registered partnerships, the matter has been discussed in the first part of this report and it suffices to say that despite the granted discretion to Member States on the matter, there remain issues of discrimination. In relation to the issue of the provided additional guidelines in connection with the prohibition of automatic expulsion due to access to the social welfare system, those act positively in ensuring the direction of the discretion granted to the relevant authorities of the republic and are therefore welcomed.

In terms of relevant case law, most of the cases involve Cypriot citizens and such were excluded from the scope of application of the Directive in the way analysed previously, while the same applied for cases where marriages of convenience were documented[101] as well as also in cases involving registered partnerships.

However, specific reference must be made to the very interesting decision in **Teresa Amayuwon v Republic**.[102] It must be stated that the decision by

101. *Abdulkader Majed v Republic*, Case Number 1099/2009, 07.02.2011; *Kale Ekema Ngomba v Republic*, Case Number 5630/2013, 26.07.2013.

102. *Teresa Amayuwon v Republic*, Case Number 802/2013. 17.10.2013.

Judge Nicolatos in effect applied the protective effect of article 12 the Directive, as implemented by article 25 of **Law 7(I)/2007**, despite the fact that the interested party (a citizen of the Philippines) was the spouse of a deceased Cypriot citizen. In effect, the shift in the approach of the Supreme Court, discussed *supra*, that applies the principle of exclusion of Cypriots from the scope of the Directive, was not applied in this instance. Hence issues about consistency of the case law arise.

The Court relied expressly on article 25 (2) of **Law 7(I)/2007** on the retention of the right of residence by family members in the event of death or departure of the Union citizen. More importantly, in the second from last paragraph of the judgment it was stated that 'the applicant in the specific case, derives rights from **Law 7(I)/2007** that implemented [the Directive] and which *has superior effect over national law, including the Constitution.*' Consequently, it is striking that this otherwise positive conclusion was reached despite the earlier decisions on the matter of reverse discrimination[103] and which followed the amendment of article 2 of **Law 7(I)/2007**. It is also interesting that Judge Nicolatos emphasised the application of the principle of supremacy of EU law, thus seeming to imply that the Directive does not permit reverse discrimination and as such its provisions have overriding effect in relation to conflicting national provisions such as article 2 of the **Law 7(I)/2007**. Unfortunately, this line of reasoning was not stated, and we are unable to draw specific conclusions as to whether this case marks the departure from the interpretation favouring reverse discrimination or is a mere misapplication of the preceding provision. The lack of reference to the concepts of direct effect and indirect effect, as well as to any case law of the CJEU is also not helpful in guiding the analysis of this otherwise significant case.

Question 4

The provisions of the Directive (articles 16-21) relating to the eligibility for the right of permanent residence include: the general rule for Union citizens and their family members; exemptions for persons no longer working in the host Member State and their family members; acquisition of the right of permanent residence by certain family members who are not nationals of a Member State; documentation certifying permanent residence for Union citizens; permanent residence card for family members who are not nationals of

103. *Majed v Republic,* Case Number 1099/09, 7.2.2011; Case 170/2011, Irina Levacheva v Republic, 15 April 2013.

a Member State; continuity of residence. These provisions have been transposed effectively in the Cypriot law. In specific, **Law 7(I)/2007** in articles 14-19 makes provision in verbatim of the respective provisions of the Directive with certain minor exceptions. In article 17 (1) (c) of the Directive reference is being made to 'workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week'. The last reference to 'each day or at least once a week' has been implemented by article 15 (1) (c) **Law 7(I)/2007** by excluding the 'each day' part. In article 17 (2) Directive reference is being made to 'the conditions as to length of residence and employment laid down in point (a) of paragraph 1 and the condition as to length of residence laid down in point (b) of paragraph 1 shall not apply if the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person'. The key point of difference is the omission in article 15 (3) **Law 7(I)/2007** of the term 'partner', while the terminology used is also gender problematic. In specific, the provision reads 'the conditions as to length of residence and employment ... and the condition as to length of residence ... shall not apply if the worker's or the self-employed person's **wife** is a national of the Republic or has lost the nationality by **her** marriage to that worker or self-employed person' (emphasis added). Therefore, the provision seems to imply that it applies only in relation to the female gender, whereas the Greek version of the Directive expressly includes both genders. Moreover, articles 17 and 18 **Law 7(I)/2007** adopt a specific procedure for applicants whereby they shall apply for the permanent residence document and for the permanent residence card in conjunction with a payment of 20 euro in each case. In addition, in article 18 (2) **Law 7(I)/2007** imposes a penalty of up to 1500 Cypriot pounds (to be estimated now in euros) for failing to comply with the requirement to apply for a permanent residence card.

In analysing the above provisions, reference can be made first to the European Commission's warning letter to the Republic of Cyprus where it was stated that although the Directive articles 16 and 19 were properly transposed through **Law 7(I)/2007**, the applied administrative practice seemed to be following a different approach. It was stated that applicants for status of permanent resident were required by form 'MEU3' to present bank statements and

utility bills for the period of five years prior to the application. This has been argued[104] amounts to breach of article 21 of the Directive where it is stated that 'continuity of residence may be attested by any means of proof in use in the host Member State', since 'any means' can not be construed as requiring such specific documentation. Therefore, the Cypriot government issued a circular (18.06.2011) where it is clarified that the list of documents included in the MEU3 form is merely indicative and does not exclude any other documents not mentioned therein.

In addition, concerned was expressed by the European Commission about the administrative fee of 34,17 € required that was found to be in breach of article 25 (2) Directive and also discriminatory since the analogous fee for Cypriots applying for identity cards was merely 5 Cypriot pounds (around 3.4 €). The Cypriot government rejected this argument by stating that the charge is not exceeding the charge for Cypriot applying for the issuing of similar documents that is beyond identity cards.[105]

Finally, an interesting complaint had been cited by the European Commission.[106] That concerned a British national who had been asked to submit proof of a deposit in a Cypriot bank of the sum of €12,000 which, in the European Commission's opinion, was in breach of Directive article 16; the said complainant was not issued with the document certifying permanent residence foreseen in Directive article 19. In its response dated 27.02.2011 the Cypriot government stated that a bank deposit of any amount is not obligatory, but did not dispute the complainant's allegations. The Cypriot government responded that the said complainant never applied for permanent residence and was never required to present evidence of a deposit in relation to that; the deposit of €12,000 was required as evidence of having sufficient means to support himself for the purposes of his application for a residence permit dated 14.06.2006.6 In any case, his application for a residence permit was never examined and the complainant was issued a registration certificate on the same day he applied (16.03.2011).[107]

In terms of relevant data, the latest published statistics[108] available are for 2010 and there it is stated that 21,727 applications for registration have been

104. Trimikliniotis, *op.cit.,* n. 27, at page 21.
105. *Ibid*.
106. *Ibid*.
107. *Ibid*.
108. http://www.moi.gov.cy/moi/crmd/crmd.nsf/DMLStatistics_gr/DMLStatistics_gr?Open Document.

filed, 1967 applications for document of permanent residence for Union citizen, and 37 applications for permanent residence cards.

In terms of case law, no noteworthy reference can be made to any case on the preceding matters.

Question 5

The provision of article 24 (2) of the Directive stating that 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status, and members of their families', has been transposed in article 22 (2) **Law 7(I)/2007** in verbatim. Moreover, an addition subparagraph has been added (article 22 (3) **Law 7(I)/2007**) stating that the provisions on equal treatment and the relevant derogation are applied only in relation to European Union citizens and to their family members that are residing in the areas under the effective control of the Republic. The rationale for this approach has already been explained in the introductory part of the report and the response to question 1.

As to the matter of relating the non-discrimination derogation with the category of jobseekers seeking allowance, the background must be examined. In general, jobseekers are obliged to register at the district job-seeking bureau and then register at the district social security office. This applies equally to Cypriots and other EU citizens. There has been no noteworthy case law on the status of Union citizens who are jobseekers in Cyprus, as well as those requiring public assistance. Trimikliniotis[109] correctly argues that in practice there seems to be a proper application of the Antonissen criteria.[110] It is positive that according to statistical analysis and research by Trimikliniotis,[111] there has been 'no information, or any report or complaint about the deportation of EU citizen who is a job-seeker in Cyprus: such rather drastic measures of requiring from an EU citizen to leave the territory of that Cyprus (subject to appeal) for failing to find employment there after six months has not been

109. Trimikliniotis, *op.cit.,* n. 96, at p. 6.
110. Case C-292/89, The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen.
111. Trimikliniotis, *op.cit.,* n. 96, at p. 6.

used in Cyprus. The policy paper/ memorandum regarding job-seekers who are EU citizens in Cyprus (issued in late 2009) is in operation since the beginning of 2010'.

With reference now to the 'real link' approach in the context of jobseekers, the relevant approach as adopted in **Case C-258/04 Office national de l'emploi v Ioannis Ioannidis/ Case C-138/02 Brian Francis Collins v Secretary of State for Work and Pensions** and in **Joined Cases C-22/08 and C-23/08 Athanasios Vatsouras and Josif Koupatantze V Arbeitsgemeinschaft**, it is analysed below.

The issues related to the cases of Ioannides and Collins was put before the Cypriot Social Security officers in personal interviews by Trimikliniotis.[112] According to the interviewer, they were invited to comment on the necessary distinction between such cases concerning the provision of 'job seekers allowance', which is of a non-contributory provision type, and the equality derogation.[113] It must first be clarified that in Cyprus unemployment benefit is based on contributions, therefore the argument by the officers was that the two cannot be compared.[114] This is unsatisfactory and overly formalistic since the established general principle must influence the approach to the provision of non-contributory benefits.

More importantly, the *Cypriot Equality Body* examined the matter in relation to the receipt of public assistance for health reasons, which is by analogy indicative of the applicable situation to European Union citizens requiring public assistance that includes jobseekers' allowance.[115] The findings are eloquently summarised by Trimkliniotis and are as such cited and relied upon below.[116]

A complaint was registered by an 18-year-old Greek citizen suffering from severe leukaemia against the Social Welfare Service, which had decided to discontinue the claimant's social assistance benefit for treatment received until May 2007. The Union citizen had been resident in Cyprus with his parents since 2002 and had been granted a 'visitor' indefinite leave to remain and was in receipt of public assistance since 2005 for humanitarian reasons, despite initial rejection due to his 'visitor' status. In October 2006, the complainant and his mother's residence status was changed to that a family mem-

112. Trimikliniotis, *op.cit.,* n. 96, at p. 37.
113. *Ibid*.
114. *Ibid*.
115. Mezeridis Compalint, AKP 70/2007, issued on 24 March 2008.
116. Trimikliniotis, *op.cit.,* n. 96, at p. 37. Note that the relevant subsection section relies heavily on the excellent analysis by Trimikliniotis.

ber of a Union citizen based on the law on free movement of workers. The Social Welfare Service decided to discontinue the public assistance on the grounds that he was not allowed assistance as his residence status was that of a dependent of his mother, who is a Union citizen with a residence permit for reasons of employment activity. According to the Report of the Cyprus Equality Body,[117] this specific circular has wider application in similar purposes and distinguishes between Union and Cypriot citizens based on **Law 7(I)/2007** and the **Law on Public Assistance 95(I)/2006**: 'the provision of law on Public Assistance 95(I)/2006, makes a distinction between the rights of Union citizens and citizens of the Republic of Cyprus, and article 12(1)(a) of the law for exemption from the responsibility for the maintenance of a disabled child in not applied in the cases of Union citizens.'[118]

The reasoning is based on the logic that the granting of residence is premised on the proof that the complainant's mother is in possession of 'sufficient means for the maintenance of her family.'[119] The Director of the Social Welfare Service erroneously suggested that a precondition for granting the free movement rights under article 9(1)(b) of Law 7(I)/2007 is that they are not considered to be 'unreasonable burden on the social assistance system of Cyprus' (AKP 70/2007, p. 4).[120] Moreover, the Director went on, again erroneously, to comment that the right of residence is dependent on being in possession of sufficient means.'[121] The Cypriot Equality Body, after analysing the relevant legal framework, determined that 'the Director of the Social Welfare Service had wrongly interpreted and applied the law on the following grounds: the Directive and the respective Cypriot law transposing the Directive do not make the exercise of the primary right of free movement, residence and work dependent upon sufficient means to avoid burdening the national social welfare system; the Directive explicitly sets out the principle of non-discrimination on the grounds of nationality; the right to free movement is a right adjacent to the exercise of a professional/economic activity in the EU that has been settled at treaty level. This is done in a manner that is broad in scope, lucid and direct and the exercise of this right is a condition precedent to the

117. *Ibid*.
118. *Ibid.,* where reference is being made to the Circular by the Director of the Social Welfare Service 7.3.2007 is quoted AKP 70/2007, p. 3.
119. *Ibid*.
120. *Ibid*.
121. *Ibid*.

exercise of any professional activity in the host country (AKP 70/2007, p. 12)'.[122]

Central to the finding of the Cypriot Equality Body is the principle of equal treatment under section 22 of **Law 7(I)/2**007, considering the discrimination by the Social Welfare Service as unreasonable. The Equality Body referred to the broad principles of paragraphs 16, 20, and 21 of the Directive preamble as well as to a number of cases before the Court of the European Communities, such as **Martinez Sala C-85/96**, **Rudy Grzelczyl C-184/99** as well as **D' Hoop C-224/98**. Moreover, the Equality Body went on to further to clarify two legal issues that also have a bearing on the residence rights of jobseekers: '(1) All administrative formalities for the exercise of free movement and residence of Union citizens and their families for a period more than three months are set out exhaustively in the law and the Directive. It is clear that their primary residence stay is not dependent on the existence of sufficient means, as is the case with students or pensioners, for instance; (2) it must be clarified that the competent authority for such issues is the Civil Registry and Migration Department, and not the Social Welfare Service; however in the case of Union citizens, such as the one above, the granting of the permit provided has but an identification and evidential value'.[123]

As for the right of Union citizens to public assistance, 'the non-discrimination principle as set out in article 22 of the law is of paramount importance and recommends that the authorities restore the public assistance benefit to the complainant and withdraw the relevant circular issued. The Social Welfare Service has complied with the recommendation'.[124] It is therefore reasonable to infer that by analogy the same principles must apply to jobseekers, yet the practice of the administrative authorities is not conclusive on the matter.

It is not clear how long jobseekers may stay without complying with formalities; presumably indefinitely so long as they do not seek recourse to public funds. There has been no case law to test whether the Ioannidis/ Collins type of social assistance benefits would be allowed.[125]

The question of how Cypriot authorities enable access to public assistance by job-seekers cannot be answered in clear terms. As Trimikliniotis argues, 'the Vatsouras/Koupatantze cases may be illuminating in clarifying possible confusion in the practices by Cypriot authorities: work which had lasted bare-

122. *Ibid*.
123. *Ibid*.
124. *Ibid*.
125. *Ibid*.

ly more than one month was considered to be professional activity, following an overall assessment of the employment relationship, which may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of article 39 EC. The issue of access to work and benefits after 3 months for work seekers has not been tested in Cypriot courts. It is not clear how long jobseekers may stay without complying with formalities; presumably indefinitely so long as they do not seek recourse to public funds. Social security officers claim that the principles do not really have bearing on contributory unemployment benefit, as these refer to general public benefits provisions to jobseekers'.[126]

The Cyprus equality is examining this type of complaints, whereas in the case law of the Supreme Court no reference has been made to the guiding cases of the CJEU while there was also no decision to date that focused in the matter of the equality derogation.

Question 6

The provisions of the Directive (articles 27-33) on the restrictions on the right of entry and the right of residence on grounds of public policy, public security, or public health have been transposed effectively in the Cypriot law. In specific, **Law 7(I)/2007** in articles 29-35 makes provision effectively in verbatim of the respective provisions of the Directive.

In applying the relevant provisions in the case law, the Supreme Court has yet to make reference to the 2009 Commission's guidelines on the implementation of the Directive.[127] Moreover, the case law on the matter is scarce and often not addressing the issue directly. In general, the Supreme Court applied vigorously the principle of proportionality when reviewing administrative decisions, yet in relation to the expulsion decisions the application of the test seems to be deferential to the discretion of the decision-making body and limited to an effective review of power to make such a decisions on the basis of the factual evidence that is used for classifying the subject of such orders as dangerous within the meaning of protection of the public interest in general. In such a context, the emphasis is also placed on whether the expulsion respects the fundamental rights. Interestingly, the latter is almost exclusively done in relation to article 8 ECHR, and not (yet) with the EU Charter of Fundamental Rights, at least in a manner that has a practical effect for the out-

126. *Ibid*.

127. COM(2009) 313 final, following the 2008 report on the implementation of the Directive (COM(2008) 840 final).

come of the review. Finally, the relevant general background is formed by the three umbrella considerations that impact upon the application of the Directive, namely the reverse discrimination principle, the marriages of convenience and the exclusion of registered partnerships. The combined effect is that not many cases remain to be examined under the provisions of articles 27-33 of the Directive and most cases are therefore within the scope of **the Aliens and Immigration Law, Chapter 105 (as amended)**.

The decision **in Anghel Vorel v Republic**[128] is characteristic of the judicial approach. The applicant, a Romanian citizen, remained in Cyprus since 1991 and married a Romanian citizen in 1993. They have a child, born in 2001 that attends school in Cyprus. Since May 2007 the applicant obtained a residence permit and remained lawfully in Cyprus. On the 1st July 2012 the applicant was arrested and ten days later was deported on grounds of public safety. The applicant had no criminal record; had no prior conviction, and no criminal proceedings were pending against him.

It is important to firstly examine the argumentation used by the applicant's lawyer in the ex parte proceedings. There, reference was made to article 45 of the **EU Charter of Fundamental Rights**: 'Every citizen of the Union has the right to move and reside freely within the territory of the Member States'. The Court acknowledged that the right is of fundamental importance and is subject to article 52 EU Charter, thus any limitation to the right must be provided by law and must be proportionate.

The lawyer of the applicant also argued that the provision in article 29 of **Law 7(I)/2007** that expressly provides that the limitations on the exercise of the right of free movement must be construed with reference to the principle of proportionality. Specifically, any limitation must be proportionate, must be founded exclusively on the personal conduct of the affected party, and must constitute a real, present and sufficiently serious threat against the essential interest of the society. It was argued that the lack of any prior criminal convictions on itself was adequate reason for finding the administrative provision disproportionate since in article 29 (3) (b) **Law 7(I)/2007** reference is made to the fact that even prior convictions should not be seen as adequate reason for expulsion. Moreover, the applicant was deported on the basis of an order by the Attorney General, while the other arrested parties involved in the same case, who were all Cypriot citizens, were released. Finally, the procedural guarantees provided for in article 33 of **Law 7(I)/2007** were also not complied with.

128. Anghel Vorel v Republic, Case Number 1064/2012, 02.08.2012.

The Supreme Court held that the procedural and substantive guarantees were not complied with and ordered the suspension of the order that prevented the applicant from re-entering into Cyprus. However, the Court failed to examine in detail the arguments relating to the application of proportionality, since in just one paragraph there was confirmation of the non compliance with proportionality. In addition, the Court failed to assess the issue of the scope of article 52 of the EU Charter. Nonetheless, the Court illustrated that in cases of clear and undisputed violation of the essence of proportionality it is willing to enforce in a strict manner the principle and with a strong willingness to apply an intense level of judicial scrutiny.

The same sensitivity and subsequent carefully protective approach was applied by the Court in the case of **OFU v Republic**,[129] this time in relation to an administrative decision based on the ground of protecting the public health. The case concerned a Nigerian national that first entered into Cyprus illegally and subsequently applied for political asylum, while at the same time notifying the authorities that he was diagnosed with Hepatitis B. Some time afterwards, the applicant married a Latvian citizen already living in Cyprus and applied for a permanent residence card, with the immigration authorities rejecting his application on the sole ground of being a threat to public health. The Supreme Court examined the action for annulment of the applicant on the basis of the principle of equality and not proportionality, yet the finding of the Court was that a less drastic approach was applied in relation to Cypriot citizens, hence the adoption of a negatively differential treatment against the applicant would be violating the principle of non discrimination on the grounds of nationality. The legal basis that the Supreme Court referred to was article 22 of **Law 7(I)/2007** and article 18 of the TFEU. Moreover, the Court relied on the precedent of **Leonie Marlyse Yombia Ngassam v Republic**[130] where it was held that in relation to a citizen of a third country who applied for political asylum and was HIV/Aids positive, the reference by the administrative authorities to that medical fact as a ground for deporting the applicant amounted to unlawful discrimination. Therefore, in that case the basis was article 6 (1) (c) of **the Aliens and Immigration Law, Chapter 105 (as amended)**, since there was no element of EU law involved. In the case of **OFU v Republic**,[131] the Court held that the expulsion of an individual on the sole ground that he is diagnosed with Hepatitis B amounts to 'breach of the principle of equality, either within the framework of article 6 (1) (c) of **the**

129. OFU v Republic, Case Number 857/2010, 24.04.2013.
130. Leonie Marlyse Yombia Ngassam v Republic*, Case Number 493/2010, 20.8.2010.*
131. OFU v Republic, Case Number 857/2010, 24.04.2013.

Aliens and Immigration Law, Chapter 105 (as amended) or the framework of article 29 (1) of **Law 7(I)/2007**'.

In conclusion, the Supreme Court has shown that in cases of clear and undisputed violation of the essence of proportionality and/or equality, it is willing to enforce in a strict manner the principles and with a strong willingness to apply an intense level of judicial scrutiny. In so doing, the Court seems to be taking into account, at least in an indirect manner, considerations such as how long the individual concerned has resided on its territory, the state of health, the stability of the family, and the employment status as well as the consequent economic situation of the affected party. The approach of the Court is certain cases theoretically and methodologically unstable since the principle of proportionality has not been applied in a structurally rigid manner as regards its components, while the use of the principle of equality seems to be substituting the provided criteria to be found in the Directive and which refer to proportionality as the yardstick. Needless to say, these concerns are of secondary value as long as the approach of the Court remains focused on safeguarding the intensity of review of the administrative actions in this field.

However, there are also examples where the Supreme Court failed to apply the same vigorous standard of review in the same context, thus illustrating an inconsistency in approach that does not make the analysis of the jurisprudence any easier, especially when there are no significant differences between cases being approached differently.

In **Krisztian Bekefi v Republic**[132] the Supreme Court examined in ex parte proceedings the application by a Hungarian citizen that was deported as a threat to public order in accordance with article 29 of **Law 7(I)/2007** while it was also prohibited to the applicant to return to Cyprus in the next 10 years. The evidence on which the decision was based were provided by the police authorities and were in effect an amalgam of suspicions and information provided to the police that created a basis for understanding that the applicant was involved in organised crime. There was neither a documented complaint filed against the applicant, nor were there any pending criminal proceedings. The argument put forward by the applicant was founded on article 29 of **Law 7(I)/2007** and on the disproportionate nature of the measures adopted against him as well as on the failure of the authorities to take into account the factors provided for in article 30 **Law 7(I)/2007** that refer to considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration

132. Krisztian Bekefi v Republic, Case Number 293/2012, 07.03.2012.

into the host Member State, and the extent of his/her links with the country of origin. The Court relied on the earlier case of ***Eddine v Δημοκρατίας***[133] where it was held that 'the deportation order, especially, in cases where public ordered is affected, does not have a punitive character but is rather an expression of state sovereignty. The presence of the affected party is not necessary during relevant proceedings, since the procedure can be limited to the written testimony that has been filed to the authorities. There is no breach of the principle of good administration'. On this basis, the Court concluded that no irreparable harm would be suffered until the examination of the merits of the case, thus making no comment or assessment of the principle of proportionality. When the substance of the case was examined in **Krisztian Bekefi v Republic**[134] the Court found in favour of the applicants on procedural grounds relating to the revocation of the expulsion order due to procedural fault and without reference to proportionality. Relevant in that respect is the earlier judgment in **Slevoslav Stoyanov v Republic**,[135] where in identical facts concerning a Bulgarian citizen the Court held that the central issue was whether the revocation of the deportation order, due to erroneous reliance of it on **the Aliens and Immigration Law, Chapter 105 (as amended)** instead of **Law 7(I)/2007**, caused irreparable harm to the applicant of a kind that would enable him to continue with his legal challenge against the administrative decision that has now been revoked and substituted with a new deportation order that was based on the correct legal basis of **Law 7(I)/2007**. The issue or proportionality was not discussed in the judgment while the Court also rejected the claim of the applicant that he was unlawfully deprived of his liberty since the procedurally faulty deportation order was later replaced with a procedurally complete deportation order. Alas, no examination if the proportionality of either of the deportation orders was made, with the Court taking for granted that the assessment by the authorities of the applicant as a threat to public order was in effect supported by evidence that were a collection of suspisions by the police authorities.

133. Eddine v Δημοκρατίας (2008) 3 ΑΑΔ 95.
134. Krisztian Bekefi v Republic, Case Number 1244/2011, 28.09.2012.
135. Slevoslav Stoyanov v Republic, Case Number 1406/2011, 31.5.2012.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU law

Question 7

It must be stated from the outset the jurisprudence on the issues covered by the question is minimal, yet the relevant issues are effectively the supporting rationale in relation to the reverse discrimination approach that is applied towards Cypriot citizens by excluding them from the scope of the Directive. Therefore the preceding analysis to be found in the first and second sections of this report is directly relevant. Nonetheless, reference can be made to the decision in ***Sari Tekin v. Republic***,[136] where Judge Konstantinides held that 'The matter of the right of residence of a third country national that is the spouse of a Cypriot citizen *is a matter that comes within the scope of the regulation of the internal state of affairs of a Member State of the Union ... It has no community element and the question as to whether such internal regulations violate other principles is a different matter* ... The Law does not create such a right of residence as it expressly states in articles 4 and 15 that it concerns the right to free movement and residence in the Republic ... It requires movement of such citizen to Cyprus and it does not concern Cypriots and their right to reside in his country. In accordance, that approach is extended to the family members of such a citizen, but dependent on the existence of a right by the Union citizen ... Since there is no movement by the Union citizen, there can be no independent right of residence of the members of his/her family' (emphasis added).[137]

The case law as regards the reverse discrimination approach seems to be partly founded on the reasoning that sees the non-movement of the Cypriot citizen as transforming the situation into a purely domestic one. Nonetheless, the inconsistency in the relevant case law combined with the lack of any further and elaborated use of the rationale of ***Sari Tekin v. Republic***,[138] lead to the conclusion that the issue has not been fully examined in the Cypriot context. Further evidence to that can be found in the lack of any reference and discussion of the CJEU's case law (e.g. Chen, Ruiz Zambrano, and subsequent decisions) and in the rarity of invocation of Articles 20 and/or 21

136. Sari Tekin v Republic, Case Number 290/06, 27/7/07.
137. Shalaeva v Republic (2010) 3 ΑΑΔ 184, as cited at p. 189 Judgment (translation by the author).
138. Sari Tekin v Republic, Case Number 290/06, 27/7/07.

TFEU in cases involving free movement as defined by Directive 2004/38. A possible and rare example where reference to EU primary law has been relied upon by the Supreme Court can be found in in the case of **OFU v Republic**.[139] The Supreme Court examined the action for annulment of the applicant on the basis of the principle of equality and not proportionality, yet the finding of the Court was that a less drastic approach was applied in relation to Cypriot citizens, hence the adoption of a negatively differential treatment against the applicant would be violating the principle of non discrimination on the grounds of nationality. The legal basis that the Supreme Court referred to was article 22 of **Law 7(I)/2007** and article 18 of the TFEU.

Question 8

In the Cypriot legal order, the issue of acquisition and/or loss of the Cypriot citizenship are governed primarily by article 113 of **Law 141(I)/02** that states:

'(1) Citizen of the Republic who is citizen following registration or naturalized person shall cease to be a citizen of the Republic if deprived of citizenship by decree of the Council of Ministers issued pursuant to this article.

(2) Subject to the provisions of this article, the Council of Ministers may by decree deprive any such citizen of the acquired Cypriot citizenship if it is satisfied that that the acquisition of citizenship was based on deception, false representation or concealment of any material fact.

(3) .....
(4) .....

(5) The Council of Minister does not deprive any person of his capacity as a citizen under this article unless satisfied that condition is not conducive to the public interest as that person continues to be a citizen of the Republic' (translation by the author).'

Therefore, the issue of automatic loss of the EU citizenship is not covered by the preceding legislation, while in the case law no such connection has been made despite the fact that in two cases the Supreme Court dealt with the loss of Cypriot citizenship in the immediate aftermath of the Rottmann judgment.

139. OFU v Republic, Case Number 857/2010, 24.04.2013.

In specific, the first case was **Hussein Alí Assaf v Republic**[140] (6.5.2010) that concerned a Lebanese citizen that acquired the Cypriot citizenship after creating a company that never had any activities and after marrying a Cypriot citizen whom she later divorced due to a parallel affair with another woman. The authorities proceeded to recommend to the Council of Ministers to revoke the granted Cypriot citizenship due to the fact that that the acquisition of citizenship was based on deception, false representation, or concealment of any material fact. The Council of Ministers issued such a decree in July 2006 and the applicant sought annulment of the relevant decision primarily for lack of adequate justification. The Supreme Court found in favor of the applicant and rejected the claim of the Government that the decree was a non reviewable act of government (prerogative power) and not an administrative decision that could be reviewed. Nonetheless, in the proceedings no reference was made to the impact that the loss of the Cypriot citizenship had on the status of the applicant as EU citizen, nor was any reference made to the CJEU decision in Rottmann.

In the subsequent case of **Matry v Republic**[141] (20.09.2011) in a relatively similar factual situation that concerned an Egyptian citizen, the Supreme Court followed **Hussein Alí Assaf v Republic**, but found that adequate justification was given in specific case. Moreover, once again no reference was made to the impact that the loss of the Cypriot citizenship had on the status of the applicant as EU citizen, nor was any reference made to the CJEU decision in Rottmann.

It is necessary to clarify that the Supreme Court relies on the arguments presented before it by the parties and if the parties failed to raise the Rottmann paradigm, then the Supreme Court's obligation to consider it in its judgment is minimized. It is submitted that this reasoning is unsatisfactory given the immensity of the significance of Rottmann and the rarity of such cases arising; a miss opportunity has in effect passed.

140. Hussein Alí Assaf v Republic, Case Number1489/2008, 6.5.2010.
141. Matry v Republic, Case Number 536/2008, 20.09.2011.

Political rights of EU citizens

Question 9

Directive 93/109/EC on European Parliament elections has been transposed by the Law Concerning the Election of the Members of the European Parliament of 2004 (**Law 10(I)/2004**) as amended by 202(I)/2004, 207(I)/2004, 13(I)/2009, 144(I)/2013.

The law came into force upon the accession of the Republic to the EU.

In terms of the right to vote, article 4 states: 'Right to vote in the elections to the European Parliament have all the citizens of the Republic, and all the nationals of another Member State who reside in the Republic, who on the reference day are eighteen-years old and had been resident in the Republic for a period of six months immediately before the day of acquisition of electoral qualifications, as defined in paragraph (7) of article 101 of the Civil Registry Law. It is understood that for the purposes of this Law, the requirement for six-month residence in the Republic before the time of acquisition of electoral qualifications is met if a citizen of the Republic or a national of another Member State was habitually resident for an equivalent time in any other Member State, provided that on the date of entry in the special electoral registers for voters and Community voters, as the case may be, is residing in Cyprus'.

Moreover, article 5 (1) states that 'The Community voters exercise their right to vote either in the Republic or in the Member State of origin', while article 6 states 'The voters and the Community voters who have not been deprived of the right to vote under the article 7 of this Law, are registered in accordance with the provisions of Part III of the present Law, in the respective special electoral registers provided for in the said Part'. In addition, article 8 (1) states 'The voters and the Community voters are registered in special electoral registers for voters and Community voters, respectively, that are prepared and completed for the purposes of this Law by the Civil Registry and Migration Department in accordance with the procedure laid down in the Civil Registry Law, mutatis mutandis, and in accordance with the provisions of article 9 of this Law, in order to include all the voters and Community voters who have the right to vote pursuant to the provisions of article 4 of this Law'.

With reference to Cypriot voters, article 9 (1) states:

'The Civil Registry and Migration Department enters in the special electoral register for voters:
(a) Each voter who on the date of publication of this Law in the Official Gazette of the Republic, is registered in the permanent electoral register under the Civil Registry Law, and
(b) every other citizen of the Republic who has the right to vote under Article 4 of this Law, and who presents himself to the Electoral Register Services at the offices of the District Administrations, and submits in a form specified by the Minister a formal statement in order to be entered into the special electoral register for voters concerting the fact that he/ she meets the terms and conditions for registration as set out in Article 4 of this Law.'

With reference to Community voters article 9 (1)-(3) provide that 'The Civil Registry and Migration Department registers in the special electoral register for Community voters each Community voter having the right to vote under Article 4 of this Law, who wishes to exercise the said right in the Republic and presents to the Electoral Register Services at the offices of the District Administrations an ID card issued by the authorities of the Republic, or a valid passport or a valid ID card issued by the authorities of the Member State of which the Community voter is a citizen, and/ or Registration Certificate of a Union citizen concerning himself, and submits a statement in which he/ she declares the following:

(i) citizenship;
(ii) that he/ she has not been deprived of the right to vote in the Member State of origin;
(iii) if applicable, the last electoral register, in which he/ she has been entered in the Member State of origin;
(iv) address of permanent residence in the Republic;
(v) the date from which he/ she resides in the Republic or in another Member State;
(vi) that he/ she will exercise the right to vote only in the Republic.

(3) Voters and Community voters who acquire the right to vote submit within thirty days from the date of acquisition of their voting rights an application to the respective District officer in order to be entered into the special electoral registers for voters or for Community voters, as the case may be, subject to the provisions of paragraphs (1) and (2) of the present article.

It is understood that voters and Community voters who acquire their right to vote in the elections to the European Parliament due to completion of the eighteenth year of age on the reference date may submit the application for registration in the electoral registers before that day, but not later than the day

immediately preceding the date of the preparing of the respective special electoral register'.

As regards the right to stand and the documentation required, article 13 imposes the same conditions for Cypriots and Community voters.

Overall; the effect of the implementation process has been satisfactory. There is question mark as to whether additional burdening conditions are imposed on EU citizens compared to national citizens in terms of special registration or residence requirements. This is the case since in practice Cypriot voters are in some cases automatically registered if they are already registered as voters in other elections despite the provision in the legislation for a special procedure. It has not been possible to confirm that the same applies equally to EU citizens given the practical obstacles arising from the possibility of them exercising their electoral rights in their country of origin.

No relevant case law in domestic courts can be found, while Law 144(I)/2013 amended **Law 10(I)/2004** in order to implement **Directive 2013/1/EE.** Finally, it must be noted that at the tie of writing there is pending draft law that will permit the automatic registration of Turkish-Cypriots (95;000) to the electoral catalogue for the forthcoming elections, thus facilitating the opportunity to participate in the elections without requiring special registration procedures.

Question 10

Law 98(I)/2004 has been adopted in order to implement the provisions of **Directive 94/80/EC** and entered into force upon the accession of the Republic to the EU.

Article 3 of the Law extends the right to vote in local elections to all the nationals of another Member State who reside in the Republic, who on the reference day are eighteen-years old; and had been resident in the Republic for a period of six months immediately before the day of acquisition of electoral qualifications, as defined in paragraph (7) of article 101 of the Civil Registry Law. It is understood that for the purposes of this Law, the requirement for six-month residence in the Republic before the time of acquisition of electoral qualifications is met if a citizen of the Republic or a national of another Member State was habitually resident for an equivalent time in any other Member State, provided that on the date of entry in the special electoral registers for voters and Community voters, as the case may be, is residing in Cyprus. The provisions of **Law 98(I)/2004** are directly analogous to those of **Law 10(I)/2004** regarding elections to the European Parliament and in addi-

tion permit the election to office without restrictions others than those that apply to Cypriots. No relevant case law in domestic courts can be found.

Question 11

In Cyprus, elections are organized with regard to the following bodies: presidential, House of Representatives, Municipal; and European. Elective rights for the municipal and European elections are on the basis of residence, regardless of the nationality of the person involved. On the other hand, participation in the national presidential and House of Representatives elections is subject to the possession of Cypriot nationality.

Question 12

According to the Cypriot Constitution, the limitations for standing for president are provided for in article 40 and include that he/she 'has not been, on or after the date of the coming into operation of this] Constitution, convicted of an offence involving dishonesty or moral turpitude or is not under any disqualification imposed by a competent court for any electoral offence; is not suffering from a mental disease incapacitating such person from acting as President'. Similarly, for standing for the House of Representatives article 64 provides 'has not been, on or after the date of the coming into operation of this Constitution, convicted of an offence involving dishonesty or moral turpitude or is not under any disqualification imposed by a competent court for any electoral offence; is not suffering from a mental disease incapacitating such person from acting as a Representative'.

In terms of exercising electoral rights, the limitations are provided for in the electoral law as stated in article 63 of the Constitution 'no person shall be qualified to be registered as an elector who is disqualified for such registration by virtue of the Electoral Law'. Therefore, article 6 of the **Law 72/1979** provides that a citizen of the Republic is derived of the right to vote if 'during the relevant period is deprived of his liberty due to lawful detainment or imprisonment or has been declared under the law as person with mental impairment; under the specific law has been deprived of his electoral rights'. The latter is specified in article 37 of the Law that states that anyone who has been convicted for specific election related offences (listed in article 37 (2)) can be deprived of his electoral rights by a court order for a period not exceeding 7 years from the moment of his conviction for such offenses.

Culture(s) of citizenship

Question 13

It is submitted that the culture that prevailed is a mixed one and one that sees a rights-based EU 'free movement' and 'constitutional' culture as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory. This is due to the unsystematic nature of the case law and the lack of effective application of fundamental principles governing EU law. Moreover, the legislation has insisted on the restrictive reading of the Directive as permitting a reverse discrimination approach and has also created gaps in terms of effectiveness for registered partnerships.

Question 14

In the view of the reporter, and as documented in the preceding sections, the full effect of the EU Charter has yet to find its application before Cypriot courts. The emphasis remains on the constitutional protection for human rights and on the role of priority given to the ECHR that has been instrumental in the development of Cypriot case law. There is an unfortunate detachment from the EU dimension of human rights that is manifested also in relation to free movement and citizenship.

Question 15

In Cyprus, media discussions of issues connected to EU citizenship generally follow events related to national politics, while issues related to EU citizenship have not been prominent or present at all. Focus is very often on the national immigration policies, especially in relation to granting social benefits. Landmark cases on residence rights (Chen, Jia, Metock) and access to student support (Bidar, Förster) have not been covered at all.

CZECH REPUBLIC

Pavla Boučková and Pavel Kandalec[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

The articles 2, 3, and 5 of the Directive have been transposed mainly in Sec. 15a, Sec. 20 para. 4 and Sec. 87a-87aa of Law no. 326/1999 Coll., on the stay of foreigners in Czech Republic´s territory (Aliens Law). In Sec. 15a paras 1 and 2 of the Aliens Law the definition of family relationships falling under the scope of Art. 2, para. 2 of the Directive is dealt with. The definition of the law is fully compatible with that of the Directive. Situations according to Art. 3 para. 2 of the Directive are dealt with by Sec. 15a para. 3 of the Aliens Law. Sec. 15a para. 4 extends the entitlements of Union citizen family members also to family members of Czech citizens, making them benefit from the equal level of protection provided by law to EU citizens. Because of this extended scope of the definition in the Czech law, the internal legislation governing foreigner´s stay made EU legislation applicable to purely internal situations.

Because of that, the judicial interpretation of the Directive treats both internal situations of Czech citizens' family members and EU citizens' family members equally.

The Supreme administrative court ruled that as family relationship should be regarded as the relationship between parents and their children or between grandparents and children. The relationship similar to family relationship according to Sec. 15a para. 4 of the Law must be defined similarly strictly, and must be analogous to those family relationships expressly mentioned in the Aliens Law in line with the Directive 2004/38/ES. Therefore, according to the Supreme administrative court case law, the relationships between the sib-

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lings or even cousins cannot be regarded as family relationship in the sense of the definition of Directive and Sec. 15a of the Aliens Law.[2]

Both the judicial interpretation and the administrative practice put the non-institutionalized partnership on the same level with the marriage for the purposes of family relationship in the sense of the Directive. The official reasoning report attached to the draft law in this respect stated, that the stable relationship of partners is in the Czech Republic equal to that of uninstitutionalized partnership.[3] However, the Supreme administrative court ruled, that it is not possible to limit not expressly defined family relationships falling under transposition legislation to uninstitutionalized partnerships only.[4]

There is also a considerable body of case-law related to fictitious marriages.[5] According to Supreme administrative court, the marriage should be regarded as functional, when it is proved in any stage of the administrative procedure that the marriage in question is fulfilling its functions, even when it was not always so.[6]

The procedural safeguards are provided by judicial revision of decisions issued by the administrative body – Czech Police, Directorate of the service of foreign police. In our opinion there are to no signs that the procedural safeguards were ineffective.

Question 2

To our knowledge there is no evidence of expulsions of EU citizens (and/or their family members) on purely economic grounds in the decisions of judicial bodies. However, in the administrative practice Article 8 para. 3 of the Directive is frequently violated, as the administrative bodies require the EU citizens to submit proof of accommodation when submitting the application for legalization of stay ('confirmation of the stay'). This requirement is vested in the Sec. 87a para. 2 e) of the Aliens law. On the other hand, there is no legal obligation for EU citizens to legalize their stay. It may be useful for

2. Judgment of the Supreme administrative court no. 5 As 6/2010-63, 16.4.2010, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.
3. The Law no. 161/2006 Coll., which amended the Aliens Law, contained the trasposition of the Directive.
4. Judgment of the Supreme administrative court no. 5 As 6/2010-63, 16.4.2010, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.
5. More about the fictious marriages see: ČIŽINSKÝ, P. a kol. *Cizinecké právo.* Praha: Linde. 2012, p. 237-238.
6. Judgment of the Supreme administrative court no. 5 As 104/2011-102, 31.8.2012, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.

practical reasons to obtain the 'confirmation of the stay', but there is no penalty for not doing this.

Question 3

The implementation of the provisions of the Directive with respect to divorce or death of the EU citizen affecting his/her family member status are implemented mainly in Sec. 87f of the Aliens Law. The law guarantees continuation of residence where the family member stayed in the Czech Republic at least a year before the death of his/her family member who was EU citizen. In case of divorce, the law stipulates that the residence continues when custody or regular visiting rights to the child were granted, or when the marriage continued for at least three years and the family member residence in the Czech territory lasted minimally 1 year at the date of the divorce. To the continuation of the residence permit is also entitled the family member who tends the child during his/her primary, secondary, and university education in the Czech Republic.

The provisions guaranteeing continuation of residence in case of divorce do not apply to splitting not registered couples, where the partner of a EU citizen has got residence permit on the ground of unification of family, and then the couple separates and the EU member moves outside the territory. There is no protection of continuation of stay specially for such a case, and such family members could only invoke one of the other provisions for continuation of stay when they qualify for it (for example childcare, etc.)

Beyond the scope of the Directive goes the provision of Sec. 87h para. 1 c) of the Aliens Law, providing that the permanent residence permit will also be issued to a EU citizen family member, who is bereaved of deceased Czech citizen permanently resident in the Czech Republic. It is not fully clear, whether 'bereaved persons' could be only those who fall within the definition contained in Art. 2 of the Directive, or whether the interpretation could be wider.

To our knowledge there are no serious disputes on the application and interpretation of Sec. 87f of the Aliens law. The court disputes, also where the Sec. 87f is being interpreted to deal primarily with the issue of fictitious marriage.

Question 4

The implementation is provided by Sec. 87g-87l of the Aliens Law. Sec. 87g of the Aliens Law provides for the right to apply for permanent residence

permit for persons whose employment or economic activity was terminated because of retirement or invalidity, for other special grounds, and provides for procedural issues. The periods of residence required as qualification ground for permanent residence according to the Aliens Law correspond to the requirements of the Directive.

According to Sec. 87h of the Aliens Law, all family members of the EU citizens have the right to be issued with the permanent residence permit after 5 years of uninterrupted continuous stay. The family members of both Czech citizens and of permanently residing EU citizens are entitled to apply for permanent residence after 2 years of continuous stay. The same applies to family members of deceased Czech and EU citizens, who stayed at the Czech territory in cause of employment or different economic activity.

The volumes of applications sorted according to the type of residence permits are published yearly by Ministry of Interior at http://www.mvcr.cz/ in the yearly *'Report on migration and integration in the Czech Republic'* [Zpráva o migraci a integraci v České republice]. To this date, the most actual report for 2011 is available at: http://www.mvcr.cz/azyl-migrace-a-integrace.aspx.

The data on the volumes of foreigners with permanent residence status granted is also provided at the web page of the Ministry of Interior, sorted by individual countries including EU countries. The statistics appear monthly on the official web pages of the Ministry of Interior: http://www.mvcr.cz/clanek/cizinci-s-povolenym-pobytem.aspx, and the last chart available at the date of submitting this report is from August 2013.

Question 5

The entitlements to different sorts of social benefits and advantages are governed by a number of special laws in the area of social security, not in the Aliens Law. For example the most important legislation in this area could be found in Law no. 117/1995 Coll., on state social support, in Law no. 111/2006 Coll., on social need help, or in Law no. 435/2006 Coll. on employment, etc. These laws usually follow the condition of registration of the foreigner according to the Aliens Law, including registration of EU citizens' family members according to the transposing legislation, in order to meet requirement equality highlighted in Art. 24 (2) of the Directive.

In the area of social benefits, there is EU legislation which is directly binding, namely Council regulation no. 1612/68, on free movement.

Regulation no. 1612/68 has precedence before national legislation on social security. Appropriate references are therefore made to the regulation by the national legislation. For example, Law no. 111/2006 Coll., on social need

help in Sec. 5, para. 1 e) declares that the EU citizen's family member registered and factually resident at the Czech territory for more than 3 months are eligible to benefits according to the conditions of the law, in case that he/she is not entitled to social advantages according to the directly applicable EU legislation.

The laws in the area of social benefits do not distinguish between EU family members and job seekers. It is not clear what sense such differentiation could have – in our opinion it would be rather contra-productive. The EU family member could also be job-seeker at the same time, as these categories are not exclusive.

Question 6

Sec. 119 para. 2 of the Aliens Law was changed by amendment no. 161/2006 Coll., in order to provide transposition of Art. 27 and 28 of the Directive.

The case law of administrative courts on Sec. 119 para. 2 as legislation transposing EU law, is produced, as a judicial review of administrative decisions on expulsion of foreigners issued by administrative organs – the Czech Republic Police, Service of Foreigners Police Directorate, takes place at the Regional courts as court of 1. instance and by Supreme administrative court as a court of cassation. The Supreme administrative court is also responsible for giving judicial opinions binding for administrative adjudication with respect to all sorts of legal issues reflected by administrative courts. In the case law of administrative courts, the terms 'public order' and 'public security' are often interpreted together. However, in fact most of the case law concerns rather expulsions which are factually based on 'public order' ground.

In its Resolution no. 3 As 4/2010-151 the Supreme administrative court gave binding judicial opinion interpreting the concept of 'disturbance of public order'. In the first place, the court held that acts of the foreigner are disturbing public order, only when these acts represent real, actual, and adequately serious danger to one of basic interests of the society. Yet, this is only general characterization of the criterion, according to the court: still, it has to be respected that expulsion is the most serious intervention with the rights of the foreigner. Therefore, the provision of Sec 119 para. 2 of the law should be applied only in accordance with principle of proportionality, with respect to real situation of the foreigner, level of his integration, his family and personal affairs, length of his stay in the territory of the member state, state of health, or relevant linkages to the country of origin.

The Supreme administrative court held, that for example the illegal stay or entry to the Czech Republic itself cannot be regarded as 'real, actual, and ad-

equatelly serious danger' in the sense of the transposing legislation – especially when it concerns the family member of the EU citizen or family member of the Czech citizen. At the same time, the court held that the 'disturbance of public order' cannot be limited only to acts 'exceeding the intensity of the defined substance of criminal act', as was held previously by one of its senates.[7]

With respect to acts consisting in conclusion of fictitious marriage, the Supreme administrative court referred to the distinctions which the Directive itself makes with respect to interests of protection of public order, public security, or public health laid down in Chapter VI of the Directive, and abusing rights or deception, for example fictitious marriage, laid down in Art. 35 of the Directive. The Supreme administrative court held that similarly, the Aliens Law differentiates grounds consisting in public order and grounds consisting in circumventions of the law, for example fictitious marriage or fictitious affidavit of paternity. Thus the Supreme administrative court refused the idea that fictitious marriage could be subsumed under the concept of 'public order', because in most cases fictitious marriage does not constitute 'real, actual, and adequately serious danger to basic interests of the society', and expulsion on this ground cannot be held as proportionate intervention to the rights of the foreigner. The same conclusion was held by the Supreme administrative court in case of fictitious affidavit of paternity.[8]

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

The tendency to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation' probably does not have a place in the Czech Republic. Sec. 15a para. 4 of the Aliens Law extends the entitlements of Union citizen family members to family members of Czech citizens, making them benefit from the equal level of protection provided by law to EU citizens. Because of this extended scope of the defini-

7. no. 5 As 51/2009-68, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.
8. Resolution no. 6 As 68/2012-39, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.

tion of EU family member in the Czech law, the internal legislation governing foreigner´s stay made EU legislation applicable to purely internal situations.

The Supreme administrative court, corroborating on this concept, held that by formulation contained in Sec. 15 a of the Law, the internal legislator extended the protection over the limits given by the EU legislation only to migrating EU citizens and their families to foreign family members of the Czech citizens. Therefore, according to the Supreme administrative court, internal legal provision can in that way 'activate' EU law, which would otherwise be inapplicable to the concrete situation, not containing any element decisive for the application of the EU law. The member state can extend the EU law to situations which cannot be subsumed under EU law. The Supreme administrative court thus concluded that the sections of the Aliens Law, which are transposing the Directive, have to be applied in both situations – those including family members of EU citizens migrating from one member state to the other, as well as to purely internal situations of Czech citizens and their family members.[9]

Question 8

Regarding any questions concerning the Czech citizenship we have to bear in mind that the existing citizenship law no. 40/1993 Coll. (hereinafter referred to as 'StObč') is replaced from 1. 1. 2014 by the new citizenship law no. 186/2013 Coll. (hereinafter referred to as 'NZStObč'). The new law introduces essential change regarding double citizenship – it will allow double citizenship (both on entry and on exit) so the loss of the previous citizenship will no longer be a requirement for the naturalization in the Czech Republic. Neither will the acquisition of another citizenship result in loss of the Czech citizenship. In this respect the new law is more inclusive since many foreigners living in the Czech Republic have so far refused to apply for Czech citizenship because of the inability to hold their previous citizenship.

Regarding the length of the required stay there is one notable change – EU citizens will be eligible for Czech citizenship after only 3 years of permanent residence (instead of 5 years which concerns the 'other' applicants) – Sec. 14 para. 1 NZStObč.

9. Resolution no. 3 As 4/2010-151, http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch.

However, in almost all other aspects the new law is stricter and it is certainly a step back to the exclusive model of citizenship.

The requirements for naturalization will be distinctly stricter. One of the new requirements is the proof of the income of the applicant (Sec. 14 para. 4 NZStObč) and the requirement that the applicant has not been a burden to the social system in the last three years (Sec. 14 para. 8 NZStObč).

Moreover, the so called 'integration test' has been introduced. The aim is to prove the knowledge of the *'constitutional system of the Czech Republic, and the cultural, geographical, and historical facts'*. Some of the questions in this test were published in November 2013. This has raised criticism since some of the questions are hardly to be answered by the majority of the current Czech citizens – e.g. what is the area of the Czech Republic, what are the tax duties for using a car for business purposes etc.

The Czech Ministry of Interior is given the power to relieve almost all of the requirements. Moreover, Sec. 12 NZStObč states expressively that there is no legal claim to naturalization. This might be a reaction to the case law of the Supreme Administrative Court which in many cases has overruled the naturalization refusal decision of the Ministry of Interior in the last ten years.

There is other disputable issue in the new citizenship law – the application can be dismissed on security grounds (Sec. 22 para. 3 NZStObč). In such a case the judicial review is explicitly excluded (Sec. 26 NZStObč). This might be unconstitutional since the Constitutional Court of the Czech Republic has already stated in other cases that the achieved level of the human rights protection shall not be diminished. This might be in conflict with Art. 12 of the European Convention on Nationality, which states that each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery, or certification of its nationality should be open to an administrative or judicial review in conformity with its internal law.

New citizenship law expressively predicts in Sec. 39 NZStObč that surreptitiously acquired citizenship shall be revoked according to the general regulation of administrative law. In theory, nothing changed in this respect since the application of the general regulations of administrative law has always been possible although not expressively stated in the existing citizenship law. Yet, in practice naturalization has so far never been revoked. According to the new citizenship law we can expect that cases of denaturalization will occur. This will be possible even if the person concerned remains stateless. Since the denaturalization decision according to the general administrative law can be subject to the judicial review, the administrative courts will have a chance to decide what role the Rottmann case will play in such cases.

Political rights of EU citizens

Question 9

The Directive 93/109/EC on European Parliament elections has never been *fully* implemented in the Czech Republic since the problems which have been mentioned in the FRACIT report from June 2013 still remain – i.e. stricter requirement on EU citizens regarding registration and the fact that EU citizen can stand as a candidate only on the ballot of a Czech political party.

EU citizens need permanent residence or sojourn for at least 45 days before the second day of the elections – Sec. 5 para. 1 European Parliament Election Act (hereinafter referred to as 'ZEP').Their registration for the EP elections is more complicated than that of Czech citizens. While Czech citizens do not have to register at all, EU citizens have to be registered at least 40 days prior to the elections (Sec. 29 para. 1 ZEP).

Concerning the passive voting rights, any Czech citizen and every EU citizen who has permanent residence or who is sojourning on Czech territory can become a member of the EP. If an EU citizen stands as a candidate, it is required that he has had permanent residence or has sojourned in the Czech Republic for at least 45 days before the second day of the elections (Sec. 6 ZEP).

A more serious obstacle to the carrying out of the EU citizens' passive rights to vote for the EP is the fact that one can only stand as a candidate on the ballot of a political party (Sec. 21 para. 1 ZEP). Here, we are facing the problem that only a 'citizen' can be a member of a political party, which is, in current practice, understood as 'citizen of the Czech Republic'. The EU-conform interpretation of the term 'citizen' as it was discused in the FRACIT report from June 2013 has so far never been held by the Czech courts.

Question 10

Directive 94/80/EC on local elections has never been *fully* implemented. Also in local elections remain the problems which have been mentioned in the FRACIT report from June 2013.

The active right of EU citizens to vote for local assemblies sometimes collides with its principal condition: the voter has to have his/her permanent resi-

dence registered in the municipality in question. As Marek Antoš[10] has pointed out, this condition is regulated in the same way for all voters (citizen residents and EU citizens). In reality, however, it is strongly discriminatory and represents a considerable obstacle for EU citizens.

The concept of *'permanent residence'* in fact does not have the same content in all of the legal code. In the case of citizens of the Czech Republic, permanent residence is regulated by Law no. 133/2000 Coll. on the record of residents and is inherently defined for record keeping purposes. A Czech citizen can change his/her permanent residence very easily – by mere declaration at the local authority – the only condition he/she has to fulfill is to prove he/she has the right to reside in the municipality (as e.g. tenant or owner of the house, flat etc.).

On the other hand, in the case of foreigners (EU citizens included), the concept of permanent residence is regulated by Law no. 326/1999 Coll. on the residence of foreigners on Czech territory and represents a significantly different institute. In principle, an EU citizen is eligible to obtain 'permission for permanent residence' (from the foreign police authority) after five years of uninterrupted sojourn on the territory of the Czech Republic, if he/she fulfils additional conditions (Sec. 87(g) of the law on the residence of foreigners). A foreigner (EU citizen) who is intending to live in the Czech Republic, obtains at first 'confirmation' of the stay and in most cases can apply for a higher level stay – 'Permanent Residence' – not earlier than after five years of sojourn.

It is thus clear that, in local elections, EU citizens' chances of carrying out their voting rights cannot be compared to the citizen residents' chances of carrying out their voting rights. Recent research shows that only two fifths of EU citizens have 'permanent residence'. The others only have what is called sojourn and cannot participate in local elections. The actual resulting participation of EU citizens in local elections is then a mere 1 % of all EU citizens living in the Czech Republic.[11]

Marek Antoš[12] further calls attention to another discriminatory circumstance: citizen residents do not have to register before the elections, because their names appear on the list of voters based on the fact that they have their

10. ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis.* 2012/2, p. 113-127.
11. ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis.* 2012/2, p. 119-120.
12. ANTOŠ, Marek. Politická participace cizinců v České republice. *Politologický časopis.* 2012/2, p. 113-127.

permanent residence in the municipality concerned. If a citizen resident presents himself/herself at the polling place on the day of the elections and by chance does not appear on the list (e.g. because he moved to the municipality a few days preceding the elections), the election committee is liable, according to Sec. 33 para. 3 Local Election Act (hereinafter reffered to as 'ZZO') to add him to the list.

An EU citizen who is intending to participate in local elections must have obtained permission for permanent residence (see above) and must also have registered, before 4 p.m at least two days prior to the elections (Sec. 28 ZZO).

Question 11

There are no other elections in which EU citizens residing in the country can participate, except the local elections and the elections to the European Parliament, i.e. no voting right is granted to EU citizens in the regional elections.

A special situation concerns the voting rights of EU citizens residing in Prague. Although Prague is a city (commune) and elections there conform to the law on elections into local assemblies (ZZO), Prague is simultaneously considered to be on the same level as the other 13 Czech regions. A paradoxical situation arises, as an EU citizen with permanent residence in Prague has in fact the possibility to vote at this higher – regional level.

Question 12

There are two problems – both of them have been mentioned in the FRACIT 2013 report. One is the de facto disfranchise of the convicted persons and the other one is disfranchise of the persons with mental impairments:

Officially in the elections for the Chamber of Deputies (the lower chamber of the Parliament), the Senate (the upper chamber of the Parliament), the European Parliament, or the presidential elections, prisoners are not limited in their active voting rights in any way. On the other hand, convicted prisoners are disenfranchised in regional and local elections (Sec. 4 para. 2 (a) ZZO; Sec. 4 para. 2 (a) Regional Election Act (hereinafter referred to as 'ZZK'). In local and regional referendums, both convicted prisoners and prisoners in pre-trial detention are disenfranchised according to the law.

The prisoners can vote for the president, the European Parliament, and the Chamber of Deputies without limitations. However, in reality they cannot fully vote for the Senate. The Senate elections take place every two years, but only individuals in one-third of 81 Senate districts are allowed to vote at any given time (the senators' mandate then continues for six years). Thus, on a

rotating basis, every two years around 33 percent of all eligible voters in 27 Senate districts can vote.

Legal regulations nevertheless specify that in order for the prisoner to be allowed to vote in Senate elections, these elections have to be announced in both the Senate district where he/she has permanent residence and the Senate district in which he/she is imprisoned. Taking into account that Senate districts are relatively small and that there are more of them than there are prisons (there are 36 prisons), it is clear that in this 'lottery' only some prisoners have actual voting rights. As can be seen from the statistics of the Prison Service of the Czech Republic, every two years only 2 percent of all prisoners (not the expected 33 per cent) can vote.[13]

Local and regional elections give rise to an even more extreme situation. Although prisoners in pre-trial detention are not disenfranchised in local and regional elections, it is in fact necessary for them to have served their pre-trial detention in the prison that is located in the same district as their permanent residence. The word district now refers to the voting district – '*okrsek*' in the sense of Sec. 26 ZZO. These districts are stipulated by the local mayors so that they contain around 1,000 voters. This is just an administrative arrangement (the results of local elections do not depend on the districts). Such a voting district usually only contains a few streets; in practice, elections for several districts take place together in the nearest public building (e.g. a school). The probability that the prisoner will reside in a prison in the same voting district in which he/she has his permanent residence is thus close to zero and in these local and regional elections, prisoners in pre-trial detention become *de facto* disenfranchised.

Legal regulations are not the sole problem for elections in prisons. It follows from recent research,[14] that around a quarter of all prisoners do not have an identity card. Although they could arrange for an ID card to be issued in the prison with the help of the prison service, since they need their ID even less in prison than when they were free they often neglect this. However, prisoners cannot participate in elections without an ID card. This issue is the same with elections for the Chamber of Deputies, the Senate, the EP, and presidential elections. All electoral laws, in fact, agree that the voter is obliged to prove his/her identity with his/her ID card or his/her passport. This normally legitimate requirement loses meaning in prison. The identity of a

13. ANTOŠ, Marek., DRÁPAL, Jakub. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue.* 10/2012, p. 224-230.
14. ANTOŠ, Marek., DRÁPAL, Jakub. Volební právo vězňů: zelená je teorie, šedý je strom života. *Trestněprávní revue.* 10/2012, p. 224-230.

prisoner cannot be doubted at all (if it was, the right of the state to imprison them would have to be doubted, too).

All electoral laws agree that *incapacitation* obstructs the carrying out of both active and passive voting rights. This has become a serious problem, mainly in relation to the practice of civil courts in the decision-making process about incapacitation. In fact, in Czech law there are two ways through which the civil courts can limit the legal eligibility of mentally disabled people: the 'limitation of legal eligibility' (Sec. 10 para. 2 of the Civil Code) and 'incapacitation' (Sec. 10 para. 1 of the Civil Code). It is the latter measure that limits legal eligibility most strongly and it is only this measure which obstructs both passive and active voting rights in all types of elections and referendums. The Constitutional Court of the Czech Republic in its finding of 12/07/2012 ref. no. IV. ÚS 3102/08 found this practice unconstitutional. The legal measure of incapacitation is a legal measure of civil law that allows courts to deprive a person of legal eligibility if this person becomes unable to make legal acts due to a mental disorder that is not completely transient. Ordinary courts, such as the Constitutional Court learned from official records, possibly because of the primarily civilian nature of incapacitation, do not take the public law consequences (i.e. the *ex lege* loss of voting rights) of their decisions into consideration. Concerning this matter, the Constitutional Court pointed out the alarming statistics which showed that by 30 July 2007 3,893 people had been 'limited in their legal eligibility' and 23,283 people had been classed as 'incapacitated'. Based on these numbers, the Constitutional Court concluded that ordinary courts too often decide on the constitutionally problematic incapacitation ruling.

When deciding about the limitation of legal eligibility or incapacitation of a natural person, ordinary courts are, according to the Constitutional Court, obliged to judge separately whether the concrete person is able to understand the meaning, the purpose, and the consequences of the elections.

The Constitutional Court, nevertheless, did not derogate any of the electoral laws. The sole fact that incapacitated people have neither active nor passive voting rights was not evaluated as unconstitutional. It criticised only the existing practice of civil courts.[15]

The practical impact of the findings mentioned above have so far been negligible, as the vast majority of people who have been incapacitated do not

15. For more about the topic see: VYHÁNEK, Ladislav, Mental Disability and the Right to Vote in Europe: A Few Notes on the Recent Development. In *WIIIth World Congress of the International Association of Constitutional Law,* 2010.

struggle for the redefinition of their legal limitations that the Constitutional Court has evaluated.

Culture(s) of citizenship

Question 13

On the basis of our findings we are convinced that EU citizenship has so far been understood only as adjunct to the Czech immigration system. However, as mentioned above, there is no duty to registry for permanent residence for EU citizens. The 'confirmation' according to the Sec. 87a of the Aliens Law is being arranged for practical reasons, but there is no penalty for not doing this.

Question 14

We have not noticed any such case.

Question 15

We have not noticed any dominant theme within national media. If there have been any well known cases of expulsion – so these were the cases regarding to non EU citizens – especially expulsion (criminal extradition) of Russian citizens with Caucasus origin to Russia (which is out of the topic of this report).

DENMARK

Catherine Jacqueson[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

The material provisions of the Residence Directive (hereafter the Directive) on residence and its termination are regulated by executive order, the EU Residence Order, which mainly duplicates its provisions.[2] The right of entry and the competence to expel Union citizens is on the contrary regulated by the Aliens Act. While the Aliens Acts concerns all foreigners, its limitations are only applicable to EU/EEA citizens and their family members provided that they are in conformity with EU law.[3] The EU Residence Order uses, in line with the Directive, a right-based terminology, whereas the complex structure of the Aliens Act and its terminology makes it more administration-friendly.

Question 1

In the EU Residence Order, Denmark has endorsed the same definitions of family members as those in its Art. 2, and assimilates registered partnership to marriage. In addition, a durable relationship under the same roof is also assimilated to marriage.[4] Art. 3 of the Directive on other 'beneficiaries' of the

1. Associate Professor, Dr., Research Centre in Legal Studies in Welfare and the Market, Faculty of Law, University of Copenhagen. Many thanks to my research assistant, Sandra Urschat, for her precious help and support.
2. Executive Order No. 358 on Residence in Denmark for Aliens Falling within the Rules of EU law of 21/4/2006 (*EU-Opholdsbekendtgørelsen*) with further amendments. The EU Residence Order actually in force is of 2001 (No 474). Competence to the Ministry of Justice to adopt the executive order follows from the Aliens Act.
3. See Sect. 2(3) of the Consolidated Aliens Act actually in force (*LBK No. 863 of 25/6/2013*).
4. This is in conformity with the Court's ruling in case 58/85, *Reed*. According to Sect. 16 of the EU Residence Order of 2011, a durable relationship requires that the Union citizen provides for the needs of the partner in the same way as in marriage.

right of family reunification, has been implemented as granting an automatic right of residence to any family member of the Union citizen having the primary right of residence (1) who in the country of origin is dependent on the Union citizen or is a member of his/her household, or (2) who has serious health problems that require the personal care of the Union citizen. The right of residence of ascendants and other family members as just defined above under (1) is conditional upon demonstration of economic dependency both in the host State and in the home State. This is in line with the Court's ruling in *Jia* (case C-1/05).[5]

The right of residence is granted to family members who accompany or join the Union citizen who has *established a genuine and effective residence* in Denmark. The EU Residence Order is hereby referring to the terminology used by the ECJ in the *Metock* ruling (case C-127/08.). Following this ruling, Danish law was amended in 2008 removing the requirement of prior lawful residence in the EU for the family member. This requirement had been inserted in 2006 as a result of the *Akrich* ruling (case C-109/01). It was a dramatic summer 2008 in Denmark with its negative flow of reactions following *Metock* and criticism by the Danish Ombudsman of the Danish authorities' misinformation of their *own citizens* on their EU-right to family reunification in Denmark.[6] The EU Residence Order is now explicitly stipulating in this respect that family members of Danish nationals have an EU-right of residence where they are covered by the Treaty.

A few cases concerning the *definition of a family member* have reached Danish courts. An Iraqi national could not be considered as a spouse to a Union citizen since his marriage under Muslim law (religious marriage) was not recognized under Danish law.[7] Nor could he be considered as a father to a Union citizen as he was not 'dependent' upon his child pursuant to Art. 2(2)(d) of the Directive.[8] Finally, the Iraqi national could not demonstrate that

5. For further details, see the Briefing Note of the Ministry of Integration of 17/3/2009 on the condition of dependency in the Directive *(Notat om forsørgelseskravet i EU-opholdsdirektivet)*.
6. Final report of the Ombudsman of 21/11/2008 on the authorities' information on the right to family reunification pursuant to EU law, *(Ombudsmandens undersøgelse af udlændingemyndighederne – vejlening om familiesammeførelse efter EU-retten mm.)*.
7. Judgment of the Supreme Court of 24/8/12 in case 58/2012, reported in U.2012. 3399H.
8. The Danish courts did not refer to case C-200/02, *Zhu and Chen* where the ECJ ruled that the parent of a 'baby' Union citizen could obviously not be seen as dependent on

he had a durable relationship to a national of another Member State pursuant to the EU Residence Order. This condition was not fulfilled even though it was not disputed that the couple had known each other for at least 6 years, and had in fact lived together for at least one year.[9] The fact that they had a child together and another to come did not alter this finding. In any event, the Supreme Court found that the offenses committed made him a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society. He was expelled and prohibited from reentering the country in 6 years. In a similar case of expulsion concerning a Ganesh national married (in absentia) in Ghana to a Polish national, the Supreme Court did not examine whether the marriage was valid and whether the Ganesh national was thereby a spouse to a Union citizen.[10] The Supreme Court found that irrelevant since the offenses committed (use of false ID-documents and illegal residence and work) were sufficient for him to be considered as a serious threat to public order and security, and be expelled with a prohibition from reentering the country in 6 years.

Concerning the *right of entry* of family members who are from third-countries (Art. 5 of the Directive), the authorities are obliged to treat visa applications on the basis of an accelerated procedure not exceeding 15 days unless the situation is exceptional and duly justified.[11] The visa should be free of charge and no conditions of dependency or travel insurance can be imposed. Only a valid passport and documentation of the family relationship can be required in this respect. Union citizens and their family members can be refused access pursuant to the Aliens Act if they do not have the required documentation. Yet, the safeguards of Art. 5(4) were literally transposed in an executive order implementing the Aliens Act.[12]

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her baby as dependency was the other way round, but could rely directly on Art. 21 TFEU for a right of residence in the UK with the baby Union citizen.

9. The couple was not formally registered at the same address, and this might have been the decisive factor for the Western Appeal Court, judgment of 25/10/2011, S-1689-11.
10. Judgment of the Supreme Court of the 7/4/2011 in case 364/2010, reported in U.2011.2014H.
11. See the Briefing Note of the Ministry of Justice of 11/1/2013 on practice regarding visas in force from the 15/1/2013.
12. See the Briefing Note of the Ministry of Integration of 30/6/2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order under 1.5 *(Notat om adgangen til ud- og afvisning af EU-/EØS-statsborgere på baggrund af subsistensløshed eller af hensynet til den offentlige orden*).

Question 2

Decisions refusing or terminating the right of residence on the specific ground of lack of sufficient resources can only be taken within the *first 3 months of arrival* and by administrative decision. This possibility is regulated in the Aliens Act.[13] According to *Udenfor*, a Danish NGO dedicated to the protection of homeless people, 278 EU-nationals were expelled on grounds of lack of sufficient economic resources between the 1st of January 2009 and the 30th of June 2011.[14] Still, according to the NGO, a person who was in possession of less than 350 kr./35 Euros (corresponding to the price of a night at a hostel) was regarded as lacking sufficient resources and was expellable. A Briefing Note of 2011 from the Ministry of Integration referring to Art. 14 of the Directive and the *Grzelczyk* ruling (case C-184/89) seems to have put an end to this practice.[15] It follows that expulsion on grounds of lack of resources within the first 3 months can only be the consequence of the person requesting economic support from the State and that this in itself is not sufficient. The authorities have to assess on the basis of the personal circumstances of each applicant whether the person is an unreasonable burden. This can never be the case upon the person's first application for social benefits.

In respect of Union citizens and their family members who have *resided for more than 3 months* in Denmark, their right of residence might be terminated where they no longer fulfill the conditions for residence pursuant to EU law. The Aliens Act stipulates that illegal residence is a ground for expulsion.[16] It might thus be that certain persons are expelled on the ground that they cannot be considered as economically active and do not fulfill the condition of self-sufficiency. There is no reported case-law on this point concerning Union citizens. On the other hand, some expulsions on grounds of protection of the public order are inherently linked to economic considerations. For example, fines for minor offenses, such as 'squatting' have justified expulsion on grounds of protection of the public order, but were annulled by the Supreme Court, cf.

13. Sect. 28 of the Aliens Act of 2013. In respect of jobseekers, the limit is 6 months or more provided that they can document that they are actively looking for a job and have serious chances of obtaining one.
14. The numbers are based on the statistics of the Danish Immigration Service, see Benedicte Ohrt Fehler, Udenfor, 'Formanskabet bør sætte fokus på hjemløse EU-borgere' *('The EU presidency should focus on homeless EU-citizens')*, of 6/12/2012 on http://udenfor.dk/dk/menu/om-projekt-udenfor/det-mener-projektudenfor/formandskabetborsattefokus-pa-hjemlose-eu-borgere.
15. Briefing Note of the Ministry of Integration of 30/6/2011 mentioned in footnote 12.
16. See Sect. 25(b) of the Aliens Act of 2013.

question 6.[17] Yet, there is evidence that expulsion on economic considerations has found place in respect of EEA citizens on the basis of the Nordic Convention.[18] This convention secures an extended right of free movement to the citizens of the 5 Nordic countries members long before the Residence Directive. Since EEA citizens are also protected by the Directive, their expulsion should have been assessed in this light and might conflict with it.

Finally, a recent practice of the Danish police, especially targeted at Roma people, is to issue them with fines for illegal residence if they do not have a registration card after the first 3 months of their stay, and retaining them until they have paid their fine. The ground for retention is to facilitate deportation, but the persons are in practice released upon payment of the fine.[19]

Question 3

The EU Residence Order entitles family members to Union citizens who die or leave the country to retain their right of residence.[20] The same is true in case of divorce, annulment of the marriage, and termination of partnership.[21] Both provisions provide that in respect of family members who are third-country nationals, retention of the right of residence is conditional upon the person being economically active or self-sufficient. There is no reported case-law.

In respect of the right to remain for children of departed Union citizens who pursue an education in the host State (Art. 12(3) of the Directive), the

17. Judgment of the Supreme Court of 31/3/13 in case 264/2010, reported in U.2011. 1794H.
18. See Kirsten Ketscher, 'Hjemsendelse af Nordiske borgere – en kritisabel dansk praksis', in *Undring og Erkjennelse*, Karl Harald Søvig, Sigrid Eskeland Schütz og Ørnulf Rasmussen (red.), Fagbokforlaget 2013, pp. 279-291. The author reports two cases, one concerning a pregnant Icelandic woman who had resided over 1 year in Denmark where she was living with her husband and had partly worked and partly received social help. She was refused a minimum means of subsistence, and was asked to leave the country. The other case concerned a Swedish national who suffered from psychological diseases linked to her previous situation as a Palestinian refugee. Pursuant to a court order, she had to leave the country as she was not self-sufficient and did not fulfill the condition of 3 years residence in Denmark pursuant to the Nordic Convention.
19. Information gathered from the Danish Charity organization, DanChurchSocial *(Kirkens Korshær)*.
20. Sect. 14 of the EU Residence Order of 2011.
21. Sect. 15 of the EU Residence Order of 2011.

Danish rules and practice are now complying with the Court's ruling in *Ibrahim and Texeira* (cases C-310/08 and C-480/08).[22]

Art. 14 of the Directive on retention of the right of residence is duplicated in various provisions of the EU Residence Order, but it is doubtful whether it is fully respected in practice, cf. answer to questions 2 and 5.

Finally, the procedural safeguards of Art. 30 of the Directive are applicable by analogy where the person is expelled on other grounds than the protection of the public order, security, and health.[23]

Question 4

The right of permanent residence in Art. 16-21 of the Directive is implemented through the EU Residence Order.[24] EU nationals who have legally resided in Denmark for 5 continuous years have an unconditional right of permanent residence. The authorities are not entitled to enquire whether the conditions of work or self-sufficiency in Art. 7 are fulfilled at the time of application. Yet, in a Briefing Note of 2009, the Ministry of Integration specifies that a registration certificate might not be enough to establish previous lawful residence and the applicant for permanent residence might have to prove by other means that this condition is fulfilled.[25] On the continuity of residence, the Order closely follows the Directive and practice assimilates imprisonment to lawful residence.[26]

The right of residence of family members under Art. 16(2) was first restrictively interpreted and enforced by the Danish authorities. Until mid-2012, Danish authorities required that the Union citizen with the right of permanent residence should document being a worker or having sufficient resources to provide for his/her family. As a result of the *Clauder* ruling by the EFTA-Court, the authorities changed their practice and family members now have

22. See the Briefing Note of the Ministry of Justice of 3/5/2010 on reviewing negatives decisions infringing Art. 12 of Regulation 1612/68 and Art. 12(3) of the Residence Directive following the Court's rulings in *Ibrahim* and *Teixeira*.
23. See further, the Briefing Note of the Ministry of Integration of 30/6/2011 under 2, mentioned in footnote 12.
24. See Sect. 19 of the EU Residence Order of 2011.
25. Briefing Note of the Ministry of Integration of 18/5/2009 on the right of permanent residence *(Notat om tidsubegrænset ophold efter opholdsdirektivet)*.
26. See judgment of the Western Appeal Court of 13/11/08, S-1421-08, reported in U.2009.581V.

an unconditional right to reside with the permanently settled Union citizen.[27] Yet, it is worth noting that this is only applicable to family members (regardless of nationality) to the *Union citizen*, who has a right of permanent residence in Denmark. In contrast, the 'old' practice is still applicable to third-country nationals who are family members to another third country national who has a permanent right of residence because of his/her relationship to an EU citizen.[28] This 'discrimination' is grounded in the fact that the *Clauder* ruling only concerned the situation of family members to a Union citizen and is evidence of a restrictive interpretation of EU law.

Art. 17 and 18 of the Directive on the right of residence for specific categories are fully implemented by the EU Residence Order and seem unproblematic. The same is true as regards the procedural provisions of Art. 19, 20, and 21. However, the EU Residence Order goes further than Art. 21, stipulating that permanent residence also ends when it has been obtained fraudulently (through for example marriage of convenience or false declaration).

The Immigration Office (*Udlændingestyrelsen*) provides statistics on their homepage on the yearly number of EU citizens who obtain a right of residence in Denmark. The statistics operate with 4 categories: (1) workers, (2) students (3) family members, and (4) the remaining EU-citizens (self-employed, retired, and self-sufficient) which are further divided by country of origin. There are no official statistics on the volume of applications for the status of permanent residence. Following a question put by a the Parliamentary Committee for Immigration and Integration in 2012, the Ministry of Justice disclosed the numbers of successful applications for the status of permanent residence of Union citizens.[29] In 2010, 2148 were registered as permanent residents pursuant to EU-law, in 2011 the number was 2121, and 848 for the first half of 2012. It is interesting to note that the numbers cover both citi-

27. Case E-4/11, *Clauder* of 26/7/2012. Persons who had wrongly been refused a right of residence as a family member to a Union citizen with a permanent right of residence could have their case decided anew. Yet, the Ministry of Justice found that there was no obligation upon the authorities to take old cases up on their own initiative since they were too difficult to identify.
28. Legal Interpretative Note of the Ministry of Justice of 14/8/2012 on the EFTA-Court's judgment in the *Clauder* case *(Juridisk fortolkningsnotat om Clauder-dommen)*.
29. Question no. 368 of the Parliamentary Committee for Immigration and Integration to the Minister of Justice of 24/5/2012 *(Spørgsmål nr. 368 fra Folketingets Udvalg for Udlændinge- og Integrationspolitik)* that was kindly brought to my attention by the Immigration Office.

zens of another Member State and their family members as well as family members of Danish citizens who have used their right of free movement.

Question 5

Strikingly, Art. 24 of the Directive was not transposed into the EU Residence Order and the exceptions to the principle of equal treatment provided for in its Art. 24(2) are explicitly or implicitly implemented in existing Acts.

The exception in respect of *students* was implemented through an amendment of the Act on Students' Grants and Loans Scheme which excludes nationals from other Member States who are not workers or family members from the entitlement to student grants and loans within the first 5 years of residence.[30] Until recently Union citizens *who worked in Denmark along their studies* were not entitled to the grant. On several occasions, the Danish authorities refused to recognize them as workers, especially if they had first arrived to enroll for a study. They were considered as students and thus not entitled to maintenance help pursuant to Art. 24(2) of the Directive. In a way, the authorities relied on the intention of the Union citizen: arrival with the purpose of studying in Denmark disqualified them as workers. The Danish Ombudsman reacted to this uncertain practice of the authorities and of the Appeal Tribunal for the Students' Grants and Loans Scheme (highest administrative body) recalling their EU law obligations. The Appeal Tribunal then asked the ECJ whether full-time students who are working along their studies should be regarded as workers and should thus be entitled to the student grant on an equal treatment basis. The Danish government argued that with the adoption of the Directive, the EU legislator intended full-time students to be covered by the exception to the principle of equal treatment in the Directive.[31] The Court disagreed in the *LN* case and practice was changed in this respect.[32] The *LN* ruling came as a shock for politicians and reactivated in the

30. See *inter alia* Sect. 2a in the Act on the Students' Grants and Loans Scheme No. 661 of 29/6/2009 *(LBK om statens uddannelsesstøtte (SU-loven))* amending Act No. 448 of 1995 with further amendments *(Lov om Statens uddannelsestøtte med senere ændringer)*.
31. See further C. Jacqueson, 'For better or for worse? Transnational solidarity in the light of Social Europe' in *Resocialising Europe in times of crisis*, CUP, October 2013.
32. Case C-46/12, *LN*. Negative decisions within the last 3 years can be reassessed in the light of the ECJ's ruling.

media fears of social tourism with its waves of students especially from Eastern EU-countries invading Danish universities.

In respect of social benefits, it is clear that Union citizens and their family members have no such entitlement within the *first 3 months* of their stay and for longer when the Union citizen is a *first-time jobseeker*. As the Act on Active Social Policy provides for public support to all persons in need that are lawfully residing in Denmark, an amendment to the Act was inserted in 2004 as a result of the EU's enlargement to the 10 new Member States. It excludes short-term residents and jobseekers from entitlement to public support except from financial help to get back home.[33] The rationale is that pursuant to EU law such persons are supposed to be self-sufficient and are therefore not entitled to any financial support from the State. The Act explicitly excludes them from the entitlement to a non-contributory benefit ensuring a minimum means of subsistence (*kontanthjælp*). This exclusion of first-time jobseekers seems to conflict with the Court's rulings in *Collins* (case C-138/02) and *Vatsouras* (case C-22/08). Indeed, this benefit can be assimilated to a jobseeker allowance since it is conditional upon the person being available to work and actively looking for employment. Thus, it fulfills the condition in the Court's case-law of being a benefit facilitating return to the labour market and should be available to all those who can demonstrate a sufficient link to the Danish labour market.[34] Yet, this is not the position adopted by the legislator and the Ministry of Employment which administrates the Act.[35]

Entitlement to social benefits for all other Union citizens residing *more than 3 months who are not workers or self-employed* shall be assessed case by case. As mentioned above, according to the Act on Active Social Policy, all persons lawfully residing in Denmark are entitled to public support if the conditions for obtaining the benefit are fulfilled.[36] Hence, the question would be whether the Union citizen is lawfully residing in Denmark.[37] This issue has especially been salient in Denmark in respect of homeless persons who

33. Act No. 282 of 26/4/2004 inserting Sect. 12a in the Act No. 455 on Active Social Policy of 1997 *(Lov om aktiv socialpolitik)*.
34. Kirsten Ketscher, *Socialret – principper, rettigheder, værdier*, 3rd ed., DJØF 2008 at p. 251 and Catherine Jacqueson, 'Unionsborgerens ret til sociale ydelser – Hvilken vej blæser vinden?' EU-ret og Menneskeret, June 2010 at p. 162.
35. Guidelines No. 19 from the Work Department of the Ministry of Employment on EU/EEA citizens' access to minimum means of subsistence of 4/4/2008 *(Vejledning om EU/EØS-borgeres adgang til kontanthjælp og starthjælp)*.
36. Sect. 3 of the Aliens Act of 2013.
37. See decisions of the Appeal Tribunal for Social and Employment Affairs *(Ankestyrelsen)* A-191-11 of 8/9/11, A-27-07 of 21/11/07.

are nationals of other Member States concerning their access to shelter homes. According to Danish law, shelter homes which are to some extent State-funded shall only accept persons who are legally residing in the country. In practice, lawful residence has in this respect been interpreted restrictively as excluding undocumented citizens (i.e. those who do not have a registration certificate, a residence card, or a Danish health card).[38] Such interpretation conflicts with the Directive as (1) all EU-nationals have an unconditional right of residence within the first 3 months and beyond when the person is actively looking for employment (without registration document) and (2) the registration certificate is not constitutive of the right of residence which might be documented by other means. The authorities' underlying rationale is that such persons are in any event not lawfully residing in Denmark since they are requesting public support by using shelter homes. They do not fulfill the condition of self-sufficiency and are a burden on the social system. This rationale conflicts with the Directive, especially with its Art. 14.[39]

Since there is very limited case-law and practice available on the issue of social benefits to non-economically active citizens, it is difficult to say whether the authorities rely at all on the real link doctrine in the ECJ's case-law in situations not covered by Art. 24(2).

Finally, as mentioned in respect of question 2, receipt of social benefits might after some time lead to termination of the right of residence of the Union citizen.

Question 6

Expulsion of nationals of the Member States is regulated in the Aliens Act which is applicable to all foreigners. A foreigner can either be (1) denied access to Denmark (within the first 3 months of arrival), or (2) be deported with a prohibition of reentering the country. In respect of Union citizens, access and residence in Denmark for the first 3 months can be refused by adminis-

38. Information gathered from the Danish Charity organization, DanChurchSocial *(Kirskens Korshær)*. In January 2013, the organization opened up a shelter home for homeless foreigners. 2/3 of the users are from EU-countries and ¼ comes from Romania. Most of the users ask for help in understanding and accessing the Danish labour market. For more information, see (in Danish): http://www.kirkenskorshaer.dk/nyheder/flere-fattigdomsmigranter-s%C3%B8ger-r%C3%A5dgivning.

39. It also conflicts with the Ministry of Justice own Briefing Note of 2011, mentioned in footnote 12, on the possibility of expelling Union citizens who are requesting public support, under 1.3 and 1.6.

trative decision if the citizens constitute a threat against public order, security or health, they have a prohibition from reentering the country, or if they cannot provide for their own needs.[40] Concerning deportation, which is normally, (but not exclusively) a consequence of a criminal conviction and normally, (but not exclusively) decided by a court, the Act does not quote or otherwise refer to Art. 27 and 28 of the Directive, but the EU Residence Order does so extensively. In addition, the Act specifies that expulsion of Union citizens and their families is only possible if it is compatible with EU law.[41] Expulsion rules are quite complex, but are based on a simple rationale which is similar to that adopted in the Directive: the longer the stay, the more serious the offense should be.[42] In contrast, the shorter the stay, the easier it is to expel the foreigner. Yet, contrary to the Directive, the Danish Act is very formalistic and specifies the type of offenses that can justify deportation. Just to mention a few examples, expulsion of a foreigner who has lived more than 9 years in Denmark requires an offense which is punished by more than three years in prison. Where the person has lived between 5 and 9 years, offenses punished by one year prison are sufficient and for all other foreigners, offenses which are punished by a prison sentence are sufficient, or where the person otherwise constitutes a threat to the public order, security, or health. Illegal residence is also a ground of expulsion.[43]

Upon an analysis of the case-law of Danish courts, two remarks can be made. First, courts' reasoning in expulsion cases appears to be quite formalistic. Courts usually start by referring to the categories of the Aliens Act and assess whether deportation has a legal basis therein. Only afterwards do courts examine whether the result would be compatible with the Directive. Second, if the personal conduct is seen as a threat to the public order and security, there should be very strong links to Denmark and to family members residing there to lead to another decision.[44] The following cases are deporta-

40. See Sect. 28 of the Aliens Act of 2013.
41. See Sect. 2(3) of the Aliens Act of 2013.
42. See Chapter 4 of the Aliens Act of 2013, especially Sect. 22-25.
43. Sect. 25b of the Aliens Act of 2013.
44. Courts do not distinguish between public order and public security. Public health has to my knowledge not been relied upon to deny access to Union citizens or to expel such persons.

tion cases with a prohibition of reentering the country and most of them, (but not all) are the natural consequence of a criminal conviction.[45]

Illegal residence and work

It appears from two cases on illegal residence of family member to Union citizens, already mentioned in question 1, that illegal residence will most likely render the person a serious threat to the public order and security and that personal circumstances, such as children in Denmark, cannot lead to another assessment. Therefore, it seems very difficult to prove that deportation in a given case is disproportionate, the argument being that the link to Denmark has been established illegally and is not worth protection. In the two above mentioned cases, the Danish Supreme Court considered that the two foreigners fulfilled the conditions for deportation in the Aliens Act. The Court then added that the use of a false identity card in order to manufacture a right of residence and work, as well as illegal residence and work make the person a genuine, present, and sufficiently serious threat to one of the fundamental interests of society pursuant to the Directive which can justify expulsion for 6 years.[46] In respect of the Ganesh national condemned to 50 days prison, the Court emphasized that expulsion was not breaching the principle of proportionality since his link to the Danish territory was established illegally as he had relied on a false ID-card.[47] In addition, the Ganesh national was not living together with his Polish spouse at the time of his arrest, and his spouse should have been aware that he was residing illegally in Denmark. Deportation was also held to be proportionate in respect of the Iraqi national who had committed the same kind of offenses and was sentenced to 60 days prison. The Supreme Court found that expulsion was not disproportionate even if the Iraqi national had lived in Denmark (illegally) for 10 years and was the father to a Romanian child living in Denmark and of another child to come.

Where the Union citizen is not resident in Denmark or has been residing there for less than 5 years, courts assess the seriousness of the threat depending on whether the offense was circumstantial or the result of a pattern, whether it led to substantial damage, and whether the person has previously

45. No court case was reported on refusing access to Denmark on the ground that the Union citizen or the family members constitute a threat to the public order or security.
46. Judgment of the Supreme Court of 24/8/12 in case 58/2012, reported in U.2012. 3399H.
47. Judgment of the Supreme Court of 7/4/11 in case 364/2010, reported in U.2011. 2014H.

been convicted.[48] This is demonstrated below where courts balance the right of free movement, on the one hand with the public order and security, on the other hand. Personal circumstances are unlikely to make the balance tip in another direction.

Public order and no residence in Denmark, cf. Art. 27 of the Directive

An infringement of the law prohibiting import and sale of fireworks in Denmark which was sentenced by 4,5 months prison was not sufficiently serious to justify expulsion of a German national who had no connection to Denmark.[49] The Appeal Court came to the same conclusion in a case concerning a Lithuanian national who was condemned to 30 days prison for violence against an airport police officer.[50] Nor was infringement of the Act on Arms by being in possession of a knife sufficiently serious to justify expulsion.[51] The same was true of a person who was found guilty of 'squatting' a secondary home for 3 days.[52] In this case, the Supreme Court found that since the offense was circumstantial and created little damage, it could not constitute a serious threat against the public order.

On the contrary, the Appeal Court found that a Polish national found 4 times guilty of driving under the influence of alcohol could be expelled according to the Aliens Act. In addition, his behavior constituted a serious threat to road safety and was thereby compatible with Art. 27 of the Directive.[53] Deportation was proportionate as there was no evidence that he resided in Denmark and he had no recent contact with his family residing there. The Supreme Court found that stealing using an 'alarmproof' bag was suffi-

48. See also the Briefing Note of the Ministry of Integration of 30th of June 2011 mentioned in footnote 12.
49. Judgment of the Western Appeal Court of 21/2/02, S-0310-02, reported in U.2002. 1080V.
50. Judgment of the Eastern Appeal Court of 3/8/09, S-2116-09, reported in U.2009. 2834Ø.
51. Judgment of the Eastern Appeal Court of 12/4/10, S-2958-09, reported in U.2010. 2082Ø, and judgment of the Supreme Court of 21/3/12 in case 230/2011, reported in U.2012.2072H.
52. Judgment of the Supreme Court of 31/3/13 in case 264/2010, reported in U.2011.1794H. On the same day the Supreme Court also held in another case, that attempt to steal a bike was not serious enough to justify expulsion, see judgment of the Supreme Court in case 319/10 reported in U.2011.1800H.
53. Judgment of the Eastern Appeal Court of 14/3/12, S-3281-11, reported in U.2012. 2231Ø.

ciently serious to justify expulsion.[54] The court relied on the fact that the EU national had committed criminality on the very day of his arrival, and that criminality was part of a pattern. The Court added that this was confirmed by previous convictions of the person in his home State. In a similar case against two Polish nationals convicted of stealing in a supermarket and sentenced to 60 days prison, the Supreme Court confirmed that the offenses committed were a serious threat to the public order and security. Since the offenders had no link to Denmark, expulsion for 5 years was justified.[55]

Public order and residence beyond 5 years, cf. Art. 27 of the Directive

A Lithuanian national who had entered Denmark in order to study there was twice found guilty of violence against persons and was twice sentenced to 3 months prison.[56] The Appeal Court found that the formal requirements for expulsion in the Aliens Act were fulfilled and the question was whether this was compatible with the Directive. Because the person had no connection to Denmark and had repetitively committed offenses during his short stay, he constituted a serious threat against the public order that justified expulsion for 3 years. A Spanish national was condemned to 4 months prison for 13 offenses of fraud using false names and credit cards and for false declarations to the police.[57] He had worked (on the black market) and lived in Denmark for nearly 2 years. The Appeal Court found that expulsion for 5 years was compatible with EU law and the free movement of workers. The Court relied directly on Art. 27(2) and quoted considerations 23 and 24 of the preamble of the Directive. Referring to the ECJ's ruling in case C-100/01, *Olazabal*, it noted that it was up to the national court to assess whether the conditions for expulsion were fulfilled. It found that the person's systematic criminal behavior made him a genuine, present, and sufficiently serious threat against the public order.

54. Judgment of the Supreme Court of 29/12/08 in case 170/2008, reported in U.2009.813H. For a similar case of expulsion as a result of stealing, see judgment of the Supreme Court of 31/3/11 in case 143/2009, reported in U.2011.1788H.
55. Judgment of the Supreme Court of 19/10/09 in case 425/2008, reported in U.2010. 250H.
56. Judgment of the Eastern Appeal Court of 29/1/09, S-3604-08, reported in U.2009. 1137Ø.
57. Judgment of the Eastern Appeal Court of 22/5/08, S-1196-08 reported in U.2008. 2079OE.

On the other hand, the Supreme Court found that it would be disproportionate to expel a British national who was condemned to 60 days prison for violence against a bus driver.[58] The Court relied on the fact that his offense was a result of an impulsive reaction, that he had not previously committed criminality, and that he had family residing in Denmark. The Supreme Court thereby quashed on this point the ruling of the district court which had been confirmed on Appeal.

Public order and imperative grounds, cf. Art. 28(3) of the Directive

A Slovakian national who had resided in Denmark for more than 10 years was sentenced to 4 years and 6 months prison for various offenses, such as stealing and violence against persons.[59] The Appeal Court considered that he should be expelled for life relying essentially on the serious nature of the committed offenses and the fact that he had previously been sentenced to 5 years prison for similar offenses. It was not disputed that the Slovakian national had strong links to Denmark, had three sisters living there, and spoke the language. In contrast, he had no link to Slovakia and could barely speak the language. Nevertheless, the Appeal Court found that because of the seriousness of the offenses, expulsion was not disproportionate. The question was raised whether the Slovakian national could be protected under Art. 28(3)(a) and whether the expulsion was based on imperative grounds of protection of public security. The Appeal Court found that prison years should be taken into account in calculating the period of residence relying on the fact that they constitute legal residence. Yet, the seriousness of the offenses committed made expulsion necessary on imperative grounds of public security.

Art. 28(3)(a) was also applicable in an expulsion case against a Portuguese national who had lived in Denmark for more than 19 years.[60] He was sentenced to 1 year and 3 months prison for abusive behavior, repeatedly beating and threatening his three sons over a period of more than 10 years. The Supreme Court found that expulsion was not required on imperative grounds of public security and would therefore be contrary to the Directive. It is interest-

58. Judgment of the Supreme Court of 29/12/08 in case 169/2008, reported in U.2009. 808H.
59. Judgment of the Western Appeal Court of 13/11/08, S-1421-08, reported in U.2009. 581V.
60. Judgment of the Supreme Court of 12/1/12 in case 128/2011, reported in U.2012. 1119H.

ing to note that the Court in this case exclusively relied on the Directive and did not refer to the Aliens Act.

In the summer 2013, the Appeal Court found that expulsion against a Croatian national who grew up in Denmark was based on imperative requirements of public security.[61] The Croatian national was condemned to 5 years prison for robbery and was previously convicted and imprisoned for similar offenses. In addition, he had twice been sentenced to expulsion, but the sanctions were suspended. The convicted person's personal situation and his link to Denmark could not outweigh the seriousness of the criminality committed. This was despite the fact that it was not disputed that he grew up in Denmark where his family was living, that he had no link to Croatia, and could only speak Roma besides Danish.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

In Denmark, EU law is only applicable where the situation is not purely internal. Danish nationals have to demonstrate that there is a cross-border element in their case in order for the EU free movement provisions to apply. There is thus is no constitutional principle of equal treatment putting Danish nationals at the same level as other EU nationals protected by EU law. Yet, in exceptional situations, EU law might apply in *purely internal situations* pursuant to Art. 20 TFEU and the *Zambrano*-ruling.

Art. 21 TFEU and purely internal situations

EU law is very relevant in cases of family reunification, since the Danish Immigration rules are quite restrictive, especially where compared to the liberal EU rules.[62] The right of Danish nationals to family reunification in Denmark pursuant to EU law is provided for in the EU Residence Order and is

61. Judgment of the Eastern Appeal Court of 26/8/13, S-4062-12, not yet reported.
62. Issues of the application of EU law to Danish nationals also arise in respect of the right to social benefits upon the person's return to Denmark. Indeed some benefits are/were conditional upon previous residence in Denmark in a certain amount of years (*D'Hoop* type of cases).

further implemented through practice of the Immigration Office which follows the guidelines issued by the relevant Ministry implementing the case-law of the ECJ. According to Danish practice, Danish nationals shall demonstrate that they have *genuinely and effectively resided* in another Member State. This requirement surprisingly follows from *Metock* (case C-127/08) even though this case has nothing to do with family reunification in one's own State. The Immigration Office then assesses on a case by case analysis whether this requirement is fulfilled. It is up to the applicants to choose how to prove their previous use of the right of free movement and it is difficult to know upon which criteria the assessment is made. A registration certificate attesting residence in another Member State is not sufficient in itself and supplementary documentation is needed. This leaves a great discretion to the public authorities, which is difficult to reconcile with the fundamental right of free movement and residence.

To my knowledge only one case of family reunification to a Dane pursuant to EU law has reached Danish courts. The couple returned to Denmark after approx. 6 months in Germany where they were residing in a rented flat.[63] The Western Appeal Court found that EU law was not applicable since the Danish national had not demonstrated that she had genuinely and effectively resided in Germany. The national court relied on the fact that the Danish national kept her apartment in Denmark while the couple resided in Germany, that she was frequently in Denmark where she worked at weekends and that the plans of setting up a pizzeria in Germany were very loose. Implicitly the ruling seems grounded in an abuse of EU law in order to circumvent the strict Danish immigration rules. It seems extremely difficult for a Danish national to demonstrate genuine and effective residence where the person has not exercised economic activity in another Member State. In other words, such residence is implicitly assimilated to an abuse of EU law regardless of whether it is genuine and effective. The Danish Appeal Court did not find it necessary to ask a preliminary question to the ECJ on the lawfulness of the Danish requirement and its application in the given case. On this background, the ECJ's rulings on the nature and extent of the cross-border element in the pending cases of *O* and *S* are nervously awaited in Denmark.[64]

Where the Danish national has a right to family reunification pursuant to the free movement rules in the Treaty, the provisions of the Directive apply by analogy in defining the protected family members, the length and the con-

63. Judgment of Western Appeal Court of 27/3/2012, B-1173-11, reported in U2012. 2187V.

64. C-456/12, *O* and C-457/12.

ditions for residence.[65] This is not the case where the right of family reunification is based on Art. 20 TFEU which is analysed below.

Art. 20 TFEU and internal situations

The Ministry of Integration has in a Briefing Note on the legal implications of the *Zambrano* ruling specified that the ECJ's ruling in this and subsequent cases is very narrow.[66] It is only applicable in cases where the decision of the Danish authorities would lead to his/her departure. In cases of family reunification, the following criteria have to be taken into account: (1) the case must concern the right of residence of a *parent* to a Danish child, (2) the parent shall be a third-country national, (3) the parent shall live with the Union citizen and provide for his/her needs, (4) refusing a right of resident to the parent would lead the child to leave the Union, which is most likely where there is no other parent with whom the child can live, (5) the parent does not need to be the biological parent, but can be another adult upon whom the child is dependent.[67] According to the Ministry of Justice, *Zambrano*-situations are unlikely to arise in Denmark as children born in Denmark normally only get Danish nationality where one of the parents is a Danish national (and in such a case the *Zambrano*-rationale is not applicable). Should the extraordinary situation nevertheless arise where a Danish child is compelled to leave the Union, then the third-country national shall be granted a right of residence pursuant to Art. 20 TFEU.[68] Yet, since the Directive is not applicable to this situation, Danish authorities shall not apply its provisions by analogy, and the

65. Where Danish nationals have not worked in another Member State, but only resided there lawfully, they have to demonstrate on their return that they can provide for their needs and for that of their family. Such interpretation of EU law is difficult to reconcile with the ECJ's ruling in case C-291/05, *Eind*.
66. Briefing Note of the Ministry of Integration of 11/5/2011 on the legal implications of the *Zambrano*-ruling. The note was subsequently updated by the Ministry of Justice (now in charge of immigration) in the light of the cases C-434/09, *Mc Carthy*, C-256/11, *Dereci* and C-356-357/11, *O & S*.
67. In accordance with the Court's rulings in joined cases C-356-357/11, *O & S*.
68. Such extraordinary situation could arise where Denmark is compelled by the U.N. Convention on the protection of the rights of children to grant Danish nationality to a stateless child born in Denmark. It could also arise in mixed couples where the Danish parent dies, departs, or is in some other way is not providing for the needs of the Danish child, or the couple divorces.

authorities are not bound by its provisions on who is a family member and on the right of permanent residence.[69]

The restrictive interpretation of *Zambrano* by the Danish government is questionable in the light of EU law. Indeed, it might argue that since the decisive criterion is the link of dependency with the Union citizen/Danish national, a right of residence pursuant to Art. 20 might also arise in cases where the Union citizen is not a child, but an adult who is dependent on another person for his financial and emotional needs. Likewise, Danish authorities' refusal to give a right of residence under EU law to the other parent who is also a third-country national (Mrs Zambrano) is also difficult to reconcile with EU law. Yet, it is typical of the Danish authorities' restrictive application of the Court's case-law on family reunification. No court case has been reported on Art. 20 TFEU, but the Ministry of Integration has in four decisions referred to the *Zambrano*-ruling.[70] In two of these cases, a right of residence was given on the basis of Art. 20 TFEU to a third-country national who was a widow to a Danish national with whom she had a Danish child.

Question 8

The *Rottmann* ruling of 2010 had no direct implications on the Danish rules of loss of nationality. Yet, Danish law and practice might be difficult to reconcile with the requirements of Union citizenship.

Danish nationality is automatically lost where the individual (1) has obtained another nationality or (2) was born in another country and has by his/her 22 years not lived in Denmark and has no attachment to the country. A person might be deprived from his/her nationality by court order (1) if the person has obtained it by fraud, or (2) has been convicted of a crime against the State.[71] Until now a couple of court orders have deprived citizens of their Danish nationality because of fraud, while the only case so far on grounds of crime against the State has been rejected.[72] It is only in respect of the latter ground that courts may refuse deprivation if the person becomes stateless. In

69. See the Briefing Note of the Ministry of Justice of 15/7/2013 on the legal implications of the *Zambrano* and subsequent rulings.
70. See P. Starup, *Grundlæggende Udlændingeret I*, DJØF 2012 at p. 354.
71. Nationality Act No. 252 of 1950 with further amendments. See Consolidated Act No. 422 of 7/6/2004 actually in force.
72. Eva Ersbøll, 'Country report – Denmark' for the EUDO Citizenship Observatory, updated in June 2013 available on: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-25-Denmark.pdf.

contrast, this is not the case where the deprivation is grounded on fraud.[73] Indeed, a person who was naturalized Danish was deprived of this nationality because of false declaration (not mentioning that he had been sentenced to prison and permanently deported from Denmark) although this deprivation rendered him stateless (he had previously renounced his Turkish nationality).[74] This ruling of the Appeal Court which was given in 2003 before *Rottmann*, is difficult to reconcile with this case and the principles of Union citizenship.

Concerning acquisition of Danish nationality, Danish rules are quite restrictive and nationality is essentially based on *jus sanguinis* while naturalization is possible after several years of residence.[75] Controversies very rarely reached Danish courts. It follows from the Constitution that nationality is indeed granted by name to each applicant by an Act of Parliament and can therefore not be subject to judicial review. This practice was very recently overruled by the Supreme Court which accepted for the first time to review the preparatory 'decisions' leading up to the Nationality Act.[76] Such 'overruling' was grounded in Denmark's international obligations which have to be respected or would otherwise lead to State liability for damages.

Finally, it might argue that the provisions of the Nationality Act which make a distinction between children depending on whether they are born in Denmark or in another country might conflict with the Union citizenship and the fundamental right of free movement.[77] Issues on nationality, naturalization, and double/multiple nationality are at the moment a hot topic in Denmark and are issues where courts might now play a role.

73. Eva Ersbøll mentioned above.
74. UfR.2003.1600V.
75. On the restrictive rules of acquisition of Danish nationality, see the report of Eva Ersbøll mentioned above.
76. Judgment of the Supreme court of the 13/9/2013 in case 306/2012.
77. See Sect. 8.1 of the Nationality Act where Danish citizens born in another country lose their nationality when they are 22 years old if they have not lived or have no connection to Denmark and Sect. 1.1 where the a child born abroad to a Danish father cannot become Danish.

Political rights of EU citizens

Question 9

The Directive on EP elections of 1993 was implemented by an amendment to the Act on Election of Danish Members of the European Parliament on the 1st of February 1994.[78] The Directive is fully implemented and contains no derogations. Similarly, it does not impose any additional conditions on EU nationals compared to Danish nationals.

Voting rights to the EP are granted to any citizen of another Member State who is 18 or above on the day of election and who is residing in Denmark.[79] Union citizens have the right to stand to the EP provided that they have the right to vote. Like Danish citizens, they may be deprived of their eligibility right if they have been punished for an act which makes them unworthy to be a member of the EP, this assessment being made by the Parliament *(Folketing)*. In addition and in accordance with the Directive, citizens of other Member States do not have such right to stand if they have been deprived of their eligibility right by a decision in civil or criminal law in their own State.[80]

Danish citizens who reside in another Member State have the right to vote and stand to EP elections on the same conditions as mentioned above with the exception of the residence requirement.[81] These rights are also granted to Danish nationals living in a third country who plan on returning to Denmark within 2 years (are considered to be residents in Denmark). Yet, this does not apply when moving to the Faroe Islands or Greenland. As pointed out by Eva Ersbøll in her report on Denmark for the EUDO Citizenship Observatory, this practice does not seem compatible with the ECJ's ruling in case C-300/04, *Eman and Sevinger*. It does indeed make a difference of treatment between

78. See Act No. 1086 of 22/12/1993.
79. According to the Act on the Civil Registration System, Sect. 6, 'residence' means the place (dwelling) where a person regularly sleeps when not temporarily absent owing to holiday, business travel, illness or the like, and where the person has his or her property and belongings, cf. Eva Ersbøll mentioned above.
80. Eva Ersbøll, 'Access to electoral rights – Denmark', June 2013, EUDO Citizenship Observatory, available on: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=137-DK-FRACIT.pdf.
81. See Section 3(1)(2) of the Act.

Danes residing in a third country and Danes residing in other parts of the Danish realm which seems difficult to justify.

Question 10

The Directive on local elections of 1994 was fully implemented by the Act on Local and Regional Elections of the 1st of July 1995.[82] The directive is implemented without derogations and there is no additional conditions imposed on EU citizens when compared to Danes. As noted by Eva Ersbøll in her report on access to electoral rights mentioned above, 'the issue of EU citizens' electoral rights at local elections has been more or less uncontroversial, and there is no relevant case law on this matter in domestic courts or the ECJ'. Denmark had indeed already granted electoral rights at local elections, first to Nordic citizens since 1977, and later, in 1981, to all foreigners.

Question 11

EU nationals who have the right to vote to local elections also have such right in respect of elections to the 5 regional councils. Regional and local elections are indeed regulated through the same Act and follow the same principles.

Question 12

There does not seem to be any tension between EU law and Danish law limiting the scope of the *franchise of residents in Denmark*. Only persons with mental disabilities may be disenfranchised. According to the Danish Constitution's Sect. 29, a person who has been declared legally incompetent becomes disenfranchised. This will be the case where a person is deprived of his or her legal capacity under a guardianship order.[83] This is also specified in the various elections Acts. Prisoners cannot be disfranchised, but a conviction may render a person unable to run to public offices. They are different rules depending on the elections (national, regional/local, and the EP).[84] No difference is made between Danish citizens and other EU nationals.

There might be a tension between EU law and the constitutional requirement of residence for the *franchise of Danish nationals*. According to Sect. 29 of the Constitution, only Danes who reside in Denmark have a right to

82. See Act No. 208 of 29/3/1995 amending the Act on local elections.
83. See the report of Eva Ersbøll mentioned above in footnote 80.
84. See further the report of Eva Ersbøll mentioned above.

vote, thereby excluding Danes residing in other Member States. Since emigrants very rarely will enjoy a right to vote for the national parliament of their place of residence, this could amount to an obstacle to the free movement of Union citizens which can only be upheld if justified and proportionate. External voting rights are supported by most political parties and, 'consequently, the residence requirement has been broadened as much as possible within the limits of the Constitution'.[85]

Culture(s) of citizenship

Question 13

Danish authorities and courts have in their application of EU law, a tendency to be quite formalistic and their starting point is generally the national legal framework and culture. Union citizen is thus at times understood as an adjunct to Danish immigration law. This is especially true in respect of expulsion cases where the reference is the Aliens Act and the formal categories that it operates with. Only afterwards, do the administration and courts check whether the given outcome is also in line with EU law. It is also interesting to note that the Aliens Act is by its complexity and its terminolgy more aimed at the administration than at the citizen. One might argue that it is more framed in permission terms than in right-based terms and this might be reflected in the way issues of foreigners, including Union citizens, are addressed and administrated. Yet, recent court cases are evidence of a change in this respect with direct reference to EU law and the protection of individual rights.

Similarly, as the report has also shown there is at times a restrictive interpretation of EU rights, especially in two areas. The first area is that of social benefits, be it for workers (and first-time jobseekers) or for inactive Union citizens. It is difficult to assess whether the latter enjoy any right or protection at all. 'Pure' Union citizenship rights thus seem predomantly construed as permission- rather than right-based, and depend on whether Union citizen is seen as lawfully residing in Denmark. The second area, where the authorities have a restrictive interpretation of EU-rights is family reunification (and social benefits) for their *own citizens* who have made used, of their free movement rights or who might be covered by the *Zambrano*-doctrine.

85. Eva Ersbøll mentioned above.

On a final note, with the exception of expulsions, I have found very little litigation. There might be issues of Union citizenship that never reach courts and Appeal boards, or that are not reported. In addition, courts and boards nearly never refer cases for a preliminary ruling to the ECJ in respect of free movement of persons and Union citizenship. In some of the expulsion cases, courts addressed this issue, but always concluded that a reference was not needed in the given case. There is only one exception which is the reference by the Appeal Tribunal for Students' Grants and Loans Scheme in the *LN* case mentioned in question 5. This is, to my knowledge, the first time an Appeal Tribunal in the social area asks the ECJ how EU law and the Residence Directive shall be interpreted.

Question 14

To my knowledge, no court case relating to Union citizenship and/or free movement rights refers to the Charter of Fundamental Rights of the European Union. For example, there is no reference to the Charter in any of the deportation cases reported under question 6.

Question 15

Issues connected to EU nationals feature quite frequently in the Danish mainstream and specialized media. Issues on EU nationals are generally reported under the heading of immigration where they are mostly pictured in negative terms. Media rarely refer to EU/Union citizenship as such. A search on Infomedia (which is a database covering all press articles published in Denmark) reveals that the concept is not used in the Danish newspapers and the rights attached thereto are generally not mentioned. As a general rule, the Danish media do not clearly distinguish between EU citizens and immigrants from third countries. In contrast, they are mostly all together treated as 'foreigners'. Yet, there is at times a tendency of criticising specific groups of foreigners, such as those from the Eastern European countries, the Polish, Turks, Somalians, and so on.

Dominant themes are access to state benefits and expulsion of immigrants. In addition, there is specific focus on issues of social tourism and social dumping, which are mainly a consequence of the application of EU law. Therefore EU citizens are the target of such criticism and especially those from the poorer Eastern European EU countries.

The media, politicians and social tourism

2013 was the year where politicians and the press were shocked by the ECJ's ruling in the *LN* case, mentioned above, entitling students who work part-time in Denmark to student grants on an equal footing with Danish nationals. Nearly all political parties reacted negatively, and claimed that this was not an issue that the EU and the ECJ shall decide upon. The general picture that emerged from the Danish media was that the ECJ's ruling threatened the existence of the Danish welfare State in the long run, as well as the future of Danish students. Yet, two parties, the Radicals and the Social Democrats claimed afterwards that this supposed threat was largely overstated as numbers did not predict a high increase in entitled students from other Member States.

Looking further back in time, since the enlargement of the EU to the 10 new Member States in 2004, the issue of social tourism has been on the agenda of both politicians and the media.[86] The discourse revolves around the distinction between 'us' and 'them', where EU-nationals – especially those from the Eastern European countries – are portrayed as people who mainly come to Denmark to benefit from its generous social system, such as family and employment benefits.[87] A few politicians refuted this assumption and in autumn 2013, the media timidly qualified the picture by quoting experts' views that there is no evidence that people move to get access to State benefits.[88] Also the Commission's report counteracting the widespread notion of welfare tourism within some Member States received some media coverage.[89]

86. In view of the enlargement of 2004, the government issued a report on Danish social benefits (*'Danske sociale ydelser i lyset af udvidelsen af EU'*) in April 2003 which was abundantly discussed in the media.
87. For example, see the article of 23/9/2013 in Jyllands-Posten on the number of EU-citizens who are in receipt of the jobseeker allowance, 'Flere end 7.000 EU-borgere får dansk kontanthjælp', and Jyllands-Posten,18/10/2013 on family benefits, 'Regeringen mangler flertal for at fjerne hegnet om børnepengene'. On benefit tourism more generally, see for example Ugebrevet A4, 'Velfærdsturisme starter dansk velfærdsslagsmål', 24/9/2013, and Jyllands-Posten, 'Spillet om den danske velfærd', 25/8/2013.
88. Mandag Morgen, ''Velfærdsturisme' er en god forretning', 16/10/2013.
89. European Commission, DG Employment, Social Affairs, and Inclusion, Final report submitted by ICF GHK in association with Milieu Ltd. 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence' of 14/10/2013.

Yet, media focus is still on EU-nationals from poor countries contributing little to the Danish welfare State or for little time and filling their pockets with State money on their way. In the Autumn 2013, the Ministry for European Affairs stated that he would look at each specific social benefits and assess which safeguards could be put into place. In this respect Denmark joined the club of countries comprising the UK, Germany, and The Netherlands which are actually putting pressure on the EU to protect themselves against what they call 'poverty migration'.[90]

The negative image of immigrants/EU nationals and their association with social tourism is to a certain extent due to the huge impact of the Danish Right Wing Party, The Danish People's party (*Dansk Folkeparti*) on the Liberal-Conservative government between 2002 and 2011 where it was supporting it. For several years, the People's Party made the adoption of restrictive immigration rules and/or cuts in immigrants' rights to social benefits a condition for their support of the government's State budget. In addition, the Party was the initiator of at least one comprehensive study examining how to restrict the social rights of foreigners.[91] Likewise, the People's Party entered into an agreement with the Liberal-Conservative government in 2008 with a view to combat the negative consequences of the *Metock* ruling. Both the report and the agreement received massive media coverage. The party is still successful in drawing the attention of politicians, the media, and the Danish people on the threat that EU citizens pose to the welfare state. This was most recently demonstrated in relation to the issue of student grants. The party perceived the *LN* ruling as the ECJ's unlawful intrusion into Danish sovereignty, and obtained that the numbers of applications would be closely monitored and the issue would be taken up again in the coming years.

The media, Roma people, and expulsion cases

The Roma people are a minority group on which the media focuses massively. Issues relating to the Roma people pop up regularly in the Danish media depending on police reporting. This is true not only in respect of problems

90. Berlingske Tidende, 'Danmark går i EU-opgør om sociale ydelser' of 30/11/2013.

91. The Danish People's party was, for example, the successful initiator of a report on foreigners' access to social benefits in March 2011 where the Ministry of Employment issued a report on 'residence requirements' (*'Rapport om optjeningsprincippet i forhold til danske velfærdsydelser'*). Still in 2011, the economic consequences of foreigners were also the object of a report, *Indvandringens økonomiske konsekvenser*, 4/2011.

arising in Denmark, but also more generally where the media refer to situations involving this minority in other Member States. The media uses cases from all Europe to fuel public indignation and thereby confirm all the stereotypes around the Roma people.

The influence of the Danish People's Party is also clearly visible on the issue of criminality committed by foreigners in Denmark, and their coverage by the media. The party is a frontrunner in discussing issues of expulsion of foreigners and prevention against criminality through border control. It is one of the few parties that support the abolition of the Schengen area and it was close to succeeding in this respect just before the Liberal-Conservative government stepped down in the autumn of 2011.

In conclusion, media mainly mirror a negative picture of immigrants, including EU nationals, which are associated to the fear of social tourism and dumping. Whereas EU individual rights, especially of workers, are at times explained by the media in small 'fact-boxes', the discourse is generally not one protective of these rights, but one which challenge their legitimacy. In other words, media attention is selective and more directed at the potential abuse of the generous Danish system. It is interesting to note in this respect that criticism is essentially targeted at those who are *economically active*, such as workers who contribute little to the Danish economy or for little time and who, nevertheless, have access to social benefits, for example jobseeker allowances and family benefits. Public discourse is not really concerned with access to social benefits by *inactive* EU citizens, but by those who in EU legal jargon qualify as workers. There is not a lot of focus on the social rights of the inactive and the reason might well be that the authorities in practice do not recognize them.

ESTONIA

Merike Saarmann and Siiri Aulik[1]

As a preliminary remark, it should be noted that there have been very few cases in Estonia relating to Directives 2004/38/EC, 93/109/EC, and/or 94/80/EC and/or the citizenship rights conferred directly by the Treaties or the Charter of Fundamental Rights. It is therefore difficult to outline any clear evolution in the understanding and interpretation of citizenship rights based on administrative and court practice.

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Directive 2004/38/EC (hereinafter also Directive) is primarily transposed into the Estonian legal system by the Citizen of the European Union Act[2] (hereinafter also CEUA), which originally entered into force on 1 May 2004 when Estonia joined the European Union. The Act was considerably amended in 2006 in order to transpose Directive 2004/38/EC, with the amendments entering into force on 1 August 2006.

As regards the application of the CEUA to Union citizens and their family members, the authors would like to point out three issues.

First, whereas Directive 2004/38/EC distinguishes between Union citizens' family members as defined in Art. 2(2) who enjoy the right of entry into and residence in the host Member State, and other family members envisaged in Art. 3(2) whose entry and residence must only be facilitated,[3] no such

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2. *Euroopa Liidu kodaniku seadus*. The English translations of Estonian Acts are available at www.riigiteataja.ee/en. Please note that not all translations are up to date.
3. Cf. C-83/11 Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others [2012] not yet reported, paras 18-20.

distinction is made in the CEUA. According to the CEUA, the term 'family member' includes the spouse of the Union citizen, direct descendants under the age of 21, and dependent direct relatives in the ascending and descending line of both the Union citizen and his or her spouse. It also includes other people who, in the country from which they arrive, are dependents or members of the household of the Union citizen or persons who require personal care by the Union citizen for reasons of health or disability.[4] However, the wording of the CEUA implies that a *dependent* person must already have resided together with the Union citizen prior to arriving in Estonia. This requirement may prove to be problematic in light of the recent case law of the CJEU, as dependent persons hoping to benefit from these provisions of the CEUA might not necessarily have previously shared a common household with the Union citizen in the country from which they arrive.[5]

Secondly, since registered partnerships, be they between same-sex or opposite-sex partners, are not legally recognized in Estonia, the concept of 'family member' in the CEUA would not seem to include registered partners. The CEUA also does not make any specific reference to partners with whom the Union citizen has a duly attested durable relationship, as set out in Art. 3(2)(b) of the Directive. However, a recent analysis on non-marital partnerships published by the Ministry of Justice suggests that a (registered) partner of a Union citizen could fall under the definition of 'member of the household' of the Union citizen, and thus fall within the scope of application of the CEAU.[6] According to the information provided by the Ministry of the Interior, this interpretation has been followed in practice and the right of residence of (registered) partners has been recognized.

4. Subsection 3(1) CEUA.
5. *Supra nota* 3, paras 27-35. The CJEU noted: '[---] the wording of Directive 2004/38 does not support the conclusion that family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive and who have duly demonstrated their situation of dependence on that citizen can be excluded from the scope of Article 3(2) of the directive solely because they have not resided in the same State as that citizen'.
6. Andra Olm. *Mitteabieluline kooselu ja selle õiguslik regulatsioon* (Non-marital Cohabitation and its Legal Regulation), Ministry of Justice, 2009, p. 77. Available at: http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf (4 November 2013). A similar interpretation has been given by the Minister of the Interior in his letter dated 17.11.2012 to the Chancellor of Justice, reference number 2-3/89-2. Available in the public document registry at: http://adr.siseministeerium.ee/sisemin/.

Thirdly, while the CEUA applies to Union citizens and their family members, it expressly states that it does not apply to Estonian citizens.[7] Yet the CJEU has confirmed that barriers to family reunification are liable to undermine the right to free movement not only when a Union citizen moves abroad, but also where that person wishes to return to his own state after having lived and (genuinely) worked in another Member State for a certain amount of time.[8] This raises the question of which rules should be applicable where an Estonian citizen who has lived and worked in another Member State wishes to return home together with his or her non-EU national spouse or (registered) partner. According to the information provided by the Ministry of the Interior, the provisions of the Aliens Act[9] (i.e. not specific to Union nationals and their family members) would be applicable in such situations. This, however, is a cause of tension, as the provisions of the Aliens Act regarding family reunification are less favourable than the comparable provisions of the CEUA (cf. answer to Question 7 below). At the time of writing this report, the authors are not aware of any such cases in Estonia, and thus it is not certain whether and how the practice of the CJEU would be taken into account when applying the relevant provisions of the Aliens Act.

As regards the implementation of Art. 5 of the Directive, no visa is required from third-country national family members who join or accompany a Union citizen and have a valid residence card.[10] Also, where a visa is required, it is issued free of charge.[11] The CEUA sets out that a visa may be issued to a family member provided that he or she has a valid travel document, there is proof that he or she will be travelling with or joining a Union citizen, and that his or her status as a Union citizen's family member is proved.[12] The family member also need not have a valid health insurance contract.[13] According to the Ministry of the Interior, where a family member does not have

7. Subsection 1(2) CEUA. Also, Art. 3(1) of Directive 2004/38/EC states that the Directive applies to all Union citizens who move to reside in a Member State *other than that* of which they are a national, and to their family members.
8. Cf. C-291/05 Eind [2007] ECR I-10719, esp. paras 35-37. Cf. also Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Brussels, 02.07.2009 COM(2009) 313 final, p. 3.
9. *Välismaalaste seadus.*
10. Section 10 CEUA .
11. Clauses 38(3)5) and 6) State Fees Act (*riigilõivuseadus*).
12. Subsection 10(2^1) CEUA.
13. Subsection 10(2^2) CEUA.

the required visa to enter Estonia, but it is proved that the person meets the abovementioned criteria, the visa is issued at the border, which in itself constitutes an accelerated procedure.[14]

Question 2

With regard to the sufficient resources requirement set out in Art. 7(1) of the Directive, the CEUA does not lay down any conditions for the right of residence of a Union citizen for more than 3 months in Estonia *except* the requirement to register one's residence in the population register.[15] This means that the Union citizen does not have to prove employment, sufficient resources or valid health insurance coverage.

However, the requirement of sufficient financial resources does come into play when a Union citizen who has come to reside in Estonia wishes to be joined by his family members who themselves are not EU nationals.[16] The CEUA foresees that the right of residence is granted to a family member provided that the Union citizen whom the family member wishes to accompany or join is either a worker or self-employed or has sufficient resources for himself and the family member, as well as valid health insurance, or if the Union citizen is a student who meets the same requirements of sufficient resources and health insurance.

The CEUA does not offer guidance on what are to be considered sufficient financial resources, but the explanatory memorandum to the draft CEUA mentions that this should be viewed on a case-by-case basis, taking account the particular circumstances of the person concerned.[17]

To date there is no administrative or court practice in Estonia on the expulsion of EU citizens and their family members on purely economic grounds. Considering that the threshold for a person to become eligible for a

14. The authors are not aware of any cases where the effectiveness of these procedural safeguards has been questioned.
15. The obligation to register one's place of residence also applies to Estonian citizens under the Population Register Act (*rahvastikuregistri seadus*).
16. The requirement of sufficient resources is also relevant with regard to retention of the right of residence by family members in the event of the death or departure of the Union citizen or in the event of divorce (sections 36-38 CEUA).
17. The explanatory memorandum to the draft CEUA (864 SE) is available on the website of the *Riigikogu*, the Parliament of Estonia at: www.riigikogu.ee.

subsistence benefit in Estonia is very low,[18] it would not be very difficult for a Union citizen to meet this requirement.

While no other (economic) conditions are posed on EU citizens to reside in Estonia, the requirement of a registered place of residence, however, seems to be the constitutive element of a Union citizen's right of residence in Estonia. According to the CEUA, a Union citizen only *acquires* the right of residence for more than three months in Estonia upon registration of his place of residence in the population register[19] and, subsequently, that right of residence automatically ceases to exist if the place of residence is no longer registered.[20] As having the right of residence is a pre-requisite for the lawful stay of more than three months of a Union citizen in Estonia (section 2 CEUA), a grammatical interpretation of the CEUA also leads to the result that, without a registered place of residence in Estonia, a Union citizen's stay becomes altogether illegal.[21] Moreover, if a Union citizen does not have a registered place of residence, his non-EU-national family members cannot join him in Estonia. It should be mentioned, however, that the CEUA does not foresee the issue of an expulsion order against someone who has not registered, nor is there any sanction for failing to register a (correct) place of residence.

While registration in the population register serves an important public interest function,[22] it is questionable whether linking a right of residence and its consequences exclusively and strictly to the administrative procedure of reg-

18. In 2013, persons whose monthly net income, after the deduction of the fixed expenses connected with their dwelling, was below 76.80 euros were eligible for a subsistence benefit.
19. Subsection 7(2) CEUA provides that a citizen of the European Union must register his or her residence pursuant to the procedure provided for in the Population Register Act no later than three months after his or her date of entry into Estonia. At the same time, a Union citizen may apply for registration before this deadline and thus obtain a right of residence earlier.
20. According to the interpretation provided by the Ministry of the Interior, a Union citizen can reside in Estonia without registration for three months after his place of residence ceases to be registered in the population register. He must have his new place of residence registered by the end of this period in order to have a continuing right of residence in Estonia.
21. This conclusion seems to apply regardless of whether the person has a job or sufficient resources to support himself and his family.
22. E.g. in relation to allocating a proportion of a person's income tax to the local government's budget, participating in local elections, calculating the period of the Union citizen's continuous residence in Estonia in order to grant the right of permanent residence, etc.

istration is proportional in terms of Art. 8(4)[23] and in light of recital 11[24] of the Directive.

Question 3

The articles concerning retention of the right of residence by family members in the event of the death or departure of a Union citizen or in the event of the divorce or annulment of a marriage have been transposed into Estonian law in accordance with the relevant provisions of the Directive.

As regards the requirements of having sufficient resources and not becoming an unreasonable burden on the Estonian social assistance system, see the answer to Question 2 above. According to the CEUA, a Union citizen must have sufficient resources for himself as well as his family if he wants to be joined by his non-EU national family member(s). If this condition is not met (or is no longer met during the period of residence), the CEUA foresees that expulsion measures may be taken against the family members. However, there are no provisions in Estonian law that prohibit the expulsion of family members of a Union citizen for economic reasons where the Union citizen is a worker, self-employed person or person seeking employment, as required by Art. 14(4) of the Directive.[25]

Question 4

The provisions of the CEUA regarding the right of permanent residence generally mirror the relevant provisions of the Directive. However, since the CEUA associates the *acquirement* of the right of residence for more than three months with registration in the population register, this criterion is also relevant when it comes to the right of permanent residence. In other words, the concept of legal residence implied by the words 'have resided legally' in Art. 16(1) of the Directive can, in the context of the CEUA, be construed to

23. Art 8(4), third sentence of the Directive states: 'Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.'
24. Recital 11 of the Directive states: 'The fundamental and personal right of residence in another Member State is conferred directly on citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures.'
25. The authors are not aware of any court cases in Estonia dealing with retention of a right of residence or having sufficient resources and not becoming a burden on the national social assistance system.

mean having a registered place of residence in Estonia according to the Population Registry Act.[26] In order for residence to be considered continuous in the meaning of Art. 16(1) of the Directive, a Union citizen (and his family members) must live in Estonia for at least six months a year, with exceptions for longer periods of absence due to reasons referred to in Art. 16(3) of the Directive.[27] The CEUA also prescribes an obligation to notify the Police and Border Guard Board of absences longer than six months.

According to the information provided by the Police and Border Guard Board, 5154 Union and European Economic Area citizens and citizens of the Swiss Confederation have been granted the right of permanent residence in Estonia. Also, 59 non-EU national family members have acquired the right of permanent residence in Estonia.[28]

Question 5

There is no specific provision in the CEUA that directly transposes Art. 24 of the Directive. Therefore, in order to obtain an overview of how the requirement of equal treatment and the derogations from this requirement (as set out in Art. 24(2)) are being applied, we must look into various sector-specific legislative acts. A number of different legislative acts regulate the provision of and access to different social benefits.[29] Pursuant to these laws, benefits are available to both Estonian citizens as well as Union citizens and their family members who *have the right of residence*[30] in Estonia. As noted earlier, according to the CEUA, the right of residence is linked to registration of a person's place of residence in Estonia. Although there is no requirement to register a place of residence during the first three months of a person's stay in Estonia, there is nothing to prevent a Union citizen from doing so. Consequently, there do not seem to be any exceptions that would specifically limit access to social assistance during the first three months of residence (or longer periods with regard to job-seekers) mentioned in Art. 24(2) of the Directive.

26. Cf. also answer to Question 2.
27. Subsection 2(2) CEUA..
28. Information as at 1 October 2013. To the best knowledge of the authors, there have been no court cases in Estonia regarding the right of permanent residence
29. E.g. the Social Welfare Act, Social Benefits for Disabled People Act, State Family Benefits Act, Victim Support Act, Labour Market Services and Benefits Act, Parental Benefit Act, etc. This list is exemplary and does not aim to provide a comprehensive overview of all the social benefits granted in Estonia at state and local level.
30. Cf. also the answer to Question 2 regarding the right of residence.

Regrettably, it would seem that Estonia has not properly transposed the derogation expressly set out in Art. 24(2) of the Directive concerning maintenance aid for studies. Whereas the Directive provides that Member States are not obliged to grant student loans prior to acquisition of the right of permanent residence, such derogation can only be applied with regard to economically non-active Union citizens[31]. Consequently, if a Union citizen is a worker, self-employed person or retains such status, he should be treated equally with nationals of the Member State for the purposes of granting student grants and loans, i.e. without setting the requirement of permanent residence. As the CJEU has recently confirmed, the fact that a Union citizen has a right of residence in the Member State as a student 'for the principal purpose of following a course of study' does not automatically exclude the possibility that he can also have the status of worker within the meaning of Art. 45 TFEU.[32] Under the Estonian Study Allowances and Study Loans Act,[33] study allowances are granted to both Estonian citizens and persons with the right of residence in Estonia under EU law. The possibility to apply for study loans, however, is limited to Union citizens and their family members who have acquired the right of *permanent* residence, regardless of whether the Union citizens simultaneously fall under the category of worker, self-employed person or someone who has retained such status.

Question 6

The CEUA provides for the possibility of restricting the right of entry and the right of residence of Union citizens and their family members, including the possibility of ordering their expulsion, if this is justified on the grounds of public policy, public security or public health. The specific regulation regarding expulsion and exclusion orders, including the considerations that must be taken into account before issuing an expulsion order, is laid down in the Obligation to Leave and Prohibition on Entry Act.[34] Although the Act sets out some specifications and limitations regarding Union citizens and their family members based on Arts 27-29 of the Directive, it does not clearly distinguish between the concepts of 'public policy, public security or public health', 'se-

31. Cf. C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte [2013] not yet reported, para. 35.
32. *Ibid*., paras 35-36.
33. *Õppetoetuste ja õppelaenu seadus*.
34. *Väljasõidukohustuse ja sissesõidukeelu seadus*. The Act applies to all foreigners, not only to Union citizens and their family members.

rious grounds of public policy or public security' and 'imperative grounds of public security'[35]. To the best of our knowledge, to date there have been no cases in Estonia where the differentiation between these concepts has been challenged or considered.

However, there has been one case in Estonia regarding prohibition of the right of entry of a Union citizen on grounds of public order and public security. This case concerned two orders by the Minister of the Interior that set a short-term prohibition on entry on a Finnish citizen who was considered to incite political hatred and provoke conflict, and was suspected of cooperating with extremist groups that organise anti-government campaigns. The prohibition orders covered the time periods when the authorities expected that campaigns aimed at provoking anti-Estonian sentiment would take place, which it was feared might result in violent clashes. According to the Minister, the decisions considered the free movement rights of Union citizens and the requirements set out in Directive 2004/38. While the court of first instance upheld the orders, they were overturned by the court of appeal, which noted that while the appellant had expressed critical opinions about Estonian history, politics and relations between ethnic groups with which many people would disagree, these statements could not in themselves be considered to induce political hatred. Moreover, since it was not substantiated that the presence of the appellant at the planned public events would cause violent clashes, the measures taken against him were based on considerations of general prevention and therefore unlawful.[36]

35. Cf. subsections 29^1(2) and (3) of the Obligation to Leave and Prohibition on Entry Act. These provisions refer to instances where a Member State *cannot* rely on grounds of public health or public order, but do not set out when expulsion decisions *can* be taken against Union citizens and their family members who have the right of permanent residence or who have resided in Estonia for ten years or more.

36. Cf. decision of the Tallinn Circuit Court No. 3-09-1279 of 12.12.2010. Available at: https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/menetlus.html?kohtuasjaNumber=3-09-1279/72 (13 November 2013).

Question 7

To date there have been no cases in Estonia where the courts have dealt with possible rights deriving directly from EU citizenship status in situations that are argued to be 'purely internal.' However, the issue of reverse discrimination arising in purely internal situations has played a role in two of the cases addressed by the Chancellor of Justice (hereinafter also Chancellor).[37]

It is the settled case law of the CJEU that any difference in treatment between Union citizens who have exercised their right of freedom of movement and those whose situation is considered purely internal, does not fall within the scope of Union law.[38] Nevertheless, the CJEU has suggested that such difference in treatment may still be relevant under national law where the law of the Member State requires that nationals of that state should be allowed to enjoy the same rights as those which nationals of another Member State would derive from Union law in a comparable situation.[39] Against this background, it can be argued that the different treatment of persons who can and cannot invoke rights deriving from EU law comes within the scope of application of § 12 of the Estonian Constitution, which sets out the principle of equality.[40] This hypothesis has yet to be tested in the courts.

In the first of two cases, the Chancellor of Justice examined the linking of reduced public transport fares in Tallinn, the capital of Estonia, to a residence requirement, i.e. only registered residents of Tallinn could benefit from the reduced fares. In the opinion of the Chancellor, such a residence requirement

37. The Chancellor of Justice (*õiguskantsler*) is an independent official who reviews the legislation of general application of the legislative and executive powers and of local governments for conformity with the Constitution of the Republic of Estonia. He also serves as an *Ombudsman.*

38. C-127/08 Metock [2008] ECR I-06241, para. 78. Cf. also different approach suggested by Advocate General Sharpston in the Ruiz Zambrano case. Opinion of Advocate General Sharpston in case C-34/09 Ruiz Zambrano [2011] ECR I-01177, paras 123-150.

39. Cf. C-212/06 Government of the French Community and Walloon Government [2008] ECR I-01683, para. 40.

40. § 12 states: 'Everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds.'

might constitute indirect discrimination on grounds of nationality under EU law and therefore EU citizens would be able to contest this measure relying on EU law.[41] As regards Estonian citizens who reside in Estonia but outside of Tallinn and who cannot rely on EU law, the Chancellor noted that where the nationals of other Member States are treated more favourably in a comparable situation solely due to the fact that they can invoke EU law, such situations could fall within the scope of § 12 of the Constitution. In other words, it might be possible to rely on the constitutional requirement of equal treatment in cases of reverse discrimination.[42]

In 2013, the Chancellor analysed the compliance of the Aliens Act with the constitutional requirements of respect for family life and equal treatment. Pursuant to the Aliens Act in conjunction with the Family Law Act,[43] the third-country national spouse of an Estonian citizen can apply for a residence permit in Estonia while the same is not possible for a same-sex (registered) partner in a comparable situation.[44] The applicants questioned whether this also constitutes reverse discrimination, as a Union citizen who resides in Estonia can rely on the CEUA and Directive 2004/38 when seeking family reunification with his or her non-EU national same-sex partner,[45] whereas the Aliens Act applicable to static Estonian citizens does not foresee such possibility. However, the Chancellor chose not to address the issue of reverse discrimination in his conclusions,[46] but rather found the regulation to be unconstitutional based on the right of family life in conjunction with equal treatment between same-sex and opposite-sex couples.[47]

41. A similar case was recently before the CJEU. Cf. C-75/11 Commission v Austria [2012] not yet reported.
42. Cf. letter from the Chancellor of Justice to the Tallinn City Government, dated 29.12.2010, reference number 6-4/100271/1007546, points 67-76. Available at the public document registry of the Chancellor of Justice at: http://adr.rik.ee/okk/.
43. *Perekonnaseadus*.
44. According to the Aliens Act, a temporary residence permit may be issued to a foreigner for the purpose of settling with a *spouse*. At the same time, the Family Law Act does not recognise registered partnerships and prescribes that marriage is contracted between a man and a woman.
45. Cf. answer to Question 1 above.
46. Cf. letter of the Chancellor of Justice to the Minister of the Interior, 05.11.2013, reference number: 6-1/120905/1304680. Available on the website of Chancellor of Justice: http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_elamisloa_taotlemine_samasoolisele_elukaaslasele.pdf (5 November 2013).
47. Whereas opposite-sex partners can marry in Estonia and thus have the potential to apply for a residence permit for a spouse, same-sex couples do not have the same option.

Question 8

Although Estonia was one of the states that intervened and submitted observations in the *Rottmann* case, the subsequent (academic) discussion about the potential effects of the judgment in general as well as in the specific context of Estonian citizenship legislation has been relatively moderate.[48] It is interesting to point out, however, that the updated commentary on the Constitution of the Republic of Estonia now refers to the judgment and specifically notes that since *Rottmann*, the conditions for the acquisition and loss of citizenship, while still within the competence of the Member States, must have due regard for EU law, and are at least partially subject to review by the CJEU.[49] It remains to be seen whether and how such considerations emanating from Union law will be taken into account in adjudicating future cases regarding the acquisition and loss of Estonian citizenship.

There is, however, an ongoing discussion regarding the conditions of acquisition of Estonian citizenship through naturalisation and, consequently, of Union citizenship. According to the Estonian Citizenship Act,[50] Estonian citizenship is acquired either by birth or naturalisation. Among other requirements for citizenship by naturalisation, the applicant must have lived in Estonia on the basis of a residence permit or a right of residence for at least eight years prior to submitting an application for Estonian citizenship and must have lived *permanently* in Estonia for at least the five preceding years. Permanent residence in the context of the Citizenship Act means a lawful stay in Estonia for at least 183 days per year, provided that absence from Estonia does not exceed 90 consecutive days per year.

48. Cf. PhD dissertation: Berit Aaviksoo. *Riigi otsustusruumi ahenemine: kodakondsus nüüdisaegses Euroopas.* (Narrowing of State Discretion: Citizenship in Contemporary Europe) Dissertationes Iuridicae Universitas Tartuensis, Tartu, 2013. Available at: http://dspace.utlib.ee/dspace/bitstream/handle/10062/29120/aaviksoo_berit.pdf?sequence=1 (13 November 2013). Cf. also Berit Aaviksoo, *Petturlik hr Rottmann, föderaliseeruv Euroopa ja põhiseaduse aluspõhimõtted – poleemiline pastišš* (The Fraudulent Mr. Rottmann, Federalising Europe and the Fundamental Principles of the Constitution – Polemical Pastiche), Juridica 4/2013, pp. 223-233.
49. Berit Aaviksoo. Comments to § 8 of the Constitution, *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne,* Juura, 2012. The commentary on the Constitution of the Republic of Estonia is available online: http://pohiseadus.ee/.
50. *Kodakondsuse seadus*.

A case brought before the Administrative Law Chamber of the Supreme Court[51] (hereinafter SC) concerned a Turkish citizen who applied for Estonian citizenship. Although he had moved to Estonia nearly ten years previously and had a family in Estonia, his application was rejected on the grounds that he did not meet the condition of permanent residence, since he had spent more than 183 days per year away from Estonia due to his work as a ship captain. The applicant claimed that he was discriminated against based on his occupation, which, due to its nature, did not allow for him to spend the necessary minimum of at least 183 days per year in Estonia.

In its decision the SC noted that while persons who have resided in Estonia for the required period of time and persons who have not are treated differently, there are legitimate reasons, which justify the permanent residence requirement. These include the need to ensure that there is a stable connection between the person and the state, which consequently allows for the presumption that he or she is sufficiently integrated in Estonian society. The permanent residence requirement also enables the state to ensure that a person respects and observes the constitutional order and laws of Estonia.[52]

In this case, which preceded *Rottmann,* the SC noted that by obtaining Estonian citizenship, a person also becomes a Union citizen.[53] The court did not, however, examine whether EU law and Union citizenship might have any impact on assessing the legality of Estonian citizenship requirements.

This judgment was criticized notably by one of the judges. In his dissenting opinion, Justice Anton held that the requirement that a person is considered to have lived permanently in Estonia only if he has not left Estonia for more than 183 days per year for the past five years and which excludes any possibility of weighing the particular circumstances of the applicant might be too strict and consequently unconstitutional. He also noted that the notion of permanent residence should be construed to take into account changing social circumstances and the fact that it is becoming more common to work abroad. This includes situations where a person works in another Member State but returns regularly home to his family in the host Member State.[54]

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51. The Supreme Court (*riigikohus*) is both a court of cassation and a constitutional review court.
52. Judgment of the Administrative Law Chamber of the Supreme Court No. 3-3-1-42-08 of 20 October 2008, paras 26-30. Available at www.riigikohus.ee.
53. *Ibid.,* para. 29.
54. Dissenting Opinion of Justice Tõnu Anton to the Judgment of the Administrative Law Chamber of the Supreme Court No. 3-3-1-42-08 of 20 October 2008, para. 3. Available at www.riigikohus.ee.

In a subsequently published article, Uno Lõhmus questioned whether, in the light of the free movement of persons in the EU, such a strict and formalistic approach to the permanent residence requirement complied with EU law. He accurately noted that this question would clearly arise if the applicant were a citizen of another Member State applying for Estonian citizenship.[55]

More recently in 2012, the Chancellor of Justice addressed a proposal to parliament in which he held that the five-year permanent residence requirement in the Citizenship Act was unconstitutional and should be amended, as it does not allow for any consideration of the specific circumstances of the applicant.[56] While the proposal found support in parliament, as of the time of submission of this report, the Citizenship Act has not been amended.

As for the conditions for loss of citizenship, the Citizenship Act foresees that a person must renounce his current citizenship in order to qualify for Estonian citizenship by naturalisation. Further, Estonian citizenship that has been acquired through naturalisation can be revoked if the person has submitted false information or concealed facts, which would have precluded the granting of citizenship[57] and, consequently, a '*Rottmann* scenario' could potentially occur. It remains to be seen whether and how the proportionality and consequences of revocation of citizenship in light of EU citizenship rights would be taken into account, should such a case be brought before an Estonian court.

55. Uno Lõhmus. *Mõtteid kodakondsusest ühe kohtuotsuse valguses* (Thoughts on Citizenship in the Light of One Judgment), Juridica 2/2009, pp. 76-85 at p. 79. The article reflects the personal opinions of the author who was Judge at the European Court of Justice from 2004-2013.
56. Proposal of the Chancellor of Justice to the *Riigikogu*, 04.07.2012. Available at: http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_ettepanek_nr_17_riigikogule_eestis_pusivalt_viibimise_absoluutne_noue_kodakondsuse_taotlemisel_kods_ss_6_ja_11.pdf (13 November 2013).
57. The Citizenship Act also provides that a person who has dual citizenship by birth must renounce either Estonian citizenship or citizenship of the other state within three years after attaining the age of 18. However, as § 8 of the Constitution prescribes that no one may be deprived of Estonian citizenship acquired by birth, in practice there is no lawful means of depriving a person of Estonian citizenship if no choice is made. Cf. B. Aaviksoo, Comments, s*upra nota* 49.

Political rights of EU citizens

Question 9

The first European Parliament Electoral Act[58] (hereinafter EPEA) in Estonia entered into force in January 2003 in anticipation of the accession of Estonia to the EU on 1 May 2004. The primary additional condition imposed on Union citizens is residence. Estonian law does not require that Estonian citizens be residents of Estonia or of an EU Member State in order to stand as a candidate or vote in European Parliament (hereinafter also EP) elections in Estonia. If, however, a non-national EU citizen wishes to register as a voter or candidate, his or her permanent residence must be in Estonia, which the EPEA specifies to mean that the address details of the person have been entered in the population register.[59] As for other additional conditions, to register as a voter, in addition to the information required pursuant to Art. 9(2) of Directive 93/109/EC, a non-national EU citizen must declare that he has not been deprived of the right to vote in his home Member State and must submit a copy of his identity document.[60] To register as a candidate, EU citizens must submit the additional information set out in Art. 10(1) and (2) of the same Directive. We have found no evidence that fulfilment of these conditions or registration as a voter or candidate has been problematic in practice.

While the EPEA appeared to transpose the full requirements of Directive 93/109/EC, the fact that the right to be a member of a political party was reserved exclusively for Estonian citizens created an important legal obstacle that interfered with the full enjoyment of the right to stand as a candidate of non-national EU citizens or, more precisely, with their right to stand a chance at actually being elected. In EP elections, candidates can stand either as individual candidates or on a list prepared by a political party. While there is no formal requirement for a person on a party list to be a member of that party, the limit of twelve persons per list means that it is unlikely that anyone other than the party faithful will be included.[61] Candidates on a list where votes are

58. *Euroopa Parlamendi valimise seadus*.
59. Clause 4(2)2) and subsection 5(2) EPEA.
60. Subsection 21(1) and (2) EPEA, in accordance with Art. 9(3) of Directive 93/109/EC.
61. EP elections are rather simple in their structure in Estonia. Both before and after the entry into force of the Treaty of Lisbon, Estonia has been allotted six seats in the EP and the entire country constitutes one electoral district.

accumulated have a clear advantage over individual candidates.[62] The legality of the exclusion of EU citizens from political parties was questioned in two separate documents in 2005 by the EU Network of Independent Experts on Fundamental Rights.[63] While this obstacle has not been challenged in the courts within the context of EP elections, it became the subject of a legal challenge in the context of municipal elections, which is detailed in the answer to Question 10 below. The Political Parties Act has since been amended to allow for EU citizens to join and form political parties in Estonia.[64]

The EPEA must be amended to comply with the December 2012 amendments to Directive 93/190/EC. Currently, non-national EU citizens must submit an attestation from the competent administrative authorities of their home Member State certifying that they have not been deprived of the right to stand as a candidate in the home Member State or that no such disqualification is known to the authorities.[65] Now, if a citizen of the Union wishes to exercise the right to stand as a candidate, he must declare that he has not lost the right to stand as a candidate in EP elections in his home Member State, but it will be up to the Member State of residence to verify this information.[66] To comply with the amendment to Art. 10 of the Directive, a Union citizen will in the future also be obliged to submit information on his date and place of birth and his last address in the Member of State of residence.[67] The current EPEA amendment bill designates the National Electoral Committee as the contact point to receive and transmit information.[68] It is interesting to note that the bill does not foresee a different deadline for the submission of appli-

62. MEP Indrek Tarand is a notable exception. In the 2009 EP elections he obtained 25.8 % of the vote as an individual candidate, second only to one of six party lists, partially due to a general protest vote against party politics.
63. Report on the Situation of Fundamental Rights in the European Union and its Member States in 2005: Conclusions and Recommendations, p. 119, available at http://www.statewatch.org/news/2006/jun/EU-funrights-report05.pdf, (10 November 2013); Opinion of the E.U. Network of Independent Experts on Fundamental Rights Regarding the Participation of E.U. Citizens in the Political Parties of the Member State of Residence. March 2005, p. 14, available at http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdfopinion1_2005_en.pdf, (10 November 2013). Cited in U. Lõhmus, *Mõtteid*, *supra nota* 55, p. 83.
64. This amendment entered into force on 10 December 2006.
65. Subsection 27(6) EPEA.
66. Council Directive 2013/1/EU OJ L 26/27, 26.1.2013, Art. 6(2) and (3).
67. Proposed amendment to subsection 27(4) EPEA.
68. As at 15 November 2013. Available in the draft legislation database of the Ministry of Justice, http://eelnoud.valitsus.ee/main/mount/docList/70101512-7641-4c9e-b1f8-ad96de672abf#dCBKykZR, (15 November 2013).

cations to stand as a candidate by non-national Union citizens than that set for national citizens, as proposed in recital 8 of the amending directive. Currently, applications are accepted between the 60th and 45th day before the elections and all candidates must be registered by the 40th day before election day.[69] This short deadline might not be sufficient for information from the home Member States of all candidates to be considered in due time before registration closes, particularly since Member States are obliged to respond to requests for information in five *working* days,[70] not calendar days.

Question 10

In preparation for membership in the EU, a new Local Government Council Electoral Act[71] (hereinafter LCCEA) was passed in March 2002, which included provisions regarding Union citizens that entered into force upon Estonia's accession to the EU on 1 May 2004. Both Estonian citizens and non-national EU citizens must have their permanent residence, according to the information in the population register, in the municipality in which they wish to vote or run as a candidate.[72] In general, all of the same requirements are imposed on Estonian and other EU citizens,[73] except that EU citizens who wish to stand as a candidate must provide information on their nationality.[74] According to the National Electoral Committee, no disputes have arisen with regards to registration of non-national EU citizens as voters or candidates. Nevertheless, the issue of the extent to which political rights are guaranteed in practice has been raised.

The new LCCEA appeared to fully transpose Directive 94/80/EC. However, an important legal obstacle interfered with the full enjoyment of the right to stand as a candidate of non-national EU citizens or, more precisely, with their right to stand a fair and equal chance of actually being elected. The

69. Subsections 29(1) and (2) and 31(1) EPEA.
70. Art 6(3) of Directive 93/190/EC.
71. *Kohaliku omavalitsuste volikogu valimiste seadus*.
72. Subsections 5(1) and (5) LGCEA. Under subsection 5(2) LGCEA, Estonia also allows third country nationals who are residing in Estonia on the basis of a long-term residence permit or the right of permanent residence to vote in local government council elections.
73. Under subsections 55(2) and 48^{2}(1) of the Local Government Organisation Act (*kohaliku omavalitsuse valimise seadus*), rural municipality and city mayors, members of local governments and rural municipality and city secretaries must be Estonian citizens.
74. Subsection $33(3^{1})$ LGCEA, in accordance with Art. 9(1) of Directive 94/89/EC.

problems stemmed from § 48 of the Estonian Constitution, which sets out that only Estonian citizens may be members of a political party. This provision was also echoed in the Political Parties Act (hereinafter PPA), which reserved the right of membership in a political party to Estonian citizens who have attained 18 years of age and have active legal capacity.[75]

The exclusion of Union citizens from the right to membership in political parties was challenged by the Chancellor of Justice in a petition for constitutional review before the Supreme Court of Estonia (hereinafter also SC).[76] The Chancellor challenged the conformity of the provision of the PPA that did not allow EU citizens to be members of political parties with Art. 19 of the EC Treaty[77] and the Constitution. He argued that since the Constitution, pursuant to the Republic of Estonia Constitution Amendment Act (hereinafter CAA),[78] is to be applied with consideration for the rights and duties arising from the Accession Treaty, then the fundamental right to belong to a political party that is reserved for Estonian citizens under § 48 of the Constitution may be interpreted such that EU citizens also have the right to belong to a political party.

In a widely discussed decision,[79] the SC held that despite reference to the Constitution and the CAA, the Chancellor was in fact challenging the conformity of the provisions of the PPA with EU law. The SC declared the application with respect to the conformity of Estonian legislation with EU law to be inadmissible, as the law did not provide the Chancellor of Justice with the competence to petition for the Supreme Court to declare a parliamentary Act to be invalid because it is in conflict with EU law. Furthermore, the CJEU has held that the supremacy of EU law means the supremacy of its application and there is no requirement that an abstract judicial review procedure to ensure the compliance of national law with EU law be available in the Member States.[80]

Justice Laffranque dissented with the opinion of the majority on the issue

75. *Erakonnaseadus*, subsection 5(1).
76. Judgment of the Supreme Court *en banc* No. 3-4-1-1-05 of 19 April 2005. English translation available at http://www.riigikohus.ee/?id=823.
77. Now Art. 22 of the Treaty on the Functioning of the European Union.
78. *Eesti Vabariigi põhiseaduse muutmise seadus*. Cf. *infra* nota 79 for an explanation of its effect.
79. Cf. e.g. PhD Dissertation by Carri Ginter: Application of general principles of European law in the supreme court of Estonia, pp. 17-19, available at: http://dspace.utlib.ee/dspace/bitstream/handle/10062/6494/gintercarri.pdf?sequence=3, (10 November 2013).
80. *Supra nota* 76, para. 49.

of admissibility. She held that while the Chancellor was not competent to request that the SC review the conformity of national norms with EU law, he did have the right to petition for legislative acts that are in conflict with the Constitution to be declared invalid. She further held that the CAA obliges the SC to take the general principles of EU law into consideration, if these do not conflict with the fundamental principles of the Estonian Constitution.[81] Thus, the SC should have reviewed the Chancellor's application regarding the compliance of the relevant provisions of the Political Parties Act with the Constitution, which must be interpreted in conformity with EU law.[82]

Justice Laffranque added that while Art. 19 TEC and Directive 94/80/EC do not expressly oblige Member States to provide all EU citizens with the right to be members of a political party, the purpose of the electoral rights of EU citizens has been interpreted in EU law to be the political and social integration of EU citizens and ensuring equal opportunities in executing local government power. The right to belong to and form political parties on all levels is also supported by Art. 12(1) of the Charter of Fundamental Rights of the European Union (CFR). Equal opportunities and the equal treatment of candidates are not sufficiently guaranteed if non-national EU citizens are only able to stand as individual candidates, or even if they are on a party list without party membership or on a non-party electoral coalition list. Consequently, in accordance with the requirement of equal treatment under § 12 of the Constitution and in conjunction with the CAA and the interpretation of EU law, all EU citizens must be allowed membership in a political party for the pur-

81. Dissenting Opinion of Supreme Court Justice Julia Laffranque to the Judgment of the Supreme Court en banc No. 3-4-1-1-05, para. 4. The Constitution of the Republic of Estonia Amendment Act, which allowed for Estonia's accession to the EU, provides a 'bridge' between Estonian and EU law. The CAA comprises only 4 provisions, two of which govern its adoption and amendment. Of the substantive provisions, § 1 states laconically, that 'Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected' while § 2 sets out: 'When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia will be applied without prejudice to the rights and obligations arising from the Accession Treaty'. The true significance of these provisions are the subject of great scholarly debate in Estonia, particularly with regards to what is meant by 'the fundamental principles of the Constitution', and what might be the consequences if some rule or principle of EU law fails to respect them. Cf. e.g. Julia Laffranque, *Pilk Eesti õigusmaastikule põhiseaduse täiendamise seaduse valguses* (A Glance at the Estonian Legal Landscape in the Light of the Constitution of the Republic of Estonia Amendment Act), pp. 523-536 at p. 525. English translation available at http://www.juridicainternational.eu/?id=12684, (15 November 2013).

82. Dissenting Opinion, *supra nota* 81, para. 4.

pose of standing as a candidate in municipal elections. § 48 of the amended Constitution must be interpreted to mean that Union citizens may also belong to political parties, and the PPA should be tested against this interpretation.[83]

By the time of delivery of the judgment, both the Government and parliament had understood the need to amend the PPA. As of December 2006, the PPA allows all EU citizens of at least 18 years of age who have active legal capacity and whose permanent residence is in Estonia to be members of a political party.

Question 11

There are no regional elections in Estonia and no other elections in which resident EU citizens have explicit electoral rights. Yet a non-national EU citizen could theoretically play a role, albeit an indirect and small one, in the election of the President of the Republic. As a general rule, the President is elected by the members of parliament (*Riigikogu)*, who must be Estonian citizens. However, if no candidate receives the required mandate, the President is elected

83. *Ibid.*, *supra nota* 81, paras 9-10. Justice Laffranque added that if the SC had been unsure of the relevant norm of EU law and of how to interpret the Constitution, the Court could have suspended the proceedings and requested a preliminary ruling from the CJEU on the interpretation of Art. 19 of the EC Treaty as further defined by Directive 94/80/EC. Dissenting Opinion, para. 11. The SC issued an advisory Opinion on the interpretation of the Constitution in anticipation of Estonia's adoption of the Euro in January 2011 (Opinion of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-3-06 of 11 May 2006). In what has been called an 'unprecedented European-friendly' Opinion (cf. J. Laffranque, *Pilk, supra nota* 81, at pp. 530-531), the SC held that where a constitutional provision is in conflict with EU law, the effect of that provision is suspended, and only that part of the Constitution which is in conformity with the EU law or which is not regulated by EU law can be applied. However, the Court failed to address the issue of what would happen in EU law were to conflict with the 'fundamental principles of the Constitution' and what these principles might be (cf. on this issue the Dissenting Opinion of Supreme Court Justices Erik Kergandberg and Villu Kõve), Therefore, it remains unclear whether or not a constitutional provision that has been held to be contrary to EU law is actually 'asleep' (cf. J. Laffranque, *Pilk, supra nota* 81, at p. 531). There has also been academic criticism of the fact that the CAA has lead to the interpretation of Constitutional provisions which either add or subtract from the letter of the Constitution, which has lead to an increasing gap between the letter and meaning of the text. Cf. on this issue U. Lõhmus, *Põhiseaduse muutmine ja muutused põhiseaduses,* (Amending the Constitution and Amendments to the Constitution), Juridica I/2011, pp. 12-26, esp. pp. 22-26.

by an electoral body comprised of members of the *Riigikogu* and representatives of the local governments.

A local government representative to the electoral body must also be an Estonian citizen and a member of the local government council in question, but the councils were free to determine the method for electing a representative to the electoral body. An amendment to the President of the Republic Electoral Act[84] in 2010 set out that delegates are to be elected by the council in one round of voting, but made no mention of the citizenship of the council members. Thus, a non-national EU citizen who is a member of a local government council could vote in the election of the representative of that council to the electoral body that will vote to elect the President. It does not appear that this indirect enfranchisement of EU citizens was ever an issue in the adoption of this amendment.[85]

Question 12

Under Estonian law, persons in active service in the Defence Forces cannot stand as a candidate in elections, but have active voting rights.[86] Persons with mental impairments are not automatically disenfranchised. Where necessary, legal capacity is limited with specific mention of the acts and transactions which the person may continue to perform himself. If a court of law appoints a guardian for a person for managing all of the person's affairs, the person is deemed to be without active legal capacity with regards to voting rights.[87] Where a person is deemed to be without active legal capacity with regards to voting rights, this is clearly set out as a separate point in the relevant court decision.[88]

The restriction of the voting rights of prisoners is, however, the cause of significant tension. Under Estonian law, persons who, according to the data in the penal register, have been convicted of a criminal offence and who, as at

84. *Vabariigi Presidendi valimise seadus*.
85. According to the explanatory memoranda to the original and amended bills, this amendment was adopted to provide proportionate representation for opposition council members in larger municipalities in which several representatives to the electoral body are elected, Draft Bill 776 SE, available at www.riigikogu.ee.
86. Subsection 4(6), *Riigikogu valimise seadus* (Riigikogu Electoral Act, REA), subsection 5(6) LGCEA, clause 4(6)3) EPEA.
87. *Tsiviilkohtumenetluse seadustik* (Code of Civil Procedure), subsection 526(5).
88. We have been unable to identify any cases in which the restriction of the voting rights of a person in active service or a person with a mental disability has been contested in court .

30 days before election day, are serving a sentence in a penal institution, cannot be registered as voters for elections to the *Riigikogu*[89] (parliament), local government councils[90] or the European Parliament.[91] A person who has been disenfranchised cannot be a candidate in any of these elections. This issue has been addressed with regard to voting rights in national elections, the right to stand as a candidate in municipal elections and the right to vote in municipal elections, including in a number of ongoing challenges[92] in the context of the local government council elections held in October 2013.

There have been two separate applications regarding the national parliamentary electoral system and the validity of its results arising from the fact that convicted prisoners are precluded from voting.[93] While both of the applications were declared inadmissible for procedural reasons, the SC nevertheless deemed it appropriate to note that the provisions prohibiting convicted criminal offenders who are serving a prison sentence from taking part in parliamentary elections may be contrary to § 57 and § 11 of the Estonian Constitution[94] 'as they must be interpreted pursuant to Art. 3 of Protocol No. 1 to the European Convention on Human Rights as interpreted by the European Court of Human Rights in *Hirst (2) v the United Kingdom, Frodl v Austria, Green and M.T. v the United* Kingdom and, in particular, in the judgment of the Grand Chamber in *Scoppola v Italy (No. 3)*.'[95] The SC held that its rules of procedure precluded it from assessing this potential conflict in the cases in hand and noted that it was up to parliament to react to any possible contradiction.[96]

Recently, in the context of the October 2013 municipal elections, several challenges related to exclusion of prisoners from the right to stand as a candidate have been launched.[97] In one case, an appeal was submitted to the Con-

89. Subsection 22(3), REA.
90. Subsection 27(3) LGCEA.
91. Clause 20 (3) 1) EPEA.
92. The information on these cases reflects the situation as at 15 November 2013.
93. Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-7-11 of 23 March 2011 and Ruling of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-26-12 of 22 January 2013.
94. § 57 of the Constitution regulates voting rights and § 11 of the Constitution sets out the principle of proportionality.
95. Ruling No. 3-4-1-26-12, *supra nota* 93, para. 38. Judgment No. 3-4-1-7-11, *supra nota* 93, para. 11.
96. Ruling No. 3-4-1-26-12, *supra nota* 93, para. 38.
97. Cf. also Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-50-13 of 9 October 2013, Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-46-13 of 3 October 2013.

stitutional Chamber of the Supreme Court against a resolution of the City of Tartu Electoral Committee not to register the applicant as an individual candidate because he had been convicted of a criminal offence for which he was serving a prison sentence.[98] He claimed that this constituted a violation of the Constitution, international law and EU law. The SC held that the Constitution only regulates the active right to vote in local government elections but is silent on the issue of passive voting rights.[99] In the opinion of the SC, the legislature has regulated this matter in accordance with the Constitution. While not all of a prisoner's fundamental rights are restricted, imprisonment brings about the automatic restriction of those fundamental rights that presuppose that the person has the right to move freely in society. The work of a council member requires at a minimum that the member attend council meetings. Incarceration as a punishment is in essence the restriction of a person's freedom of movement, and it is therefore 'not unjustified' that prisoners be denied the right to stand as a candidate.[100]

This decision raises as many questions as it answers. If the SC considered a person's passive voting right to be a fundamental right, it should have assessed whether this practical consideration or inevitable consequence could be equated with a legitimate aim or whether some other legitimate aim for the restriction of passive voting rights existed. The permissibility of this measure would then have to be tested through the proportionality test required by § 11 of the Constitution. If, however, deprivation of this right is merely an additional consequence of the punishment of imprisonment, this raises the question of the permissibility of such additional punishment, as the deprivation of voting rights, active or passive, is not among the principal or supplementary punishments which may be imposed on a natural person pursuant to the Penal Code.[101]

As for the applicant's claims relating to international law, the SC held that Art. 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not regulate municipal elections and was therefore not applicable. The cited case law of the European

98. Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-44-13 of 2 October 2013. The Supreme Court is competent to hear complaints against the decisions or acts of electoral committees pursuant to Chapter 6 of the Constitutional Review Court Procedure Act. Such complaints must be adjudicated within seven working days.
99. *Ibid.*, para. 12.
100. *Ibid.,* para. 13.
101. *Karistusseadustik*, Chapter 3.

Court of Human Rights (ECtHR) is also not relevant, as the cases *Hirst v the United Kingdom, Green and M.T. v the UK and Scoppola v Italy* only address the right of prisoners to *vote,* not to stand as a candidate.[102] As for EU law itself, the SC held that Arts 39 and 40 CFR apply only to the rights of *non-national* EU citizens to participate in municipal *and* EP elections *under the same conditions* as nationals of that Member State, and do not regulate the voting rights of prisoners with the citizenship of the Member State in question. The CFR was therefore deemed to be irrelevant, and no other provisions or principles of EU law were considered.[103]

While this view might hold up to scrutiny with regards to Art. 40 CFR and municipal elections, this statement would seem to ignore that Art. 39(2) lays down the fundamental principle that '[m]embers of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.' This paragraph sets requirements for the conduct of EP elections with respect to all Union citizens, both nationals and non-nationals, who partake in EP elections in their Member State of residence.[104]

Less than a week later the SC made a similar judgment in an appeal launched by a convicted killer against refusal to register him as a candidate in the rural municipality in which he is serving his sentence. The applicant emphasized that the right to vote, which is guaranteed under the Constitution, and the right to stand as a candidate are closely related in Estonian law, as the right to stand as a candidate is restricted to persons who are entered on the list of voters. The applicant claimed that the absolute deprivation of voting rights was a disproportionate restriction of his fundamental rights and stressed that under the rule of law, restriction of voting rights cannot be punitive in nature.[105] While the SC conceded that the right to stand as a candidate is determined by the right to vote, this was not relevant in this case since the prisoner had not been refused registration as a candidate because he did not have the right to vote, but because he was in prison. Further, the Constitutional Chamber considered the prisoner's lack of a right to stand as a candidate to be con-

102. *Supra nota* 98*,* paras 16-17, emphasis added.
103. *Ibid.,* para. 15, emphasis added.
104. According to the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), 'Article 39(2) takes over the basic principles of the electoral system in a democratic State'.
105. Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-49-13 of 8 October 2013, para. 9.

stitutional regardless of whether he has the right to vote.[106] The SC reiterated that Arts 39 and 40 CFR do not regulate the voting rights of prisoners.[107]

Restriction of the active voting rights of prisoners in municipal elections has also been challenged in at least two different applications launched with an administrative court of first instance[108] by a total of nine prisoners. Unfortunately, as of the time of submission of this report, these cases were still within the appeal process, and the judgments have therefore yet to enter into force or be made public.

In a rather extraordinary application submitted to the National Electoral Committee by 145 prisoners,[109] the applicants claimed that the right to vote of 2380 persons who were serving a sentence in a penal institution had been violated in the October 2013 municipal elections and that consequently the elections should be declared unlawful and void throughout Estonia.[110] The SC rejected the application for procedural reasons but responded to the applicants' claim that Art. 3 of Protocol 1 of the ECHR had been violated. The SC pointed out that the European Court of Human Rights in *McLean and Cole v the UK* found that local governments bodies in the UK are not part of the legislature and therefore do not come under the scope of Art. 3 Protocol 1.[111] In *Molka v Poland*, the ECtHR held that the municipal councils, based on the Polish Constitution, do not form part of the legislature of the Republic of Poland. The SC noted that Estonia, like Poland, is a unitary state in which, pursuant to the Constitution, legislative power is vested in the *Riigikogu,* and thus perhaps signalled how it might find should it be faced with a similar but admissible case. Further, the SC noted that as a general rule, the results of local elections may be declared void only in a particular voting district, electoral district, county or city. However, the National Electoral may declare the results of voting to be void throughout the entire country if the elections have been held pursuant to a legal norm that has been declared to be unconstitutional.[112] In this case the SC decided that it could not review the constitution-

106. *Ibid.,* para. 17
107. *Ibid.,* para. 19.
108. Refusal to register a person on the list of voters must be challenged in an administrative court according to regular procedure.
109. The authorisation of all of the prisoners was not however recognised.
110. Judgment of the Constitutional Review Chamber of the Supreme Court No. 3-4-1-58-13 of 14 November 2013.
111. *Ibid.,* paras 27-30.
112. *Ibid.*, paras 25-27.

ality of the LGCEA, but provided procedural guidelines on how such procedure might be initiated.[113]

With EP elections scheduled for May 2014 and national parliamentary elections due in March 2015, it is highly likely that the outright ban on voting and standing as a candidate of convicted prisoners will be challenged. It will be interesting to follow where this series of cases will lead, and what Constitutional, EU and ECHR law will be applied. To date, the SC has addressed the issue of voting rights in appeals against decisions of the National Electoral Committee which must be decided within seven days[114] and which have centred around passive voting rights, to which cited ECtHR case law does not apply. Furthermore, the applications have related to the rights of prisoners in municipal elections, which may justifiably fall outside the scope of the ECHR and CFR. It will be interesting to see whether the courts will respond to questions regarding the legitimate aim of these bans and to the proportionality of blanket measures,[115] and whether they will re-assess the significance of Art. 39(2) CFR or look towards the democratic principles set out in Arts 6, 10 and 14 TEU should the issue of prisoners' voting rights be raised within the context of EP elections. As for Art. 3 Protocol 1 ECHR, the ECtHR has already found a violation where there was a blanket ban on prisoners' voting in elections to the European Parliament.[116] In the national courts, the SC has stated that § 56 of the Constitution must be interpreted to mean that the people exercise their supreme power also through EP elections and that article this provides for the fundamental right of Estonian citizens to vote and be elected in EP elections.[117]

113. *Ibid.,* paras 34-35.

114. *Põhiseaduslikkuse järelevalve kohtumenetluse seadus* (Code of Constitutional Review Procedure), section 44.

115. The Chancellor of Justice has analysed the possible legitimate aim of these restrictions in an Opinion submitted to the Chair of the Parliamentary Constitutional Committee Nr. 6-8/051820/0601632 in March 2006. According to the preparatory materials for the Constitutional Assembly that drafted the first post-occupation Constitution that was adopted in 1992, the ban on prisoner voting was intended to be temporary. The Assembly considered that the state was not yet 'technically prepared' to provide prisoner voting and there was also insufficient experience with democracy at that time. Decision of this issue was therefore delegated to parliament. While the Government of the Republic has proposed amending the ban, parliament has yet to act.

116. *Greens and M.T. v the United Kingdom*, nos. 60041/08 and 60054/08, § 77-78, ECHR 2010 (extracts).

117. Judgment of the Supreme Court *en banc* No. 3-4-1-33-09 of 1 July 2010, para. 40.

Within and beyond the Constitution, the issue of equal treatment of persons is also unresolved. For example, Estonian law prohibits convicted prisoners who are serving a sentence in a penal institution from voting and running in elections, but not persons who are subject to electronic surveillance as a *substitute* punishment or who may have been convicted of a more serious crime but who have been given a conditional sentence. The ban is also limited to the actual time that a person spends in a penal institution, which means that one prisoner might be banned from voting in more or fewer elections than another prisoner serving an identical sentence for an equivalent crime. Whether or not a person convicted of treason,[118] an act against the state, is in a comparable situation with a person convicted of theft is also pertinent, as unequals should not be treated equally if we are to respect the principle of equality[119].

What is clear is that under current Estonian law, the ban on convicted prisoners' voting rights in national parliamentary and EP elections is automatic and indiscriminate and fails to take into account the nature or gravity of the offence, the length of the prison sentence or the prisoner's individual conduct or circumstances. Since *Hirst (No. 2)* the ECtHR has found such blanket measures to be outside any margin of appreciation that the member state might have and thus incompatible with Art. 3, Protocol No. 1, ECHR.

Culture(s) of citizenship

Question 13

In Estonia, it is appropriate to speak of cultures of citizenship in the plural, as the cultures of Estonian citizenship by naturalization and within the context of Union citizenship are somewhat different. Within the context of naturalization in the post-occupation era, there are clear indications that Estonian citizenship is still considered to be a matter of 'permission', if not more. In a much discussed case detailed in the answer to Question 8, the Supreme Court

118. Hermann Simm, a former chief of the Estonian Defence Ministry's security department and convicted Russian spy who is serving a sentence for treason also applied for, and was refused, registration on the list of voters.

119. These concerns were raised by the Chancellor of Justice in an Opinion submitted to the Chair of the Parliamentary Constitutional Committee, *supra nota* 115, cf. in particular paras 49-51.

in 2008 emphasized that citizenship through naturalization is not a fundamental right, but indeed a privilege.[120] This sentiment was echoed by the Minister of the Interior on Estonian Citizenship Day in 2011.[121]

The appropriateness of the notion of privilege in today's world has been questioned in the academic literature by Uno Lõhmus,[122] who pointed out the notable effect of European integration, the weakening of national identity and the rise of cosmopolitanism on the institution of citizenship, as well as the influence of the principle of real and effective nationality, as developed by the ICJ in the 1955 *Nottenbohm* case.[123] In his view, it is difficult to justify the setting of formal obstacles to citizenship for foreigners who have strong ties to the Estonian state and society. This, he noted, would clearly raise the issue of compatibility with EU law, if an applicant were an EU citizen who had exercised his free movement rights.[124]

With regards to Union citizenship rights, we have found that administrative practice for EU citizens and their family members is generally favourable in its interpretation, and that the courts, the Chancellor of Justice, the Government and parliament have all recognized that the political rights of Union citizens must not only be enacted, but also guaranteed in practice.

These two cultures were intertwined recently in a speech by President Ilves in which he emphasized that Estonian citizenship is based on the Western ideals of the right of peoples to self-determination, independence as well as the equality of all people. While this was disrupted by the fanaticism of both Communism and Fascism, the value and guarantee provided by Estonian citizenship now extends beyond Estonia to the entire European Union. This allows for Estonian citizens to not only elect members of the Estonian parliament, but also, under certain circumstances, to elect the mayor of London or a city councillor of Berlin. He emphasized that we cannot say that 'the right to be an Estonian citizen means the obligation to be or become an Estonian' but that 'we can surely say that the right to be a European Union citizen that ac-

120. Judgment No. 3-3-1-42-08, *supra nota* 52, paras 28 and 31.
121. Ken-Marti Vaher: *Eesti kodakondasus on privileeg* (Estonian Citizenship is a Privilege), available at: http://www.parnupostimees.ee/650439/ken-marti-vaher-eesti-kodakondsus-on-privileeg (10 November 2013).
122. U. Lõhmus, *Mõtteid, supra nota* 55, at p. 85.
123. *Ibid.,* pp. 77 and 81.
124. *Ibid.,* p. 79.

companies Estonian citizenship means the obligation to be a European. This means to share the values upon which today's Europe is built'.[125]

Question 14

As there have been very few cases in Estonia where the courts have interpreted any of the rights of EU citizens addressed in this report, it would be misleading to speak of any trends. Whereas it has been noted that the Estonian Supreme Court was rather forward thinking in that it repeatedly made reference to the CFR already before its entry into force as a binding instrument,[126] with regard to the EU citizenship rights under review in this report, the potential effect of the CFR has yet to be investigated.

On the contrary, in the two challenges in relation to the October 2013 municipal elections detailed in the answer to Question 12, the Supreme Court held that Arts 39 and 40 CFR apply only to the rights of non-national EU citizens to participate in municipal and EP elections under the same conditions as nationals of that Member State, and do not regulate the voting rights of prisoners with the citizenship of the Member State in question. This view has been critiqued in the answer to Question 12 above.

Question 15

In our opinion, it cannot be said that issues connected to EU citizenship have been a very salient issue in the national media, since the national public discourse on citizenship is dominated by debate on the foundations of Estonian citizenship law and the integration of the non-ethnic-Estonian population since the restoration of independence in 1991. However, within and beyond this context, a number of issues relate to EU citizenship rights.

First, the local context should be explained briefly. As the Republic of Estonia that was established in 1918 never ceased to exist *de jure* during half a

125. *Ilves rõhutas Eesti kodakondsuse suurt väärtust*, (Ilves Emphasized the Great Value of Estonian Citizenship), available at http://www.postimees.ee/863284/ilves-rohutas-eesti-kodakondsuse-suurt-vaartust, (10 November 2013).

126. Cf. Julia Laffranque, *Eesti põhiseadus ja Euroopa õiguse kooselu,* (The Cohabitation of the Estonian Constitution and European Law), Juridica VIII/2003, pp. 180-190, at p. 187. Also, in her dissenting opinion to a 2005 case addressing the right to belong to political parties (cf. answer to Question 10) Justice Laffranque pointed to Art. 12(1) CFR as a source supporting the right to belong to and form political parties on all levels.

century of occupation, upon the restoration of *de facto* independence, the Estonian citizenry consisted of persons who were citizens of the Republic of Estonia on June 16, 1940[127] and their descendants. This meant that the hundreds of thousands of non-citizens who had settled in Estonia in the interim, and their descendants, did not automatically acquire Estonian citizenship.

Estonian citizenship is based on the principle of *ius sanguinis*. According to the Constitution, every child with at least one parent who is an Estonian citizen has the right to Estonian citizenship by birth,[128] with no territorial restrictions. There are no automatic rights for persons who are born on Estonian territory under the law (*ius soli*). Over the past years, there has been significant debate on whether Estonian citizenship law needs to expand its bases. This would include providing Estonian citizenship automatically to children born in Estonia to parents with undetermined citizenship to prevent their stateless status.[129] There have also been calls to initiate debate on whether Estonia's 'extremely conservative citizenship policy is sustainable ... for the development of a small state'[130] or whether a paradigm shift towards a form of 'constitutional patriotism'[131] needs to be made. The discourse is more focused on how to create a common identity and citizenship *within* the country

127. The invasion and occupation of Estonia by the Soviet Union began on 16 June 1940.
128. § 8, first sentence.
129. The Chancellor of Justice called for a public debate on the issue in 2009. Council of Europe Commissioner for Human Rights Nils Muižnieks has also called on the Estonian authorities to consider this option, cf. Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following his visit to Estonia from 25 to 27 March 2013, CommDH(2013)12, p. 3, available online at ww.coe.int.
130. Cf. *Valitsuse esimene tegevusaasta – vahekokkuvõtted* (The Government's First Year of Office – Interim Summary), Praxis Centre for Political Studies, May 2012, available at: http://www.praxis.ee/fileadmin/tarmo/PraxisYldine/praxis_05_29a.pdf, p. 19. Estonia also does not generally allow for dual citizenship, except where a person is a citizen by birth in both countries of citizenship. Cf. *supra nota* 57.
131. Report by the Chancellor of Justice to the *Riigikogu*, minutes of the XI Riigikogu, VI session, 1 October 2009, available at http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&date=1254380700&pkpkaupa=1&paevakord=4902#pk4902, (10 November 2013); The Chancellor borrowed this idea from a presentation made by Lauri Mälksoo on 15 May 2008 '*Põhiseadusel põhivev patriotism – kas see Saksamaal välja kujunenud mõiste puudutab ka Eestit?'* (Patriotism based on the Constitution – Does this Concept that Has Developed in Germany Also Concern Estonia?), Vikerkaar 2009, No. 10-11, Available online at http://www.vikerkaar.ee/?page=Arhiiv&a_act=article&a_number=5001 (10 November 2013).

than on promoting (or questioning) a greater European citizen-based identity made possible by EU citizenship.

Yet EU citizenship is not without a role in these processes. Since 1991, non-citizens have had the right to apply for Estonian citizenship through naturalisation, and for citizenship of the Russian Federation as the successor to the USSR or other states (such as Ukraine) under the laws of those countries. Over time, where no choice has been made, a third group of persons with undetermined citizenship has emerged in Estonia who hold a so-called 'grey passport' or alien's passport.[132] Currently, holders of an alien's passport can travel visa-free within the Schengen area and are also allowed visa-free entry into the Russian Federation. As Estonian citizens and other EU citizens cannot travel to the Russian Federation without obtaining a visa, this places holders of a grey passport, who often have strong family and cultural ties to Russia, at a practical advantage. This has been portrayed in the media as a disincentive for holders of grey passports to acquire Estonian and thereby EU citizenship.[133]

Since 2004, EU citizenship has also contributed to a surge of migration. According to data from the 2011 census, there were 6751 non-national EU citizens living permanently in Estonia. Net emigration just in 2012, however, amounted to 7000 persons, with the primary destinations being Finland and the UK. The entire population had decreased by 75 000 since 2000.[134]

With an ageing population and only 889 770 residents identifying themselves as ethnic Estonians in the census, it is understandable that the viability of the economy as well as survival of the Estonian people and their unique language and culture are at the centre of the public discourse and concern[135]. Within this discourse, the EU is perceived as a guarantee for economic and geopolitical security, but also as a destination and facilitator for those who seek an economically more prosperous and simple life.

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132. According to the 2011 Census, of the total population of slightly less than 1.3 million, over 98 000 were foreigners with the citizenship of countries outside the EU, while more than 84 000 persons had yet to determine the citizenship of their choice.
133. This generalisation has been recognized, but also refuted. Cf. e.g. Sergei Stadnikov, *Miks halli passi omanikud enam Eesti kodakondsust ei taha*? (Why Don't Holders of Grey Passports Want Estonian Citizenship Anymore?*),* available at http: www.ekspress.ee/archive/article.php?id=45125699 (10 November 2013).
134. Information on the 2011 census in available in English at http://www.stat.ee/phc2011.
135. Cf. e.g. Argo Ideon, *Väljarändest paanikata,* (On Emigration, Without Panic) in Eurokratt, 16 September 2013, available at: http://www.eurokratt.ee/valjarandest-paanikata, (10 November 2013). Cf. also U. Lõhmus, *supra nota* 55, p. 80.

Most recently, media attention has been focused on EU citizens who participated in the municipal elections in October 2013, in particular as this is still a rather new and exotic phenomenon in Estonia.[136] Significant attention was given to the candidacy and successful election of Abdul Turay, a UK citizen of African descent who was already quite well known as a commentator in the national media. He had been invited by two major parties to run on their candidate lists, and his candidacy, with the candidacies of other EU citizens, was generally portrayed not only as a natural consequence of Estonia's inclusion in the EU, but also as a positive step towards expanding Estonian society, providing recent immigrants with a voice in politics and making the Estonian capital of Tallinn a more cosmopolitan city.[137]

136. According to the National Electoral Committee, 24 non-national EU citizens ran as a candidate in the 2013 municipal elections (0.16 % of all candidates).

137. Cf. e.g. Interview: Abdul Turay, the Expat Running for Tallinn City Council, published 17.08.2013 on the Estonian Public Broadcasting English language website at http://news.err.ee/features/4d45d87d-5e06-4b2f-984d-3000a20569e2, (10 November 2013). There are very few visible minorities in Estonia and virtually none among politicians.

FINLAND

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Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Article 2 ('Definitions') of the Directive was implemented by an amendment of the Aliens Act (later AA)[4] entering into force in 2007.[5] Articles 2(2)a, c, and d are implemented by Sections 154(1)1, 2, and 3 AA. The definition of 'Union citizen' (Article 2(1)) is given in Section 3(2) of the AA as: '*EU citizen* or a *comparable person* means a citizen of a Member State of the [EU] or a citizen of Iceland, Liechtenstein, Norway, or Switzerland.' Section 154 AA (Ch. 10 'Residence of citizens of the European Union or comparable persons') on EU citizens' family members implements Article 2(2)b as 'persons living continuously in a marriage-like relationship in the same household regardless of their sex are comparable to a married couple if they have lived in the same household for at least two years. [...] However, the [two-year] requirement [...] does not apply if the persons living in the same household have a child in their joint custody or if there are other weighty reasons for it'.[6] According to the Finnish National Police Board, weighty reasons may include, *i.a.*, a joint mortgage or home loan. Additionally, according to Section 154(2) AA, the guardian of a minor EU citizen living in Finland is considered

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4. Aliens Act (*Ulkomaalaislaki*) 30.4.2004/301.
5. Government Proposal (HE) 205/2006 vp. leading to law 360/2007 amending the AA, in force 30.4.2007.
6. Section 154(3) AA, and more generally, the Act on Registered Partnerships (*Laki rekisteröidystä parisuhteesta*) 9.11.2001/950, Section 8.

a family member for the purpose of the Directive – already from the entry into force of the current AA, in 2004.[7]

Transposing Article 3 ('Beneficiaries') of the Directive was revisited by a 2007 amendment to the AA. The AA provides that its Ch. 10 applies to 'EU citizens who move to Finland or reside in Finland, and their family members who accompany them or join them later';[8] whereas the next paragraph provides for Finnish citizens' family members: 'The Chapter applies to family members of a Finnish citizen if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later.'[9] After *Metock*,[10] the requirement of prior lawful residence by a third country national family member (Art. 2(2)), in another Member State has been removed from Section 153 AA in 2010.[11]

Rights of other family members (Art. 3(2)),[12] are provided for in the AA (amended in 2007) as: 'Other relatives are treated in the same manner as family members of EU citizens, regardless of their citizenship, if: the relative is, in the country of departure, dependent on an EU citizen who has the primary right of residence, or the relative lived in the same household with the EU citizen in question; or serious health grounds [strictly][13] require the EU citizen in question to give the relative personal care.'[14] The provision shall be applied on a casuistic basis according to the exact wording thereof. Cases are decided based on an overall consideration (*kokonaisharkinta*) of the merits (for which the burden of proof vests with the applicant). The Government Proposal on amending the AA expressly considered it impossible to predict how this change will affect granting the status of 'other relative'.[15] National courts

7. Section 154(2) AA.
8. Section 153(3) AA.
9. Section 153(4) AA.
10. Case C-127/08, *Metock*, [2008] ECR I-624 is mentioned as the cause for amendment, see Government Proposal (HE) 77/2009 vp, pp. 6-7.
11. See Government Proposals (HE) 77/2009 vp. and (HE) 432/2010 vp.
12. The term applied in the AA 'other relatives' (FI: *muut omaiset*) aims to correspond with 'other family members'.
13. Unofficial translations of Finnish legislation do not always take into account English versions of the directives being implemented: In this case, 'strictly' in the directive EN text appears as 'ehdottomasti' [unconditionally] in the FI text, translated as 'absolutely'. No change in meaning appears to have been intended. This assumption is followed throughout this report.
14. Section 154(4) AA.
15. Government Proposal (HE) 205/2006 vp., p. 30.

have not yet dealt with the provisions related to the definition of family member or beneficiary. However, the National Police Board maintains that the degree of relation between such a relative and the primary rights holder does not matter. All 'other relatives' are required to present documentary evidence issued by the country of origin which recognises the existence of prior co-habitation and/or proof of serious health grounds that strictly require that the EU citizen in question give the relative personal care (in compliance with Arts 8(5)e and 10(2)e).

Sections 155 and 155a AA specify entry requirements (following Art. 5 'Right of entry') for EU citizens and their family members. The transposition of Article 5(4) closely corresponds to the wording of the Directive.[16] The higher level of procedural protection accorded to EU citizens and their third-country-national (TCN) family members in Article 5(2)2 (visa) and (4) (travel documents/visa) – including an accelerated procedure, free of charge, for processing visa applications of TCN family members – is provided for by Sections 155(2) and 155a(3) AA.[17] Ministry for Foreign Affairs of Finland internal guidelines reflect this requirement. According to the website of one embassy,[18] processing times for the free visas of EU/EEA citizens' TCN family members varies between 3 to 10 days as compared to the normal 15 days.[19] Greater procedural protection is also conferred to family members of EU citizens in this respect, as an oral hearing may be arranged[20] for the visa applicant or his or her family members with regard to the consideration of the issuance of the visa, unlike with other regular TCNs.

Sections 155a(3-4) and 191(1)1 AA on the procedural safeguards on notification and appeals of negative visa decisions (refusals, annulments, and non-voluntary revocations) for Union citizens' TCN family members follow Articles 30-31 of the Directive together with Articles 32(3) and 34(7) of the Visa Code (Reg. 810/2009). Whereas regular TCNs denied a visa are given a standard form identifying a standard reason for the refusal and appeals follow

16. Section 155(2) AA.
17. Section 155a(3) AA.
18. Embassy of Finland in Bangkok, Thailand <http://www.finland.or.th/public/default.aspx?contentid=105843&nodeid=35097&contentlan=2&culture=en-US> (accessed May 11th 2013).
19. Cf. Art. 23 Visa Code (Reg. 810/2009).
20. If interviewee is abroad, hearing is conducted by a Finnish consulate, if in Finland, by the police, see Section 155a(3) AA.

a more formal procedure,[21] EU citizens' TCN family members are given more comprehensive accounts of the reasons for denying a visa and benefit from enhanced legal safeguards in the form of appeals which follow a more thorough and substantial procedure governed by the Finnish Administrative Procedure Act (Sections 7(2) and 12(1)), appeals at the Administrative Court of Helsinki).[22] Hence, the theme of *effective protection* is evident in the implementation of Article 5 as a whole: significant procedural protection in various forms is granted to family members of EU citizens concerning their entry, visa applications, supporting documents, travel documents, appeals, and fees.

Question 2

As to deportation,[23] EU citizens who have registered their residence and/or their family members (and other relatives) who have been issued a residence card, including situations where grounds could be considered economic,[24] is governed by Sections 167-168 AA. Existing case-law does not shed light on the threshold for expulsion or refusal of entry purely on economic grounds as: after the entry into force of the transposed Directive cases regarding deportation and refusal of entry have exclusively regarded criminal activities. According to information received from the Finnish Immigration Service, deportations on purely economic grounds are extremely rare, although the FIS did not rule out this possibility if the relevant conditions are met.

Because of the way residence-based (comprehensive) health insurance is organised in Finland, it is unlikely that lack of health insurance would give rise to disputes. Sections 167(2) and 168(1) AA allows economically inactive EU citizens, their family members, or other relatives, to be refused entry or deported on economic grounds. According to Section 167(2) AA Union citizens and their family members can become an unreasonable burden on Fin-

21. Following Article 32(2) of the Visa Code, Finnish authorities employ its Annex VI Standard form for notifying and motivating refusal, annulment or revocation of a visa.).
22. Finnish Administrative Procedure Act (*Hallintolainkäyttölaki*) 1.12.1996/586. No such case is known to have been lodged before 31.5.2013.
23. When residence permitless aliens enter Finland, their deportation is called 'refusing entry' (*käännyttäminen*) until their residence has been registered (Sections 159-159a AA) or they hold a residence card (Sections 161-161a-c AA). For the definition of refusing entry, see Section 142 AA.
24. Section 158a AA covers economic requirements for residence over three months for the economically non-active and their family members (mainly reproducing Art. 7).

land's social security system by 'resorting repeatedly to social assistance provided in the Act on Social Assistance or other comparable benefits or in other similar manner'. Nevertheless, the (legislative) approach to the notion of an unreasonable burden does not seem overly strict.

Question 3

Articles 12-15 on retaining the right of residence are transposed into Finnish law in Ch. 10 AA. Section 161d AA implementing Article 12 resembles it considerably, quite like Section 161e AA has been transposed in almost identical words to Article 13 – except for the title of the Section ('in the event of divorce'). Although the Section title, especially the wording used in the official Finnish and Swedish texts refers only to marriage, as does the wording in Section 161e(2)3 AA (implementing Article 13(2)c) on a TCN family member in the event of having been a victim of domestic violence), a general rule of interpretation elsewhere in national legislation provides that registered partnerships are presumed to be treated equally to marriage, unless expressly excluded.[25] The wording of Section 161f AA on retaining right of residence follows closely that of Article 14. At the point of implementing Directive 2004/38, the AA was already considered to satisfy the procedural safeguards in Article 30 and referred to in Article 15.[26]

According to the National Police Board, there is currently neither ongoing litigation nor administrative appeal procedures regarding the issue of rights retention. The National Police Board views the retention of the right of residence by family members in a positive light insofar as there is no suspicion of abuse of the rights pertaining to the Directive.

Question 4

Article 16 of the Directive ('General rule for Union citizens and their family members') on the right of permanent residence is transposed into national legislation in Section 161g AA. The Finnish legislation, enacted during the

25. See e.g. Section 8 Act on Registered Partnerships (*Laki rekisteröidystä parisuhteesta*) 9.11.2001/950: 'Unless otherwise provided for in legislation, the registration of a partnership has the same legal effects as a marriage; A legal rule concerning marriage is applied also to registered partnership; A legal rule concerning a spouse also concerns a registered partner, and rules on engagements also apply to those who intend to register their partnership.'
26. See Government Proposal (HE) 205/2006 vp., p. 18.

discussions leading to the adoption of Dir. 2004/38, had set the required period of continuous residence in Finland at four years (instead of five as in the final version of the Dir.) for the right of permanent residence.[27] From 2007, Section 161g(1-2) AA has required five years of lawful and continuous residence in order for Union citizens and their family members to have the right of permanent residence (implementing Articles 16(1-2) and 18). On the continuity of residence, Section 161g(3) AA closely follows the exceptions listed in Article 16(3). Article 16(4) concerning absence and acquiring the right to permanent residence is implemented by Section 165(2) AA for Union citizens and their family members. As stated in the answer to question 1 above, the AA treats those who qualify as 'other family members' (*muut omaiset*, Art. 3(2)a) as 'family members' (*perheenjäsenet*, Art. 2(2)), hence Article 18 is implemented by Section 161g(1-2) AA. Implementing Articles 16(4) and 20(3), Section 165(2) AA states that the right of permanent residence and permanent residence card are revoked upon continuous over two-year absence from Finland. Article 17 ('Exemptions for persons no longer working in the host Member State and their family members') has been transposed into Section 163 AA in virtually identical wording, including family members' rights (163(5) AA).

A case from the Supreme Administrative Court of Finland (KHO 2011:64, judgement of 5 July 2011) dealt with the right of permanent residence. An Italian citizen had lawfully resided in Finland from 1997, the latest residence permit being valid from 2002 to 2007. In 2008, the national authority had advised him to register his residence. The Supreme Administrative Court found that having resided in Finland lawfully for a period exceeding the five-year period stipulated in Section 161g AA, registering residence was no longer necessary (the unfounded 40€ registration fee must be refunded) and instead an *ipso jure* right of permanent residence existed, and a document certifying this can be issued upon application.

Section 161h AA transposing Article 19 ('Document certifying permanent residence for Union citizens') follows closely the wording of the Directive ('upon application', 'without delay'), as well as Section 162 AA implementing Article 20 ('Permanent residence card for TCN family members'). Section 162(3) AA, as to TCN family members, implements Article 20(3) quite literally: 'Interruptions to residence not exceeding a maximum of two consecutive years do not affect the validity of the permanent residence card.' The

27. See Government Proposal (HE) 205/2006 vp., p. 14. The duration of residence in Finland is normally verified from the Population Information System, maintained by the local register offices as well as the address register of Posti, the national postal office.

AA poses no special sanctions (Art. 20(2)) for neglecting to apply for a permanent residence card, as Section 185 AA generally states that if an alien 'through negligence fails to comply with the obligation to register his or her residence or apply for a residence card or permanent residence card', the alien 'shall be sentenced to a fine for a violation [of the AA]'.[28] Article 21 ('Continuity of residence') did not cause any change in the AA.[29]

The Police have access to the Register of Aliens (*Ulkomaalaisrekisteri*) which contains detailed data on permanent residence permits. Information on the number of both applications for documents certifying the right of permanent residence of EU citizens and permanent residence permit applications is regularly published. Police statistics for 2012 show that 335 certificates of permanent residence right were issued to Union citizens (none were rejected). Of 35 applications by TNC family members for a permanent residence card, one was rejected.[30] In 2011 and 2012, these groups of applications counted for 0.5 % of all alien licenses and permits.[31] In 2012, the average time of processing EU citizens' documents on permanent residence was 14 days and for TCN family members 43 days.[32]

Question 5

Article 24(2) is not expressly transposed into national law as the government proposal mentions no changes to the pre-existing legislation based on this provision. Pre-existing legislation does not fully utilise the possible exceptions to equal treatment. For example, an exception to the rule provides that anyone in need of urgent support can be granted social assistance. Assistance is granted by a body of the municipality where the person (or family) – whatever the reason for their stay in Finland and including stays not exceeding three months – is staying when the application is submitted.[33]

National law does not distinguish between Union citizens who are short-term residents and Union citizen jobseekers from other MSs (falling under the scope of Co-ordination Regulation 883/2004). Residents are treated

28. Section 185 AA.
29. See Government Proposal (HE) 205/2006 vp., pp. 15 and 11.
30. Publicly available on the Police website (https://www.poliisi.fi/), see 'Poliisin lupahallinnon toimintaa kuvaavia tilastoja, tammi-huhtikuu 2013', pp. 11-12.
31. Id. p. 12.
32. Id. p. 15.
33. Section 14(3) Social Assistance Act (SAA) (*Laki toimeentulotuesta*) 30.12.1997/1412. See also Government Proposal (HE) 205/2006 vp., p. 17.

equally with nationals or other immigrants in terms of access to related unemployment benefits (unemployment allowance / labour market subsidy / integration assistance) as soon and as far as they fulfil the Finnish requirements of qualifying as jobseekers – as is their TCN family upon obtaining a (non-temporary) residence permit and qualifying as jobseekers.[34]

As for students, maintenance aid[35] is granted to mobile workers (and family members) and EU citizens (and family members) who base their right of residence on other than Article 7(1)c student status and who have registered their residence, on equal basis with host MS nationals.[36] Union citizens relying on student status are eligible for student maintenance aid upon obtaining the permanent right of residence.

Article 24(2) did not cause any amendments to the AA or other national legislation regarding social assistance (including unemployment benefits) and study grants.[37]

Question 6

The concepts of public policy, public security, and public health (Article 27, Sections 156 and 156a AA) relate to expulsion, which in Finland takes the form of two distinct procedures: refusing entry and deportation. In practice, the former applies to EU citizens whose residence has not been registered and their family members or other relatives who have not been issued with a residence card.[38] The threshold for the former is far lower than for the latter. In practice, EU citizens, their family members or other relatives have been refused entry into Finland on the basis of fairly minor offences. According to information obtained from the Finnish Immigration Service, even the suspicion of having committed an offence has led to refusing entry into Finland. Repetitive petty theft and shoplifting, drug offences (other than for minor self-use), and multiple cases of driving while seriously intoxicated have also led to the refusal of entry. Such criminal behaviour and the refusal of entry related thereto are justified under 'public order and security' (Section 156

34. See Section 2 (Ch. 2) Unemployment Security Act (*Työttömyysturvalaki*) 30.12.2002/1290.
35. Student maintenance aid consists of student grant (*opintoraha*), housing allowance (*asumislisä*), and a student loan guarantee by the State (*opintolainan valtiontakaus*)
36. Section 1 Student Maintenance Aid Act (*Opintotukilaki*) 21.1.1994/65.
37. See Government Proposal (HE) 205/2006 vp., p. 15 and 11.
38. Sections 167 and 168 AA.

AA).[39] There are no known cases related to public health for the purposes of the Directive.

A Supreme Administrative Court (KHO 2004:89[40]) case illustrates refusing entry into Finland on the basis of public order and security. An Estonian citizen had been sentenced to six years for an aggravated narcotics offence (sentence scale: 1-10 years imprisonment).[41] Assessment of the circumstances and individual factors leading to the imprisonment lead the court to conclude that the perpetrator's previous behaviour (sentence for a forgery offence, prior entry refusals based on suspected criminal activity) and personal conduct poses a present threat to public order and security and, as the applicant had no family ties to Finland, the appeal against deportation was rejected. The court's reasoning emphasises proportionality,[42] the review of which follows ECJ case-law (e.g. Joined cases C-482/01 and C-493/01, *Orfanopoulos*) and takes into account: the nature and seriousness of the offence; unlawful residence; duration of time spent in the host MS; time elapsed from committing the offence; the (lack of) family or other ties to Finland; and that the applicant (and family members) are unlikely to face problems upon returning to the MS of origin.

Imperative grounds (Art. 28) are defined in Section 168(5) AA: being found guilty of an act which is punishable by no less than one year of imprisonment, and the Union citizen is, on grounds of the seriousness of the crime or of continued criminal activity, considered a danger to public security, or where there are grounds for suspecting the person is seriously endangering the nation security of Finland or another State. In case KHO 2006:82,[43] also decided prior to the implementation deadline of the Directive, the Supreme Administrative Court found that an EU citizen guilty of aggravated negligent manslaughter and aggravated assault (sentenced to three years and ten months imprisonment and fined for a separate assault), could not be deported on serious grounds of public order or security. In finding for the Estonian applicant that the deportation order was unlawful, the court considered the applicant's age, state of health, family, and financial matters, how well the applicant had integrated into the society and culture of the host MS as well as the lack of remaining ties to the MS of origin. Having resided in Finland for ten years

39. Section 156 AA.
40. http://www.kho.fi/paatokset/27793.htm.
41. Section 2 (Ch. 50) The Criminal Code of Finland (*Rikoslaki*) 19.12.1889/39.
42. See also Section 168b AA on overall consideration as to deportation on grounds of public order or security.
43. http://www.kho.fi/en/paatokset/37638.htm.

with all family ties in Finland, too, and no family ties existing in the MS of origin, entrepreneurship in Finland, the applicant's circumstances and behaviour after the crime, his deportation could not be justified on serious grounds of public order or security as the personal conduct of the applicant did not pose a continuing threat to the life of other people.

Yet, in another case decided prior to the implementation deadline of the Directive, KHO 2006:83,[44] the Supreme Administrative Court found that a Union citizen could be deported on imperative grounds of public security. The Estonian applicant had been found guilty on four charges of aggravated narcotics offence in 1999 and for unlawful dealing in imported goods in 2003 and sentenced, altogether, for five years and six months imprisonment. The applicant had resided in Finland for 11 years and had both family ties (exercised parental visiting rights after divorce) and part-time employment in Finland. The court found that the prison sentence alone could not be ground for deportation, however, taking into account the nature of repeated criminal conduct that indicates disregard towards the prohibitions of the law and how aggravated narcotics trafficking and unlawful dealing in imported prescription drugs poses a danger to the safety of the society at large and individuals therein, the deportation was lawful.

The case-law examples above demonstrate how 'overall consideration', regulated by Section 146 AA is in practice carried out. This applies to decisions on refusal of entry, deportation, and when determining the duration of an entry restriction. Emphasis is placed on the best interests of the child as well as the protection of family life. Other factors include duration of the alien's stay, purpose of stay, and the social and family ties to both the host state and state of origin. The principle of proportionality is in this regard is contemplated especially in Section 146 AA, as amended in 2007.

In the recent case (KHO 2013:88), the Supreme Administrative Court annulled a decision to refuse the residence registration of a Union citizen who was also a worker. The police, responsible for registration, had refused this on the basis that the Union citizen had been found guilty of unlawfully importing a registered substance and of petty theft offences and therefore presented a threat to public order and security. However, as the SAC observed, this was not an express ground for refusal in the national legislation, which must be interpreted in the light of Union law. This supported the outcome that such grounds for refusal could only be relied on where a person was refused entry or deported, in which case both the Directive and the relevant national

44. http://www.kho.fi/paatokset/37639.htm.

legislation enabled this. The judgment cites Treaty provisions, the directive, the Charter of Fundamental Rights, as well as the C-215/03, *Oulane* and C-376/89, *Giagounidis* judgments of the Court of Justice.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

The recent judgment of the Finnish Supreme Administrative Court (FSAC) in its case KHO 2013:97 illustrates current practice on many of the issues raised by the question. L, a TCN, had received a residence permit on the basis of a previous marriage. L had custody of A, a child who was a Finnish citizen, and thus an EU citizen. M, another TCN, subsequently married L and was then deported. L and M later had a child, B, who was only a TCN due to inherited citizenship. The judgment concerned whether it was lawful for the Immigration Service to deny a residence permit to M for lacking sufficient means. Before issuing its judgment, the FSAC received an answer to its related preliminary reference in Joined cases C-356/11 and C-357/11 (KHO 2011:62 and 63). The FSAC ultimately denied the family reunification application of L and M, noting in its reasoning that the decision of the Immigration Service to deny M's residence permit application did not apply directly to L or L's children. The decision to deny M's right of residence did not, according to the FSAC, have the consequence of denying the Union citizen child their genuine enjoyment of Union citizenship rights. In this case, M did not have custodial rights over A. The judgment notes the distinction between rights acquired under the Directive and under the Treaty Articles themselves.

In KHO 2012:47, the FSAC confirmed the deportation of a TCN family member who was the spouse of a Finnish union citizen and the father of their Finnish child. Grounds of public security could be invoked on the basis of a prior drugs conviction and outweighed other claims for effective enjoyment of citizenship rights. The FSAC issued its judgment after considering *Ruiz Zambrano* and *Dereci*, but without a preliminary reference. The case is typical of the 'overall consideration' exercised under Finnish nationality law.

Question 8

Ordinary multiple citizenship has been accepted since 2003: acquiring Finnish citizenship does not require loss of other citizenship and those with multiple citizenship, yet sufficiently connected to Finland, can retain their Finnish citizenship beyond the age of 22. Prior to this, multiple citizenship was highly exceptional, according to the domestic rules on the acquisition and loss of nationality. Citizenship can still be lost within five years from acquiring it if the applicant withheld or provided false or misleading information decisive for the naturalisation decision (see Section 33 NA). Since the latest 2011 amendment of Section 29 of the Nationality Act (NA), former Finnish citizens can (always) reacquire Finnish citizenship by their own declaration. The Government Proposal for this amendment does not mention *Rottmann*, suggesting instead that the amendment regularises earlier more limited Sections on reacquiring Finnish citizenship.[45] Article 5 of the Finnish Constitution and Sections 4 and 56 NA forbid loss of Finnish citizenship which would lead to statelessness. These predate *Rottmann*, and prevent the situation in *Rottmann* from arising due to the withdrawal of Finnish citizenship. See also KHO 2011:77, concerning the finality of a decision awarding Finnish citizenship regardless of later evidence supporting a contrary outcome.

Political rights of EU citizens

Question 9

Directive 93/109/EC was transposed by 22 December 1995 (final part of several pieces of legislation entered into force 1 January 1996). Finland acceded to the EU on 1 January 1995 and the first EP elections took place in Finland on 20 October 1996.

There are no derogations.

The Election Act (EA) poses an additional residence and registration requirement for EU citizens as compared to Finnish nationals. According to the EA, all EU citizens 18 years of age or over (on the day of elections), who have registered their residence in accordance with Municipality of Residence Act are considered to reside in Finland and hence eligible to vote in EP elec-

45. See Government Proposal (HE) 80/2010, p. 38.

tions (in accordance with Articles 4-6).[46] In order to use the voting right, in addition to residing in Finland, they must register at the Local Register Office, at the latest, 80 days (by 4 p.m.) before the day of (the first) elections – according to Section 18(5) EA. Each is prompted to do so by a personal letter sent by the Population Register Centre.[47] Under Section 2 EA, a person who has lost their franchise in EP elections in their state of citizenship will not gain the vote in Finland.

Amendments to Directive 93/109/EC required changes to Sections 172(1), 174(1), and 177 EA concerning candidates. These have entered into force 1

46. See Section 2 Election Act (*Vaalilaki*) 2.10.1998/714 and Section 4(3) Municipality of Residence Act (*Kotikuntalaki*) 11.3.1994/201.

47. As prompted by Section 22 EA, the letter informing of 2009 elections stated:

'The European Parliament elections will be held in Finland on 7 June 2009. Thirteen members will be elected from Finland to the European Parliament. No one may vote in more than one Member State of the European Union in the same election. As a citizen of a Member State of the European Union you will be entered in the register on those with the right to vote in Finland as eligible to vote provided that 1) you still have a municipality of residence in Finland on 17 April 2009, 2) you have not forfeited your right to vote in your home state, 3) you have, by no later than 4 p.m. on 19 March 2009, notified the Local Register Office (maistraatti) in writing that you want to use your right to vote only in Finland. You can make the notification by filling in the attached form.

If you register in Finland as a person entitled to vote, the Population Register Centre will inform the relevant authority in your home state of your registration. In this case, your personal data will be removed from the electoral register of your home state.

The Local Register Office (maistraatti) will, by no later than 14 May 2009, notify all those entered in the register on those with the right to vote in the European Parliament elections in Finland of their eligibility to vote (notification card).

If you want to vote in the European Parliament elections in your home state, you are not required to submit a notification to the Finnish authorities.

You will also be eligible as a candidate in these elections provided that 1) based on your notification you have the right to vote in these elections in Finland, 2) you have not been nominated as a candidate in these European Parliament elections in another Member State, 3) you have not forfeited your eligibility in the European Parliament elections in your home state.

If you want to be a candidate in these European Parliament elections, you must contact the political parties operating in Finland or, if you do not want to be a candidate of a political party, collect support for your candidacy from 2000 people with the right to vote. Additional information on being a candidate can be obtained from the Electoral District Committee of Helsinki (address: Helsingin vaalipiirilautakunta, PL 25, c/o Oikeusministeriö, 00023 VALTIONEUVOSTO).

For more information on the European Parliament elections, please visit www.vaalit.fi.'

July 2013 and include: candidates' declaration (of not been deprived of the right to stand as candidate in EP elections in their home state) replacing a certificate by the home State; identifying the candidate also by identity number; and the Population Register Centre (i.e. contact point) relaying information on such declarations to the home State without delay.[48]

Question 10

Directive 94/80/EC was fully implemented in mainland Finland by 22 December 1995 (into force 1 January 1996), and in the autonomous Province of Åland Islands by 1 March 2007.[49] As to Åland, the right is limited to municipal elections for those having resided there for a year before the elections.

No additional conditions are imposed on EU citizens in the elections on local (municipal) councils. EU citizens at least 18 years of age (on the day of elections) and resident in Finnish municipalities are eligible voters (automatically registered as such), and can stand as candidates in the municipality where they reside 51 days prior to the day of local municipality elections.[50]

Question 11

No official regional elections beyond municipal elections exist in (mainland) Finland. Beyond what EU law requires, in addition to municipal and EP elections, EU citizens can take part in Municipal Consultative Referenda on the same terms as Finnish nationals (age and residence terms are the same as in question 10 above). Since the beginning of 1995, 49 such referenda have taken place within the currently 320 municipalities.[51]

That the franchise remains the same in municipality elections and municipal consultative referenda seems only logical. That EU nationals and Nordic non-EU nationals are treated similarly as to franchise and privileged as compared to regular TCNs (required longer period of residence) may reflect the closer bonds between EU MSs and, traditionally, Nordic states (e.g. Nordic Council cooperation).

48. See Act amending the Election Act (*Laki vaalilain muuttamisesta*) 1.7.2013/496.
49. See Provincial laws of Åland (*Landskapslag*) ÅFS 10/2007 and ÅFS 11/2007.
50. Section 26 Municipality of Residence Act.
51. See Section 30 Municipality Act, see also Act on the Procedure for Municipal Consultative Referenda (*Laki neuvoa-antavissa kunnallisissa kansanäänestyksissä noudatettavasta menettelystä*) 16.7.1990/656.

Question 12

There are no specific areas of tension on voting rights. In Finland, limitations to franchise mentioned in the question do not exist (for the only requirements, see questions 9 and 10).

Culture(s) of citizenship

Question 13

It would seem that national implementation in this field is understood more as an adjunct to national immigration systems, and is based on permissions and registrations. Nevertheless, the legislation does not directly contradict free movement as a rights-based or constitutional culture founded in EU law. Recent case law of the Supreme Courts tends to balance a number of sources and perspectives, and refer to overlapping legal sources including national law, EU treaties, secondary law, and case law. As a result of the underlying positivist and dualist national legal culture, courts prefer to interpret and apply national law as far as possible, although they appear aware of and respectful of EU law and ECJ case-law. The courts' openness to considering a rights-based approach may not be emphasized in reasoning which is often comparatively minimalist or laconic, although instruments such as the Charter of Fundamental Rights or directly applicable free movement provisions may be cited in judgments.

Question 14

At the time of writing, there are 25 published judgments of the Finnish Supreme Administrative Court which refer to the Charter of Fundamental Rights, many of these citizenship cases which are discussed above. The dates of the judgments demonstrate that the CFR has received judicial attention in Finland well before the entry into force of the Lisbon Treaty. In the first FSAC case to refer to the CFR, the Charter right to good administration was invoked on the grounds presented by the Court of Justice in paragraph 38 of C-540/03, according to which the Charter, even if it is not binding in itself, reaffirms rights found in other legally binding sources (KHO 2006:86 at 16). Thus, the CFR was legally relevant before 1.12.2009. However, most of the case law is dated after the entry into force of the Lisbon Treaty, from KHO

2010:82. In the context of EU citizenship, some of the FSAC case law on citizenship or residence in fact often involves explanations for why particular rights in the CFR are not an obstacle to the application of national law, especially where citizenship and residence rights are concerned. (KHO 2013:97, discussed above, KHO 2011:98 concerning CFR 47, which did not prevent expulsion (contra KHO 2010:84 and KHO 2011:25, and 2012:1 , 2012:18, all referring to CFR 2, 18 and 19 and preventing deportation; KHO 2013:88 on registration, referring to CFR 45). The FSAC regularly refers cases to the Court of Justice, including questions related to EU citizenship and the Charter (Joined cases C-356 O and S and C-357/11 L, involving both). A very recent reference from a lower court (C-318/13, Sähköalojen ammattiliitto), asks i.a. about the direct effect of Article 47 CFR. Thus, it is clear that some lower courts also have a clear appreciation of the significance of the Charter, and are prepared to refer questions that concern its outer limits.

In a recent general evaluation, Tuomas Ojanen considers that the Lisbon Treaty appears to have generally made way for the application of the Charter before Finnish Courts (Ojanen in Lavapuro and Heinonen (eds) Oikeuskulttuurin eurooppalaistuminen 241-263, esp. 259-262). Ojanen notes that the FSAC has a tendency to refer to national and EU fundamental rights in tandem, without always clarifying the relative importance of the European dimension in relevant cases. Both of these general observations can be supported with evidence from the EU citizenship case law noted in this report.

Question 15

We find that a small empirical sample might provide an answer. By submitting search words 'EU-citizen', 'Union citizen', 'Union citizenship', 'Union citizens' to the data archive (1994 to mid-2013) of the highest circulating Finnish daily newspaper (Helsingin Sanomat), some 200 results are returned. That is, on average the concept has been employed less than fortnightly. Some 30 'hits' were published on the opinions pages, focusing mainly on personal accounts or concerns on work, mobility, and family life. From the remaining 'hits', three more related general themes seem to emerge: articles on the Lisbon Treaty, mobile Romanians, and two cases concerning deportation decisions of two TCNs' elderly grandmothers. Generally the facts, if such are provided for, seem relatively accurate. As for media influence, the general disinterest of the media (observation consistent with the sample above) and audience towards the EU might show in the recent success of political anti-EU movement that has also benefitted from the coinciding economic (or Euro) crisis.

FRANCE

Margot Bloch[1]

La citoyenneté *dans le cadre* de la directibe 2004/38/CE – La stabilité de résidences des citoyens de l'Union et des membres de leurs familles

Question 1

La directive 2004/38/CE (ci-après : la directive) a été transposée en droit français par la loi du 24 juillet 2006,[2] venant modifier le code de l'entrée et du séjour des étrangers et du droit d'asile (le « CESEDA ») en intégrant aux articles L. 121-1 à L. 122-3 et R. 121-1 à R. 122-5 du CESEDA ces droits d'origine supranationale. Cette loi a été complétée par deux décrets.[3] Enfin, une circulaire ministérielle, en date du 10 septembre 2010, est venue préciser l'interprétation à donner de ces textes par l'Administration.[4]

Les définitions contenues dans l'article 2 de la directive sont intégrées dans l'article L. 121-1 du CESEDA en ce qui concerne les séjours de plus de trois mois. Le droit de séjour de moins de trois mois relevait de l'article R. 121-3 du CESEDA, avant d'être hissé au rang législatif par l'article L. 121-4-1.[5] Selon l'article 3 de la directive, le droit de se rendre ou de séjourner dans un Etat membre autre que le sien, varie selon : que le bénéficiaire est un citoyen de l'Union européenne (L. 121-1.1° à 3° du CESEDA) ; un membre de la famille d'un citoyen de l'Union européenne (L. 121-1 4° et 5° du CESEDA) ; un membre de famille ressortissant d'un Etat tiers (L. 121-3 du CESEDA) ou un membre de famille autre que ceux visés à l'article 2.2 de la directive (R. 121-2-1 ; R. 121-4-1 du CESEDA).

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1. Juriste spécialisée en droit européen, Master 2 droit européen des affaires, Université Nice Sophia-Antipolis.
2. Loi n° 2006-911, du 24 juillet 2006.
3. Décret n° 2007-371 du 21 mars 2007 et décret n° 2011-1049 du 6 septembre 2011.
4. Circulaire du Ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, Circulaire n° NOR IMIM1000116C.
5. Décret n° 2011-1049 du 6 sept. 2011, art. 4.

Un ressortissant peut devenir membre de la famille d'un citoyen de l'Union européenne de diverses façons :

– Il peut le devenir par les liens du mariage. Il a été jugé, par les tribunaux français, qu'il n'était pas exigé que l'étranger soit en situation régulière à la date de son mariage avec un ressortissant d'un Etat membre pour se prévaloir de sa qualité de conjoint d'un ressortissant de l'Union Européenne.[6] Aussi, le mariage religieux n'est pas considéré par les juridictions françaises comme équivalant au mariage civil ou à un partenariat enregistré. Une telle union religieuse peut néanmoins être un élément venant appuyer la communauté de vie.[7]
– Il peut le devenir en concluant un partenariat enregistré, au sens de l'article 2.2.b de la directive. Si le pacte civil de solidarité[8] n'était pas regardé, comme le prévoit la directive, comme équivalent au mariage – ni par la loi de transposition du 24 juillet 2006 ni par la circulaire ministérielle relative aux conditions d'exercice du droit de séjour[9] – les juridictions françaises ont usé à plusieurs reprises de l'effet direct de la directive en reconnaissant cette équivalence. À cette fin, les juges réfutaient l'application de l'article L. 313-11 7° du CESEDA (ie: 3.2b de la directive), au profit de l'application des articles L. 121-1 et L. 121-3 du CESEDA (ie: 2.2.b de la directive).[10] Enfin, il appartient au préfet, afin de caractériser de frauduleux la communauté de vie postérieure à un tel partenariat enregistré, d'apporter les éléments probants à l'appui de ses allégations de fraude; tel que l'absence de résidence commune.[11]

6. Cour administrative d'appel de Paris, 18 févr. 2010, Karmani Seffar: req. n° 09PA04280.
7. Cour administrative d'appel de Paris – Paris – 7ème chambre – 11PA04118 – 21 septembre 2012.
8. Equivalent de l'article 2 .2. b) « le partenaire avec lequel le citoyen de l'Union a contracté un partenariat enregistré ».
9. Point 3.5.2 et 3.5.5 Circulaire du Ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, Circulaire n° NOR IMIM1000116C.
10. Tribunal administratif de Nice, 16 oct. 2009, *Alves do Couto: req. no 0902958 ;* Cour administrative d'appel de Marseille – Marseille – 5ème chambre – formation à 3 – 09MA04065 – 12 mai 2011 ; Cour administrative d'appel de Marseille – Marseille – 5ème chambre – formation à 3 – 10MA04024 – 28 juin 2012; Cour administrative d'appel de Bordeaux – Bordeaux – 1ère chambre – formation à 3 – 12BX00350 – 05 juillet 2012.
11. Cour administrative d'appel de Bordeaux – Bordeaux – 1ère chambre – formation à 3 – 12BX00350 – 05 juillet 2012.

– Par une communauté de vie lorsque la relation est durable et dûment attestée. L'interprétation par les juridictions françaises d'une « *relation durable, dûment attestée* » entre ressortissants, doit être individualisée. À cet égard, une communauté de vie de trois mois avant la date du dépôt de la demande est considérée comme trop brève pour permettre d'être regardé comme membre de la famille d'un citoyen de l'Union européenne.[12] Dans une autre espèce, le juge administratif français considère que ne présente pas un caractère suffisamment stable une communauté de vie de quatre mois, même si elle était prouvée par un certificat de concubinage.[13]

L'article 5.1 de la directive porte sur le droit d'entrée et les documents y attenants. Si l'article, de droit commun, L. 221-1 du CESEDA pose le principe de l'obligation de présentation de certains documents et visas, les articles R. 121-1 et R. 212-1 du CESEDA dérogent au principe susmentionné pour les ressortissants d'un Etat de l'Union européenne, en ce que la simple présentation d'une carte d'identité ou passeport en cours de validité est suffisant pour l'admission sur le territoire français. Les articles R. 121-1 alinéa 2 et R. 121-2-1 du CESEDA visent les membres de la famille ressortissants d'un Etat tiers. Ces derniers sont admis sur le territoire français sous les mêmes conditions que celles imposées par la directive.[14] Le décret du 6 septembre 2011 met la France en conformité avec les garanties procédurales de l'article 5.2° et 5.4° de la directive et les lignes directrices de la Commission[15] qui estiment qu'un délai raisonnable doit être de l'ordre de quatre semaines. En effet, le décret susmentionné rajoute aux articles R. 121-1 et R. 121-2 du CESEDA une procédure accélérée, procédure qui a été reconnue par la juridiction suprême de l'ordre administratif français.[16]

12. Cour administrative d'appel de Bordeaux – Bordeaux – 3ème chambre (formation à 3) – 10BX03057 – 08 novembre 2011.
13. Cour administrative d'appel de Marseille – Marseille – 7ème chambre – formation à 3 – 10MA01524 – 13 mars 2012.
14. Point 2.1, Circulaire du Ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, Circulaire n° NOR IMIM1000116C.
15. Communication de la Commission au Parlement européen et au Conseil concernant les lignes directrices destinées à améliorer la transposition et l'application de la directive 2004/38/CE relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres, COM/2009/0313.
16. Conseil d'Etat – 2ème et 7ème sous-sections réunies – 323758 – 19 mai 2010.

Question 2

Le bénéfice du droit de séjour de plus de trois mois est conditionné à la preuve de ressources suffisantes, ainsi que d'une assurance maladie ; afin de ne pas devenir une charge pour le système d'assistance sociale selon l'article L. 121-1 2° à 5° du CESEDA. Nous qualifierons par la suite ces pré-requis de « motifs purement économiques » pouvant mener à une expulsion. Les modalités et le caractère suffisant de ces motifs purement économiques sont régis par les dispositions de l'article R. 121-4 du CESEDA et sont interprétés dans la circulaire de la Direction de la sécurité sociale.[17]

Les bénéficiaires de l'article L. 121-1 du CESEDA doivent produire une attestation d'assurance maladie couvrant les prestations prévues aux articles L. 321-1 et L. 331-2 du code de la sécurité sociale (le « CSS »). La preuve est libre, la régularité de la demande sera appréciée en fonction de la réalité[18] et de la durée de cette couverture maladie.

Lorsque le caractère suffisant des ressources est exigé par l'article L.121-1 du CESEDA, il doit être apprécié individuellement, à l'aune du *revenu de solidarité active* de l'article L. 262-2 2° du code de l'action sociale et des familles (le « CASF ») et s'il s'agit de l'allocation de solidarité aux personnes âgées des familles, de l'article L. 815-1 du CSS. Ces montants sont adaptés en fonction du nombre de personnes composant la famille du ressortissant de l'Union. La preuve peut s'administrer par tout moyen.[19] Si les moyens d'existences sont personnels ou issus d'une tierce personne, le demandeur devra en justifier l'effectivité et la durée.

L'article 7.3 de la directive, qui prévoit les hypothèses dans lesquelles un citoyen de l'Union européenne perd sa qualité « de travailleur », est transposé à l'article R.121-6 du CESEDA. La charge induite sur le système d'aide so-

17. Circulaire DSS/DACI n° 2011-225, du 9 juin 2011, relative à la condition d'assurance maladie complète dont doivent justifier les ressortissants européens inactifs, les étudiants et les personnes à la recherche d'un emploi, au delà de trois mois de résidence en France ; B.O. santé, Protection sociale Solidarité n° 2011/7 du 15 août 2011, p. 365.
18. Ie : Si le ressortissant est couvert par une assurance autre que française, le « panier de soin » doit être comparable aux prestations en natures offertes par l'assurance maladie française.
19. Cour administrative d'appel de Nancy – Nancy – 1ère chambre – formation à 3 – 10NC01754 – 15 décembre 2011 ; Point 3.3.1, Circulaire du Ministre de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire, Circulaire n° NOR IMIM1000116C.

ciale au regard des prestations ou aides qu'il solliciterait s'apprécie au cas par cas, selon la lettre de l'article R.121-4 alinéa 3 et 4 du CESEDA.

Au-delà des griefs portés par l'association *Human Rights Watch*,[20] selon lesquels les préfectures françaises ne motiveraient pas à suffisance de droit la durée du séjour de plus de trois mois permettant ainsi d'appliquer les critères de ressources suffisantes, il convient de souligner les tendances jurisprudentielles majeures. À titre préliminaire, il convient de rappeler qu'en 2008, le Conseil d'Etat a jugé que l'insuffisance des ressources peut être opposée par le préfet pour prendre une décision d'éloignement à l'encontre d'un ressortissant communautaire qui séjourne en France depuis plus de trois mois ; alors même que l'intéressé n'est pas encore effectivement pris en charge par le système d'aide sociale et ne dispose d'aucune resource.[21] Aussi, l'insuffisance de ressources qui peut conduire à une expulsion d'un ressortissant communautaire, sans domicile fixe dans l'espèce visée, doit préalablement faire l'objet d'une appréciation individuelle de la situation ressortissant.[22] Enfin, ces critères s'appliquent aussi à l'ascendant ressortissant d'un Etat tiers qui a, à sa charge, son enfant ressortissant d'un Etat membre.[23]

Les juridictions françaises ont estimé, sur le fondement des article L. 121-1 4° et L. 121-3 du CESEDA, que le droit au séjour ne pouvait être refusé à un ressortissant d'un Etat tiers au motif que son épouse, ressortissante d'un Etat membre et bénéficiant d'un droit de séjour permanent, disposait de ressources insuffisantes suite à un accident de la circulation, alors même que cette dernière était titulaire de diverses allocations et que le montant de ces dernières dépassait le seuil minimum de l'article R. 121-4 du CESEDA. En conséquence, l'arrêté du préfet procédant à son éloignement a été annulé.

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20. « Le respect par la France de la Directive européenne relative à la liberté de circulation et l'éloignement de ressortissants européens appartenant à la communauté Rom Document d'information », Human Rights Watch soumis à la Commission européenne en juillet 2011, disponible au : http://www.hrw.org/fr/news/2011/09/28/le-respect-par-la-france-de-la-directive-europ-enne-relative-la-libert-de-circulatio
21. CE, avis, 26 novembre 2008, *Silidor, req. N° 315441 : lebon 442, AJDA 2009 270, conl. Guyomar, RFDA 2009. 183 ; repris par* Cour administrative d'appel de Versailles – Versailles – 4ème chambre – 09VE02162 – 08 juin 2010 ; Cour administrative d'appel de Versailles – Versailles – 4ème chambre – 10VE01303 – 24 mai 2011.
22. Cour administrative d'appel de Lyon, 8 octobre 2009, Iancovici : req n° 09LY01119. Et Cour administrative d'appel de Douai – Douai – Juge des reconduites à la frontière – 10DA01148 – 16 décembre 2010.
23. Cour administrative d'appel de Bordeaux – Bordeaux – 5ème chambre (formation à 3) – 10BX01839 – 08 juillet 2011.

Pour caractériser l'insuffisance des ressources, un préfet peut s'appuyer sur l'absence d'un emploi stable, de ressources propres, de domicile ou encore d'assurance maladie.[24] Il pourra aussi justifier sa décision d'expulsion par le fait que le ressortissant se livre à la mendicité ou vit dans des conditions matérielles précaires. Aussi, l'intéressé ne peut utilement invoquer une attestation d'aide établie par sa fille à une date postérieure à la décision litigieuse à l'appui de sa prétendue qualité d'ascendante à charge.[25] La notion de ressources inclut nécessairement, selon les juridictions nationales, une certaine stabilité. Ne peuvent être considérés comme étant suffisants, au regard des articles L. 121-1 et R. 121-4 du CESEDA, les revenus tirés de missions d'intérim ne dépassant pas 800 euros par mois pendant deux mois consécutifs.[26] En ce qui concerne la charge induite sur le système d'aide sociale, au regard des prestations ou aides qu'un ressortissant solliciterait, il a été jugé que l'absence totale de moyens de subsistance permet de considérer qu'un ressortissant se trouve dans une situation irrégulière en France au sens de l'article L. 512-2 du CSS, le privant par là même du bénéfice de plein droit des prestations familiales.[27] Partant, est constitutif d'un abus de droit au sens des dispositions du 2° de l'article L.511-3-1 du CESEDA, le ressortissant qui ne remplit pas les conditions de ressources suffisantes prévues aux articles L.121-1 et R121-4 CESEDA et qui effectuait de multiples allers retours entre la France et son pays d'origine, dans le seul but de se maintenir sur le territoire français pour une durée inférieure à trois mois, sans justifier des conditions requises.[28] Est aussi considéré comme un abus de droit, le fait d'être une charge déraisonnable pour le système d'assistance sociale en ayant recours à l'assistance dans des conditions telles que le séjour en France est effectué dans le but essentiel de bénéficier du système d'assistance sociale français.[29]

24. Cour administrative d'appel de Lyon – Lyon – 2ème chambre – formation à 3 – 11LY00993 – 05 janvier 2012.
25. Cour administrative d'appel de Lyon – Lyon – 2ème chambre – formation à 3 – 11LY02480 – 26 juin 2012.
26. Cour administrative d'appel de Marseille – Marseille – 7ème chambre – formation à 3 – 09MA00375 – 24 janvier 2011.
27. Cour d'appel de Rennes – Rennes – CH. 09 CH. SECURITE SOCIALE – 10/01381 – 29 novembre 2011.
28. Cour administrative d'appel de Lyon – 6ème chambre – N° 12LY00483 – Préfet du Rhône c/ M. D. – 29 novembre 2012.
29. Cour administrative d'appel de Lyon – Lyon – 1ère chambre – formation à 3 – 12LY02930 – 30 mai 2013.

Question 3

L'article 12 de la directive 2004/38[30] (ci-après « la directive ») concerne le maintien du droit de séjour des membres de la famille en cas de décès ou du départ du citoyen de l'Union. Les alinéas 1er et 2ème de cet article ont été transposés en droit français par un décret de 2011,[31] respectivement à l'article R.121-7 du Code de l'entrée et du séjour des étrangers et du droit d'asile (ci-après « CESEDA ») qui concerne les ressortissant d'un Etat membre de l'Union ; l'article R.121-8 CESEDA, qui concerne les ressortissants d'un Etat tiers à l'UE ; enfin un décret de 2007[32] a créé l'article R.121-9 CESEDA qui transpose l'alinéa 3 de la directive et qui traite des conditions de conservation du droit de séjour des enfants du citoyen de l'Union ou du parent qui en a la garde. Alors que la directive partage les dispositions des articles 12 et 13 selon le cas du décès ou départ du citoyen de l'Union pour l'article 12 et le cas du divorce pour l'article 13 ; la transposition française distingue entre les membres de la famille issus d'un Etat membre pour l'article R.121-7, et ceux issus d'un Etat tiers pour l'article R.121-8.

Le deuxième paragraphe de l'alinéa 2 de l'article 12 de la directive énonce les conditions du maintien du droit de séjour des membres de la famille du citoyen de l'Union pour les périodes de plus de trois mois, et avant l'acquisition d'un droit de séjour permanent. Ces conditions sont celles de démontrer que les intéressés disposent de ressources suffisantes pour ne pas devenir une charge pour le système d'assistance sociale de l'Etat membre d'accueil, et la couverture par une assurance maladie dans l'Etat membre d'accueil. L'article R.121-4 CESEDA modifié par un décret de 2011[33] transpose ces dispositions.

L'alinéa 3 de l'article 12 de la directive sur la conservation du droit de séjour des membres de la famille du citoyen de l'Union après son départ ou son décès ayant la garde des enfants est conditionné à deux éléments, et ce quelque soit leur nationalité : la résidence dans l'Etat membre d'accueil et l'inscription des enfants dans un établissement scolaire jusqu'à la fin de leurs études. La transposition française a été effectuée à l'article R.121-9 CESEDA,

30. Directive 2004/38/CE du Parlement européen et du Conseil du 29 avril 2004 relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres, modifiant le règlement (CEE) n° 1612/68 et abrogeant les directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE et 93/96/CEE.
31. Décret n°2011-1049 du 6 septembre 2011 – article 9.
32. Décret n°2007-371 du 21 mars 2007 – art 1 JORF 22 mars 2007.
33. Op.cit. (Note 1).

mais restreint la conservation de ce droit de séjour pour ce qui est du deuxième élément, à l'achèvement de la scolarité des enfants dans un établissement français d'enseignement secondaire, qui correspond à la fin du lycée.

L'article 13 de la directive concerne le maintien du droit de séjour des membres de la famille en cas de divorce, d'annulation du mariage ou de rupture d'un partenariat enregistré. L'alinéa 1er traite des membres de la famille ayant la nationalité d'un Etat membre et a été transposé en droit français par l'article R.121-7 CESEDA. Le deuxième alinéa traite des membres de la famille de la nationalité d'un Etat tiers et est transposé à l'article R.121-8 CESEDA. Il est intéressant de noter que le droit français, à l'inverse de la directive, ne mentionne pas le cas de la rupture d'un partenariat enregistré, mais seulement celui de la rupture ou l'annulation du mariage.

L'article 14 de la directive sur les conditions du maintien du droit de séjour est transposé à l'article L.121-1 et L.121-4-1 CESEDA.[34] Des doutes quant à l'interprétation de l'article 14 alinéa 2 de la directive ont pu être exprimés dans la jurisprudence,[35] mais n'ont jamais été portés à la Cour de Justice de l'Union européenne par les cours et tribunaux français.

Question 4

Les articles 16 à 21 de la directive 2004/38[36] (ci-après « la directive ») traitent du droit de séjour permanent. L'article 16 de la directive énonce la règle générale pour les citoyens de l'Union et les membres de leur famille. L'alinéa 1er accorde un droit de séjour permanent aux citoyens de l'Union ayant séjourné légalement pendant une période interrompue de cinq ans sur le territoire de l'Etat membre d'accueil et est transposé en droit français à l'article L.122-1 du code de l'entrée et du séjour des étrangers et du droit d'asile (ci-après « CESEDA »). L'alinéa 2, transposé au même article du CESEDA octroie l'application de l'alinéa 1 aux membres de la famille n'ayant pas la nationalité d'un Etat membre. L'alinéa 3 de l'article 16 de la directive indique les conditions

34. Article L.121-4-1 CESEDA créé par la loi n° 2006-911 du 24 juillet 2006 – art. 23 JORF 25 juillet rectificatif JORF 16 septembre 2006.
35. Voir par exemple arrêt n° 10VE01177 du 14 décembre 2010, 4ème chambre de la cour administrative d'appel de Versailles.
36. Directive 2004/38/CE du Parlement européen et du Conseil du 29 avril 2004 relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres, modifiant le règlement (CEE) n° 1612/68 et abrogeant les directives 64/221/CEE, 68/360/CEE, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE et 93/96/CEE.

dans lesquelles la continuité du séjour n'est pas entachée malgré une absence de six mois par an au total, des absences plus longues,[37] ou douze mois maximum.[38] Ces conditions sont retranscrites à l'article R.122-3 CESEDA. Selon l'alinéa 4 de l'article 16 de la directive transposé à l'article L.122-2 CESEDA, une fois acquis, le droit de séjour permanent ne se perd que par des absences d'une durée supérieure à deux ans consécutifs de l'Etat membre d'accueil.

L'article 17 de la directive concerne des dérogations pour les travailleurs ayant cessé leur activité dans l'Etat membre d'accueil et les membres de leur famille. Cet article se divise en 4 alinéas, transposés aux articles R.122-4 et R.122-5 CESEDA.

L'article 18 de la directive sur l'acquisition du droit de séjour permanent des membres de la famille n'ayant pas la nationalité d'un Etat membre est transposé à l'article R.122-2 CESEDA.

Les articles 19, 20 et 21 régissent les formalités administratives. L'article 19 sur le document attestant de la permanence du séjour pour les citoyens de l'Union est transposé à l'article R.121-15 CESEDA. L'article 20 concerne la carte de séjour permanent pour les membres de la famille qui n'ont pas la nationalité d'un Etat membre. L'alinéa 1er de cet article prévoit le délai dans lequel la carte de séjour permanent doit être donnée aux membres de la famille n'ayant pas la nationalité d'un Etat membre, et énonce que la carte de séjour permanent est renouvelable de plein droit tous les dix ans. La transposition de l'alinéa 1er de l'article 20 de la directive se trouve à l'article L.122-1 CESEDA. Le deuxième alinéa de ce même article traite du délai à respecter pour la demande de la carte de séjour permanent et est transposé à l'article R122-2 CESEDA. Enfin, le troisième alinéa de l'article 20 de la directive transposé à l'article L.122-2 CESEDA énonce les cas dans lesquels la validité de la carte de séjour permanent est menacée. Les modalités concernant la continuité de séjour sont exposées à l'article 21 de la directive et à l'article R.122-3 CESEDA.

Question 5

Les exceptions à l'égalité de traitement prévues par l'article 24, paragraphe 2, de la directive 2004/38/CE (la « directive ») ont été abondamment reprises par la France en matière législative. Le cadre règlementaire est en revanche

37. Dans le cas d'accomplissement d'obligations militaires.
38. Pour des raisons importantes telles qu'une grossesse, un accouchement, une maladie grave etc.

favorable aux droits du ressortissant d'un autre Etat membre de l'Union européenne (le « ressortissant d'un autre Etat membre »).

Au niveau législatif, le droit du ressortissant d'un autre Etat membre à obtenir une prestation d'assistance sociale est assez réduit. Si le législateur français a souvent pris le soin de rappeler les droits qu'avaient le travailleur et ses enfants[39] conformément à l'article 45 TFUE et au règlement n° 492/2011[40] (le « travailleur »), il a presque systématiquement recouru à la « solution la plus restrictive[41] » pour les autres ressortissants, en combinant deux exceptions.

D'une part, le législateur français a introduit une condition de résidence de trois mois *minimum* dans plusieurs articles du code de l'action sociale (le « CASF ») et du code de la sécurité sociale (le « CSS »). Tel est, par exemple, le cas des dispositions relatives au revenu de solidarité active (le « RSA »),[42] ainsi que du revenu minimum d'insertion (le « RMI »)[43] et de l'allocation de parent isolé (l'« API »),[44] qu'il a remplacés. La condition de résidence de trois mois *minimum* est également un préalable nécessaire à l'obtention de l'allocation de solidarité aux personnes âgées (l'« APSA »), de l'allocation supplémentaire d'invalidité (l'« ASI »)[45] et de l'allocation aux adultes handicapés (l'« AAH »).[46]

D'autre part, le demandeur d'emploi a fait l'objet de dispositions spécifiques. En effet, « le ressortissant d'un autre Etat membre de l'Union européenne (...), entré en France pour y chercher un emploi et qui s'y maintient à ce titre n'a pas droit [au RSA,[47] et auparavant au RMI[48] et à l'API,[49] ainsi qu'à la couverture maladie universelle (la « CMU »),[50] l'APSA, l'ASI[51] et l'AAH ».[52]

39. V. notamment l'article L. 262-6 du code de l'action sociale et des familles (le « CASF ») et l'article L. 821-1 du code de la sécurité sociale (le « CSS »).
40. Règlement n° 492/2011 du 5 avril 2011 relatif à la libre circulation des travailleurs à l'intérieur de l'Union, JO L 141/1, 27 mai 2011.
41. B. KHIARI, Débats parlementaires, Sénat 1ère lecture, XII° législature, Séance du 1er février 2007.
42. Article L. 262-6, alinéa 1, du CASF.
43. Article L. 262-9-1, alinéa 1, du CASF.
44. Article L. 524-1, alinéa 4, du CSS.
45. Article L. 816-1, du CSS.
46. Article L. 821-1, alinéa 3, du CSS.
47. Article L. 262-6, alinéa 5, du CASF.
48. Article L. 262-9-1, alinéa 5, du CASF.
49. Article L. 524-1, alinéa 8, du CSS.
50. Article L. 380-1, du CSS. Cet article vise l'accès au régime général d'assurance maladie. « En pratique, ce n'est pas l'accès à l'assurance maladie mais à une prise en charge gratuite à travers la CMU qui est l'objet du débat dans la mesure où, par cons-

« Le refus systématique d'accorder [certaines des prestations précédemment listées] au [demandeur d'emploi], quel que soit le lien qu'il a pu tisser avec le marché de l'emploi [est] contraire au droit [de l'Union européenne] ».[53] En effet, les Etats membres doivent, en vertu de l'article 18 TFUE, de l'article 45, paragraphe 2, TFUE et des arrêts *Collins*[54] et *Vatsuras*,[55] accorder une prestation « de nature financière destinée à faciliter l'accès à l'emploi sur le marché du travail d'un Etat membre »[56] s'il existe un « lien réel » entre le demandeur d'emploi et le marché du travail de l'Etat membre d'accueil.[57]

Il serait donc nécessaire de cibler toutes prestations « de nature financière [destinées] à faciliter l'accès à l'emploi sur le marché du travail d'un Etat membre » et d'ajouter une nouvelle exception qui préciserait les critères permettant de caractériser un « lien réel ». Pourraient être intégrés, la formule des arrêts *Collins* et *Vatsouras*, selon laquelle « la personne en cause a, pendant une période d'une durée raisonnable, effectivement et réellement cherché un emploi »,[58] et, conformément à l'arrêt *Prete,*[59] « les éléments ressortant [de son] contexte familial », tels la durée de son séjour et « le mariage avec un ressortissant de [l'Etat membre d'accueil] ».[60]

L'arrêt de la cour administrative d'appel de Paris du 20 octobre 2011[61] est topique du manque de prise en compte de la jurisprudence de la Cour de justice de l'Union européenne (la « CJUE ») sur le « lien réel » par les cours et les tribunaux nationaux. En l'espèce un ressortissant polonais s'était vu refuser l'accès au RSA. Confirmant le jugement du tribunal administratif de Paris, la cour administrative d'appel de Paris a estimé que le demandeur n'était pas fondé à toucher le RSA car celui-ci était « entré en France pour y chercher un emploi » et qu'il s'y maintenait à ce titre. Le juge semble avoir procédé à un

truction, des personnes en recherche d'emploi ne sont pas redevables de cotisations » (Rapp. d'information n° 3671 C. BOUTIN, Ass. Nat., XII° législature, 5 mars 2007).

51. Article L. 816-1 du CSS.
52. Article L. 821-1, alinéa 7, du CSS.
53. J. CAVALLINI, Recherche d'emploi et accès aux aides sociales, JCP S, n° 29, 14 juillet 2009, 1325 ; En ce sens, v. A. MATH, Roms et autres : la protection sociale des ressortissants communautaires, Droit social 2010, p. 1037.
54. CJCE, 23 mars 2004, aff. C-138/02, Collins.
55. CJCE, 4 juin 2009, aff. jointes C-22 et C-23/08, Vatsouras.
56. *Ibid*, pt. 37 ; Collins, *Op. cit*., pt. 63.
57. Vatsouras, *Op. cit.*, pt. 38 ; Collins, *Op cit*., pt. 67.
58. Vatsouras*, Op. cit.,* pt. 39 ; Collins, Op cit. pt. 70.
59. CJUE, 25 octobre 2012, aff. C-367/11, Déborah Prete c/ Office national de l'emploi.
60. *Ibid*, pt. 50.
61. CAA Paris, 20 octobre 2011, n° 10PA05222.

double contrôle : celui de la conformité du refus d'accorder le RSA avec la directive et de sa conformité avec le statut de « travailleur ». Il n'a en revanche pas recherché s'il existait un « lien réel » entre le demandeur et le marché de l'emploi de l'Etat membre d'accueil.

Au niveau règlementaire, le texte de nombreuses circulaires rappelle les droits des « travailleurs » ainsi que ceux des étudiants pouvant faire état d'un « lien réel » tel que défini par la jurisprudence *Bidar*.[62] Pour rappel, une circulaire est un *texte qui permet aux autorités administratives d'informer leurs services. En matière d'attribution de bourses, celles-ci sont la règle puisque les articles L. 821-1 à L. 821-4 du code de l'éducation relatifs aux aides aux étudiants ont confié au pouvoir exécutif la charge de déterminer les conditions d'attribution des bourses.*

A titre d'exemple, la circulaire du 22 août 2012[63] est venue expliciter la condition de la « nationalité » prévue à l'article 1er du décret n° 2008-974 du 18 septembre 2008 relatif aux bourses et aides financières accordées aux étudiants relevant du ministère de l'enseignement supérieur,[64] modifié par le décret n° 2012-455 du 4 avril 2012.[65] Cette circulaire prévoit que le ressortissant d'un autre Etat membre doit remplir deux conditions alternatives. Soit celui-ci établit qu'il relève de la protection du régime du « travailleur », soit il se prévaut de sa qualité de citoyen de l'Union européenne, auquel cas il doit attester « d'un certain degré d'intégration ».[66] Ce degré d'intégration peut être « apprécié notamment au vu de la durée du séjour (un an minimum), de la scolarité suivie en France ou encore des liens familiaux en France ».[67]

62. CJCE, 15 mars 2005, aff. C-209/03, Bidar, pt. 63.
63. Circulaire du 22 août 2012 relative aux modalités d'attribution des bourses d'enseignement supérieur sur critères sociaux et des aides au mérite aux étudiants des établissements d'enseignement supérieur habilités à délivrer un diplôme relevant du ministère de la culture et de la communication et des écoles ou centres de formation agréés ou habilités, pour l'année 2012-2013 ; v. aussi circulaire du 22 juin 2012 relative aux modalités d'attribution des bourses d'enseignement supérieur sur critères sociaux et des aides au mérite et à la mobilité internationale pour l'année 2012-2013 ; circulaire du 9 octobre 2012 relative aux bourses nationales d'enseignement supérieur agricole court et long.
64. Décret n° 2008-974 du 18 septembre 2008 relatif aux bourses et aides financières accordées aux étudiants relevant du ministère de l'enseignement supérieur : JO, 19 septembre 2008, n° 219, p. 14553.
65. Décret n° 2012-455 du 4 avril 2012 modifiant le décret 2008-974 du 18 septembre 2008 relatif aux bourses et aides financières accordées aux étudiants relevant du ministère de l'enseignement supérieur : JO, 6 avril 2007, n° 81, p. 6286.
66. Circulaire du 22 août 2012, *Op. cit*., p. 7.
67. Circulaire du 22 août 2012, *Op. cit*., p. 7.

Cette durée *minimum* est bien plus favorable au ressortissant d'un autre Etat membre que ce qu'offrent aux Etats membres l'article 24, paragraphe 2, de la directive et l'arrêt *Föster*.[68] La directive prévoit, en effet, la possibilité de n'accorder aucune bourse avant l'obtention du droit de séjour permanent, à savoir 5 ans.[69] La CJUE avait, quant à elle, estimé qu'une condition de résidence de 5 ans était conforme au droit de l'Union européenne.[70] Les conditions avantageuses, qu'offre le droit français au regard du droit de l'Union européenne, expliquent peut-être l'absence de contentieux récent relatif à l'article 24, paragraphe 2, de la directive ou au « lien réel » devant les cours d'appel et le Conseil d'Etat en matière de bourses.[71]

Il s'avère donc que les démarches administratives permettant d'accéder aux minimas sociaux et les conditions à remplir sont assez contraignantes, de sorte qu'il est possible de se demander si le ressortissant de l'Union n'est pas considéré comme un étranger aux yeux des autorités françaises.

Question 6

Le juge français a intégré très tôt dans sa jurisprudence,[72] la solution de l'arrêt *Bouchereau*[73] reprise par la directive 2004/38/CE (la « directive ») et codifiée

68. CJCE, 18 novembre 2008, aff. C-158/07, Förster ; Il ne semble pas que la solution de l'arrêt *Förster* soit plus restrictive que celle de l'arrêt *Bidar*. Certes la durée de séjour qui a été censurée par la CJUE dans l'arrêt *Bidar* était de 3 ans, alors que dans l'arrêt *Förster*, une durée de séjour de 5 ans a été déclarée conforme au droit de l'Union européenne (Förster, *Op. cit*., pts. 51 et s.). Cependant, la première affaire « concernait une règlementation nationale qui, outre le respect d'une condition de résidence, imposait aux étudiants provenant d'autres Etats membres prétendant à une aide visant à couvrir leurs frais d'entretien qu'ils soient établis dans l'Etat membre d'accueil » (Förster, *Op. cit*., pt. 47). Or, « la règlementation en cause (...) excluait toute possibilité pour un ressortissant d'un autre Etat membre (...) de remplir ladite condition » (Förster, *Op. cit*., pt. 47). Une telle condition n'existait pas dans l'affaire *Förster*.
69. Article 16, paragraphe 1, de la directive codifié à l'article L. 122-1, alinéa 1, du code de l'entrée et du séjour des étrangers et du droit d'asile (le « CESEDA »).
70. Förster, *Op. cit*., pts. 51 et s.
71. Pour un aperçu de la situation telle qu'elle était antérieurement aux circulaires des dernières années, v. CE, 2 février 2005, requête n° 257984 ; CE, 15 juillet 2004, requête n° 245357 ; J.-P. LHERNOULD, *L'accès des étrangers aux bourses d'enseignement supérieur sur critères sociaux*, Droit social 2005, p. 1018.
72. A. ILIOPOULOU, *Le temps des gitans: à propos de la libre circulation des Roms dans l'Union*, Europe n° 1, Janvier 2011, étude 1, note de bas de page 28 ; CAA Nantes, 21 décembre 2007, n° 07NT02122 ; CAA Versailles, 29 décembre 2009, n° 09VE02276 ; CAA Lyon, 22 septembre 2009, n° 09LY00111.
73. CJCE, 27 octobre 1977, aff. 30/77, Bouchereau, pts. 28 et 36.

par le législateur français en 2011,[74] selon laquelle il est nécessaire que le comportement de l'intéressé représente « une menace réelle, actuelle et suffisamment grave pour un intérêt fondamental de la société » pour constituer une « menace à l'ordre public ». Cette formule, qui assure une appréciation au cas par cas, signifie que l'assimilation entre condamnation pénale et « menace pour l'ordre public » n'a pas sa place en droit français. Elle vaut également pour la « menace grave à l'ordre public » et la « nécessité impérieuse pour la sûreté de l'Etat et la sécurité publique » (la « nécessité impérieuse »), équivalent des « raisons impérieuses de sécurité publique » de l'article 28, paragraphe 3, de la version consolidée de la directive.[75] Une analyse approfondie de la pratique du juge français révèle toutefois que chacune de ces notions est associée de façon récurrente aux mêmes infractions pénales.[76]

La « nécessité impérieuse » n'avait été conçue au départ que pour permettre l'éloignement des terroristes, des espions et des trafiquants de drogue[77] mais son champ d'application a été étendu. Il a ainsi été admis que « la commission d'actes portant atteinte à la sécurité des personnes (...) pouvait justifier [une mesure éloignement] ».[78] Le juge a, notamment, permis aux autorités administratives d'étendre cette notion au viol.[79] Ces dernières se sont également vues reconnaître le pouvoir de prendre une décision pour « nécessité impérieuse » en cas de trafic de stupéfiants.[80]

La « menace grave pour l'ordre publique » peut être fondée sur des actes portant atteinte à l'intégrité physique des personnes, révélant ainsi la dangerosité de l'individu. Il peut, par exemple, s'agir d'assassinat,[81] de violences suivies d'incapacité[82] ou de viol sur une personne vulnerable.[83] Des infractions

74. *Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité, JORF n°0139 du 17 juin 2011, p. 10290 ;* articles L. 121-4, L. 511-3-1, L. 521-1, L. 521-1 et L. 521-5 du code de l'entrée et du séjour des étrangers et du droit d'asile (le « CESEDA »).
75. Rectificatif au rectificatif à la directive 2004/38/CE du 29 avril 2004 relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des Etats membres*, JO L 197 du 28 juillet 2005, pp. 34-34*.
76. Le juge semble appréhender le comportement d'un ressortissant d'un Etat membre ou d'un membre de sa famille, et de toute autre intéressé, de la même façon. Notre réponse ne les distinguera donc pas.
77. Déclaration de N. QUESTIAUX : JOAN CR, 30 septembre 1981, p. 1420.
78. D. ROMAN, Chronique de jurisprudence administrative, police administrative et libertés fondamentales : n° 1, LPA, 3 novembre 2003, n° 219, p. 4.
79. CE, 22 septembre 1997, requête n° 165434.
80. CE, 2 juillet 2001, requête n° 223181.
81. CE, 18 février 2002, requête n° 236902.
82. CE, 20 octobre 2007, requête n° 310111.

pénales d'une moindre gravité ne révèlent, en revanche, aucune « menace grave contre l'ordre public ». Telle peut être le cas d'une escroquerie en bande organisée.[84]

Enfin, la « menace à l'ordre public » a, notamment, été retenue par le juge pour les infractions de vol[85] et de menace de mort avec arme.[86] Par contre, le juge français a considéré que l'occupation illégale d'un terrain « [n'était] pas, à elle seule, de nature à caractériser une menace pour l'ordre public[87] ». Il en est de même pour des faits de prostitution et de racolage actif.[88] Si l'on peut grossièrement associer à chaque notion certains types d'infractions pénales, l'articulation de ces différentes notions demeure assez floue. En effet, une mesure d'éloignement doit être adoptée en considération de l'ensemble du comportement de l'étranger et non pas seulement d'une infraction pénale dont il aurait fait l'objet.[89] La répétition d'infractions,[90] la gravité croissante des infractions[91] et la volonté de réinsertion de l'intéressé[92] sont autant de circonstances susceptibles de jouer sur l'adoption d'une mesure d'éloignement.

La délimitation imprécise de chaque notion dénote également un contrôle au cas par cas du juge sur l'appréciation de l'autorité administrative. Il peut ainsi s'avérer particulièrement difficile de « distinguer [la notion de « nécessité impérieuse »] de la simple « menace grave pour l'ordre public[93] ». En effet, des infractions identiques ont pu justifier un éloignement pour « menace

83. CE, 7 novembre 2012, requête n° 354224 ; CE, 4 février 2003, requête n° 253742.
84. CE, 25 janvier 2007, requête n° 298431.
85. CAA Bordeaux, 5 juin 2012, n° 11BX02697 ; CAA, Bordeaux, 1 mars 2012, n° 11BX02753 ; CAA Bordeaux, 12 mai 2011, n° 10BX02859.
86. CAA, Lyon, 3 février 2010, n° 09LY00407.
87. CAA Versailles, 29 décembre 2009, n° 09VE02276 ; Le législateur a intégré l'occupation illégale d'un terrain dans la liste de l'article L. 533-1 du CESEDA relatif aux ressortissants d'Etat tiers, « cette dernière précision [paraissant] nécessaire au regard de l'interprétation de la notion d'ordre public par certaines juridictions judiciaires qui considèrent que l'occupation illégale d'un terrain pour y installer un campement n'est pas susceptible de porter atteinte au bon ordre, à la sécurité, à la salubrité et la tranquillité publiques, qui sont pourtant les éléments constitutifs traditionnels de l'ordre public » (Rapp. d'information n° 2814 T. MARIANI , Ass. Nat. XIII° législature, 16 sept. 2010).
88. CAA Paris, 1 février 2013, n° 12PA01733.
89. CE, 6 décembre 2002, requête n° 238068.
90. CE, 29 juillet 1994, requête n° 145997.
91. CAA Douai, 31 janvier 2002, requête n° 246942.
92. CE, 27 mai 1994, requête n° 147307.
93. D. ROMAN, *Op. cit.*

grave » et pour « nécessité impérieuse ».[94] Cette appréciation du comportement de l'intéressé au cas par cas est complétée par un examen de la proportionnalité de la mesure par rapport à la situation personnelle de l'intéressé. Les cours et tribunaux français n'ont pas attendu la codification tardive de 2011[95] par le législateur français des critères énumérés par la directive, à savoir la durée de séjour, l'âge, l'état de santé, la situation familiale et économique, l'intégration sociale et culturelle et l'intensité des liens avec le pays d'origine, pour apprécier la proportionnalité d'une mesure d'éloignement au regard de la situation personnelle de l'intéressé. Ils ont, en effet, tenu compte de ces critères depuis des dizaines d'années en s'efforçant de protéger le droit au respect de la vie privée et familiale tel qu'énoncé à l'article 7 de la charte des droits fondamentaux de l'Union européenne et à l'article 8 de la convention européenne des droits de l'homme et des libertés fondamentales (la « CESDH »). Le contrôle de proportionnalité a été réalisé en cas de « menace à l'ordre public »,[96] mais aussi en cas de « menace grave à l'ordre public »[97] et de « nécessité impérieuse ».[98]

« Aucune grille de lecture ne permet d'établir des circonstances qui s'opposeraient formellement au départ forcé de certains étrangers ».[99] D'une part, « l'absence de lien dans le pays d'origine, la présence d'enfants de nationalité française et une vie maritale ne [garantissent] nullement l'annulation de la mesure de départ forcé ».[100] D'autre part, « l'éloignement d'un célibataire ne peut pas être tenue pour acquise [même si] elle constitue un élément à décharge ».[101] Il faut toutefois relever que certaines « infractions d'une particulière gravité (trafic de drogue, homicide) (...) semblent automatiquement exclure une éventuelle annulation [d'une mesure d'éloignement] ».[102] Le viol

94. V. par exemple CE, 26 avril 1992, requête n° 105013 pour une « menace d'ordre public » et CE, 28 octobre 1994, Lebon T. 944 en matière de nécessité impérieuse pour la sûreté de l'Etat ou la sécurité publique. Les deux affaires concernaient des coups et blessures volontaires.
95. *Loi n° 2011-672 du 16 juin 2011, Op. cit. ;* articles L. 121-4, L. 511-3-1, L. 521-1, L. 521-1 et L. 521-5 du CESEDA.
96. CAA Versailles, 8 novembre 2012, n° 11VE01627.
97. CE, 21 septembre 2005, requête n° 260269.
98. CE, 2 juillet 2001, requête n° 223181.
99. V. TCHEN, Vers une réforme salutaire des mesures d'éloignement forcé visant des étrangers qui ont commis des infractions pénales, JCP A, 1 juin 2003, 1592, p. 827.
100. *Ibid*.
101. *Ibid*.
102. X. MAGNON, L'expulsion d'un étranger pénalement sanctionné disposant d'attaches familiales en France, LPA, 19 mars 2003, n° 56, p. 13.

fait également l'objet d'une « certaine automaticité dans l'appréciation du juge ».[103] Cette automaticité ne signifie pas que le juge ne procède pas à un contrôle de proportionnalité. Elle traduit seulement le fait que presque aucune circonstance personnelle ne permet de faire pencher la balance de la proportionnalité vers une annulation de la mesure d'éloignement lorsque l'intéressé commet des infractions particulièrement graves.

La citoyenneté européenne *au-delà* des dispositions de la directive 2004/38/CE – Etudier l'application, au niveau national, du droit primaire européen

Question 7

Dans l'affaire Zambrano[104] la CJUE a franchi un cap dans l'encadrement des droits du citoyen européen découlant de l'article 20 TFUE, en conditionnant son application à l'existence d'une privation de la jouissance effective de l'essential de ce droit. Dans cette affaire, la CJUE n'a pas appliqué le droit à la libre circulation de la Directive 2004/38 dans laquelle un élément transfrontalier est nécessaire pour son effectivité. Plus précisément, la Cour a eu à connaitre de *l'étendue du droit de séjour de ressortissants de pays tiers qui sont les parents d'un mineur citoyen de l'Union qui n'a pas, jusqu'à à présent, quitté l'Etat membre où il est né.* Cette interprétation entraîne une certaine confusion au regard du champ d'application des droits du citoyen européen[105] et sa limite avec le droit national. Jusqu'à *Zambrano,* le droit européen ne s'appliquait pas aux situations purement internes.[106] Par ailleurs, l'existence d'une discrimination à rebours contre les citoyens européens qui n'ont jamais franchi la frontière de leur pays au regard des citoyens d'un Etat tiers reste aussi très polémique. Il ressort l'existence d'un droit de séjour autonome du

103. *Ibid*.
104. CJUE 8 mars 2011
105. PLATON Sebastien, « Le champ d'application des droits du citoyen européen après les arrêts *Zambrano, McCarth et Dereci* », Revue Trimestrielle de droit européen 2012, p. 23.
106. HEYMANN Jeremy, « libre circulation des personnes, citoyenneté européenne et situations purement internes », Revue critique de droit international privé 2012 p. 352. BOUTAYEB, Chahira, « Le bénéfice du regroupement familial élargi aux parents étrangers d'enfants citoyens de l'Union », Revue de droit sanitaire et social 2011 p. 449.

droit de circuler et sans qu'il soit nécessaire de prouver un déplacement. Néanmoins, cette hypothèse a été relativisée un peut plus tard par l'arrêt McCarthy.[107] Une telle différence de traitements entre la famille Zambrano et la famille McCarthy reste difficilement justiciable au regard de la Directive 2004/38 qui inclut à la fois le conjoint et les enfants dans le cadre des membres de famille.

En France, l'article 20 du TFUE l'article 20 est intégré dans l'article L.121-1 du CESEDA. Plusieurs décisions ont été adoptées à la lumière du raisonnement de la CJUE et fondées sur la citoyenneté européenne tirée de l'art 20 TFUE. Il semble que les Tribunaux français reconnaissent l'autonomie des droits tirés de l'art 20, cependant jusqu'à aujourd'hui, les Tribunaux n'ont pas eu à trancher une situation telle que celle de Zambrano, c'est-à-dire, une situation purement interne. Le champ d'application ne reste toujours pas clair au sein de la jurisprudence française et la législation française n'a pas été modifiée. Dans une récente décision de la CAA de Lyon,[108] le refus de délivrance de titre de séjour a été discuté à la lumière de l'art 20 du TFUE et tel qu'interprété par la jurisprudence Zambrano. Notamment si la décision en lui obligeant à quitter le territoire français méconnaissait les dispositions de l'art 8 de la CEDH. En l'espèce, Mme C ressortissante tunisienne est entrée en France durant l'été 2011 accompagnée par son époux et trois enfants de nationalité belge. Selon la cour, il ne pouvait pas être regardé comme ayant droit de séjour faute d'y exercer une activité professionnelle et des documents justifiant des ressources suffisantes. De plus, les enfants venaient d'être inscrits dans un centre scolaire français. La cour interprétant l'art 20 TFUE et l'arrêt Zambrano considère d'une part que Mme C n'a pas sollicité un titre de séjour en qualité de parent d'enfant mineur sinon en qualité de conjointe d'un ressortissant de l'Union européenne. D'autre part, la Cour considère aussi que le droit des enfants de séjourner ne revêt pas un caractère absolu et s'exerce dans la limite de l'art 121-1 du Code de l'entrée et du séjour des étrangers et du droit d'asile, transposition de la directive 2004/38.

De la même façon, la CA de Bordeaux fait une interprétation limitée du droit au respect de la vie familiale et privée de l'art 311-7 du même Code[109] et lui refuse la carte de séjour considérant que les *pièces ne permettent d'établir ni la réalité de la vie commune avant son mariage, ni le caractère habituelle de sa présence en France*. D'une part, la Cour déclare le non rattachement du demandant et sa famille au territoire française et toujours à la lumière de l'art

107. CJUE 5 mai 2011.
108. CAA Lyon de 24 janvier 2013.
109. Transpositions art 13 de Schengen.

20, la Cour décide que le refus de séjour assorti d'une obligation de quitter le territoire, malgré la séparation temporaire, n'empêche pas la demande postérieure d'un visa longue durée. En outre, la CA de Paris[110] a également rejeté le droit de séjour et oblige M. Oscar Ernesto de nationalité péruvienne et ses enfants de nationalité espagnole à quitter le territoire à cause de l'absence de justification de leur entrée et séjour sur le territoire français.

On peut déduire encore une certaine confusion au regard du champ d'application des droits des citoyens européens découlant de l'art 20. D'un côté, les tribunaux interprètent l'art 20 malgré l'existence d'un élément transfrontalier et reconnaissent une différence de traitement entre les enfants et les conjoints. D'autre part, le rattachement au territoire français fait l'objet d'une interprétation très stricte et les tribunaux se montrent d'accord pour établir comme condition *sine qua non* pour l'octroi d'un titre de séjour, l'entrée et le séjour régulier.

Question 8

L'institution d'une citoyenneté européenne a pour base la notion de nationalité comme l'a déjà souligné l'art. 20-1 du TFUE dont dispose qu'est citoyen de l'Union européenne toute personne ayant la nationalité d'un Etat membre. Cette disposition montre clairement que la compétence pour régler les conditions d'acquisition de la nationalité appartient aux Etats membres. La jurisprudence de la Cour de justice des Communautés européennes est claire et constante[111] sur la définition des conditions d'acquisition et de perte de la nationalité, elle dit que la compétence relève, conformément au droit international, de chaque Etat membre, mais ces compétences doivent être exercées dans le respect du droit communautaire. Toutefois la Cour de justice des Communautés européennes a défini l'influence que peut avoir le droit de l'Union sur l'exercice de la compétence relative à la nationalité. Précisément dans l'arrêt Rottmann la Cour dit que le respect a le droit de l'Union ne porte pas atteinte au principe de droit international selon lequel les Etats membres sont compétents pour définir les conditions d'acquisition et de perte de la nationalité, mais consacre le principe selon lequel, lorsqu'il s'agit de citoyens de l'union, l'exercice de cette compétence, dans la mesure où il affecte les droits conférés et protégés par l'ordre juridique de l'Union, est susceptible d'un contrôle juridictionnel opéré au regard du droit de l'Union.

110. CA Paris 31 juillet 2012.

111. CJCE, 7 juillet. 1992 aff. C-369/90; CJCE, 11 nov. 1999 aff. C-179/98; CJCE, 19 oct. 2004 aff. C-200/02; CJUE, 2 mars 2010 aff. C-135/08.

Dans l'arrêt Rottmann, la décision de retrait de la naturalisation en raison de la fraude commise par l'intéressé dans le cadre de la procédure de son acquisition est a priori est valable, parce qu'il est légitime pour un Etat membre de vouloir protéger le rapport particulier de solidarité et de loyauté entre lui-même et ses ressortissants ainsi que la réciprocité de droits et des devoirs, qui sont le fondement du lien de nationalité. Ces considérations restent valables lorsqu'un tel retrait a pour conséquence que la personne concernée perde, outre la nationalité de l'Etat membre de naturalisation, la citoyenneté de l'Union. Mais vu l'importance qu'attache le droit primaire au statut de citoyen de l'Union, il convient, lors de l'examen d'une décision de retrait de la naturalisation, de tenir compte des conséquences éventuelles que cette décision emporte pour l'intéressé et, le cas échéant, pour les membres de sa famille, en ce qui concerne la perte des droits dont jouit tout citoyen de l'Union. Il importe à cet égard vérifier si la décision de retrait respecte le principe de proportionnalité en ce qui concerne les conséquences qu'elle comporte sur la situation de la personne concernée au regard du droit de l'Union, outre, le cas échéant, l'examen de la proportionnalité au regard national. L'examen de proportionnalité doit vérifier si cette perte est justifiée par rapport à la gravité de l'infraction commise par celui-ci, au temps écoulé entre la décision de naturalisation et la décision de retrait, ainsi qu'a la possibilité pour l'intéressé de recouvrer sa nationalité d'origine. L'utilisation du principe de proportionnalité sert pour diminuer les cas des apatrides au niveau de l'Union, et de renforcer davantage le processus vers l'autonomie du statut de citoyen européen.[112]

Dans le cas de la France l'art. 27-2 du Code civil[113] permet à l'Etat le retrait de la naturalisation si telle décision a été obtenue par mensonge ou fraude. Pour la France le retrait de naturalisation est une solution pour les cas les plus graves.[114] De la même façon qu'il existe ce type de dispositions dans la plupart des législations des Etats membres.[115] Mais depuis l'arrêt Rottmann, dans un tel cas, il doit y avoir un contrôle de proportionnalité avec un examen de la situation personnelle du citoyen européen.

112. Astéris PLIAKOS, « Citoyenneté ». mars 2012 (dernière mise à jour avril 2013). (Dalloz).
113. EUDO-CITIZENSHIP, Data bases. (http://eudo-citizenship.eu/databases/modes-of loss?p=&application=modesLoss&search=1&modeby=country&country=France).
114. Christophe Bertossi, Abdellait Hajjat, « COUNTRY REPORT: FRANCE », 2013. (http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=France.pdf).
115. EUDO-CITIZENSHIP, Data bases. (http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=idmode&idmode=L09).

Les droits politiques des citoyens européens

Question 9

La directive 93/109/CE du Conseil du 6 décembre 1993 fixant les modalités du droit de vote et d'éligibilité au Parlement européen pour les citoyens de l'Union européenne qui résident dans un pays membre de l'Union européenne dont ils n'ont pas la nationalité prévoit les modalités de l'exercice de ce droit. Elle est entrée en vigueur le 30 décembre 1993, avec un délai de transposition fixé au 1er février 1994. La loi n°94-104 du 5 février 1994 a transposé la directive dans notre ordre juridique interne.

Dans un rapport datant du 27 octobre 2010,[116] la Commission européenne a pu constater que les pays de l'Union ont, de manière générale, correctement transposé et mis en œuvre la directive 93/109. L'article 19 ex- TCE prévoit cependant une dérogation que la Commission européenne peut accorder à un Etat membre, « lorsque des problèmes spécifiques à un Etat membre le justifient ». Seul le Luxembourg l'a demandée et en a bénéficié : l'Etat a ainsi pu conserver son système de réserve du droit de vote aux électeurs qui justifient d'une durée minimale de résidence dans cet Etat membre. Ce n'est pas le cas en France

S'agissant des conditions juridiques permettant aux citoyens de l'Union d'exercer leur droit de vote et d'éligibilité dans l'Etat membre de résidence, la France impose des conditions aux ressortissants supplémentaires au citoyen de l'Union européenne pour l'exercice de son droit de vote. Le ressortissant, doit, tout comme le citoyen français, jouir de sa capacité civile et politique dans son état d'origine. Par ailleurs, il doit jouir de leur capacité civile et politique dans leur Etat d'origine ; ils doivent par ailleurs être domiciliés dans la commune où ils souhaitent voter, ou résider en France depuis au moins 6 mois, ou être inscrits au rôle d'une contribution directe communale depuis 5 années au moins.

Enfin, ils doivent s'être préalablement inscrits sur une liste électorale complémentaire de leur lieu de résidence avant le 31 décembre 2008. Les ressortissants doivent compléter ce formulaire accompagné de pièces justificatives : photocopie d'une pièce d'identité et de nationalité en cours de validité (carte d'identité, passeport ou carte de séjour) et d'un justificatif de domicile (quittance de loyer, facture d'électricité ...). Pour finir, ce formulaire s'accompagne

116. Rapport de la Commission européenne du 27 octobre 2010, COM(2010)603 final.

d'une déclaration sur l'honneur par laquelle le ressortissant s'engage à ne pas prendre part au vote dans un autre Etat membre autre que la France pour ce scrutin.

De même, la Bulgarie, la République Tchèque, la République Chypre, l'Estonie, la Hongrie ainsi que la Lettonie exigeaient des citoyens de l'Union européenne qu'ils produisent une attestation d'enregistrement pour prouver leur lieu de résidence, ou bien un renouvellement de leur inscription pour chaque nouvelle élection européenne. Quant à la République de Malte, elle exigeait des citoyens de l'Union européenne ressortissants d'un autre Etat membre qu'ils présentent une carte d'identité maltaise pour tout inscription sur une liste électorale – cette exigence de carte de séjour a été supprimée par la directive 2004/38/CE à laquelle s'est substituée l'exigence d'une attestation d'enregistrement. Enfin, le rapport constate que seuls quelques Etats membres, dont la République Tchèque, la République Chypre, la Lituanie et l'Estonie, avaient transposé correctement l'obligation d'informer les citoyens sur les conditions et modalités d'exercice du droit de vote et d'éligibilité aux élections européennes. Tout ressortissant de l'Union européenne votant en France à cette élection perd son droit de vote dans un autre Etat de l'Union. Il pourra exercer à nouveau son droit de vote dans un autre Etat de l'Union seulement lorsqu'il se sera fait radier des listes complémentaires en France : un vote multiple est puni d'une peine prévue à l'article L.92 du code électoral, à savoir deux ans de prison et 15 000 euros d'amende. Ces exigences supplémentaires contraires à la directive ont pu donner lieu à une procédure d'infraction. Dans une affaire du 12 septembre 2006 opposant Gibraltar au Royaume-Uni de Grande-Bretagne, la Cour de justice avait établi que « la détermination des titulaires du droit de vote et d'éligibilité aux élections au Parlement européen est dans la compétence de chaque Etat membre, en respect du droit communautaire ».

La directive 2013/1/UE du Conseil du 20 décembre 2012 en ce qui concerne certaines modalités de l'exercice du droit d'éligibilité aux élections du Parlement européen pour les citoyens de l'Union résidant dans un Etat membre dont ils ne sont pas ressortissant a été adoptée le 20 décembre 2012, et vient modifier la directive 93/109/CE. Suite au constat, par la Commission européenne, en 2010,[117] de la baisse de participation aux élections européennes et la nécessité de faciliter la participation des citoyens de l'Union européenne aux élections, il était nécessaire de promouvoir et faciliter la parti-

117. Voir le communiqué de presse de la Commission européenne du 27 octobre 2010, IP/10/1390.

cipation aux élections européennes, car celles-ci sont « l'un des moyens les plus importants pour les citoyens de faire entendre leur voix dans l'Union européenne ».[118]

Le premier changement notable tend à faciliter la possibilité, pour les citoyens de l'Union européenne, de présenter leur candidature aux élections européennes. Ainsi, l'obligation faite aux citoyens de l'Union européenne de présenter, lors du dépôt de leur candidature dans un Etat membre autre que leur Etat membre d'origine, une attestation des autorités administratives compétentes de l'Etat membre d'origine certifiant que les personnes concernées ne sont pas déchues ou qu'une telle déchéance n'est pas connue desdites autorités, est supprimée. Le citoyen de l'Union européenne candidat ne devra plus que présenter une déclaration confirmant qu'il n'a pas été déchu de son droit d'éligibilité au Parlement européen. C'est à l'Etat membre de résidence du citoyen qu'incombe la tâche de s'enquérir d'une éventuelle déchéance du droit d'éligibilité auprès de l'Etat membre d'origine. Si celui-ci ne répond pas dans les délais impartis, cela n'entraînera pas l'inéligibilité pour le citoyen de l'Union. Les Etats membres devront par ailleurs, dans leur droit interne, prévoir des délais différents pour le dépôt de candidatures aux élections européennes selon qu'il s'agit d'un ressortissant de l'Etat membre ou d'un citoyen de l'Union européenne, pour qui les démarches sont nécessairement plus longues et plus complexes. Tous ces changements supposent donc la désignation, par les Etats membres, d'un point de contact unique chargé de fournir les informations requises pour les candidats. Cependant, les nouvelles règles fixées par la directive 2013/1/UE ne seront effectives que lorsque celle-ci sera entrée en vigueur : c'est-à-dire le lendemain de sa publication au Journal Officiel de l'Union européenne.

Question 10

La volonté de donner voix au chapitre aux citoyens européens lors des élections municipales a été affirmée à l'occasion du premier Conseil européen en 1974.[119] La participation aux élections municipales, en tant qu'électeur ou comme candidat, constitue aujourd'hui un droit fondamental consacré par l'article 40 de la charte des droits fondamentaux de l'Union européenne[120] et ses modalités sont fixées par la directive 94/80/CE. Aux termes de l'article 14 de

118. Discours de Viviane Reding, Vice-présidente de la Commission européenne.
119. A. Lucchese, « Le droit de vote aux étrangers pour les élections locales en Europe », R.M.C., 1987, p. 473.
120. Charte des droits fondamentaux de l'Union européenne (JO C 83/389 du 30.3.2010).

la directive, les Etats membres devaient adopter les mesures nationales de transposition avant le 1er janvier 1996. A cette date,

- quatre Etats membres (Danemark, Irlande, Luxembourg et Royaume-Uni) avaient adopté l'intégralité des mesures de transposition
- trois Etats membres (Allemagne pour les Länder, sauf Brême, Finlande continentale et Autriche pour Carinthie et Tyrol) avaient partiellement transposé la directive
- onze Etats membres n'avaient pas mis en œuvre la directive (Belgique, Allemagne pour Brême, Grèce, Espagne, France, Italie, Pays-Bas, Autriche pour sept Länder, Portugal, Finlande pour les îles Åland et Suède). Des procédures d'infraction pour défaut de notification des mesures nationales de transposition (Article 226 du traité CE) à l'encontre de ces Etats ont été engagées par la Commission en 1996. Ces procédures ont été clôturées avant la saisine de la Cour de justice des Communautés européennes, sauf dans le cas de la Belgique, qui a été condamnée en 1998, avant notification de ses mesures de transposition à la Commission en 1999.[121]

Des dérogations sont prévues à l'article 12 de la directive. En son paragraphe 1er, il est énoncé que les Etats, dans lesquels la proportion de citoyens de l'Union en âge de voter y résidant sans en avoir la nationalité dépasse 20 % de l'ensemble des citoyens de l'Union en âge de voter y résidant, peuvent exiger une période minimale de résidence, tant des électeurs que des candidats, ou prendre des mesures relatives à la composition des listes de candidats. Comme cela a pu être souligné par la réponse précédente, le seul Etat membre ayant appliqué cette dérogation est le Luxembourg qui a limité le droit de vote aux citoyens de l'Union non nationaux qui y sont légalement domiciliés et y résident depuis une période minimale de moins cinq ans avant leur inscription sur la liste électorale.[122] En ce qui concerne le droit d'éligibilité, ces derniers doivent également y avoir résidé pendant au moins cinq années avant le dépôt de leur déclaration de candidature.[123] Dans ses rapports, adoptés les 22 novembre 1999,[124] 22 août 2005[125] et 9 mars 2012,[126] la

121. Arrêt de la Cour de Jusitce, 9 juillet 1998, affaire C-323/97.
122. Article 2 de la loi du 18 février 2003.
123. Article 192 de la loi du 18 février 2003.
124. COM (1999) 597 final, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=fr&type_doc=COMfinal&an_doc=1999&nu_doc=597.
125. COM (2005) 382 final, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=fr&type_doc=COMfinal&an_doc=2005&nu_doc=382.

Commission a examiné si cette dérogation était toujours applicable au Luxembourg. Sur la base d'une vérification des données statistiques correspondantes, elle a conclu que les raisons qui justifiaient l'octroi de cette dérogation au pays persistent et que, en conséquence, il n'y a pas lieu de proposer des adaptations. L'article 12, paragraphe 2, autorise la Belgique à appliquer des restrictions prévues par la directive à un nombre limité de communes dont elle communique la liste un an au moins avant le scrutin communal pour lequel il est envisagé de faire usage de cette dérogation. Toutefois, la Belgique n'a jamais requis l'application de cette derogation.[127]

L'article 12, paragraphe 3, autorise tout Etat membre à ne pas appliquer les articles 6 à 11 aux citoyens de l'Union qui ne sont pas ressortissants de l'Etat en question, si ces derniers ont le droit de vote au parlement national de cet Etat et sont donc inscrits sur les listes électorales dans exactement les mêmes conditions que les électeurs nationaux. Aucun Etat membre n'a jamais invoqué la dérogation prévue à l'article 12, paragraphe 3.[128]

Plusieurs conditions supplémentaires imposées aux citoyens européens par rapport aux nationaux ont été constatées par la Commission et ont été par la suite annulées. A titre d'exemples :

1 En Grèce, la législation comportait une disposition aux termes de laquelle seules les personnes connaissant la langue grecque disposaient du droit de vote. Comme une telle exigence est discriminatoire et contraire à l'article 3 de la directive, la Commission a adressé un avis motivé à la Grèce. Une autre disposition non conforme à l'article 4 de la directive prévoyait que seules les personnes résidant en Grèce depuis au moins deux ans étaient autorisées à voter. Ces conditions supplémentaires ont été abrogées suite à une modification de la législation nationale.
2 En Allemagne, les Länder de Saxe et de Bavière exigeaient que l'électeur non national fasse une déclaration sous serment attestant qu'il réside depuis au moins trois mois, sans interruption, dans la municipalité où il souhaite voter et que c'est là que se trouve son principal centre d'intérêt. En outre, ces deux Länder allemands exigeaient que les citoyens de l'Union résidant en Allemagne présentent une demande d'inscription sur la liste

126. COM (2012) 99 final, http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_fr.pdf.
127. COM (2012) 99 final, http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_fr.pdf.
128. COM (2012) 99 final, http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_fr.pdf.

électorale avant chaque élection municipale, ce qui constitue une violation de l'article 8, paragraphe 3, de la directive. Après l'ouverture des procédures d'infraction, la législation nationale a été modifiée, de telle sorte que les citoyens de l'Union non nationaux sont à présent inscrits automatiquement sur la liste électorale pour chaque élection municipale.

Question 11

Il existe plusieurs types d'élections, à savoir,

1 les élections locales regroupant les élections municipales, les élections cantonales et les élections régionales
2 les élections nationales regroupant l'élection présidentielle, les élections législatives et les élections sénatoriales
3 les élections européennes qui consistent à élire les députés du Parlement européen.

Les traités et la Charte des Droits fondamentaux garantissent le droit de vote et d'être élu dans l'Etat membre de résidence dans les mêmes conditions que les nationaux uniquement pour les élections européennes et municipales. Cette limitation tient à la notion de souveraineté. Ainsi, statuant sur le droit de vote accordé aux ressortissants de l'Union européenne aux élections locales, le Conseil constitutionnel avait considéré qu'il n'était contraire à la Constitution que dans la mesure où il risquait de les faire participer à la désignation des sénateurs, et donc à l'élection d'une Assemblée qui, elle, est connectée sur une notion de souveraineté nationale.[129] Toutefois, une initiative citoyenne européenne intitulée « Let Me Vote ! » est actuellement en cours et vise à accorder à tout citoyen européen résidant dans un Etat membre de l'Union Européenne dont il n'a pas la nationalité, le droit de voter non seulement aux élections municipales et européennes, mais aussi aux élections régionales et nationales de son pays de residence.[130]

Un droit de vote spécifique, allant au-delà des droits électoraux aux élections locales et à celles du Parlement européen tels que prescrit dans le droit européen, est attaché à la citoyenneté européenne. En effet, la directive 94/80/CE n'affecte pas les dispositions de chaque Etat membre régissant les

129. Conseil Constitutionnel 9 avril 1992, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1992/92-308-dc/decision-n-92-308-dc-du-09-avril-1992.8798.html.
130. http://www.letmevote.eu/fr/.

droits de ses propres nationaux ou des ressortissants de pays tiers résidant sur leur propre territoire. Les modalités d'exercice du droit de vote aux élections locales ainsi qu'à celles du Parlement européen sont donc conditionnées par les droits internes. Ainsi les Etats membres peuvent-ils réserver à leurs ressortissants les fonctions de maire et d'adjoint au maire, en raison de leur participation à l'autorité publique ou à l'élection d'une assemblée parlementaire (article 5, paragraphes 3 et 4 de la directive). Une dérogation permet aussi aux Etats membres dans lesquels des problèmes spécifiques peuvent se poser, dans la mesure où plus de 20 % des personnes y résidant sont citoyens de l'Union sans être nationaux, de réserver le droit de vote et d'éligibilité aux électeurs qui satisfont à certaines exigences de durée de résidence – dérogation dont bénéficie le Luxembourg. Par ailleurs, le double vote et la double candidature sont des droits attachés à la particularité de la citoyenneté européenne, la directive 94/80/CE ne s'y oppose pas. Ils permettent ainsi au citoyen de l'Union non ressortissant d'un Etat membre de voter à la fois dans une commune de l'Etat membre dans lequel il a sa résidence principale, mais également dans une commune de l'Etat membre d'origine.

Le Traité de Maastricht en 1992 a consacré un nouveau droit en faveur des citoyens de l'Union européenne, le droit de vote et d'éligibilité aux élections municipales dans un Etat dont ils n'ont pas la nationalité.[131] Cette avancée correspond à la volonté des rédacteurs d'amorcer le processus d'intégration politique de l'Union européenne, par le truchement d'une citoyenneté européenne de résidence, ouverte à toutes les personnes qui travaillent, vivent, résident sur le territoire de l'un des Etats membres. La notion de citoyenneté est de nature à encourager la pleine participation des citoyens à la vie démocratique de l'Union. Jean MONNET l'affirmait : « nous ne coalisons pas des Etats, nous unissons des hommes », et ce nouveau droit correspondait à un souhait de faciliter une intégration locale et efficiente des citoyens. L'Europe est une construction, une volonté politique – en plus d'une communauté économique. Dès lors, le citoyen européen devait avoir le droit de participer à tous les scrutins, afin « d'apporter sa pierre à l'édifice européen ».[132] L'identité

131. Article 8 B : « *Tout citoyen de l'Union résidant dans un Etat membre dont il n'est pas ressortissant a le droit de vote et d'éligibilité aux élections municipales dans l'Etat membre où il réside, dans les mêmes conditions que les ressortissants de cet Etat. Ce droit sera exercé sous réservé des modalités à arrêter avant le 31 décembre 1994 par le Conseil (...)* ».

132. LAGARDE (J.-C.), *Proposition de loi constitutionnelle visant à accorder le droit de vote et d'éligibilité (à l'exception du mandat de Président de la République) pour toutes les élections, aux citoyens européens résidant en France*, du 8 mars 2013.

européenne s'est forgée à partir d'une volonté politique de partager un destin commun et des valeurs communes. Cela doit avoir pour conséquence l'attribution de droits, au nom d'une ambition et d'un destin communs. Le Traité de Maastricht constituait une « nouvelle étape dans le processus créant une union sans cesse plus étroite entre les peuples de l'Europe ; [considérant] que l'Union a, notamment, pour mission d'organiser de façon cohérente et solidaire les relations entre les peuples des Etats membres ; qu'elle compte, au nombre de ses objectifs fondamentaux, celui de renforcer la protection des droits et des intérêts des ressortissants de ses Etats membres par l'instauration d'une citoyenneté de l'Union ».[133] Il convenait d'assurer que le citoyen puisse participer à la vie démocratique et influencer le processus décisionnel au niveau local, où les décisions prises concernent directement le citoyen. Ce droit s'affirme comme une possibilité de combler le déficit démocratique dont souffre l'Union, en permettant au citoyen européen de s'intégrer et de participer à la vie démocratique de son pays d'accueil.[134] En outre, le plan d'action de Stockholm du 20 avril 2010 soulignait que « pour rapprocher les citoyens du projet européen, il est essentiel de faciliter et d'encourager leur participation à la vie démocratique de l'Union. L'augmentation du taux de participation aux élections du Parlement européen est une ambition commune. Le droit de vote et d'éligibilité aux élections locales et européennes dont jouissent les citoyens européens résidant dans un autre Etat membre que leur Etat membre d'origine doit être encore valorisé et renforcé ».[135]

Question 12

Avec les élections pour le Parlement européen qui se profilent l'an prochain[136] et l'année 2013 déclarée comme l'Année européenne pour les citoyens par la Commission européenne, la thématique des droits dévolus au

133. Directive 94/80/CE, du 19 décembre 1994, fixant les modalités de l'exercice du droit de vote et d'éligibilité aux élections municipales pour les citoyens de l'Union résidant dans un Etat membre dont ils n'ont pas la nationalité, JO L 368 du 31 décembre 1994.
134. Rapport de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, « *Rapport 2013 sur la citoyenneté de l'Union. Citoyens de l'Union : vos droits, votre avenir* », COM(2013) 269, le 8 mai 2013.
135. Communication de la Commission au Parlement européen, au Conseil, Comité économique et social européen et au Comité des régions – Mettre en place un espace de liberté, de sécurité et de justice au service des citoyens européens – Plan d'action mettant en œuvre le programme de Stockholm, 20 avril 2010, COM(210) 171.
136. Elections prévues en mai 2014.

citoyen européen reprend de sa vigueur, notamment appréciée dans son acception politique.

La communication sur et l'effectivité des droits fondamentaux au sein de l'Union ont connu de nombreuses réussites au cours de ces dernières années ; pour autant, les dirigeants européens demeurent confrontés à des défis d'envergure, comme il est nécessaire de rappeler « les droits dont [les citoyens] bénéficient grâce à l'Union européenne et ce que cette dernière peut faire pour chacun d'entre nous ».[137] Ainsi, le droit de vote -droit politique et civique par excellence- demeure sujet à des restrictions, des limitations contraires au droit de l'Union européenne, et il convient de faire évoluer les droits nationaux pour assurer leur conformité aux normes européennes pertinentes.

Le droit de vote des détenus reste une question épineuse, en particulier au Royaume-Uni condamné par un arrêt retentissant,[138] qui n'a consenti à aucune modification de son cadre légal en dépit d'obligations juridiques.[139] L'affaire *Peter Chester v Secretary of State for Justice* actuellement pendante devant la *Supreme Court* met une nouvelle fois en exergue l'incompatibilité des dispositions britanniques avec le droit de l'Union européenne, et notamment l'article 39 de la Charte des droits fondamentaux.[140] L'appelant est un prisonnier condamné à une peine d'emprisonnement à perpétuité pour le meurtre de sa nièce intervenu en 1977. En raison de son incarcération il a été déchu de son droit de vote aux élections nationales et européennes, en vertu du *Representation of the People Act 1983* et du *European Parliamentary Elections 2002*.[141] En 2008, le condamné a introduit un recours en invoquant une violation de ses droits garantis par le droit de l'Union européenne, soulignant la disproportion d'une suppression totale du droit de vote des prisonniers au Royaume-Uni pour les prochaines élections du Parlement européen. Le Premier Ministre David CAMERON a pu partager sa réticence ferme quant au

137. REDING (V.), Vice-présidente de la Commission européenne, Bruxelles, 11 août 2011.

138. Arrêt de la Grande Chambre, « Hirst c. Royaume-Uni », n° 74025/01, du 6 octobre 2005.

139. Voir l'arrêt « Greens c. Royaume-Uni » du 23 novembre 2012, dont l'exécution fera l'objet d'un examen par le Comité des Ministres au plus tard en septembre 2013, Rapport annuel 2012 « Les droits fondamentaux : défis et réussites en 2012 », Agence des droits fondamentaux de l'Union européenne, p. 241.

140. Qui se lit comme suivant : « *1. Tout citoyen ou citoyenne de l'Union a le droit de vote et d'éligibilité aux élections au Parlement européen dans l'Etat membre où il ou elle réside, dans les mêmes conditions que les ressortissants de cet Etat. 2. Les membres du Parlement européen sont élus au suffrage universel direct, libre et secret* ».

141. http://www.supremecourt.gov.uk/current-ases/CCCaseDetails/case_2012_0151.html.

recouvrement par les prisonniers de leur droit de vote : « *It makes me physically ill even to contemplate having to give the vote to anyone who is in prison. Frankly, when people commit a crime and go to prison, they should lose their rights, including the right to vote. But we are in a situation that I am afraid we have to deal with. This is potentially costing us £160 million, so we have to come forward with proposals, because I do not want us to spend that money; it is not right. So, painful as it is, we have to sort out yet another problem that was just left to us by the last Government* ».[142]

Contrairement à son homologue britannique, la législation française qui prévoie aussi des restrictions répond aux impératifs européens. Elle est affiliée à « une catégorie intermédiaire dans laquelle la privation du droit de vote est appliquée en fonction du type d'infraction et/ou à partir d'un certain seuil de gravité de la peine privative de liberté (lié à sa durée) »[143] par la Cour de Strasbourg. La suspension du droit de vote ne peut pas en principe être liée automatiquement à une condamnation, mais doit être expressément prononcée par un juge. Ce système satisfait aux exigences européennes, la CEDH accordant sa préférence à « un tribunal indépendant appliquant une procédure contradictoire » pour le prononcé de cette sanction.[144] En d'autres termes, l'interdiction des droits civiques, civils et de famille est devenue une peine complémentaire, ne revêtant plus de caractère automatique depuis 1994 et la réforme du code pénal. La privation n'est automatique que dans les cas de corruption et de menace à l'encontre d'un agent public.[145]

Une limitation du droit de vote en cas de handicap est encore observée dans certains Etats membres.

Le Comité des Nations Unies sur les droits des personnes handicapées, adoptant une interprétation large de la signification de la participation à la vie politique et publique, a appelé à revoir « toutes les dispositions pertinentes [...] afin de garantir que toutes les personnes handicapées puissent voter, quel que soit leur handicap, statut juridique ou lieu de résidence, et qu'elles puis-

142. *Official Report*, 3 *November* 2010; Vol. 517, c. 921, voir http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110111/halltext/110111h0001.htm.
143. Arrêt Hirst, point 33.
144. FATIN-ROUGE STEFANINI (M.), « Le droit de vote des détenus en droit canadien, sud-africain et conventionnel européen », *Revue Internationale de Droit Comparé*. 3-2007, p. 636.
145. « L'administration pénitentiaire et les droits des personnes détenues », document ENA, février 2011, p. 13.

sent participer à la vie politique et publique au même titre que les autres citoyens ».[146]

L'accessibilité des bureaux de vote demeure un problème récurrent pour les Etats membres de l'Union européenne, alors que 24 d'entre eux ont souscrit au principe que les élections devraient être totalement accessibles.[147] En guise d'illustration, des évolutions ont été constatées en Autriche et en Finlande, où plusieurs plans d'action nationaux ont été adoptés en 2012 visant à augmenter la participation des personnes handicapées à la vie publique et politique.

La France, au nom d'une plus grande accessibilité, a mis en place un vote électronique par internet à l'occasion des élections parlementaires françaises de juin 2012 et au bénéfice des citoyens résidant à l'extérieur du territoire.[148] Les électeurs ont communiqué leur adresse électronique et leur numéro de portable aux consulats, qui leur ont ensuite envoyé un identifiant ainsi que des instructions sur la procédure de vote.[149] Pour autant, l'Etat doit procéder à de nouveaux efforts afin d'assurer une meilleure accessibilité de tous ses bureaux de vote aux électeurs souffrant d'un handicap.[150] S'agissant des personnes malvoyantes et de leur accès à l'isoloir, un rapport de l'OSCE souligne « qu'aucune mesure particulière n'[a] été adoptée afin d'aider les personnes malvoyantes, qui n'ont de la sorte pas pu voter dans le secret ».[151]

Le droit de vote des personnes souffrant d'un handicap mental ou de troubles de la santé mentale est un domaine du droit qui varie énormément d'un Etat membre de l'Union européenne à l'autre. La majorité d'entre eux associent encore la perte de la capacité juridique à la privation du droit de vote. Les Etats membres de l'Union suivent trois approches principales : l'exclusion

146. ONU, Comité des droits des personnes handicapées (2012), paragraphe 46.
147. Rapport annuel 2012 « Les droits fondamentaux : défis et réussites en 2012 », Agence des droits fondamentaux de l'Union européenne, p. 241.
148. Code électoral, articles L 330-13 et R 176-3 à R 176-3-10.
149. Rapport « OSCE/ODIHR Election Assessment Mission – Final Report » de l'Office for Democratic Institutions and Human Rights, OSCE, sur les élections parlementaires des 10 et 17 juin 2012, du 10 septembre 2012, p. 9.
150. Rapport « OSCE/ODIHR Election Assessment Mission – Final Report » de l'Office for Democratic Institutions and Human Rights, OSCE, sur les élections parlementaires des 10 et 17 juin 2012, du 10 septembre 2012.
151. Rapport « OSCE/ODIHR Election Assessment Mission – Final Report » de l'Office for Democratic Institutions and Human Rights, OSCE, sur les élections parlementaires des 10 et 17 juin 2012, du 10 septembre 2012, p. 2.

totale, l'examen au cas par cas, et la participation pleine et entire.[152] En France, la participation des personnes handicapées mentales et des personnes souffrant de troubles mentaux à la vie politique est considérée comme « satisfaisante » puisque ne prônant pas « l'exclusion ».[153] Le Code électoral dispose en son article L5 qu'il appartient au juge de statuer sur le maintien ou la suppression du droit de vote de la personne protégée. Auparavant, les droits civiques étaient supprimés automatiquement dès que les personnes étaient placées sous une protection juridique. L'inversion du principe est intervenue avec l'entrée en vigueur en 2009 de la loi sur le handicap de 2005. Il s'agit en conclusion d'une participation limitée, au cas par cas, souvent sur décision du juge.

Culture(s) de la citoyenneté

Question 13

En général en France, on peut considérer que la mise en œuvre des normes en matière de citoyenneté européenne fait partie d'une culture européenne basée sur les droits de la « libre circulation » et des droits « constitutionnels ». En effet, on trouve des nombreux exemples dans la pratique décisionnelle des tribunaux français, ainsi que dans les différentes lois de transposition du droit de l'UE, dans les domaines traités dans les questions ci-dessus. Le droit de séjour fait partie des droits compris dans les droits « constitutionnels » français. En matière des droits de séjour accordés aux membres de la famille d'un citoyen de l'UE, le pacte civil de solidarité[154] prévu par la directive comme équivalent au mariage n'était pas regardé en France. Néanmoins, les juridictions françaises ont usé à plusieurs reprises de l'effet direct de la directive en reconnaissant cette équivalence. À cette fin, les juges réfutaient l'application de l'article L. 313-11-7° du CESEDA (ie: 3.2b de la directive), au profit de

152. Rapport annuel 2012 « Les droits fondamentaux : défis et réussites en 2012 », Agence des droits fondamentaux de l'Union européenne, p. 189.
153. Rapport annuel 2012 « Les droits fondamentaux : défis et réussites en 2012 », Agence des droits fondamentaux de l'Union européenne, p. 243.
154. Equivalent de l'article 2 .2. b) « le partenaire avec lequel le citoyen de l'Union a contracté un partenariat enregistré ».

l'application des l'article L. 121-1 et L. 121-3 du CESEDA (ie: 2.2.b de la directive).[155]

En ce qui concerne le droit d'accès, et même si l'article, de droit commun, L. 221-1 du CESEDA pose le principe de l'obligation de présentation de certains documents et visas, les articles R. 121-1 et R. 212-1 du CESEDA dérogent au principe susmentionné pour les ressortissants d'un Etat de l'Union européenne, en ce que la simple présentation d'une carte d'identité ou passeport en cours de validité est suffisant pour l'admission sur le territoire français.

Les juridictions françaises ont estimé, sur le fondement des article L. 121-1 4° et L. 121-3 du CESEDA, que le droit au séjour ne pouvait être refusé à un ressortissant d'un Etat tiers, sur le fondement de l'article L.121-1 4° et L.121-3 CESEDA, au motif que son épouse, ressortissante d'un Etat membre et bénéficiant d'un droit de séjour permanent, disposait de ressources insuffisantes suite à un accident de la circulation, alors même que cette dernière était titulaire de diverses allocations et que le montant de ces dernières dépassait le seuil minimum de l'article R. 121-4 du CESEDA. En conséquence, l'arrêté du préfet disposant de l'obligation de quitter le territoire procédant à son éloignement a été annulé.

Les cours et tribunaux français n'ont pas attendu la codification tardive de 2011[156] par le législateur français des critères énumérés par la directive, à savoir la durée de séjour, l'âge, l'état de santé, la situation familiale et économique, l'intégration sociale et culturelle et l'intensité des liens avec le pays d'origine, pour apprécier la proportionnalité d'une mesure d'éloignement au regard de la situation personnelle de l'intéressé. Ils ont, en effet, tenu compte de ces critères depuis des dizaines d'années en s'efforçant de protéger le droit au respect de la vie privée et familiale tel qu'énoncé à l'article 7 de la charte des droits fondamentaux de l'Union européenne et à l'article 8 de la convention européenne des droits de l'homme et des libertés fondamentales (la « CESDH »). Le contrôle de proportionnalité a été réalisé en cas de « menace à

155. Tribunal administratif de Nice, 16 oct. 2009, *Alves do Couto: req. no 0902958 ;* Cour administrative d'appel de Marseille – Marseille – 5ème chambre – formation à 3 – 09MA04065 – 12 mai 2011 ; Cour administrative d'appel de Marseille – Marseille – 5ème chambre – formation à 3 – 10MA04024 – 28 juin 2012; Cour administrative d'appel de Bordeaux – Bordeaux – 1ère chambre – formation à 3 – 12BX00350 – 05 juillet 2012.

156. Loi n° 2011-672 du 16 juin 2011, Op. cit. ; articles L. 121-4, L. 511-3-1, L. 521-1, L. 521-1 et L. 521-5 du CESEDA.

l'ordre public[157] », mais aussi en cas de « menace grave à l'ordre public[158] » et de « nécessité impérieuse[159] ».

On peut néanmoins trouver des exemples d'une mise en œuvre des normes en matière de citoyenneté européenne en tant « qu'ajout » aux systèmes d'immigration. En ce qui concerne le droit aux prestations sociales des demandeurs d'emploi, l'arrêt de la cour administrative d'appel de Paris du 20 octobre 2011[160] est typique du manque de prise en compte de la jurisprudence de la Cour de justice de l'Union européenne (la « CJUE ») sur le « lien réel » par les cours et les tribunaux nationaux. En l'espèce un ressortissant polonais s'était vu refuser l'accès au RSA. Confirmant le jugement du tribunal administratif de Paris, la cour administrative d'appel de Paris a estimé que le demandeur n'était pas fondé à toucher le RSA car celui-ci était « entré en France pour y chercher un emploi » et qu'il s'y maintenait à ce titre. Le juge semble avoir procédé à un double contrôle : celui de la conformité du refus d'accorder le RSA avec la directive et de sa conformité avec le statut de « travailleur ». Il n'a en revanche pas recherché s'il existait un « lien réel » entre le demandeur et le marché de l'emploi de l'Etat membre d'accueil.

Question 14

Il faut rappeler que le juge national reste l'organe juridictionnel privilégié pour assurer la protection des citoyens ; de même, le juge ordinaire du droit de l'Union est le juge national. La CJUE ne peut connaître d'un recours que si elle est saisie par une institution de l'Union européenne ou à travers le renvoi préjudiciel en interprétation et en appréciation de validité. Mais la primauté du droit de l'Union sur l'ensemble du droit national pourrait se heurter à la conservation de l'autorité des Cours constitutionnelles des Etats membres,[161] dont la France.

La Charte des droits fondamentaux de l'Union européenne[162] est l'exemple habituel, les droits fondamentaux faisant partie intégrante des principes géné-

157. CAA Versailles, 8 novembre 2012, n° 11VE01627.
158. CE, 21 septembre 2005, requête n° 260269.
159. CE, 2 juillet 2001, requête n° 223181.
160. CAA Paris, 20 octobre 2011, n° 10PA05222.
161. Cour constitutionnelle allemande, 30 juin 2009, décision relative à la ratification du Traité de Lisbonne.
162. Charte des droits fondamentaux de l'Union européenne du 18 décembre 2000, JOCE 18 décembre, no C 364.

raux[163] du droit dont le juge de l'UE doit assurer le respect,[164] y compris les dispositions de ladite Charte des droits fondamentaux de l'Union européenne. Même avec sa visibilité réduite (du fait de sa non-inscription dans le corps du Traité de Lisbonne) il lui est reconnu la même valeur que les Traités[165] et sa justiciabilité est limitée à la mise en œuvre du droit de l'Union au sein des Etats membres, comme rappelé par la Cour.[166] De même, il a été précisé que les droits reconnus par la Charte doivent être interprétés en cohérence avec les traditions des Etats membres.[167]

La régulation ces dernières années a été complexe. La Cour de justice a étendu la responsabilité d'un Etat membre pour violation du droit de l'UE, en la reconnaissant quel que soit l'organe national imputable.[168] En France, elle a également établi une sorte de contre-limite aux capacités du contrôle de conformité à la Constitution nationale dans une affaire relative à la question prioritaire de constitutionnalité.[169] Selon elle, « l'article 267 TFUE s'oppose à une législation d'un Etat membre qui instaure une procédure incidente de contrôle de constitutionnalité des lois nationales, pour autant que le caractère prioritaire de cette procédure a pour conséquence d'empêcher, tant avant la transmission d'une question de constitutionnalité à la juridiction nationale chargée d'exercer le contrôle de constitutionnalité des lois que, le cas échéant, après la décision de cette juridiction sur ladite question, toutes les autres juridictions nationales d'exercer leur faculté ou de satisfaire à leur obligation de saisir la Cour de questions préjudicielles ».

Encore en ce qui concerne la protection des droits fondamentaux, dans le cadre d'une procédure faisant application du droit français de la concurrence, la Cour de cassation a censuré sur le fondement du droit à un procès équitable[170] un arrêt de condamnation dès lors que l'entente était prouvée par un enregistrement d'une conversation téléphonique obtenue à l'insu de l'auteur

163. Idot L., Le respect des droits de la défense in Réalités et perspectives du droit communautaire des droits fondamentaux, sous la direction de F. Sudre et H. Labayle, Bruylant Bruxelles, 2000, p. 213.
164. Traité UE, art. 6, § 2.
165. Article 6 TUE.
166. CJCE, 13 juill. 1989, aff. 5/88, Waschauf c/ Bundesamt für Ernährung und Forstwirtschaft, Rec. CJCE, p. 2609 ; CJCE, 13 avr. 2000, aff. C-292/97, Karlsson, Rec. CJCE, I, p. 2737.
167. I. article 52, § 4, de la Charte.
168. CJCE, 30 sept. 2003, aff. C-224/01, Köbler, Rec. CJCE, I, p. 10239.
169. CJUE, 22 juin 2010, aff. jointes C-188/10 et C-189/10, Melki et Abdeli.
170. CEDH, art. 4, § 1.

des propos.[171] Si la Cour d'appel de Paris a résisté sur renvoi après cassation et conclu que les enregistrements peuvent être écartés si leur production porte atteinte au droit à un procès équitable, au principe du contradictoire et aux droits de la défense de ceux auxquels ils sont opposés, mais qu'en l'espèce, les sociétés mises en cause n'apportaient pas la preuve d'une atteinte concrète à ces droits et principe,[172] la Cour de cassation a cassé l'arrêt au visa de l' article 9 du Code de procédure civile et de l'article 6, paragraphe 1 de la Convention européenne des droits de l'Homme.[173] De manière générale, la sous-protection du ressortissant dans le cadre du droit de l'Union européenne rappelle la sous-protection du ressortissant d'un Etat tiers dans la Convention Européenne des Droits de l'Homme.

Le droit français et le droit de l'Union coexistent d'une façon nécessaire. Il en est de même pour leurs juges, qui dialoguent (ou qui s'ignorent) et même parfois, arrivent à affirmer leur suprématie sur l'autre. Néanmoins, émettre des jugements en ce qui concerne le rôle joué par la Charte dans la manière dont les droits des citoyens européens sont interprétés par le juge français nous semble précipité à ce stade, d'autant qu'elle n'est que peu utilisée par les parties de manière générale.

Question 15

Comme l'affirmait Bronislaw Geremek[174] : « *Après avoir fait l'Europe, nous devons faire maintenant des Européens* ». Cet objectif était celui de l'Europe il y a déjà vingt ans au moment de la création de la citoyenneté européenne. En effet, il s'agissait de favoriser l'identification des citoyens à l'Union européenne et de développer une identité européenne qui viendrait se fondre dans la citoyenneté nationale. Les médias constituent une extraordinaire plateforme pour modeler le ton du débat public. Or, un grand nombre d'enquêtes montrent que les médias français continuent d'informer très peu les citoyens sur ce qui se passe dans le reste de l'Union. Quant à ce qui se passe à Bruxelles, le traitement qui en est fait est généralement technique et rébarbatif. La construction de la citoyenneté passe nécessairement par l'information,

171. Cass. com., 3 juin 2008, no 07-17.147, Bull. civ. IV, no 112.
172. CA Paris, 29 avr. 2009, 1re ch., sect. H, no RG : 2008/11907, Philips France, Avantage, Sony France.
173. Cass. ass. plén., 7 janv. 2011, nos 09-14.316 et 09-14.667, Bull. ass. plén., no 1, RLDA 2011/57, no 3284, obs. Anadon C.
174. Visions d'Europe, 2007.

cela suppose donc que les médias concentrent d'avantage leur attention sur l'Union européenne.

En France, on constate que les questions liées à la notion de citoyenneté européenne dans sa globalité sont peu relayées par les médias nationaux. L'Europe, et plus particulièrement le thème de la citoyenneté, est le parent pauvre des médias français.[175] On ne peut parler d'un véritable paysage médiatique européen qui permettrait de susciter des débats et d'intéresser le public. A ce propos, le rapport de M. Lamassoure[176] avait mis en évidence que les actualités concernant la politique américaine étaient considérées, dans de nombreux Etats membres dont la France, comme plus importantes que l'actualité européenne. L'anniversaire des vingt ans de la création de la citoyenneté européenne en est un exemple flagrant. En effet, en dépit de l'importante communication de la part des institutions européennes, peu de sujets lui ont été consacrés dans les médias français. Ainsi, s'agissant d'une part de l'audiovisuel, les chaînes de télévision ont pour la plupart consacré à ce thème un reportage de quelques minutes dans les journaux télévisés, consistant en général en des « micro-trottoir » où des citoyens étaient questionnés sur leur sentiment d'être citoyen européen. S'agissant d'autre part de la presse écrite, les articles ont simplement fait état des initiatives des collectivités territoriales en faveur de la citoyenneté européenne. L'absence de débats, même à cette occasion, est à déplorer. Nous pouvons donc malheureusement affirmer qu'il y a en France une absence quasi-totale de communication sur l'Europe.

Il semble s'imposer dans les médias français la thématique de la difficulté de la construction de la citoyenneté européenne, au travers des sondages et autres enquêtes portant sur le sentiment de conscience de sa citoyenneté et des droits qu'elle confère. Ainsi, on a pu voir émerger un grand nombre de sondages posant les questions suivantes : « *vous sentez-vous européen ? Etes-vous familier avec le terme citoyen européen ? A quel moment vous sentez-vous le plus citoyen européen ? Comment renforcer le sentiment de citoyenneté européenne ? »,*[177] etc. On constate que certains aspects de la citoyenneté

175. Rapport Herbillon, « *La fracture européenne* », Documentation française, 2004.

176. Rapport de M. Alain Lamassoure, « *Le citoyen et l'application du droit communautaire* », 2008.

177. – TNS SOFRES – CIDEM « *Les français et la citoyenneté européenne* », septembre 2008.
– La Croix, « *Les Européens pessimistes et peu entendus, selon Eurobaromètre* », 23 juillet 2013, <http://www.la-croix.com/Actualite/Monde/Les-Europeens-pessimistes-et-peu-entendus-selon-Eurobarometre-2013-07-23-989857>

européenne ont dominé dans les médias nationaux tels que la libre circulation des personnes et des travailleurs et le droit de résidence. En effet, un des thèmes ayant fait l'objet d'un traitement médiatique important est l'intégration de la minorité rom dans la société française. La question de leur expulsion est souvent au cœur des rédactions de la presse écrite. A ce sujet, on note de nombreux articles dans les journaux tels que *Le Point,*[178] *L'Express,*[179] *L'Humanité,*[180] mais aussi dans la presse sur internet où des vifs débats ont lieu à ce sujet (site de Médiapart[181] ou de Rue 89), ainsi que dans les journaux télévisés avec un reportage consacré à l'expulsion de terrains occupés par des Roms plusieurs fois par mois. Il ressort de ces articles le thème de la discrimination à l'égard de cette population en dépit de leur citoyenneté européenne. Le ton est donné par les médias français qui, en ne parlant que très peu de la citoyenneté européenne et en évoquant principalement l'aspect de la libre circulation des personnes à travers les expulsions de Roms, soulignent uniquement des aspects de la citoyenneté qui font polémiques au regard des implications qu'elles ont au niveau de la politique nationale. Ainsi, à travers l'angle choisi par les médias, cela influence le ton des débats alors lancés en opposant les intérêts nationaux aux droits attachés à la citoyenneté européenne. Le titre de cet article du journal en ligne Médiapart[182] : « *l'Europe menace, Paris expulse* » en témoigne. Outres ces thèmes récurrents, l'information relative à la citoyenneté européenne étant assez pauvre, et donc incomplète, on peut difficilement apprécier son exactitude. De ce manque d'information et du fait de l'angle choisi par les médias pour traiter des questions de citoyenneté européenne, il ressort une connaissance de cette notion

– Place publique.fr, « *Deux Français sur trois se sentent 'citoyens de l'Union européenne'* », mars 2013, <http://www.place-publique.fr/article/deux-francais-sur-trois-se-sentent>.

178. Le Point, « *ROMS – Le Parlement européen demande à Paris de suspendre les expulsions* », 9 septembre 2010 <http://www.lepoint.fr/politique/roms-le-parlement-europeen-demande-a-paris-de-suspendre-les-expulsions-09-09-2010-1234218_20.php>.
179. L'Express, « *Ce que dit l'Union européenne au sujet des Roms* », 19 août 2010, <http://www.lexpress.fr/actualite/societe/ce-que-dit-l-union-europeenne-au-sujet-des-roms_913545.html>.
180. L'humanité, « *Roms: à Bordeaux, l'expulsion préférée à l'intégration* », 28 février 2013, <http://www.humanite.fr/asti/roms-bordeaux-lexpulsion-preferee-lintegration-col-516428>.
181. Mediapart, « *A quand une politique exemplaire pour l'intégration des Roms ?* », 8 avril 2013, <http://blogs.mediapart.fr/edition/roms-et-qui-dautre/article/080413/quand-une-politique-exemplaire-pour-l-integration-des-roms>.
182. Mediapart, « *Roms : l'Europe menace, Paris expulse* », 14 septembre 2010, <http://www.mediapart.fr/journal/france/140910/roms-leurope-menace-paris-expulse>.

qui ne peut être qu'erronée ou tout du moins partiale. Le résultat d'une enquête effectuée dernièrement montrant que 47 % des Français estiment que les Roms ne sont pas des citoyens européens comme les autres[183] est un exemple que les médias ont aujourd'hui une réelle influence sur le discours public. Le ton du débat public donné dans les médias et dans la société civile imprégnée de ces thématiques, nous dévoile une image et une compréhension du statut et des droits liés à la notion de citoyenneté qui reste encore assez vague et incertaine pour la population française. Mis à part l'accent mis sur des aspects polémiques, les Français sont peu sensibilisés par les médias à la citoyenneté européenne. Ces médias pourtant détenteurs d'une grande responsabilité, en raison de leur pouvoir d'influence sur le débat public, n'ont pas usé de manière responsable de ce pouvoir, notamment en ne fournissant pas d'informations assez précises sur les droits en vigueur, et en choisissant de ne traiter que certains aspect de cette citoyenneté.

183. Sondage Newsring, 2013.

GERMANY

Christoph Schönberger und Daniel Thym[1]

Unionsbürgerschaft *im Rahmen* der Richtlinie 2004/38/EG – Beständigkeit des Aufenthalts von Unionsbürgern und ihren Familienangehörigen

Frage 1

Der personale Anwendungsbereich des Freizügigkeitsgesetzes beschränkt sich auf Familienangehörige im Sinn des Art. 2 Nr. 2 RL 2004/38/EG. Eine besondere Bestimmung für sonstige Familienangehörige wurde bis zum heutigen Zeitpunkt nicht in dem Freizügigkeitsgesetz aufgenommen. Allerdings gilt insoweit die allgemeine Bestimmung des § 36 AufenthG, der auch alle sonstigen Familienangehörigen im Sinn des Art. 3 Abs. 2 RL 2004/38/EG umfasst. Ob dessen Voraussetzungen den Anforderungen des *Rahmann*-Urteils genügen,[2] ist umstritten. Es scheint uns, dass eventuelle Unsicherheiten im Wege der europarechtskonformen Auslegung beseitigt werden können, so dass im Ergebnis kein Konflikt besteht.

Freilich könnte eine Änderung des Staatsangehörigkeitsgesetzes neue Streitfragen verursachen. Gemäß § 4 Abs. 3 StAG erlangen die Kinder von nicht-deutschen Eltern, die sich seit mindestens acht Jahren in Deutschland aufhalten, regelmäßig die deutsche Staatsangehörigkeit kraft Geburt. Bei Unionsbürgern darf hierbei die eventuell bestehende weitere Staatsangehörigkeit des Herkunftslandes der Eltern ohne Bedingungen beibehalten werden.[3] Wenn ein Kind hiernach, zum Beispiel, die deutsche und die französische Staatsangehörigkeit besitzt, stellt sich die Frage, ob das Kind sich auf das EU-Freizügigkeitsrecht berufen kann (etwa wenn es einen Ehepartner aus einem Drittstaat heiratet). Einzelne Verwaltungsgerichte sind der Auffassung, dass in einem solchen Fall die Unionsbürgerrechte nicht gelten sollen, weil

1. Beide Berichterstatter sind Inhaber eines Lehrstuhls an der Universität Konstanz und Ko-Direktoren des örtlichen Forschungszentrums Ausländer- und Asylrecht.
2. Vgl. EuGH, Rs. C-83/11, *Rahman u.a.*, Slg. 2012 I-0000.
3. Vgl. zur Mehrstaatigkeit bei Unionsbürgern § 12 Abs. 2 StAG.

die betroffene Person sich aus Sicht der deutschen Rechtsordnung im Land der eigenen Staatsangehörigkeit aufhält und mithin nicht von ihrem Freizügigkeitsrecht Gebrauch machte.[4] Ob sich diese Auffassung durchsetzt, bleibt abzuwarten. Für türkische Arbeitnehmer entschied der EuGH, dass sie ihrer Rechte aus dem Assoziierungsabkommen nicht verlustig werden, wenn sie neben der türkischen auch die deutsche Staatsangehörigkeit erwerben.[5]

Uns ist nicht bekannt, dass die Verfahrensvorschriften gemäß Art. 5 der Richtlinie nachhaltige Schwierigkeiten verursachen.

Frage 2

Im Jahr 2013 wurde das deutsche Freizügigkeitsgesetz zur Umsetzung der RL 2004/38/EG geändert und die behördliche Bescheinigung des Freizügigkeitsrechts für Unionsbürger abgeschafft.[6] Dies hat zur Folge, dass Unionsbürger keine (deklaratorische) Bestätigung ihres Aufenthaltsstatus erlangen. Sie müssen – wie jeder Bürger – ihren Wohnsitz bei den Meldebehörden anzeigen, ein spezielles aufenthaltsrechtliches Verfahren gibt es jedoch nicht mehr. An die Stelle der behördlichen Ex-ante-Überprüfung des Aufenthaltsstatus tritt die Möglichkeit der nachgelagerten Ex-post-Kontrolle durch die zuständigen Behörden, die in einer deklaratorischen Verlustfeststellung münden kann, soweit der betroffene Unionsbürger die Voraussetzungen des Art. 7 RL 2004/38/EG nicht (mehr) erfüllt.[7] Zu unterscheiden ist die Verlustfeststellung hinsichtlich der Nichtexistenz eines Aufenthaltsrechts von der Entziehung aus Gründen der öffentlichen Ordnung oder Sicherheit.[8]

In der Praxis besitzt die Verlustfeststellung eine geringe Bedeutung. Ausweislich der staatlichen Statistiken, die sowohl die Verlustfeststellung als auch den Entzug aus Gründen der öffentlichen Ordnung umfassen, sind negative Behördenentscheidungen selten, freilich mit steigender Tendenz: Im Jahr 2012 ging es um 1557 Fälle, im Vergleich zu 926 im Jahr 2006 sowie 1144 im Jahr 2009.[9] Andere Daten zeigen, dass gegenüber 1726 Unionsbürgern ei-

4. Siehe VGH München, Urteil vom 9. 08. 2012, 19 CE 11/1893; OVG Münster, Urteil vom 17. 03. 2008, 18 B 191/08.
5. Siehe EuGH, verb. Rs. C-7/10 & C-9/10, *Kahveci & Inan*, Slg. 2012 I-0000.
6. Vgl. die Neufassung des § 5 FreizügG/EU durch G v. 21.1.2013 (BGBl. 2013 I 83).
7. Vgl. § 5 Abs. 4 FreizügG/EU; eine Verlustfeststellung erfolgt z.B. mangels Arbeitnehmerstatus oder in Abwesenheit ausreichender Existenzmittel.
8. Hierzu § 6 Abs. 1 FreizügG/EU.
9. Siehe die Antwort der Bundesregierung auf eine Kleine Anfrage der Fraktion DIE LINKE bezüglich der Haltung der Bundesregierung zum Umgang mit EU-Bürgerin-

ne Ausreiseverpflichtung ausgesprochen wurde, wobei 1338 das Land freiwillig oder aufgrund einer Abschiebung verließen.[10] Die meisten betroffenen Personen kamen aus Rumänien (439), Polen (362), Bulgarien (251) und Litauen (94). All diese Zahlen sind gering, wenn man bedenkt, dass beinahe 3 Millionen Unionsbürger in Deutschland wohnen (eine Ausreisepflicht wurde einzig gegenüber ca. 0,05 % ausgesprochen). Diese vergleichsweise geringen Fallzahlen sind teils auf die kategorische Trennung zwischen AufenthG und FreizügG/EU zurückzuführen (siehe Frage 13). Im Bereich der Unionsbürgerschaft scheint der Streit über den Zugang zu Sozialleistungen an die Stelle von aufenthaltsrechtlichen Verfahren getreten zu sein (siehe Frage 5).

Die aufgeführten Statistiken unterscheiden nicht zwischen einer Verlustfeststellung aus Gründen der öffentlichen Ordnung sowie mit Blick auf Art. 7 RL 2004/38/EG. Zudem gibt es keine verlässlichen Informationen, ob die letztgenannte Kategorie in erster Linie Arbeitnehmer betraf (genauer: den fehlenden Arbeitnehmerstatus) oder ausreichende Existenzmittel. In beiden Fällen stellen der Gesetzestext, die Verwaltungsvorschrift sowie die Rechtsprechung freilich sicher, dass die innerdeutsche Praxis sich prinzipiell an den EU-Vorgaben orientiert. Dies gilt auch für Art. 7 Abs. 1 Buchst. b und das *Brey*-Urteil, hinsichtlich dessen juristische Datenbanken bisher wenig Streitigkeiten aufweisen. Dies kann sich freilich schnell ändern.

Frage 3

Art. 12-15 wurde vollständig in nationales Gesetz umgesetzt.[11] Rechtsstreitigkeiten speziell zu diesen Normen gibt es nur wenige, wichtiger sind die Diskussionen um die wirtschaftliche Selbstständigkeit sowie die Einschränkung aus Gründen der öffentlichen Ordnung (siehe Fragen 2 und 3).

Frage 4

§ 4 a FreizügG/EU orientiert sich am Wortlaut von Art. 16-21 RL 2004/38 EG und garantiert allen Unionsbürgern ein Recht auf Daueraufenthalt. Es gibt

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nen und Bürgern aus Rumänien und Bulgarien, BT-Drs. 17/13322 vom 26. 04. 2013, S. 19 f. (die Daten betreffen alle EU-Bürger, nicht nur Rumänen und Bulgaren).

10. Vgl. Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion DIE LINKE: Abschiebungen im Jahr 2012, BT-Drs. 17/12442 vom 22. 02. 2013, S. 33 f.; die unterschiedlichen Zahlen sind wohl durch unterschiedliche Definitionen des Rückführungsbegriffs zu erklären, der in den Dokumenten nur allgemein bezeichnet ist.
11. Siehe § 3 Abs. 4 f. FreizügG/EU.

vereinzelte Gerichtsentscheidungen zur Auslegung der Norm, unter Einschluss des EuGH-Urteils *Ziolkowski & Szeja*, das einer Vorlage des BVerwG entspringt.[12] Es steht zu erwarten, dass das Recht auf Daueraufenthalt zukünftig eine größere rechtspraktische Bedeutung erlangt, nachdem die Freizügigkeitsbescheinigung im Frühjahr 2013 abgeschafft wurde (siehe Frage 2). Dies hat zur Folge, dass Unionsbürger mit ungewissem Aufenthaltsstatus vermehrt eine behördliche Automatisierung ihres Aufenthalts nach fünfjähriger Anwesenheit beantragen könnten. Da jedoch das Daueraufenthaltsrecht nicht infolge Zeitablaufs automatisch entsteht,[13] dürfte es bei der Entscheidung zu vermehrten Streitigkeiten kommen, ob in den zurückliegenden fünf Jahren die Voraussetzungen des Art. 7 RL 2004/38/EG erfüllt waren.[14]

Frage 5

Politischer Kontext: Sozialleistungen für Unionsbürger sind zu einem umstrittenen rechtspolitischen Thema geworden. Zu Beginn des Jahres 2014 berichteten zahlreiche deutsche Tageszeitungen auf den Titelseiten über Warnungen speziell der CSU vor der »Armutszuwanderung« innerhalb Europas, insb. aus Bulgarien und Rumänien. Das Thema beherrschte einige Wochen lang die Schlagzeilen und die neue Bundesregierung richtete einen Staatssekretärsausschuss ein, der praktischen und/oder rechtlichen Handlungsbedarf ausloten soll.[15] Bereits im Koalitionsvertrag der Großen Koalition aus dem November 2013 heißt es: »Wir wollen im nationalen Recht und im Rahmen der europarechtlichen Vorgaben durch Änderungen erreichen, dass Anreize für Migration in die sozialen Sicherungssysteme verringert werden.«[16]

Rechtlicher Kontext: Seit Jahren dreht sich die juristische Debatte um die Deutung des *Vatsouras*-Urteils, in dem der EuGH eine Vorlage des BSG zur Vereinbarkeit des deutschen Rechts mit Art. 24 Abs. 2 RL 2004/38/EG nicht eindeutig beantwortet hatte.[17] Binnen fünf Jahren fand die deutsche Sozialge-

12. Siehe EuGH, verb. Rs. C-424/10 & C-425/10, *Ziolkowski & Szeja*, Slg. 2011 I-0000.
13. Vgl. EuGH, Rs. C-325/09, *Dias*, Slg. 2011 I-6387, Rn. 53-55.
14. Ein ähnliches Phänomen ist derzeit im Vereinigten Königreich zu beobachten, das schon länger keine Freizügigkeitsbescheinigung mehr hat.
15. Ergebnisse werden für Mai/Juni 2014 erwartet.
16. Koalitionsvertrag zwischen CDU, CSU und SPD: Deutschlands Zukunft gestalten (18. Legislaturperiode), 28. 11. 2013, S. 108.
17. EuGH, Rs. C-22/08 & C-23/08, *Vatsouras & Koupatantze*, Slg. 2009 I-4585, Rn. 41-43 verpflichtet die nationalen Gerichte zur eigenständigen Beurteilung, ob das deutsche Hartz IV als Sozialhilfe im Sinn der Richtlinie bei einer primärrechtskonformen

richtsbarkeit zu keiner eindeutigen Position. Überaus wichtig ist freilich die Feststellung, dass der Streit einzig Arbeitsuchende im Sinn des Unionsrechts betrifft und mithin diejenigen Personen meint, die »mit begründeter Aussicht auf Erfolg« einen Job suchen.[18] Für Personen, die nicht hierunter fallen, gelten andere Regeln, die nachfolgend dargestellt werden.

Wenn man das Zusammenwirken von nationalem und supranationalem Recht verstehen will, hilft das Bewusstsein für die Unterscheidung zwischen drei Kategorien an Sozialleistungen in Deutschland:

(a) *Arbeitslosengeld II* gemäß § 7 SGB II (»Hartz IV«) wird an Personen gezahlt, die prinzipiell erwerbsfähig sind – und zwar unabhängig davon, ob sie wegen begründeter Einstellungschance zugleich als Arbeitsuchende im Sinne des Unionsrechts gelten.
(b) *Sozialhilfe* im engeren Sinne gemäß § 23 SGB XII wird an all diejenigen gezahlt, die nicht dem Arbeitsmarkt zur Verfügung stehen, insbesondere Rentner, Erwerbsunfähige, etc.
(c) *Sonstige Sozialleistungen*, wie etwa Kindergeld, Wohngeld, Studienbeihilfen, Betreuungsgeld, etc., verfügen teils über eigene, spezialgesetzliche Regelungen bezüglich der Leistungsberechtigung.[19]

Soweit keine spezialgesetzliche Regelung besteht, gilt für Unionsbürger die Generalklausel des § 30 SGB I, wonach alle Personen über Leistungsansprüche nach deutschem Sozialrecht verfügen, die ihren Wohnsitz oder gewöhnlichen Aufenthalt in Deutschland haben.[20]

1. Drei-Monats-Periode nach der Einreise

In Übereinstimmung mit Art. 24 Abs. 2 RL 2004/38/EG verweigert § 7 Abs. 1 S. 2 Nr. 1 SGB II allen Unionsbürgern während der ersten drei Monate des Aufenthalts einen Anspruch auf Grundsicherung bei Arbeitsuche (»Hartz

Auslegung einzustufen sei, ohne dass die europarechtlichen Vorgaben eindeutig wären.

18. EuGH, Rs. C-292/89, *Antonissen*, Slg. 1991 I-745, Rn. 22; die innerstaatliche deutsche Definition rekurriert auf die EuGH-Begrifflichkeit; vgl. § 2 Abs. 2 FreizügG/EU sowie Nr. 2.2.1.3 Allgemeine Verwaltungsvorschrift zum Freizügigkeitsgesetz/EU vom 26. 10. 2009 (BMBl. 2009, 1270).
19. Gemäß EuGH, Rs. C-140/12, *Brey*, Slg. 2013 I-0000, Rn. 52 unterfallen all diese Leistungen dem Sozialhilfebegriff der RL 2004/38/EG.
20. Die Vorschrift wird ähnlich (aber nicht identisch) ausgelegt wie der Begriff des gewöhnlichen Aufenthalts gem. VO (EG) Nr. 883/2004.

IV«). Für die Sozialhilfe im engeren Sinne bestimmt § 23 Abs. 3 SGB XII dem Wortlaut nach ambivalenter, dass Personen nicht umfasst seien, »die eingereist sind, um Sozialhilfe zu erlangen, oder deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitsuche ergibt.« Juristische Datenbanken enthalten keine Hinweise, dass die letztgenannte Norm zahlreiche Rechtsstreitigkeiten zur Folge hätte, was von einer geringen Praxisrelevanz zeugt (ganz anders als der Streit um Hartz IV, der im Folgenden dargelegt wird). Dies überrascht nicht, weil die meisten Unionsbürger prinzipiell erwerbsfähig sind und damit innerstaatlich den Regelungen des SGB II unterfallen.

2. Arbeitnehmer/Selbstständige

Da Arbeitnehmer und Selbstständige dem Arbeitsmarkt als wirtschaftlich aktive Bürger zur Verfügung stehen, unterfallen sie den Regelungen im SGB II, die ihrerseits eine volle Gleichbehandlung von Arbeitnehmern, Selbstständigen sowie Familienangehörigen gewährleisten – unter Einschluss der ersten drei Monate nach der Einreise. Praktische Bedeutung besitzt dies für diejenigen Arbeitnehmer, die als »Aufstocker« ergänzende Sozialleistungen beziehen. Berichte der Bundesagentur für Arbeit deuten darauf hin, dass diese Personengruppe die Mehrzahl an Unionsbürgern ausmacht, die derzeit (partiell) Hartz IV-Leistungen beziehen.[21] Dies gilt auch für Selbstständige, hinsichtlich derer einzelne Beobachter ein erhöhtes Missbrauchspotenzial bei der Anmeldung (vermeintlicher) Gewerbe i.V.m. ergänzenden Sozialleistungen ausmachen.[22] Jenseits des Zugangs zur Grundsicherung wirft die Gruppe der Arbeitnehmer und Selbstständigen freilich wenig Probleme auf, zumal § 30 SGB I einen prinzipiellen Gleichbehandlungsgrundsatz während des Aufenthalts in Deutschland zusichert. Problematischer ist die Situation von Grenzgängern, die freilich nicht vom Anwendungsbereich der RL 2004/38/EG umfasst sind und daher an dieser Stelle nicht näher behandelt werden.

21. Siehe die Pressemitteilung vom 14.01.2014 http://www.presseportal.de/pm/6776/2642295; sowie die beständig aktualisierten statistischen Daten unter http://statistik.arbeitsagentur.de/Navigation/Statistik/Statistische-Analysen/Statistische-Sonderberichte/Statistische-Sonderberichte-Nav.html.
22. Siehe Frankfurter Allgemeine Zeitung vom 16.01.2014, http://www.faz.net/-gqg-7ld5o.

3. Studierende

In Übereinstimmung mit Art. 24 Abs. 2 RL 2004/38/EG besitzen nicht alle Unionsbürger einen Anspruch auf BAföG-Leistungen. Während Wanderarbeitnehmer und deren Kinder über gleiche Rechte wie deutsche Staatsangehörige verfügen, gilt dies für sonstige Unionsbürger gemäß § 8 Abs. 1 BAföG erst nach Erwerb des Rechts auf Daueraufenthalt. Einschränkungen für deutsche Staatsangehörige, die im EU-Ausland studieren, sorgten für wiederkehrende Streitigkeiten nebst EuGH-Vorlagen.[23] Da das Verhältnis eigener Staatsangehörigen zum Heimatstaat nach der Ausreise gleichfalls nicht von RL 2004/38/EG umfasst ist, wird auch diese Gruppe nicht betrachtet.

4. Arbeitsuchende (im Sinn des Unionsrechts)

Bekanntlich wird der Zugang von Arbeitsuchenden zur Grundsicherung (»Hartz IV«) seit dem *Vatsouras*-Urteil des EuGH in Rechtskreisen intensiv diskutiert. Hintergrund ist die Entscheidung des deutschen Gesetzgebers, in § 7 Abs. 1 S. 2 Nr. 2 SGB II eine Ausnahme vom Leistungsanspruch für Personen niederzulegen, »deren Aufenthaltsrecht sich allein aus dem Zweck der Arbeitsuche ergibt«. Nachdem der EuGH sich zur Europarechtskonformität dieser Norm nicht eindeutig positioniert hatte, begann ein langwieriger Streit in der deutschen Sozialgerichtsbarkeit. Erst jüngst näherte sich eine endgültige Entscheidung, als das Bundessozialgericht in Dezember 2013 entschied, erneut ein Vorabentscheidungsersuchen nach Luxemburg zu senden, um dort eine Klarstellung der früheren Rechtsprechung sowie Aussagen zu den Auswirkungen der VO (EG) Nr. 883/2004 zu erhalten.[24] Eine vergleichbare Vorlage hatte das SG Leipzig bereits einige Monate zuvor an den EuGH gerichtet.[25] Hierdurch scheint eine jahrelange innerstaatliche Debatte mit immer neuen Wendungen einer Lösung zugeführt zu werden.

Für das Verständnis der jüngeren innerdeutschen Entwicklung vor der EuGH-Vorlage ist ein Urteil des BSG aus dem Jahr 2010 bedeutsam,[26] das einen Widerspruch zwischen § 7 Abs. 1 S. 2 Nr. 2 SGB II mit dem Europäischen Fürsorgeabkommen angenommen hatte (ein völkerrechtlicher Vertrag,

23. Im Lauf des Jahres 2013: EuGH, verb. Rs. C-523/11 & C-585/11, *Prinz & Seeberger*, Slg. 2013 I-0000; EuGH, Rs. C-220/12, *Thiele Meneses*, Slg. 2013 I-0000; und EuGH, Rs. C-275/12, *Erlick*, Slg. 2013 I-0000.
24. BSG, Beschluss vom 12.12.2013, B 4 AS 9/13 R.
25. SG Leipzig, Beschluss vom 3.06.2013, S 17 AS 2198/12 = Rs. C-333/13, *Dano*.
26. BSG, Urteil vom 19.10.2010, B 14 AS 23/10.

der im Jahr 1953 im Rahmen des Europarats ausgearbeitet wurde). Dies hatte zur Folge, dass Bürger aus EFA-Vertragsstaaten, die vorrangig im Westen und Süden Europas liegen,[27] einen Anspruch auf Hartz IV erlangten.

Auch dies war nur eine Zwischenlösung, weil die Bundesregierung im Dezember 2011 entschied, durch eine Erklärung gemäß Art. 16 Buchst. d des Übereinkommens die Grundsicherung zur Arbeitsuche von dessen Anwendungsbereich auszunehmen. Das letzte Wort war freilich auch dies nicht, weil die deutschen Sozialgerichte alsbald die Vereinbarkeit der Erklärung mit dem Völkerrecht bezweifelten.[28] Zudem wurde argumentiert, dass österreichische Staatsbürger aufgrund eines bilateralen Abkommens aus dem Jahr 1966 einen Anspruch auf Hartz IV besäßen.[29] Beide Fragen sind bis heute nicht abschließend geklärt, d.h. deutsche Sozialgerichte beurteilen die völkerrechtliche Zulässigkeit der Erklärung unterschiedlich. Freilich gilt das nur für Antragsteller aus den Vertragsstaaten des Übereinkommens, zu denen die meisten mittel- und osteuropäischen Staaten *nicht* gehören. Speziell für diese letzte Gruppe bleibt mithin die Vereinbarkeit des Leistungsausschlusses in § 7 SGB II mit dem Unionsrecht das zentrale Thema, zu dem zwischenzeitlich mehr als 100 Entscheidungen deutscher Sozialgerichte mit divergierendem Ausgang vorliegen. Aus diesem Grund ist eine klare Antwort des EuGH auf die anhängigen Vorlagen für die deutsche Rechtspraxis so wichtig.

Die meisten Gerichtsentscheidungen zur Thematik in Deutschland konzentrieren sich auf die abstrakte Frage, ob die Grundsicherung zur Arbeitsuche infolge des *Vatsouras*-Urteils als Sozialleistungen im Sinn der Richtlinie einzustufen ist, beschäftigen sich jedoch nicht (oder allenfalls am Rande) mit der ergänzenden Frage, ob jeder einzelne Antragsteller eine tatsächliche Verbindung mit dem deutschen Arbeitsmarkt aufweist, die der EuGH als zusätzliche Voraussetzung für eine Gleichbehandlung fordert.

5. Wirtschaftlich inaktive Unionsbürger

Es sollte erneut betont werden, dass das *Vatsouras*-Urteil sich nur auf Arbeitsuchende im Sinn des EU-Rechts bezieht und mithin nur diejenigen betrifft,

27. Aktuell sind EFA – Vertragsstaaten Belgien, Dänemark, Deutschland, Estland, Frankreich, Griechenland, Irland, Island, Italien, Luxemburg, Malta, Niederlande, Norwegen, Portugal, Schweden, Spanien, die Türkei und das Vereinigte Königreich.
28. Siehe z.B. die divergenten Auffassungen verschiedener Spruchkörper innerhalb des LSG Berlin-Brandenburg, Beschluss vom 09. 05. 2012, L 19 AS 794-12 B ER sowie ebd., Beschluss vom 02. 08. 2012, L 5 AS 1297/12 B ER.
29. LSG Mecklenburg-Vorpommern, Beschluss vom 07.03.2012, L 8 B 489-10, Rn. 27-9.

die eine begründete Aussicht auf Einstellung besitzen. Wenn ein Antragsteller das letztgenannte Kriterium nicht erfüllt, unterfällt er aus Sicht des EU-Rechts dem allgemeinen Freizügigkeitsrecht nach Art. 21 AEUV sowie Art. 7 Abs. 1 Buchst. b RL 2004/38/EG. Hierbei geht es um Personen, die von vornherein keine Arbeit suchen (etwa: Rentner; Erwerbsunfähige; Eltern, die sich auf die Kindererziehung konzentrieren) oder keine begründete Aussicht auf Einstellung besitzen (etwa: mangels Qualifikation; nachhaltig erfolglose Arbeitsuche; Arbeitsunwilligkeit). Diese Personen sind keine Arbeitsuchenden im Sinn des EU-Rechts und unterfallen aufgrund der prinzipiellen Erwerbsfähigkeit dennoch den Regeln im SGB II (Hartz IV).[30] Diese Unterscheidung klingt akademisch, hat jedoch bedeutende Auswirkungen.

Erstens greift in diesem Fall nicht die Ausnahme in Art. 24 Abs. 2 RL 2004/38/EG für den Sozialleistungsausschluss für Arbeitsuchende im Sinn des EU-Rechts. Stattdessen tritt das Kriterium der ausreichenden Existenzmittel als Voraussetzung für das Aufenthaltsrecht (siehe Frage 2) und einhergehende Gleichbehandlungsrechte gemäß Art. 24 Abs. 1 RL 2004/38/EG und/oder Art. 18 AEUV in das Zentrum. Wenn es zutrifft, dass diese Bestimmungen die EuGH-Rechtsprechung zu modifizieren bestimmt sind (und keine unbedingte Rechtsgleichheit einfordern),[31] richtet sich die Abgrenzung zwischen Personen mit/ohne Leistungsanspruch nach der EuGH-Formel, dass einzig Unionsbürger eine Gleichbehandlung beim Sozialleistungszugang erlangen, die sich »bis zu einem gewissen Grad in die Gesellschaft ... [integriert haben].«[32] Dies wird von den nationalen deutschen Gerichten jedoch selten diskutiert. Während einzelne die Unterscheidung zwischen Arbeitsuchenden und wirtschaftlich Inaktiven im Sinn des EU-Rechts nicht verstanden haben dürften, lösen andere Gerichte derartige Fragen einzig auf Grundlage des nationalen Rechts.

Zweitens gilt es zu beachten, dass der deutsche Leistungsausschluss gemäß § 7 Abs. 1 S. 2 Nr. 2 SGB II nach dem Wortlaut nur diejenigen Personen betrifft, »deren Aufenthaltsrecht sich *allein* aus dem Zweck der Arbeitsuche ergibt«. Dies wurde von verschiedenen Sozialgerichten restriktiv interpretiert, unter Einschluss des BSG, das bislang freilich keine abschließende Position bezog, ob alle Personen, die keine Arbeitsuchenden im Sinn des EU-Rechts

30. Hierzu die einleitenden Bemerkungen; bei fehlender Erwerbsfähigkeit gelten die Regeln des SGB XII (Sozialhilfe), die gleichfalls oben beschrieben wurden.
31. See *D. Thym*, Sozialleistungen für und Aufenthalt von nichterwerbstätigen Unionsbürgern, NZS 2014, 81 (88 f.).
32. EuGH, Rs. C-209/03, *Bidar*, Slg. 2005 I-2119, Rn. 57.

sind, kraft nationalen Rechts einen Anspruch auf Hartz IV besitzen.[33] Diesen Weg beschreitet freilich das LSG Nordrhein-Westfalen, das im Oktober 2013 zu dem Schluss kam, dass alle Unionsbürger, die keine Arbeitsuchenden im Sinn des EU-Rechts (mehr) sind, unabhängig vom Europarecht einen Leistungsanspruch kraft § 7 SGB II besitzen, weil von der zitierten Ausnahmeklausel nur die Arbeitsuche im Sinn des Unionsrechts umfasst sei.[34] Es bleibt abzuwarten, ob das BVerfG diese Rechtsansicht in der Revision aufrecht erhält. Selbst wenn dies der Fall sein sollte, könnte der Bundesgesetzgeber immer noch § 7 Abs. 1 S. 2 Nr. 2 SGB II ändern. In diesem Fall würde die Vereinbarkeit mit Unionsrecht wieder in das Zentrum rücken.

Drittens betrifft die aufgeführte Debatte einzig die Sicherung des Lebensunterhalts aufgrund von »Hartz IV«-Leistungen im engeren Sinn, während andere innerstaatliche Sozialleistungen nach Maßgabe des § 30 Abs. 1 SGB I grundsätzlich allen Unionsbürgern zustehen. Hiervon gibt es freilich eine Ausnahme. Das neu eingeführte Betreuungsgeld gilt, ebenso wie das Elterngeld, einzig für Unionsbürger, die über ein Freizügigkeitsrecht nach EU-Recht verfügen und schließt mithin diejenigen Personen aus, die nicht die Schwelle des Art. 7 RL 2004/38/EG überwinden, etwa weil sie nicht über ausreichende Existenzmittel verfügen.[35] Da speziell das Betreuungsgeld erst seit kurzem existiert, überrascht es nicht, dass juristische Datenbanken insoweit bislang von keinen umfassenderen Streitigkeiten berichten.

Frage 6

Bis zum Jahr 2004 war die Ausweisung von Unionsbürgern aus Gründen der öffentlichen Ordnung ein überaus kontroverses Thema in Deutschland. In der Zwischenzeit besitzt die Frage eine geringere rechtspraktische und theoretische Relevanz, nachdem der EuGH die Europarechtswidrigkeit der deutschen Regeln festgestellt hatte,[36] das Bundesverwaltungsgericht die Abkehr vom alten Regime verkündete[37] und der Gesetzgeber die Regeln für Unionsbürger

33. BSG, Urteil vom 25.01.2012, B 14 AS 138/11 R für einen polnischen Unionsbürger, der als Kind nach Deutschland eingereist war; sowie ebd., Urteil vom 30.01.2013, B 4 AS 54/12 R in Bezug auf eine schwangere Frau.
34. LSG Nordrhein-Westfalen, Urteil vom 10.10.2013, L 19 AS 129/13.
35. § 4 a i.V.m. § 1 Abs. 7 Gesetz zum Elterngeld und zur Elternzeit (BEEG).
36. Siehe EuGH, verb. Rs. C-482/01 & C-493/01, *Orfanopoulos & Olivieri*, Slg. 2004 I-5257.
37. BVerwG, Urteil vom 03.08.2004, 1 C 30.02.

aus dem Ausländerrecht ausgliederte.[38] Seither orientiert sich das Freizügigkeitsgesetz am Wortlaut der Art. 27 f. RL 2004/38/EG und wird von den Verwaltungsgerichten in Übereinstimmung mit den EU-Vorgaben ausgelegt. Falls neue Fragen auftreten, scheuen die Gerichte nicht davor zurück, diese dem EuGH zur Entscheidung vorzulegen. Prominente jüngere Urteile zum Ausweisungsrecht gründen in innerdeutschen Streitigkeiten, unter Einschluss der Rechtssachen *Tsakouridis* und *P.I.*[39]

Zum Grundsatz der Verhältnismäßigkeit gab es eine innerdeutsche Auseinandersetzung, wie die hinreichende Gefahr der Rückfälligkeit bei Wiederholungstätern gemessen werden soll, die als ein Aspekt von mehreren in die Verhältnismäßigkeitsprüfung einfließt. Der Verwaltungsgerichtshof Baden-Württemberg bezweifelte die Europarechtskonformität des Je-desto-Ansatzes des Bundesverwaltungsgerichts, wonach die Wiederholungsgefahr von der Schwere der Straftat abhängt (je schwerer die Straftat, desto größer die Gefahr).[40] Diese Ansicht wies das BVerwG in einem obiter dictum unter Hinweis auf die EuGH-Rechtsprechung zurück.[41]

Ergänzende Faktoren wie Sprachkenntnisse, der Gesundheitszustand oder der gesellschaftliche Integrationsgrad scheinen bei der Entscheidung von Einzelfällen keine entscheidende Rolle zu spielen. Es entspricht der kontinentaleuropäischen Tradition der Auslegung von Gesetzesrecht (anstelle des Fokus des Common Law auf den Sachverhalt und dem Kontext), dass juristische Datenbanken sich auf die abstrakte Rechtsauslegung durch Obergerichte konzentrieren. Auf dieser Ebene gibt es jedoch keine Hinweise, dass sonstige gesellschaftliche Faktoren eine entscheidende Rolle spielten. Es gibt keine Hinweise, dass Unionsbürger aus Gründen der öffentlichen Ordnung ausgewiesen würden, weil sie über keine hinreichende Integration verfügen. Vielmehr hat es den Anschein, dass die überwiegende Mehrzahl an Ausweisungen gegenüber Straftätern ausgesprochen wird (auch wenn die Ausweisung nie die automatische Konsequenz einer Verurteilung ist). In diesen Fällen werden persönliche Lebensumstände, wie die Gesundheit oder gesellschaftliche Bindungen, zu Gunsten der Betroffenen gewichtet.

38. § 6 FreizügG/EU.
39. Vgl. EuGH, Rs. C-145/09, *Tsakouridis*, Slg. 2010 I-HYPERLINK „http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=de&Submit=Rechercher&numaff =C-145/09“11979; und EuGH, Rs. C-348/09, *P.I.*, Slg. 2012 I-0000.
40. VGH Baden-Württemberg, Urteile vom 04.05.2011, 11 S 207/11; und vom 10.02.2011, 11 S 136/11.
41. BVerwG, Urteil vom 10.07.2012, 1 C 19.11.

Unionsbürgerschaft *außerhalb* der Richtlinie 2004/38/EG – Untersuchung der nationalen Anwendung von primärem EU-Recht

Frage 7

Frühphase: Deutsche Gerichte (und Wissenschaftler) reagierten schnell auf das *Ruiz Zambrano*-Urteil und eruierten mögliche Folgen. In einer ersten Phase gab es Forderungen nach einer juristischen Kehrtwende, insbesondere mit Blick auf den Aufenthaltsstatus von drittstaatsangehörigen Familienmitgliedern deutscher Staatsangehöriger.[42] Ein prominentes Folgeurteil des EuGH, die Rechtssache *Iida*, nimmt seinen Ausgang in einer deutschen Rechtsstreitigkeit, welche die Grenzen der Kernbereichsdoktrin auszutesten bestimmt war.[43] Nachdem der EuGH erklärt hatte, dass der neue Ansatz restriktiv zu handhaben sei, wurde dies von deutschen Gerichten umgehend zur Kenntnis genommen. Verschiedene Berufungsgerichte wiesen das Kernbereichsargument unter Verweis auf die neue EuGH-Rechtsprechung zurück.[44] Denselben Weg ging das Bundesverwaltungsgericht wenige Wochen nach *McCarthy* in einem Urteil vom Juni 2011; die Richter betonten, dass der neue Ansatz nicht die Position des EuGH zur so genannten Inländerdiskriminierung ändere.[45] Hieraus folgte ganz konkret, dass die rechtspraktisch bedeutsame Fallkonstellation des Familiennachzugs zu deutschen Staatsangehörigen nicht von der Kernbereichsdoktrin umfasst ist.

Umweg (»Dänemark-Fälle«): Immer wieder sorgt die Inländerdiskriminierung in Bezug auf immobile deutsche Staatsangehörige für Diskussionen. In zeitlicher Parallelität zum *Ruiz Zambrano*-Urteil des EuGH wurden innerstaatlich die deutschen Regeln zum Familiennachzug zu Deutschen in den »Dänemark-Fällen« unter Berufung auf Art. 21 bzw. 56 AEUV herausgefordert. Deutsche Staatsangehörige heirateten ihre Partner aus Drittstaaten in Dänemark, wo sie zumeist nur ein verlängertes Wochenende verbrachten (das dänische Eherecht verlangt keinen Inlandswohnsitz), um sodann unter Beru-

42. Exemplarisch *B. Huber*, Die ausländerrechtlichen Folgen des EuGH-Urteils *Zambrano*, NVwZ 2011, 856-858; und, kritischer, *K. Hailbronner/D. Thym*, *Ruiz Zambrano* – Die Entdeckung des Kernbereichs der Unionsbürgerschaft, NJW 2011, 2008-2013.
43. Vgl. EuGH, Rs. C-40/11, *Iida*, Slg. 2012 I-0000.
44. Siehe, z.B., VGH Kassel, Beschluss vom 20.10.2011, 3 A 554/11 Z; VGH Mannheim, Urteil vom 04.05.2011, 11 S 207/11.
45. Siehe BVerwG, Urteil vom 22.06.2011, 1 C 11.10.

fung auf die innereuropäische Freizügigkeit ein Aufenthaltsrecht für die Ehegatten nach den privilegierten Regeln für Unionsbürger einzufordern. Dieser Gedanke wurde vom Bundesverwaltungsgericht im Jahr 2011 zurückgewiesen, als dieses entschied, dass durch die Eheschließung in Dänemark von den unionalen Freizügigkeitsrechten nicht »nachhaltig Gebrauch gemacht« wurde.[46] Dieser Position folgten diverse Oberverwaltungsgerichte,[47] während deutsche Staatsangehörige, die längere Zeit im Ausland wohnten, sich selbstverständlich auf das Freizügigkeitsrecht berufen können.

Status quo: Die enge Auslegung der Kernbereichsdoktrin durch den EuGH in *Dereci* und die neue Flexibilität im Urteil *O & S* wurden vom Bundesverwaltungsgericht aufgegriffen. In einer Reihe von Urteilen im Jahr 2013 hatte dieses über das Aufenthaltsrecht von drittstaatsangehörigen Eltern junger Deutscher zu entscheiden. Hierbei stufte das BVerwG die Kernbereichsdoktrin als subsidiäre Auffangkategorie ein, die erst nach den speziellen Regelungen des deutschen und des europäischen Rechts geprüft wird.[48] Dies hat den Vorteil, dass nationale Richter im ersten Zugriff die teils detaillierten Vorgaben in den Spezialgesetzen unter Einschluss der EGMR-Standards anwenden, bevor sie auf die vielfach vagen EuGH-Kriterien in der Fortfolge des Urteils *Ruiz Zambrano* eingehen. Letztere bleiben ein subsidiärer Kontrollstandard im Hintergrund, während der Rechtsalltag von nationalen und europäischen Spezialregelungen geprägt wird (die deutsche Richter etwas großzügiger auslegen und auf diesem Weg eventuelle Härtefälle lösen, die aufgrund der Kernbereichsdoktrin hätten geprüft werden können).[49]

Frage 8

Das Urteil *Rottmann* entsprang einer Vorlage aus Deutschland und das BVerwG folgte in seinem Urteil den EuGH-Vorgaben, deren Anwendung im Einzelfall dem zuständigen OVG überlassen wurde,[50] dessen Entscheidung in

46. BVerwG, Urteil vom 11.01.2011, 1 C 23/09 sowie die kritische Bewertung von *T. Oberhäuser*, Dänemark-Ehen, Unionsrecht und Inländerdiskriminierung, NVwZ 2012, 25-28.
47. Siehe, z.B., VGH München, Beschluss vom 30.11.2012, 10 CS 12.1563.
48. Siehe BVerwG, Urteile vom: 13.06.2013, 10 C 16.12; 30.07.2013, 1 C 15.12; 30.06. 2013, 1 C 9.12.
49. Weiterführend *M. Wendel*, Aufenthalt als Mittel zum Zweck, DÖV 2014, 133 ff. sowie *D. Thym*, Grenzen der Unionsbürgerschaft, EuR 2014, Beiheft 1, i.E.
50. BVerwG, Urteil vom 11.11.2010, 5 C 12/10.

juristischen Datenbanken nicht erhältlich ist (dem Vernehmen nach verlor Herr Rottmann die deutsche Staatsangehörigkeit). Mit Ausnahme einer Fallkonstellation, die unten diskutiert wird, scheint das *Rottmann*-Urteil keinen nachhaltigen Einfluss in Deutschland entfaltet zu haben. Die Gründe hierfür sind einfach. Traditionell unterliegt der Verlust der deutschen Staatsangehörigkeit aufgrund verfassungsrechtlicher Vorgaben einer strikten Verhältnismäßigkeit. Hiernach war die einzige Neuerung des EuGH-Urteils die notwendige Berücksichtigung des Verlustes auch der Unionsbürgerschaft. Diese vergleichsweise dezente Neuausrichtung der Verhältnismäßigkeitsprüfung scheint in der Praxis wenige Auswirkungen zu haben.

Eine Bedeutung könnte der *Rottmann*-Test bei der so genannten Optionspflicht entfalten, die Kinder von drittstaatsangehörigen Eltern betrifft, die aufgrund des Geburtsortsprinzips (*ius soli*) deutsche Staatsangehörige werden. Wenn diese Kinder neben der deutschen auch eine weitere Staatsangehörigkeit besitzen, verlangt das deutsche Staatsangehörigkeitsrecht bis zur Vollendung des 23. Lebensjahrs eine Entscheidung zwischen den beiden Staatsbürgerschaften (es sei denn eine Ausnahmeklausel greift). Da diese Reform aus dem Jahr 1999 nur bestimmte Jahrgänge betrifft, gibt es bislang erst wenige Streitfälle. Wissenschaftliche Beobachter sind sich jedoch einig, dass das *Rottmann*-Urteil ein wichtiger Faktor in künftigen Gerichtsurteilen sein wird.[51] Dieser Streit könnte evtl. jedoch hinfällig sein, nachdem die neue Bundesregierung entschied, die Optionspflicht einer erneuten Reform zu unterziehen, deren Einzelheiten innenpolitisch überaus umstritten sind.

Politische Rechte von Unionsbürgern

Frage 9

Seit dem Jahr 1994 ist die Richtlinie in Deutschland vollständig umgesetzt. Freilich war die erste Umsetzung fehlerhaft, weil es seinerzeit kein permanentes Wahlregister gab, so dass Unionsbürger sich für jede Europawahl gesondert registrieren mussten – und zwar auch dann, wenn sie an einer früheren Europawahl teilgenommen hatten (eine Verpflichtung, der deutsche Staatsangehörige nicht unterliegen, weil sie nach der Anmeldung automatisch

51. Siehe *U. Berlit*, »Rottmann« und die Option, in: Jochum u.a. (Hrsg.): Grenzüberschreitendes Recht. Festschrift für Kay Hailbronner (C.F. Müller, 2013), S. 283-299; und *F. Lämmermann*, Ein Jahrzehnt ius soli, ZAR 2011, 1-8.

zugleich als Wahlberechtigte registriert wurden[52]). Dies widersprach Art. 9 Abs. 4 der Richtlinie und die innerstaatlichen Regelungen mussten angepasst werden. Dies geschah zwischenzeitlich. Gemäß § 17 b Europawahlordnung besitzen Unionsbürger heute ein Wahlrecht, solange sie bei den Meldebehörden registriert sind und sich an einer früheren Europawahl beteiligten.

Nach Maßgabe des deutschen Europawahlgesetzes unterliegen Unionsbürger und deutsche Staatsangehörige denselben Bedingungen. Insbesondere müssen beide Personengruppen seit mindestens drei Monaten in Deutschland oder einem anderen Mitgliedstaat der EU gewohnt haben (§ 6). Gleiche Voraussetzungen gelten auch für den Ausschluss vom Wahlrecht, zum Beispiel als Folge von Gerichtsentscheidungen (§ 6 a). Die Änderungen der Richtlinie im Dezember 2012 wurden durch das Fünfte Änderungsgesetz zum Europawahlgesetz vom 7. Oktober 2013 vollständig umgesetzt.[53]

Frage 10

Für die Ausweitung des Wahlrechts musste in Deutschland die Verfassung geändert werden, mit Blick auf die Rechtsprechung des Bundesverfassungsgerichts (siehe Frage 11). Aus diesem Grund wurde im Dezember 1992 ein neuer Art. 28 Abs. 1 S. 3 in das Grundgesetz eingefügt, der den Weg für die Ratifikation des Vertrags von Maastricht bereitete. Hiernach besitzen Unionsbürger bei Kommunalwahlen ein Wahlrecht nach Maßgabe des EU-Rechts.[54] In der Folge änderten auch die Bundesländer ihre regionalen Regelungen zur Öffnung des Kommunalwahlrechts. An Bedingungen war diese Entwicklung nicht gebunden. In der Regel besteht ein Wahlrecht nach einem dreimonatigen Aufenthalt in einer Gemeinde. Uns ist keine Rechtsprechung bekannt, die von weit reichenden Problemen zeugte.

Frage 11

Einzig bei Kommunal- und Europawahlen besitzen Unionsbürger in Deutschland ein Wahlrecht. Insoweit gibt es keine Rechte, die über die EU-Vorgaben hinausgehen. Insbesondere an Bundestagswahlen sowie an Wahlen zu den Landtagen können Unionsbürger nicht teilnehmen. Die Einführung entsprechender Wahlrechte würde eine Verfassungsänderung erfordern, weil nach

52. Siehe den Bericht der Kommission an das Europäische Parlament und den Rat zur Anwendung der Richtlinie 93/109/EG, KOM(97) 731, Abschn. 4.2.
53. Siehe insb. den neuen § 11.
54. Siehe *C. Schönberger*, Unionsbürger (Mohr Siebeck, 2005), 446-454.

der Rechtsprechung des Bundesverfassungsgerichts das Demokratieprinzip im Grundgesetz einer einfachgesetzlichen Ausweitung des Wahlrechts entgegensteht.[55] Die Verfassungsänderung des Jahres 1992 reagiert auf diese Rechtsprechung (siehe Frage 10).

Frage 12

In Deutschland stellt sich die Frage nicht in vergleichbarer Weise wie im Vereinigten Königreich und uns sind keine vergleichbaren Streitlagen bekannt. Insbesondere scheinen die deutschen Einschränkungen weniger streng zu sein als die britischen, die gegenwärtig von den Gerichten überprüft werden.

Kultur(en) der Staatsbürgerschaft

Frage 13

Seit dem Jahr 2004 ist die Umsetzung der Unionsbürger-Richtlinie das Paradebeispiel für einen Rechte-basierten Ansatz, der das Individuum ins Zentrum rückt. Seinerzeit wurde entschieden, die Regeln für Unionsbürger aus dem allgemeinen Ausländerrecht auszugliedern und in das neu geschaffene Freizügigkeitsgesetz/EU zu überführen. Diese Trennung hat zur Folge, dass in der Rechtspraxis immer klar ist, dass die Regeln für Unionsbürger nicht dem konventionellen Ausländerrecht folgen. Seither gibt es weniger Streit und die nationalen Behörden und Gerichte orientieren sich vollumfänglich am EuGH. Dies gilt freilich nur für die verwaltungsrechtliche Ebene. Im Verfassungsrecht besteht die Spannung zwischen eigenen Bürgern und (fremden) Unionsbürgern partiell fort, sodass auf der Ebene des Verfassungsrechts keine vollständige Inklusion der Unionsbürger gewährleistet ist.

Frage 14

Im Allgemeinen konzentriert sich die deutsche Rechtspraxis auf den Grundrechtskatalog im Grundgesetz, der ein zentraler Inhalt der juristischen Ausbildung ist. Dies hat zur Folge, dass die Europäische Menschenrechtskonven-

55. Federal Constitutional Court Decision Reports (BVerfGE) 83, 37 (1990).

tion sowie die Charta der Grundrechte eine vergleichsweise geringe Rolle besitzen. Dies wandelt sich nur Schritt für Schritt und es hat den Anschein, dass das Migrationsrecht (gegenüber Drittstaatsangehörigen) ein Sachbereich ist, der sich in besonderer Weise an den internationalen Menschenrechten orientiert.[56] So ist die geringe Bedeutung des *Ruiz Zambrano*-Urteils in der jüngeren deutschen Rechtsprechung zumindest auch das Ergebnis einer Auslegung des nationalen Rechts im Lichte der EMRK (siehe Frage 8). Früher oder später werden die Folgen der Grundrechtscharta ausgetestet werden – wie dies der VGH Baden-Württemberg in der Vorlage unternahm, die zum *Iida*-Urteil führte, in dem der EuGH freilich die Anwendung der Grundrechtscharta zurückwies.[57] Ein weiterer Anlass könnte die Vorlage des SG Leipzig zum Sozialleistungsanspruch von Arbeitsuchenden sein (siehe Frage 5), die unter anderem die Wechselwirkung zwischen den sozialen Grundrechten in der Charta und dem *Vatsouras*-Urteil zu ergründen sucht.

Frage 15

Im allgemeinen wird die Unionsbürgerschaft in überregionalen Tageszeitungen nicht intensiv diskutiert. Eine Ausnahme ist die jüngere Debatte um die Arbeitnehmerfreizügigkeit zum Jahreswechsel 2013/14, als die Übergangsfrist für die Freizügigkeit von Rumänen und Bulgaren auslief. Seinerzeit dominierte die Warnung vor der so genannten »Armutszuwanderung« mehrere Wochen lang die Schlagzeilen – und wurde in TV-Talkshows wiederholt diskutiert. Hierbei gibt es, nicht nur beim Thema der Freizügigkeit, immer wieder Probleme in der korrekten Darstellung des Europarechts (was jedoch auch an dessen Komplexität liegen dürfte). Zugleich hat die Euro-Krise zur Folge, dass in der Öffentlichkeit ein größeres Bewusstsein für EU-Fragen besteht. Führende Intellektuelle wie Jürgen Habermas und Ulrich Beck sind die prominentesten Akteure in dieser öffentlichen Debatte. Dieses neu erwachte Interesse an Europa scheint zunehmend andere Sachthemen als die Euro-Krise sowie, jüngst, die Arbeitnehmerfreizügigkeit zu betreffen.

56. Siehe *D. Thym*, Migrationsverwaltungsrecht (Mohr Siebeck, 2010), Kap. 4.
57. EuGH (Fn. 43), Rn. 78-81.

GREECE

Dimosthenis Lentzis[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Directive 2004/38/EC (hereinafter, the Directive) has been transposed into national law by Presidential Decree 106/2007 on the 'free movement – residence in Greece of EU citizens and their family members' (hereinafter, the Presidential Decree).[2] This act was recently amended by article 42 of Law 4071/2012.[3] Although some of the amendments were just stylistic or technical in nature, some others aimed at fixing a number of transposition problems linked to specific provisions.[4] Useful implementation guidelines are contained in several ministerial decisions and administrative circulars. It should be noted at the outset that cases concerning the application of the Presidential Decree (and the Directive) are still rare before the Greek courts – a few interesting judgments of the Council of Sate (Συμβούλιο της Επικρατείας), the country's supreme administrative court, will be considered bellow – and that EU citizenship is the subject of only a small number of academic writings.

1. Lecturer in EU Law, Aristotle University of Thessaloniki.
2. Government Gazette Issue A 135 of 21.6.2007. Greece was one of the nineteen Member States against which the European Commission had initiated infringement proceedings under article 226 TEC (now 258 TFEU) for failure to communicate national transposition measures (Member States had to adopt national transposition measures before 30 April 2006). After the adoption of the aforementioned Presidential Decree, however, the case was closed.
3. Government Gazette Issue A 85 of 11.4.2012.
4. These problems had been spotted by the European Commission. See EUROPEAN COMMISSION, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC (...), COM (2008) 840 final.

Question 1

Following the distinction made in article 3 of the Directive, the Presidential Decree distinguishes between family members (of an EU citizen) who enjoy an automatic right of entry and residence in Greece, and family members (of an EU citizen) who do not enjoy such a right, but should be facilitated to enjoy it.

Family members who enjoy an automatic right of entry and residence in Greece include a) the spouse, b) the direct descendants (and those of the spouse) who are under the age of 21 or who, irrespective of their age, are dependants, and c) the dependent direct relatives in the ascending line (and those of the spouse).[5] Since the Greek legislation does not treat registered partnership as equivalent to marriage, the partner with whom the EU citizen has contracted such a partnership does not fall into this category.

Family members (in a broader sense) who do not enjoy an automatic right of entry and residence in Greece, but should be facilitated to enjoy it include a) all other family members who, in the country from which they have come, were dependants or members of the household of the EU citizen having the primary right of entry and residence or who require his/her personal care due to serious health problems and b) the partner with whom the EU citizen maintains a durable relationship dully attested.[6]

The term 'durable relationship' is not defined. However, such a relationship is irrefutably presumed to exist when the EU citizen and his/her partner have contracted a registered partnership in Greece or elsewhere or they have (or have adopted) children together.[7] The undertaking of shared long-term legal, social, or financial commitments (for example, mortgage to buy a house) can serve as proof of the durability of the relationship, especially if the EU citizen and his/her partner live under the same roof.[8]

As a general rule, applications submitted by family members not enjoying an automatic right of entry and residence in Greece are examined in priority and on the basis of an accelerated procedure. Other minor facilities for family

5. See article 2 (2) of Presidential Decree 106/2007 as amended by article 42 (1) of Law 4071/2012. In case b) there is now no restriction as to the degree of relatedness. Before it was amended, this case concerned only the children of the EU citizen and those of the spouse.
6. See article 3 (2) of Presidential Decree 106/2007.
7. See Joint Ministerial Decision 23443/7.9.2011, Government Gazette Issue B 2225 of 4.10.2011.
8. Ibid.

members of this category are provided for in administrative circulars. Finally, the 'reasonable period of time', foreseen in article 5 (4) of the Directive, within which a family member of any category who does not have the necessary travel documents or, when required, the necessary visa must obtain them or have them brought to him/her, has been set at one month.[9]

The lack of case-law on these matters is probably a sign that the relevant national provisions are clear and that the procedural safeguards contained in article 5 of the Directive do provide effective protection.

Question 2

In order to verify if EU citizens have sufficient resources for themselves and their family members, the competent authorities must take into account a) the personal situation of each individual concerned and b) the minimum social security pension paid by Greece.[10] There is no evidence that the authorities undertake checks on the existence and the availability of the resources after the EU citizens (and their family members) have been granted the right of residence for more than three months. On the other hand, the recent discovery of frauds has led to regular checks on the financial situation of EU citizens (and their family members) who have made recourse to the national social assistance system.[11] There is no evidence that EU citizens (and/or their family members) have been expelled on purely economic grounds (i. e. failure to satisfy the conditions set out in article 7 of the Directive).

Question 3

Articles 12-15 of the Directive have been adequately transposed into national law by articles 11-12, 21 (3) and 22 (5) of the Presidential Decree. It is worth mentioning that Greece is one of the few Member States that have explicitly transposed the provision of article 14 (2) of the Directive, prohibiting systematic verifications of the conditions attached to the right of residence.

9. See article 5 (4) of Presidential Decree 106/2007. In September 2013, the minimal social security pension in Greece amounted to 360 euros per month.
10. See article 8 (3) of Presidential Decree 1062007, as amended by article 42 (7) of Law 4071/2012.
11. See Social Security Institute, Press Release of 1.9.2011, http://www.ika.gr/gr/infopages/press.cfm.

Question 4

Articles 16-21 of the Directive have been adequately transposed into national law by articles 13-18 of the Presidential Decree; they have also been properly implemented by the authorities that – and this is something worth noting – always take into account periods of residence acquired by EU citizens before their home countries acceded to the EU.

Perhaps the only problem in relation to these provisions could be found in the disproportional character of the sanctions imposed for failure to comply with the requirement to timely apply for a permanent residence card. Before it was amended in 2012, article 17 (4) of the Presidential Decree provided that, if the application (for a permanent residence card) was submitted up to one year after the expiry of the residence card, the individual concerned would have to pay a fine of 150 euros, but if it was submitted more than one year after the expiry of the residence card, it would be rejected. Today, rejection of the application is not possible in any case; its late submission simply results to the imposition of a fine of 50 euros.

Strangely enough, there are no published data on the volume of applications for the status of permanent residence submitted by EU citizens, but there are on the volume of applications for the status of permanent residence submitted by EU citizens' family members who are third country nationals.[12] This unpleasant situation in relation to the flow of information is due to the fragmentation of powers and competencies to two different authorities: the Greek Police (supervised by the Ministry of Public Order and Citizen Protection) for EU citizens and the Immigration Offices of the country's thirteen Regions (supervised by the Ministry of Interior) for EU citizens' family members who are third country nationals.

No disputes on the interpretation or application of the provisions on the right of permanent residence have been addressed within national courts so far.

12. Total number of applications for the (granting or renewal of the) status of permanent residence submitted by third country national family members of EU citizens: 151. Third country nationals spouses of EU citizens: 143; Third country nationals children of EU citizens: 3; Third country nationals parents of EU citizens: 1; Third country nationals family members (other than spouses, children, or parents) of EU citizens: 4. The above data cover the period from 1.1.2009 to 31.12.2012.

Question 5

Article 24 (2) of the Directive has been adequately transposed into national law by article 20 (3) of the Presidential Decree. According to this provision, '(...) Greece is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period within which EU citizens can provide evidence that they are seeking employment in Greece and that they have a genuine chance to be engaged, nor shall be obliged, prior to the acquisition of the right of permanent residence to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status, and members of their families'.

Nonetheless, there are two problems closely related to each other that could jeopardize proper implementation of this provision. The first is that national law does not distinguish between the categories specified in article 20 (3) of the Presidential Decree and job seekers who, pursuant to the *Collins* and *Vatsouras and Koupatantze* case-law of the Court of Justice,[13] are entitled to benefits of a financial nature intended to facilitate access to the labor market. The second is that national law does not answer the question when a social benefit is intended to facilitate access to the labor market and when it is only social assistance. Unfortunately, national courts have not until today been called to resolve any disputes related to these issues.

Question 6

Greek courts distinguish between the concepts of 'public policy or public security' (article 27 of the Directive), 'serious grounds of public policy or public security' and 'imperative grounds of public security' (article 28 of the Directive)[14] by making explicit references to the relevant case-law of the European Court of Justice.[15] In judicial practice, the distinction is applied in a quite consistent way. Thus, for example, theft is characterized as a threat to public policy or public security, whereas selling drugs as a serious threat to public policy or public security. Under certain aggravating circumstances,

13. See Case C-138/02, *Collins*, Judgment of the Court (Full Court) of 23 March 2004, ECR 2004, I-2703, and Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, Judgment of the Court (Third Chamber) of 4 June 2009, ECR 2009, I-4585.
14. See, respectively, articles 21 and 22 of Presidential Decree 106/2007.
15. And especially to Case C-145/09, *Tsakouridis*, Judgment of of the Court (Grand Chamber) of 23 November 2010, ECR 2010, I-11979.

crimes in connection with dealing in narcotics are characterized as imperative threats to public security.

The way Greek courts take into account previous criminal convictions in order to decide if the personal conduct of the individual concerned represents a genuine, present, and serious threat to the society is, on the other hand, less consistent. The following examples are telling:

– In 2009, a Polish citizen was denied a registration certificate on the sole ground that she had been recently convicted to a minor sentence for insulting a police officer. The Council of State pointed out that prior criminal convictions can not, in themselves, constitute a ground for taking public policy or public security measures and that, in any event, the behavior at issue did not pose a threat to public policy or public security.[16] Here, the previous criminal convictions criterion was applied exactly as it should.
– In 2008, a Romanian citizen was denied a registration certificate on the sole ground that he had been convicted for committing a series of burglaries over a long period of time and for illegally entering Greece. In this case, the Council of State found that these convictions, dating back from 1998 and 2002, were indicative of the personal conduct of the individual concerned and could justify public policy or public security measures against him.[17] This is clearly not a very satisfactory judgment.

Finally, it is safe to say that in most (if not in all) cases Greek courts and tribunals understand and apply the principle of proportionality in the right sense. After all, Greek judges are familiar with it. This is demonstrated by the following examples:

– In 2008, a Bulgarian citizen living and working in Greece since 2003 was convicted for selling cocaine and 'ecstasy' pills. Soon after his conviction, an expulsion decision was also taken against him. In its judgment, the Council of State found that this decision did not violate the principle of proportionality: the individual concerned was an adult not facing any serious health problem, had no family in Greece and had kept strong ties with the Member State of origin.[18]
– In late 2006, an expulsion decision was taken against a Bulgarian citizen who was living and working in the island of Rhodes illegally for more

16. See Council of State 695/2012.
17. See Council of State 1304/2012.
18. See Council of State 4023/2011.

than four years. Enforcement of the decision was still pending when, a few months later, Bulgaria became a Member State of the EU. The Administrative Tribunal of Rhodes ruled that the contested decision had disregarded the impact the expulsion would have had on the professional and social situation of the individual concerned and was, for this reason, disproportional.[19]

As far as public health is concerned, suffice to say that there is no evidence that the authorities, within three months of the date of arrival, require EU citizens (and their family members) to undergo medical examinations as a matter of routine.[20]

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

Greek citizens seeking family reunification with third country nationals do not fall within the scope of Presidential Decree 106/2007 on the 'free movement – residence in Greece of EU citizens and their family members' (the act implementing the Directive), but within the scope of Law 3386/2005 on the 'entry, residence, and social integration of third-country nationals on Greek territory'.[21] The relevant provisions of the latter are nevertheless almost identical to those of the Presidential Decree 106/2007 (and the Directive) and, in any case, the Greek Ministry of Interior has called all the competent administrative authorities to interpret them under the light of the said Presidential Decree (and the Directive).[22] For the above reasons, the potential for reverse discrimination is not likely to exist.

19. See Administrative Tribunal of Rhodes 138/2007.
20. Article 29 (3) of Directive 2004/38/EC has been transposed into national law by article 21 (9) of Presidential Decree 106/2007.
21. Government Gazette Issue A 212 of 23.8.2005.
22. See Ministry of Interior, Circular no. 10 of 28.2.2008. Third country national family members of Greek citizens are granted with the same type of residence card issued to third country nationals family members of EU citizens, with the indication though that they are family members of a Greek citizen.

Given that the legal framework regulating the right of family reunification for Greek citizens is not, more restrictive than the one regulating the right of family reunification for EU citizens, it should not come as a surprise that, in judicial practice, the related disputes (at the heart of which lie usually the rights of spouses of Greek citizens)[23] are treated as involving a purely internal situation. Indeed, the arguments put forward before national courts in support or against family reunification and the judgments these courts deliver focus solely on the interpretation of articles 61-64 of Law 3386/2005.[24]

Cases in which there could be facts very similar to those that formed the basis for the Court of Justice case-law in *Zhu and Chen* and *Ruiz-Zambrano*[25] are, for example, those of children born in Greece by stateless parents. These children automatically acquire Greek citizenship.[26] If the position of the Council of State, according to which the administration is obliged to grant or to renew the residence permit of an alien parent of a Greek citizen, even if he/she is divorced and does not have custody of the child,[27] is taken into account, it can be assumed that in cases like these Greek courts will decide in the same way the Court of Justice did, though probably without making any reference to its case-law on EU citizenship.

Cases concerning EU citizens seeking family reunification from their home Member States have not yet reached the Greek courts. As a consequence, it remains to be seen if national courts will be able to distinguish between rights acquired under the Directive and rights acquired under articles 20 and 21 TFEU in this particular context. The relationship betweeαn the relevant TFEU provision and the provisions of the Directive is, however, quite clear in judgments rendered in cases concerning other EU citizenship rights. It is of course true that in the first months after the application of the Di-

23. This is so because the provisions on family reunification in Greece are often circumvented by means of marriages of convenience. For a detailed analysis see CENTRE FOR EUROPEAN CONSTITUTIONAL LAW, Misuse of the right to family reunification: marriages of convenience and false declarations of parenthood, National contribution (Greece to the EMN Focused Study 2012, http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network.
24. See, for example, Council of State 22/2009, and Council of State 1559/2011.
25. Case C-200/02, *Zhu and Chen*, Judgment of the Court (Full Court) of 19 October 2004, ECR 2004, p. I-9925, and Case 34/09, *Ruiz Zambrano*, Judgment of the Court (Grand Chamber) of 8 March 2011, ECR 2011, p. I-1177.
26. See article 1 (2) of the Greek Nationality Code. For more details see Z. ΠΑΠΑΣΙΩΠΗ-ΠΑΣΙΑ, Το 'δικαίωμα' στην ιθαγένεια κατά το Σύνταγμα της Ελλάδος, Αρμενόπουλος 2009. pp. 813-832.
27. See, for example, Council of State 2921/2005.

rective in Greece a few judgments given by lower courts created some confusion as to exactly which provisions had been applied, but subsequent judgments given by higher courts clarified the situation.

Question 8

At present, requirements of EU citizenship have no major implications on national rules on the acquisition and/or loss of Greek nationality.

In *Rottmann*, the Court of Justice held that it is not contrary to EU law, in particular to article 17 TEC (now 20 TFEU), for a Member State to withdraw from an EU citizen the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.[28] It has been established that the tightening of the rules in this area is one of the main current trends with respect to the loss of nationality in Europe.[29] However, unlike most EU Member States, Greece does not (and, actually, could not) have regulations concerning the loss of nationality on the grounds of false information or other forms of fraud.[30]

The issue of the so-called 'home comers' is slightly different. After the end of the Cold War, hundreds of thousands of ethnic Greeks fled the territories of the former USSR where they (and their ancestors) were living since the fall of the Ottoman empire at the beginning of the 20th century; most of them tried their luck in Greece. The Greek State showed extreme generosity towards them in the matter of nationality.[31] After careful examination of each case, the competent administrative authorities would issue a decision declaring that the individual concerned was indeed a Greek national. Later, it was found that some of these declaratory decisions were based on fake documents or false information and the administration proceeded to their revocation. Technically speaking, this is not a case of withdrawal of nationality (since it

28. Case C-135/08, *Rottmann*, Judgment of of the Court (Grand Chamber) of 2 March 2010, ECR 2010, I-1449.
29. See the conclusions of H. VALDRAUCH, Loss of nationality, in R. Bauböck et al. (Eds), Acquisition and loss of nationality, vol. I, Comparative analysis: policies and trends in 15 European countries, Amsterdam University Press, Amsterdam, 2006.
30. Article 4 (3) of the Greek Constitution provides that '[w]ithdrawal of the Greek citizenship shall be permitted only in cases of voluntary acquisition of another citizenship or of undertaking service contrary to national interests in a foreign country, under the conditions and procedures specifically provided by law'.
31. See D. CHRISTOPOULOS, Report on citizenship law – Greece (revised and updated January 2013), EUDO Citizenship Observatory, http://eudo-citizenship.eu.

is proved that the Greek nationality was never acquired) and the Council of State points out that the principle of proportionality (as enshrined in the national legal order) must be observed.[32]

Permanent residence abroad as a reason for loss of nationality is to be found in many EU Member States, but not in Greece. At least not any more: article 19 of the Greek Nationality Code, stating that Greek nationality could be withdrawn from any person of alien origin who had obtained a foreign nationality and had left the country without the intention of coming back, was abolished in 1998.[33] If still in force, this provision, which in the past was mainly used by the authorities to withdraw the Greek nationality from politically active members of ethnic minorities living abroad,[34] could, at least in theory, stand in the way of every Greek citizen of non-Greek origin wishing to take advantage of his/her free movement right as EU citizen.

Political rights of EU citizens

Question 9

Directive 93/109/EC on European Parliament elections was transposed into the Greek legal order by Law 2196/1994.[35] Greece has not (and could not have) invoked any derogation under article 14 (1) of Directive 93/109/EC. The European Commission has found the transposition to be satisfactory.[36] There has been no relevant case-law in domestic courts.

EU citizens wishing to exercise their voting rights are registered upon request on special electoral rolls. For this purpose, they need to present themselves to their municipality of residence with a valid identity document (pass-

32. Consequently, the declaratory decision can be revoked only within a reasonable period of time after it was issued. See, for example, Council of State 3935/2011 (where it was held that four years is a reasonable period of time).
33. By article 9 of Law 2623/1998, Government Gazette Issue A 139 of 25.6.1998.
34. See more about this article in N. SITAROPOULOS, Discriminatory denationalisations based on ethnic origin: the dark legacy of ex Art. 19 of the Greek Nationality Code, in P. Shah – W. Menski (Eds), Migrations, diasporas and legal systems in Europe, Routledge, London, 2006, pp. 107-125.
35. Government Gazette Issue A 41 of 22.3.1994. This act has never been amended.
36. Like in most Member States. See EUROPEAN COMMISSION, Report to the European Parliament and the Council on the application of Directive 93/109/EC, COM (1997) 731 final.

port or ID card) and fill out a relevant formal declaration form. The procedure is quite simple and the registration is valid for all subsequent European Parliament (as well as municipal) elections. EU citizens vote at the same polling stations as Greek citizens. The Ministry of Interior provides EU citizens specific information on the detailed arrangements for the exercise of their right to stand as candidates.

Yet, there is a possible obstacle to EU citizens' enjoyment of their right to participate in European Parliament elections linked to the conditions for founding a political party. According to article 29 (1) of the Greek Constitution, only Greek citizens have the right to found a political party; non-nationals can only become members of existing political parties. It is believed that, this way, EU citizens are to a certain extent denied the chance of representing platforms not represented by existing political parties.[37]

The December 2012 amendments to Directive 93/109/EC should induce the following changes to the current legal framework: a) the requirement for EU citizens when submitting their applications to stand as candidates to produce an attestation from the competent administrative authorities of their home Member States certifying that they have not been deprived of their electoral rights[38] should be replaced by a simple statement with the same content to be included in the formal declaration they need to produce as part of their application, b) the above mentioned formal declaration should also include the EU citizen's date and place of birth and his/her last address of residence in the home Member State[39] and c) the competent administrative authorities should from now on be under an obligation to consider the possibility of an EU citizen having been deprived of his/her electoral rights through an individual administrative decision.[40]

Question 10

In Greece, municipalities form the first – that is to say the lowest – level of local government. In 2010, their number was significantly reduced from ap-

37. See EUROPEAN COMMISSION, Report on the election of Members of the European Parliament and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence, COM (2010) 603 final.
38. See article 5 (2) (b) of Law 2196/1994.
39. In addition to his/her nationality and address in Greece; see article 5 (2) (a) of Law 2196/1994.
40. As it will be further analyzed below (see answer to question 12), deprivation of electoral rights in Greece is only possible through an individual judicial decision.

proximately 1000 down to 325. According to the country's Constitution, municipalities enjoy full administrative independence and their authorities are elected by universal and secret ballot.[41]

Directive 94/80/EC on municipal elections was transposed into the Greek legal order by Presidential Decree 133/1997.[42] The European Commission found the transposition to be incorrect on several grounds and therefore sent Greece a reasoned opinion under article 226 TEC (now 258 TFEU).[43] More specifically, the exercise by EU citizens of their electoral rights was originally subject to their a) having spent a minimum period of two consecutive years in the country, b) having an elementary knowledge of the Greek language and c) producing a written declaration that they have not been deprived of the right to vote in their home Member State.[44] These were additional conditions imposed on EU citizens compared to national citizens. Apart from that, EU citizens taking part in municipal elections in Greece were prohibited from taking part in municipal elections in their country of origin. In other words, EU citizens were forced to choose between exercising their electoral rights in their country of origin or their country of residence. Most of the above provisions were abolished in late 1999 and the remaining in 2002;[45] as a result, the European Commission decided not to refer the case to the Court of Justice.

– In a couple of cases, the results of the 2006 municipal elections were contested on the ground that a number of EU citizens were allowed to vote

41. See article 102 (2) of the Greek Constitution.
42. Government Gazette Issue A 121 of 12.6.1997. For a detailed analysis of this act see Α. ΞΗΡΟΣ, Τα εκλογικά δικαιώματα των πολιτών της Ευρωπαϊκής Ένωσης στις δημοτικές-κοινοτικές εκλογές, Το Σύνταγμα 1998, 853-877. Greece was one of the eleven Member States against which the European Commission had initiated infringement proceedings for failure to communicate national transposition measures (Member States had to adopt national transposition measures before 1 January 1996). However, after the adoption of the aforementioned Presidential Decree, the case was closed before referral to the Court of Justice.
43. See EUROPEAN COMMISSION, Report to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections, COM (2002) 260 final.
44. The language condition was held lawful by the Council of State's opinion 245/1997 (the elaboration of all presidential decrees of regulatory nature falls under the jurisdiction of the Council of State which has the competence to give an opinion concerning the legality thereof).
45. See Presidential Decree 320/1999 of 31 December 1999, Government Gazette Issue A 305 of 31.12.1999, and Presidential Decree 130/2002 of 15 May 2002, Government Gazette Issue A 107 of 15.5.2002.

> even if they were not residents of the municipality concerned or were residents of the municipality concerned for less than two years. The Council of State emphasized that EU citizens wishing to exercise their right to vote in municipal elections must definitely be residents of the municipality concerned, but they do not need to live there for a minimum period of time, since this last condition had been abolished.[46]

EU citizens wishing to exercise their voting rights are registered upon request on special electoral rolls. For this purpose, they need to present themselves to their municipality of residence with a valid identity document (passport or ID card) and fill out a relevant formal declaration form. The procedure is quite simple and the registration is valid for all subsequent municipal (as well as European Parliament) elections. EU citizens vote at the same polling stations as Greek citizens.[47]

EU citizens have the right to run for the office of municipal or departmental councilor, but not for the office of mayor or deputy mayor; furthermore, if elected, they cannot hold the office of president, vice-president, or secretary of the municipal council, nor can they be appointed president or vice-president of the municipality's executive committee.[48] This makes Greece one of the few Member States that have applied every restriction under article 5 (3) of Directive 94/80/EC.

Question 11

In Greece, regions form the second level of local administration. Until now, EU citizens living in the country have not been granted electoral rights in these elections.[49]

Question 12

There are no specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise.

46. See Council of State 122/2008 and Council of State 1454/2008. See also A. ΞΗΡΟΣ, Κοινοτικοί πολίτες και εκλογές στην τοπική αυτοδιοίκηση, Θεωρία & Πράξη Διοικητικού Δικαίου 2008, pp. 280-287.
47. See article 4 (1) of Presidential Decree 133/1997.
48. See article 3 (11) of Presidential Decree 133/1997.
49. See D. CHRISTOPOULOS, Report on electoral rights – Greece (June 2013), EUDO Citizenship Observatory, http://eudo-citizenship.eu.

In Greece, permanent or temporary deprivation of political rights as part or as a result of a criminal conviction is rather rare. Until recently, however, all detainees were de facto deprived of their right to vote, since no polling stations were set up in penitentiary institutions. The situation changed when the Greek legislator provided for special polling stations within prisons for national and regional elections (1996) and for European parliamentary elections and referenda (1998).[50] Detainees not deprived of their political rights are registered on special electoral rolls.

Deprivation of political rights as a result of mental impairments is also rather rare. It only occurs in cases of severe mental illnesses making the individual completely incompetent to care for himself/herself and it entails a (civil) court decision placing the individual concerned under full guardianship.[51] On the contrary, persons suffering from mental illnesses limited in their functional effects and placed under limited or temporary guardianship cannot be deprived of their political rights.

Culture(s) of citizenship

Question 13

The implementation of EU citizenship in Greece is generally understood as an adjunct to the national immigration system based on 'permissions' to non-nationals to be present in the territory. Even in the country's Law Schools the relevant matters are usually dealt within the context of the courses on immigration law. It is not so difficult to understand why. The vast majority of EU citizens making use of the rights conferred upon them by EU citizenship are Bulgarian and Romanian nationals living in Greece long before their home countries joined the EU in 2007.[52] For the administrative authorities (as well as for the public), these people simply moved, thanks to their new status,

50. See article 3 (9) of Law 2409/1996, Government Gazette Issue A 120 of 17.6.1996, and article 5 (46) of Law 2623/1998, Government Gazette Issue A 139 of 25.6.1998, respectively. See also Σ ΜΗΝΑΪΔΗΣ, Τα εκλογικά δικαιώματα των κρατουμένων, Αντ. Ν. Σάκκουλας, Αθήνα, 2009.
51. See article 128 of the Greek Civil Code and article 5 (a) of Presidential Decree 96/2007 on parliamentary elections, Government Gazette Issue A 116 of 5.6.2007.
52. According to a 2011 census, almost 70 % of the 199,101 EU citizens living in Greece are Bulgarian or Romanian nationals.

from a less favorable immigration regime to a much more favorable one. As we have already seen, the Greek government showed great concern about the effective transposition of EU citizenship directives into the national legal order, but it did not manage to communicate the new rights-based EU 'free movement' and 'constitutional' approach these directives were aspiring to impose.

Question 14

Soon after the entry into force of the Lisbon Treaty in 2009, Greek courts started making recourse to the provisions of the EU Charter of Fundamental Rights, although not in a way that could be described as being systematic or coherent. The provisions that are mostly used are those contained in Title VI (Justice) of the Charter and, more particularly, those guaranteeing the right to a fair trial and the right not to be tried and punished twice for the same offense (the ne bis in idem principle).[53] For the moment, Greeks courts seem to ignore Title V of the Charter (Citizens' Rights) and rare are the judgments that include a simple reference to the settled case-law of the Court of Justice according to which EU citizenship 'is destined to be the fundamental status of nationals of the Member States'.[54] The only instance in which the Charter plays a role in how the rights of EU citizens are implemented is when judges are asked to determine if expulsion of an EU citizen would consist a disproportionate intervention to his/her private and family life; in answering this question judges sometimes consider article 7 of the Charter (among other provisions of national and international law.[55]

Question 15

EU citizenship and the rights deriving from it have never been a salient issue in Greek media – in fact, they have never been an issue at all. This striking lack of interest was traditionally attributed to the relatively small number of EU citizens living in Greece. However, after the 2007 accession of Bulgaria and Romania to the EU, this explanation was no longer convincing. Actually,

53. See Σ. ΚΟΥΚΟΥΛΗ-ΣΠΗΛΙΩΤΟΠΟΥΛΟΥ, Ο Χάρτης θεμελιωδών δικαιωμάτων της ΕΕ: πεδίο εφαρμογής και ελληνική νομολογία, Θεωρία & Πράξη Διοικητικού Δικαίου 2013, pp. 176-185.
54. See, for example, Case C-413/99, *Baumbast and R*, Judgment of the Court (Full Court) of 17 September 2002, ECR 2002, I-7091.
55. See, for example, Council of State 4023/2011.

it is doubtful if it ever was. The truth is that most of the journalists who are responsible for setting the Greek media's agenda were and still are unaware of what EU citizenship is all about and how it is connected to many issues they consider to be of high importance.

Issues concerning foreigners living in Greece has been at the top of national media's agenda for the past twenty years. There are (or, to be more precise, used to be) two main debates: one focusing on the role foreigners have played to the rise of criminality (with mass expulsions often mentioned as a solution to the problem) and one other on their poor living conditions (which are supposed to improve if they are given access to social and other state benefits).[56] More recently, in 2010, there was also a debate on their right to vote and to stand as a candidate to local (municipal and regional) elections. But the actual or potential impact of EU citizenship on these issues is never explored.

56. For obvious reasons, the second debate became less important after the beak of the financial crisis in 2009.

HUNGARY

Éva Lukács[1] *and Tamás Molnár*[2]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Articles 2, 3 and 5 of the Directive have been implemented by *Act No I of 2007 on the Entry and Stay of Persons Enjoying the Right of Free Movement and Residence* (hereinafter referred to as Freedom of Movement Act)[3] and by *Government Decree No 113/2007 (V.24.) implementing the Freedom of Movement Act* (hereinafter referred to as the Implementing Government Decree),[4] both national implementing legislations entered into force on 1 July 2007.[5] Therefore, the Freedom of Movement Act and the Implementing Gov-

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4. *A szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény végrehajtásáról szóló 113/2007. (V.24.) Korm. rendelet* (promulgated in *Magyar Közlöny* No 65/2007 of 24 May 2007, pages 4384-4402; the text in force can be downloaded from www.njt.hu).
5. On the transposition of the Directive in Central and Eastern Europe, including Hungary, see briefly e.g. Judit Tóth, *Report on the Free Movement of Workers in Hungary in 2008-2009* (http://ec.europa.eu/social/BlobServlet?docId=5064&langId=en – accessed on 01.09.2013), Éva Lukács Gellérné, Free movement of persons – a synthesis, in Réka Somssich – Tamás Szabados (Eds), *Central and Eastern European Countries after and before the Accession. Volume I*, Budapest, ELTE Faculty of Law, Department of Private International Law and European Economic Law, 2011, pp. 75-76. (http://jmce.elte.hu/docs/PersonsFreeMovement/PersonsFreeMovement.pdf – accessed on 01.09.2013), Judit Tóth, 'Hungary', in *International Encyclopedia of*

ernment Decree also contain the relevant domestic rules with respect to Union citizen's family members. As a preliminary issue, it is to be noted that in order to avoid reverse discrimination with regard to third-county national family members of Hungarian nationals not having exercised their right of free movement yet, Hungarian law has upgraded their legal status to that of family members of EEA nationals. In other words, Hungarian nationals' third-country national family members living in Hungary are on equal footing with Union citizens' family members in terms of the rights and entitlements related to free movement and residence under EU law.

The domestic provisions related to family members, implementing *Articles 2(2) and 3 of the Directive* are the following:

'family member' for the purposes of the Freedom of Movement Act means:
a) the spouse of an European Economic Area (EEA) national;
b) the spouse of a Hungarian national;
c) the direct descendants of an EEA national and those of the spouse of an EEA national who are under the age of 21 or are dependents;
d) the direct descendants of a Hungarian national and those of the spouse of a Hungarian national who are under the age of 21 or are dependents;
e) unless otherwise prescribed in this Act, the dependent direct relatives in the ascending line of an EEA national and those of the spouse of an EEA national;
f) the direct relatives in the ascending line of a Hungarian national and those of the spouse of a Hungarian national;
g) the person having parental custody over a minor child who is a Hungarian national;
h) any person whose entry and stay has been authorized by the competent authority on grounds of family reunification;
i) an EEA national's partner from a third country provided that a registered partnership was established before an authority in Hungary or another Member State of the European Union;
j) a Hungarian national's partner from a third country provided that a registered partnership was established before an authority in Hungary or another Member State of the European Union.[6]

Furthermore, in implementing *Article 3(2) of the Directive*, the Freedom of Movement Act also stipulates that

(1) The competent authority may grant the right of residence to persons on the grounds of family reunification, who:

Laws: Migration Law (ed.: Dirk Vanheule), Alphen aan den Rijn: Kluwer Law International, 2012, pages 107-122.

6. Article 2 lit. b) of the Freedom of Movement Act.

a) are dependents or members of the household of a Hungarian national for a period of at least one year, or who require the personal care of a Hungarian national due to serious health grounds; or
b) had been dependents or members of the household of an EEA national satisfying the requirements set out in Article 6(1) in the country from which they are arriving, for a period of at least one year, or who require the personal care of an EEA national due to serious health grounds.

(2) The right of residence of the persons referred to in paragraph (1) shall come to an end when their relationship is terminated.
(3) The persons referred to in paragraph (1) shall have the same legal status as the family member of an EEA national during their period of lawful residence, with the exception that such right of residence may not be retained on these grounds:
a) in the event of the Hungarian national's death or if his/her nationality is terminated;
b) in the event of the EEA national's death or if his/her right of residence is withdrawn, or if the EEA national no longer exercises the right of residence.[7]

As for *Article 5 of the Directive*, the Hungarian implementing provisions are as follows in respect of the right of entry for Union citizens' family members:

(1) EEA nationals may enter the territory of Hungary with a valid travel document or a personal identification document.
(2) Third-country nationals accompanying an EEA national or a Hungarian national or joining an EEA national or a Hungarian national residing in the territory of Hungary, who are family members, may enter the territory of Hungary with a valid travel document and – unless otherwise prescribed by any directly applicable EU legislation or an international treaty – with a valid visa.
(3) Third-country nationals may also enter the territory of Hungary with a valid travel document and – unless otherwise prescribed by any directly applicable EU legislation or an international treaty – a valid visa on the grounds of family reunification, who:
a) are dependents or members of the household of a Hungarian national for a period of at least one year, or who require the personal care of a Hungarian national due to serious health grounds; or
b) had been dependents or members of the household of an EEA national in the country from which they are arriving, for a period of at least one year, or who require the personal care of an EEA national due to serious health grounds.
(4) The persons referred to in paragraphs (2) and (3) may enter the territory of the Hungary without a visa, provided that they hold a document evidencing the right of residence as set out in this Act, or a residence card issued by States being parties to the Agreement on the European Economic Area to family members of EEA nationals who are third-country nationals.
(5) The provisions set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules gov-

7. Article 8 of the Freedom of Movement Act.

> erning the movement of persons across borders (hereinafter referred to as 'Schengen Borders Code') shall also apply to the entry specified above.[8]

The Hungarian legislation provides *every facility to obtain the necessary visa*, which is evidenced, in particular, by Articles 7, 9 and 11 of the Implementing Government Decree.

Article 9(1) of the Implementing Government Decree sets out that the visa authority shall presume the availability of financial means necessary for the entire duration of stay or for the return or continued travel. Similarly, Article 11 of the Implementing Government Decree introduces an accelerated procedure for persons enjoying the right of free movement meaning that 'the competent consulate officer shall adopt a decision concerning visa applications within fifteen days.' Whereas, the timeframe for visa procedure applicable to third country nationals not enjoying the right of free movement is 15/30/60 days under the EU Visa Code,[9] accordingly accelerated procedure for visa requests by Union citizens' third-country family members is ensured. Furthermore, Article 7 of the Implementing Government Decree lays down special rules facilitating the receipt of the required visa at the border under which procedure special provisions are set out in order to provide an accelerated procedure:

(1) Short-term visas under Chapter VI of the Visa Code may be applied for at road, air, and water border crossing points of Hungary (hereinafter referred to as 'border crossing points'), with applications submitted to the Police.
(2) The Police shall forward visa applications submitted at border crossing points by way of electronic means without delay to the competent Regional Directorate of Office of Immigration and Nationality.
(3) The Regional Directorate shall promptly adopt a decision concerning the aforementioned applications, not to exceed three hours, and shall notify, via the Police, the applicant of its decision electronically.
(4) If the application is approved, the short-term visa shall be issued to the applicant by the Police.

8. Article 3 of the Freedom of Movement Act.
9. *Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code)*. OJ L 243, 15.9.2009, pages 1-58.

Finally, Point 1 of Annex 2 of Decree No 28/2007 (V.31.) of the Minister of Justice and Law Enforcement on the Costs related to the Entry and Stay of Third-Country Nationals and Persons enjoying the Right of Free Movement[10] specifies the fees for the visa procedure. Given that the Ministerial Decree exempts third-country national family members of EU citizens (and of Hungarian nationals) from visa fee[11] and the Annex does not set out that any fee should be paid by third-county national family members, it follows that *visa procedure under the Freedom of Movement Act is free of charge*.

The table below summarizes the correspondence between the relevant rules of the Directive and the Freedom of Movement Act as well as other national implementing measures:

Directive 2004/38/EC	**Freedom of Movement Act and/or other national implementing measures**
Article 2(2)	Article 2 lit. b)
Article 3	Article 2 lit. b) Article 8
Article 5	Article 3 Implementing Government Decree, Articles 7, 9, 11 Decree No 28/2007 (V.31.) of the Minister of Justice and Law Enforcement, Article 5(3) lit. a); Annex 2, Point 1

Regarding the above, it can be stated that the procedural safeguards contained in Article 5 of the Directive have been incorporated into the Hungarian legal system and they are consistently applied by immigration authorities; *therefore, they provide effective protection* for Union citizens' family members.

As far as the *practice of the Hungarian courts and tribunals* are concerned, we have limited case-law on the interpretation and/or application of the different types of family relationships outlined in Articles 2 and 3 of the Directive. Hungary is a relatively new Member State of the EU (since 1 May

10. *28/2007. (V.31.) IRM rendelet a szabad mozgás és tartózkodás jogával rendelkező személyek, valamint a harmadik országbeli állampolgárok beutazásával és tartózkodásával kapcsolatos eljárások díjáról* (promulgated in *Magyar Közlöny* No 67/2007 of 31 May 2007, pages 4723-4729; the text in force can be downloaded from www.njt.hu).
11. Article 5(3) lit. a) of the Decree No 28/2007 (V.31.) of the Minister of Justice and Law Enforcement.

2004) and the judiciary has been slowly adapting its practice to apply EU law regularly. Moreover, the domestic implementing legislation of Directive 2004/38/EC entered into force on 1 July 2007, so not many years have passed since then. Consequently, the few recent judicial decisions characterise the legal reasoning of the Hungarian courts and tribunals concerning the application of Articles 2 and 3 of Directive 2004/38/EC.

As for Article 8(1) of the Freedom of Movement Act (relating to beneficiaries – quoted above) the Supreme Court (*Kúria*) has expressed in several judgments[12] that in line with Article 3(2) of the Directive, the competent authorities need to thoroughly investigate the existence of the *elements contained in the definition of 'beneficiaries'*. According to our national law it is needed to verify in details if the EEA national and the family members (including third-country national family members) have been living together in one household for a year, as the same registered address is not a proof in itself. Furthermore, the Supreme Court has stated many times[13] that not only should the simple declaration of the support by the EEA national be checked, but it should also be verified whether there are such *strong economic and physical ties* between the third-country national and its sponsor EEA national, which provides reasonable ground for placing the third-country national beneficiary under the personal scope of the Freedom of Movement Act. Furthermore, in 2012 the Supreme Court held that basing residence rights on a family relationship with a Hungarian national gained as a result of declaration of paternity by the Hungarian national, which relationship, however, has *no real substantive elements, is incompatible* with the primary purposes of EU law and national law.[14]

Question 2

Article 27 of the Directive lists clearly and exhaustively the grounds on which the freedom of movement and residence of EU citizens (and their family members) may be restricted, including expulsion. These ground encompass public policy, public security, and public health considerations, nothing more thus it stems from this provision that economic grounds cannot justify these restrictions (expulsion) as well as it is explicitly stated that 'these

12. Kfv. III.37.256/2010/4, Kfv.III.37.834/2009/4., Kfv. III.37856/2009/5.
13. See e.g. Kfv.IV.37.258/2010/4.
14. Kfv.II.37.566/2011/6.

grounds shall not be invoked to serve economic ends' either.[15] The Hungarian implementing legislation *strictly follows these rules and principles*, so there is *no domestic provision permitting expulsion on economic grounds*.[16]

Regarding the *administrative practice*, based on the experiences of the immigration authorities (mainly the Hungarian Office of Immigration and Nationality and its seven Regional Directorates) it can be stated that no administrative decision on expulsion has been made so far based purely on economic reasons. As a consequence, there is *no relevant case law of the Hungarian courts and tribunals* either; since there was not any administrative decision (expulsion order) to be appealed before the court (the procedural rules of the judicial review of such expulsion orders can be found in Article 46 of the FMA and in Chapter XX of the Act No III of 1952 on Civil Procedure[17]).

Question 3

Articles 12-13 of the Directive (retention of the right of residence) have been transposed into Hungarian law by the Freedom of Movement Act as follows:

Article 10

(1) The right of residence referred to in Article 6 (1) shall be retained, subject to the conditions defined therein, by the family member of an EEA national:
   a) in the event of the EEA national's death;
   b) in the event of the EEA national's departure.

(2) The right of residence of an EEA national who is a family member of a Hungarian national shall be retained according to paragraph (1), in the case specified in lit. a) of paragraph (1).

(3) The right of residence of the spouse of an EEA national shall be retained according to paragraph (1), if the marriage was dissolved or annulled by the court.

(4) The right of residence of an EEA national shall be retained on the grounds of family reunification if he/she is a family member of a Hungarian national or a family member of an EEA national satisfying the conditions set out in Article 6(1).

15. Regarding the restrictions on the right to free movement (generally, under EU law and specifically, under Hungarian law) in the Hungarian legal literature, see Tóth Judit, 'Az uniós munkavállalók mozgása és annak néhány akadálya', in *Föld-rész: Nemzetközi és Európai Jogi Szemle*, 4 (2012), pages 47-70. Ágnes Töttős, A közrendre, közbiztonságra veszélyesség uniós szabályozása a legális migráció területén (http://www.pecshor.hu/periodika/XIII/tottos.pdf – accessed on: 09.01.2013); Zámbó Katalin, Ordre public azaz vészfék? Vagy zárt kapuk? (http://www.pecshor.hu/ periodika/XIII/zambo.pdf – accessed on: 01.09.2013).
16. See Articles 40-47/B of the Freedom of Movement Act.
17. *A polgári perrendtartásról szóló 1952. évi III. törvény* (downloadable from www.njt.hu).

Article 11

(1) The right of residence of third-country national family members of EEA nationals and Hungarian nationals shall be retained as family members in the event of the death of the EEA national or Hungarian national if:
   a) they are engaged in gainful employment;
   b) they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of Hungary during their period of residence, and have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family members for such services as required by statutory provisions; or
   c) they exercise the right of residence as family members of a person who satisfies the requirements set out in lit. a) or b).

(2) The right of residence of a spouse being a third-country national shall be retained as family member in the event of divorce or annulment of marriage if:
   a) prior to the divorce or annulment of marriage the marriage has lasted at least two years, and the former spouse has resided at least one year in the territory of Hungary during the marriage as a family member of the EEA national or Hungarian national;
   b) by court decision the former spouse has custody of the child of an EEA national who resides in the territory of Hungary, or by agreement between the spouses has the right of access to the minor child;
   c) this is warranted by particularly difficult circumstances, such as having been a victim of any willful crime committed by the spouse who is an EEA national or a Hungarian national while the marriage was subsisting, or if having had the right of permanent residence prior to contracting marriage; or
   d) by agreement between the spouses or by court decision, the former spouse has the right of access to the minor child, provided that such access shall take place in the territory of Hungary according to the agreement or court decision.

(3) In the case defined in paragraph (2) the right of residence of a third-country family member shall be subject to his/her compliance with the requirements set out in lit. a), b) or c) of paragraph (1).

(4) By way of derogation from paragraphs (1) and (3), the right of residence of a third-country national spouse of a Hungarian national shall be retained unconditionally if the spouse has custody of the child who was born during their marriage.

Article 12

If the EEA national dies, his/her right of residence terminates or if he/she departs from Hungary, the right of residence of his/her child shall be retained – irrespective of age – until the completion of the studies, if already and continuously engaged in such studies. The right of residence of the other parent who has custody of the child shall be retained for the period of studies of the minor child.'

Furthermore, *Article 14(1)-(2) of the Directive* have been implemented by the following provisions of the Freedom of Movement Act:

Article 5
EEA nationals holding a valid travel document or a personal identification document, and third-country national family members holding a valid travel document shall have the right of residence not exceeding three months from the date of entry for as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of Hungary.
[...]

Article 6
(1) All EEA nationals shall have the right of residence for a period of longer than three months if they:
   a) intend to engage in some form of gainful employment;
   b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of Hungary during their period of residence, and have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family for such services as required by statutory provisions; or
   c) are enrolled at an educational institution governed by the act on public education or the Act on higher education, for the principal purpose of following a course of study, including vocational training and adult education if offering an accredited curriculum, and they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of Hungary during their period of residence, and have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family members for such services as required by statutory provisions.
(2) The family members of an EEA national shall have the right of residence, if the EEA national satisfies the requirements set out in paragraph (1) lit. a) or b).
(3) The spouse and dependent children of any EEA national who satisfies the requirements set out in paragraph (1) lit. c) shall have the right of residence.

Article 7
(1) The family members of any Hungarian national being engaged in gainful employment shall have the right of residence for a period of longer than three months.
(2) The right of residence for a period of longer than three months shall also extend to the family members of a Hungarian national if:
   a) they have sufficient resources for themselves or the Hungarian national has sufficient resources for such family members not to become a burden on the social assistance system of Hungary during their period of residence; and
   b) they have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family members for such services as required by statutory provisions.

(3) The right of residence for a period of longer than three months may be granted to a person who exercises parental custody of a minor child who is a Hungarian national, even in the absence of the requirements set out in paragraph (2).

[...]

Article 35

(1) The competent authority shall have powers to check compliance with the conditions for residence and with the requirements of notifications set out in this Act, if there is reason to believe that these conditions are not satisfied or that the person affected failed to comply with any requirement of notification.

In addition to that, the Implementing Government Decree elaborates more on the meaning of the term 'unreasonable burden on the social assistance system' when stipulating as follows:

Article 35

(1) An EEA national or his/her family member shall be considered to have become an unreasonable burden on the social assistance system of Hungary if(s)he receives:
   a) old age allowance (as set out in Art. 32/B(1) of SocialA);
   b) benefit for persons in active age (as set out in Art. 33 of SocialA);
   c) nursing allowance depending on the income (as set out in Art. 43/B of SocialA)
   for any period of more than three months.

(2) If the benefits referred to in parapgraph (1) are not provided on a regular basis, the period mentioned in parapgraph (1) shall be calculated with any duration of any subsequent payment period and any payment period within one year prior to the first day of payment included.

(3) For the purposes of determining as to whether an EEA national and his/her family member has become an unreasonable burden the competent authority shall take into account the personal circumstances of the person in question, such as the duration of residence in the territory of Hungary, the duration of payment of benefits and whether the difficulties are considered permanent or temporary.'

As regards *Article 14 (3)-(4) of the Directive* it is important to clarify that under Hungarian law if the legislation expressly sets out certain conditions, thus provides for an exhaustive list of conditions, it means that except of the listed conditions it is strictly forbidden to require other conditions. Therefore, in case of listed specific conditions there is no need to set out other provisions which would prohibit requiring other conditions, because their prohibition lies in the very fact that they are not included in the list. The same holds true for the national implementation of *Article 15(2) of the Directive*.

Similarly, with regard to the procedural safeguards mentioned in *Article 15(1) of the Directive*, it needs to be highlighted that provisions governing the decision-making process and the rights of the individuals involved in administrative procedures are laid down in Act No CXL of 2004 on the General

Rules of Administrative Proceedings and Services.[18] Article 72(1) of this Act contains a long list on the essential elements of an administrative decision. According to this provision, authorities are obliged to include in their written decision the grounds of it as well as information on the appeal procedures. As for the use of language, the same Act sets forth rules in its Articles 9-11, among which Article 10(1) stipulates in which case it is compulsory for the authorities to provide the decision in the language of the person concerned (here: Union citizens or their family members) as well.

The table below summarizes the correspondence between the relevant rules of the Directive and the Freedom of Movement Act.

Directive 2004/38/EC	**Freedom of Movement Act and/or Implementing Government Decree**
Article 12(1)	Article 10(1) Article 10(2) – more favorable provision
Article 12(2)	Article 11(1)
Article 12(3)	Article 12
Article 13(1)	Article 10 (3)
Article 13(2)	Article 11 (2) – more favorable provision [lit. a)] Article 11(3)
Article 14(1)	Article 5 Implementing Government Decree, Article 35
Article 14(2)	Article 6 Article 7 – more favorable provision Article 35(1)
Article 14(3)-(4)	Article 40
Article 15	Article 40

The above provisions show Hungarian law fully implemented the articles on the retention of residence rights of the Directive. Moreover, the Freedom of Movement Act applied here as well most favorable conditions and extended the benefits of the retention of residence rights to family members of Hungarian nationals.

18. *A közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény* (promulgated in *Magyar Közlöny* No 203/2004 of 28 December 2004, pages 16142-16191.; the text in force can be downloaded from www.njt.hu).

Based on the information received from the Office of Immigration and Nationality (which authority shall act in judicial review proceedings before courts if an administrative decision restricting or denying the retention of the right of residence is challenged by the EU citizen or his/her family member), *there are no such court cases so far*.

Question 4

The eligibility conditions for enjoying the right of permanent residence *(Articles 16-18 of the Directive*) have been transposed in the Hungarian *corpus iuris* by the below provisions of the Freedom of Movement Act:

Article 16

(1) Permanent residence status shall be granted to:
   a) EEA nationals who have resided legally and continuously within the territory of Hungary for five years;
   b) family members who have resided legally and continuously within the territory of Hungary for five years;
   c) persons who have retained the right of residence in connection with their relationship to an EEA national or a Hungarian national, and who have resided legally and continuously within the territory of Hungary for five years; and
   d) the children of a parent having the right of permanent residence in the territory of Hungary.

(2) Permanent residence status shall be granted to:
   a) the family members of Hungarian nationals – except the spouse – who have resided continuously within the territory of Hungary in the household of a Hungarian national for a period of at least one year;
   b) the spouse of a Hungarian national if their marriage was contracted at least two years prior to the date when the application was submitted and they share the same household since then.

   (3) Where an EEA national or his/her family member has abandoned to exercise his/her right of residence in Hungary, and returned to Hungary for a period exceeding three months, the duration required for the right of permanent residence shall start over from this time.

Article 17

(1) In the absence of proof to the contrary, the first day of continuous residence in Hungary shall be deemed the date of registration of residence according to Article 21 or the date of submission of the application for the residence card [for the third-country national family members] described in Article 22.

(2) The following cases shall not be deemed as discontinuity of residence:
   a) temporary absences from the territory of Hungary not exceeding six months a year;
   b) absences for compulsory military service;

c) one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting.

(3) The departure of an EEA national or his/her family members from Hungary shall be treated as discontinuity of residence.

Article 18

(1) Permanent residence status shall be granted to an EEA national who is engaged in gainful employment in the territory of Hungary before completion of the five-year period of residence specified in Article 16(1) lit. a) if:
   a) having resided in the territory of Hungary continuously for more than three years from the time of entry and at the time of termination of his gainful employment has reached the age laid down by law for entitlement to an old-age pension, or ceased his gainful employment in order to take early retirement, provided that such person has been working in the territory of Hungary for at least the preceding twelve months before going into retirement with old-age pension or before taking early retirement;
   b) having resided in the territory of Hungary for the purpose of gainful employment continuously for more than two years from the time of entry and stopped working due to incapacity to work as the result of an illness or accident requiring medical treatment;
   c) his/her incapacity to work is the result of an accident at work or an occupational disease entitling the person concerned to a benefit specified in specific other legislation; or
   d) after three years of continuous employment and residence in the territory of Hungary, taking up gainful employment in another State party to the Agreement on the European Economic Area, while retaining his/her place of residence in the territory of Hungary.

(2) For the purposes of paragraph (1), periods of gainful employment shall also include the periods:
   a) when the EEA national has registered as a job-seeker as prescribed in specific other legislation; or
   b) when the EEA national did not work due to an illness or accident;
   c) when the EEA national does not engage in gainful employment for reasons beyond his or her control.

(2a) For the purposes of paragraph (1) lit. a) and b), the duration of gainful employment shall also include the duration of gainful employment in a State party to the Agreement on the European Economic Area.

(3) If the spouse of an EEA national residing in Hungary for the purpose of gainful employment is a Hungarian national, the conditions as to length of residence and employment laid down in paragraph(1) lit. a) and b) shall not apply and the EEA national shall be granted the right of permanent residence if:
   a) eligible for old-age pension or early retirement; or
   b) he/she is no longer engaged in gainful employment due to incapacity to work as the result of an illness or accident requiring medical treatment.

(4) Where an EEA national has acquired the right of permanent residence under paragraph (1), his/her family members holding the right of residence shall also have the right of permanent residence.
(5) If an EEA national who is engaged in gainful employment in the territory of Hungary dies before acquiring permanent residence status under paragraph (1), his/her family members residing with him shall acquire the right of permanent residence on condition that:
   a) the EEA national had, at the time of death, resided continuously on the territory of Hungary for the previous two years; or
   b) the EEA national's death resulted from an accident at work or an occupational disease.

Article 19
(1) The right of permanent residence of an EEA national or his/her third-country national family member shall be lost after an absence for a period exceeding two consecutive years.
(1a) The right of permanent residence of a Hungarian national's third-country family member shall be lost
   a) after an absence of two consecutive years;
   b) in the event that an entry ban has been ordered;
   c) in the event that the family relationship has been established to obtain the right of residence; or
   d) in the event that he/she misrepresented data or facts in order to obtain the right of permanent residence, of which he/she has been convicted by a final criminal court decision.
(2) In the cases referred to in paragraphs (1) and (1a) the competent authority shall determine the loss of the right of permanent residence in a written decision.

The administrative formalities relating to the exercise of the right of permanent residence as prescribed *by Articles 19-21 of the Directive* have been incorporated into Hungarian law by the following national implementing measures:

Article 24
(1) The right of permanent residence of EEA nationals and their family members shall be evidenced by a document issued by the competent authority (hereinafter referred to as 'permanent residence card').
(2) Upon receipt of an application for a permanent residence card the competent authority shall issue the permanent residence card or shall reject the application by way of a written decision.
(3) In the proceedings for issuing the permanent residence card, the competent authority shall adopt its decision within three months from the date of submission of the application.

Article 25
(1) The family member who is a third-country national shall submit the application for a permanent residence card before his/her residence card expires. Any applicant who submits the application after his/her residence card has expired, if unable to offer a plausible excuse therefor, shall be required to prove that his/her right of permanent residence still exists.
(2) The competent authority shall immediately issue a certificate of application for the permanent residence card to testify the right of residence of the family member who is a third-country national.

Article 26
The permanent residence card shall be invalid in the event that the right of permanent residence has terminated.[19]

Furthermore, the *Implementing Government Decree* also contains relevant, more detailed and technical provisions:

Article 38
(1) EEA nationals and their family members shall submit their application for a permanent residence card at the regional directorate of the Office of Immigration and Nationality of jurisdiction by reference to their future residence.
(2) At the time of submitting the application the applicants shall produce their travel document or personal identification document, and shall enclose the authentic instruments or any other documents specified in this Government Decree to verify of having resided legally and continuously in Hungary.
(3) The regional directorate of the Office of Immigration and Nationality, before issuing the permanent residence card, shall check the legal background, duration and continuity of residence.
(4) The competent regional directorate of the Office of Immigration and Nationality shall automatically renew after ten years, without examining the conditions the permanent residence card issued to third country national family members.
(5) The permanent residence card – together with a valid travel document or personal identity card – issued to an EEA national shall remain valid for an indefinite period.[20]

As the national implementing measures show, the document certifying permanent residence in Hungary is called 'permanent residence card' ('*állandó tartózkodási kártya*').[21] This title is indicated on the document itself thereby

19. Freedom of Movement Act, Articles 24-25.
20. Implementing Government Decree, Article 38.
21. For the data indicated on the 'permanent residence card' see Decree No 25/2007 (V. 31.) of the Ministry of Justice and Law Enforcement, Annex 6, point 3 (promulgated in *Magyar Közlöny* No 67/2007 of 31 May 2007, pages 4598-4713 – the text can be downloaded from www.njt.hu).

differentiating it from any other residence card. Given that the nationality of its holder is indicated on the card, it clearly shows whether it was issued for an EEA national or a non-EU citizen family member. It should also be stated that permanent residence card can only be issued according to the conditions laid down in the Freedom of Movement Act; therefore, only persons enjoying the right of free movement and residence are entitled to be holders of such a permanent residence card. As a consequence, for third country nationals with long-term residence, who do not enjoy such a right, other types of '*titre de séjour*' are issued, such as national permanent residence permit or EC permanent residence permit.

Some additional explanation may be useful regarding the implementation of *Article 20(2) of the Directive relating to sanctions*. Relevant Hungarian legislation sets out proportionate and non-discriminatory sanctions in the case of those family members who do not apply for a permanent residence card before the expiry of their residence card. It should be noted at the outset, that the competent authority in any case needs to verify whether the conditions of issuing the permanent residence card (i.e. continuous five year residence in the territory of Hungary) are met; given that this is a necessary prerequisite for issuing such a card. If the family member fails to submit the application in a timely manner he/she still has the right to justify this failure. Detailed provisions regarding what constitutes a 'plausible excuse' are set out in the Act No CXL of 2004 on General Rules of Administrative Proceedings and Services.[22] According to this Act, any person who was unable to keep a deadline or time limit in the administrative proceedings for reasons beyond his control may lodge an application for excuse. The deadline for submitting such an application is a maximum of six months from the day of expiry of the residence card. In this respect it is important to highlight that competent authorities cannot require the applicant to justify facts that are officially known by the authority (e.g. data that is available in the official registries). Hence, this verification in practice does not impose any extra burden of proof on the part of the applicant and there is no 'additional' verification of the entitlement either in case the applicant fails to submit the application for a permanent residence card in a timely manner.

The table below summarizes the correspondence between the relevant rules of the Directive and the Freedom of Movement Act as well as the Implementing Government Decree:

22. Article 66(1) and (4).

Directive 2004/38/EC	**Freedom of Movement Act and/or Implementing Government Decree**
Article 16(1)-(2)	Article 16(1),(3) Article 16(2) – more favorable provision Article 17(1)
Article 16(3)	Article 17(2)
Article 16(4)	Article 19(1),(2) Article 19(1a) – Hungarian nationals' family members
Article 17	Article 18
Article 18	Article 16(1) lit. c)
Article 19	Article 24
Article 20	Article 24 Article 25 Implementing Government Decree, Article 38
Article 21	Implementing Government Decree, Article 38(2)-(3)

The Office of Immigration and Nationality has annually been publishing on its website (www.bevandorlas.hu) the *data on the volume of applications* for the status of permanent residence as well as the *number of persons enjoying this status* (cumulative stock). For previous years these figures were the following:

	2010	**2011**	**2012**	**1.01.2013-6.30.2013**
Applications for permanent residence card[23]	5,741	4,479	3,523	1,880
EEA nationals/its family members holding permanent residence card (cumulative stock)	14,272	16,508	17,014	17,176

23. The main nationalities are Romanians, Germans, and Slovaks. See: Judit Tóth, 'Hungary', in *International Encyclopaedia of Laws: Migration Law* (ed.: Dirk Vanheule), Alphen aan den Rijn: Kluwer Law International, 2012, p. 23.

According to the information collected from courts and the Office of Immigration and Nationality, *there were no court cases* relating to the interpretation and application of the provisions on obtaining permanent residence by EU citizens or their family members.

However, *outside the scope ratione personae* of the Directive, some judicial review proceedings have been initiated against decisions of the immigration authority rejecting the permanent residence card applications of *Hungarian nationals' family members*, since the Office of Immigration and Nationality has considered the applicant posing a threat to public policy, public security, or national security. Although the court has ordered the immigration authorities to restart the administrative procedure, such decisions were based exclusively on procedural deficiencies,[24] and did not interpret substantive law.

Question 5

Article 24(2) of the Directive enumerates the exceptions to the equal treatment principle.[25] After giving a general overview of the situation, special focus is put on study grants and the situation of job-seekers.

1. First and foremost, there is the issue how Member States categorise their benefits and which benefits are qualified under the heading 'social assistance' in terms of the Directive. In Hungary the separation is quite clear-cut. Social assistance benefits are those which are not contribution-based and not universal (these two are meant to be social security benefits). Contribution based are health insurance benefits, old age and invalidity benefits, unemployment benefits, and a number of family benefits, while universal benefits are the residence-based old age and family benefits.

Social assistance is meant to be mostly means-tested and granted mostly by the local government in case of financial or social need. We are concerned that Article 24 (2) of Directive 2004/38/EC refers to these types of benefits

24. *Fővárosi Bíróság* 21.K.35.104/2008/11.; *Fővárosi Bíróság* 6.K.33.398/2010/10.
25. '2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4) lit. (b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status, and members of their families.'

only meaning (i) that the 3 months waiting period (limitation) is strictly confined to these social assistance benefits while (ii) social security benefits must mandatorily be granted from the first day of contribution-payment (insurance) or from the first day of establishing social security residence (under Hungarian law this equals to residence under the Directive). Based on this approach, when replying *Question 5,* social security benefits are not dealt with.

2. Since 1 January 2008, in accordance with the personal scope of the Freedom of Movement Act, several social laws and governmental decrees have been amended. The former approach based on the requirement of economic activity has been revisited in a number of cases and the concept of union citizenship has been pronounced.[26] In this spirit not only Community workers and their family members, but every union citizen and their family members (including the family members of Hungarian nationals) became entitled to claim social assistance benefits if they meet the criteria.

3. At first, a general observation shall be made, namely that there is a strong interrelationship in Hungary between eligibility to social assistance benefits in broad terms and lawful residence. Access to benefits is, as a main rule, subject to the effective registration of residence and possession of the registration certificate / residence card for third countries family members. If the EEA national or the family member disposes the right of residence in Hungary and can verify it with a proper residence document (issuing the registration certificate or the residence card automatically means for the person concerned the establishment of domicile in Hungary), s/he is entitled to apply for all the social assistance benefits. Here, the system is very generous, hence no further criteria are examined. At present, no declaration is required that the person has his/her habitual residence in Hungary or that she/he has decided to leave the former country of residence with a final effect. No special investigation takes place as regards his/her future expectations. The authorities accept that by registering the residence here, she/he wishes to be part of the solidarity community and is given all the opportunities to join. This solidarity is exercised in accordance with the concept of 'unreasonable burden' (see the forthcoming point on limitations).

The covered fields are as follows: social assistance benefits and benefits for the disabled. Both cash benefits and in kind benefits are involved.

26. Most prominently Act CXXI of 2007 on Social Laws.

4. Social assistance benefits, benefits for the disabled.
Pursuant to Article 3(3) lit. b) of the Act III of 1993 on Social Administration and Social Benefits (hereinafter referred to as SocialA) Union citizens (including Hungarian citizens)[27] and their family members residing lawfully in Hungary for more than three months and being registered in the permanent address register can be entitled to all benefits enshrining in the Act. The text of the Act clearly indicates that the Hungarian legislator made use of the 3 months waiting period in case of access to social assistance benefits. Union citizens and their family members are eligible only after having been registered for at least three months. The Act contains both cash and in kind benefits, the most of which are means tested and awarded by the self-governments. Such benefits are old age allowance, benefit for persons on active age, nursing allowance, home maintenance support, temporary assistance, funeral support, public funeral, public health care card, debt management service. A typical form of benefits for active persons not having sufficient income and for their family members is the benefit for persons in active age. As a type of benefit for persons in active age for those being able to be employed within the meaning of the SocialA wage subsidizing allowance can be granted. Wage subsidizing allowance can be granted to those who have already exhausted their entitlement for unemployment benefit, or have not even been entitled for such a benefit due to the lack of required eligibility period.

5. Study grants
As a general and horizontal comment it has to be stated that, albeit Article 24(2) would provide for the possibility, no requirement of long-term residence status is foreseen in this field, as a main rule. There is one exception in the area of grants. Study loan is only granted to economically active union citizens and their family members or those who obtained the long-term resident status (see these under point 5.2)

5.1. *Students attending the vocational school (15-18-21 years of age)* are eligible for scholarship regardless of their nationality or legal status if they participate as enrolled (practically resident) in a field that is hit by labour shortage. The list of these occupations is determined by the regional Vocational Training Centre with consultation of chambers and employment agencies. According to the Government Decree No 328 of 2009, XII. 29 on Scholar-

27. The personal scope has been extended to the family members of Hungarian nationals as well meaning that reverse discrimination in this regard was terminated.

ship for Students in vocational training, the scholarship is financed from the Labour Force Public Foundation through the administration of the National Vocational and Adult Education Institution on the grounds of contributions of employers. The monthly 10-30,000 HUF (37-110 €) support is available for each student whose study result in average reaches 2.52. The Government Decree provides the grant for the student independently from other financial support that s/he is obtained.

High-level education encompasses universities and colleges founded or recognised by the state in the territory of Hungary, the list of which can be found in Annex 1 of the Act CCIV of 2011 on the National Tertiary Education (hereinafter referred to as HighA). Only recognised/registered high-level educational institutions are entitled to normative financing from the state – among others – on the basis of the number of students who are qualified as '*students taking part in education financed by the state*'. Their yearly quota is determined by the Government, but its maximal length takes 12 semesters and plus 4 semesters for handicapped students [Art 55 (2)] Studies beyond this period shall be financed by the student.

Pursuant to the HighA EEA nationals and their family members are entitled to enter into Hungarian high-level education under the same conditions as Hungarian nationals [Article 39 (1) lit. a)]. EEA nationals and their family members are entitled to social maintenance payments and other study grants, contribution to their books and accommodation as students taking part in education financed by the state [Art. 80]. It means that Hungarian law benefits in general EEA nationals and their family members irrespective of the duration of their stay. No prior residence conditions are foreseen.

Hungarian law also takes account of the *Grzelczyk* case,[28] according to which in certain cases a Member State is obliged to endure that a legally resident student faces financial difficulties. Moreover, the HighA expressly delegates the power to the Government to regulate the conditions of foreign students' studies in Hungary [Article 119 (3)]. It regulates the issue in Government Decree No 51 of 2007 (III. 26) on Benefits and Fees of Students in High-level Education (Articles 7, 26-28) that enumerates the benefits which are generally available for students determining the system of supports payable to foreign nationals who study in Hungary. It stipulates that persons falling within the scope of the Freedom of Movement Act shall be treated on

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

equal footing with Hungarian nationals as regards rights and obligations in terms of fees and benefits. The minister for education is entitled to provide grants for non-state financed foreign students [Article 27(1)].

5.2. *Exception*
Only Hungarian nationals are eligible to get support to studies abroad/at foreign institutions getting scholarship from the state (ministerial grant that would be provided upon application, grant for studies in mother language of minority in the kin-state, Article 79 of the Act).

Government Decree No 86 of 2006 (IV. 12) on study loans and on the Study Loan Centre aims at providing for long-term and subsidized study loan construction for students in high-level education. The Study Loan Centre is responsible for granting the loan to the student who meets the requirements laid down in the Decree. The following categories form the personal scope: Hungarian nationals, refugees, TCN persons with permanent residence permits, and in turn, pursuant to Article 3(1) lit. (b) ba) EEA nationals who exercise an economic activity are entitled to apply for the study loan. Furthermore, pursuant to Article 3(1) lit. (b) bb) family members of EEA nationals who exercise an economic activity can also apply. Finally, persons who are entitled to permanent residence in terms of the Freedom of Movement Act can apply (Art. 3(1) lit. (b) bd). Enrolment to the high-education institution (student relationship with the institution), *residing registered address* in Hungary are the main preconditions. The student loan is available for maximum 10 semesters up to his/her age of 40 monthly up to 60,000 HUF (220 €). In brief, the Hungarian rule is in compliance with Article 24(2) of Directive 2004/38/EC. The loan shall be repaid in monthly instalments after termination of the student relationship with the institution on the basis of his/her monthly income (about its 8 %) and in case of unemployment the reimbursement amount fits to the minimum wage. The rate of interest is solid due to state subvention and prudent operation of the SLC.

6. Not only social protection benefits and study grants are guaranteed for resident union citizens and their family members, but also other benefits which embrace a much wider scope of grants and subsidies. In this sense, we tend to reach the borderline with Regulation No 492/2011/EU on free movement of workers, and the social advantages concept inherent in it.

7. Limitations
However, benefits from the social assistance system are subjected to the limitation that the person cannot be an unreasonable burden to the social assis-

tance system of the host Member State. The SocialA and the Freedom of Movement Act, reading together, interpret in Hungarian national law the concept of 'unreasonable burden'. This is valid for all groups (including workers, economically inactives, students, and job-seekers alike). According to Article 21(1) of the Implementing Government Decree – in line with Article 8(4) of the Directive – a person has sufficient resources, if the income per capita in one household reaches the minimum amount of the old age pension.[29] According to Article 35(1) of the Implementing Government Decree an EEA citizen or a family member becomes an unreasonable burden on the social assistance system of Hungary if he/she receives

a) old age allowance (as set out in Article 32/B(1) of SocialA);
b) benefit for persons in active age (as set out in Article 33 of SocialA);
c) nursing allowance depending on the income (as set out in Article 43/B of SocialA)

for more than three months.

In accordance with this provision a condition for obtaining the right of residence for longer than three months – in case they are not workers or self-employed persons, or are not following a course of study – is not to become a burden on the social assistance system of Hungary during their period of residence. In case a person is entitled to the right of residence for longer than three months, s/he is entitled to have recourse to the social assistance system as well. In case the beneficiary receives the enumerated social benefit for more than three months, the clerk in the municipal has to report this fact to the immigration authorities. As a result, the immigration authorities decide on a case by case basis whether the person has sufficient resources in order not to become an unreasonable burden on the social assistance system of Hungary. During such verification the criteria set out in Article 21(4) of Implementing Government Decree needs to be taken into account (number of persons having income or assets in a household; number of dependants in a household; whether the applicant is the owner, beneficiary, or user of the real estate providing accommodation for the applicant and his/her family members).

Further cash benefits and benefits in kind specified in the SocialA can be obtained without verifying whether the person concerned would become an unreasonable burden on the social assistance system of Hungary. According

29. It is 28,500 HUF (approximately 100 €) per capita.

to public information, no case has ever appeared in Hungary where a union citizen has sought recourse to the social assistance system and was rejected. There are no statistics either on the number of non-Hungarian nationals drawing social assistance benefits in Hungary.

In sum: the right of residence of family members shall be terminated if they are qualified as an unreasonable burden and consequently, they are no longer able to comply with the conditions for the exercise of the free movement right. However, in practice, not a single case has ever been reported in which the right was withheld because of lack of financial resources and recourse to the social protection system.

Question 6

As far as the application of *Article 27 of Directive* is concerned (restrictions on the grounds of 'public policy, public security, public health'), in some cases judicial review proceedings have been initiated against decisions of the immigration authority rejecting the permanent residence card applications of Hungarian nationals' family members, since the Office of Immigration and Nationality has considered the applicant posing a threat to public policy, public security, or national security. Although the court has ordered the immigration authorities to restart the administrative procedure, such decisions were based exclusively on procedural deficiencies,[30] and did not interpret substantive law, therefore, they did not elaborate more on the meaning of 'public policy, public security, and public health' in connection with restrictive measures against persons enjoying the right of free movement and residence. However, the court recalled the relevant case law of the CJEU in relation to the meaning of those legal terms, and stated that over the decades the European Court of Justice has elaborated a massive jurisprudence in this regard that should be taken into account as well as required a substantive, thorough, and detailed examination (balancing) of the factors by the immigration authority.

30. *Fővárosi Bíróság* 21.K.35.104/2008/11.; *Fővárosi Bíróság* 6.K.33.398/2010/10.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

In Hungary the issue of cases with 'purely internal situation' does not arise. As stated above, in order to avoid reverse discrimination with regard to *third-county national family members of Hungarian nationals* not having exercised their right of free movement yet, Hungarian law has *upgraded their legal status* to that of family members of EEA nationals. In other words, Hungarian nationals' third-country national family members living in Hungary (i.e. being in purely internal situations) *are on equal footing with Union citizens' family members* in terms of the rights and entitlements related to free movement and residence under EU law. This e.g. is reflected in the definition of 'family member' used in the Freedom of Movement Act.[31]

Against this backdrop, it can be held that Hungarian law effectively implements the CJEU's relevant case law, using the above logic of legislation. As regards the *Zambrano* ruling, according to the Freedom of Movement Act, third-country family members of Hungarian nationals are entitled to the right of residence for a period of longer than three months according to the following conditions:

(1) The family members of any Hungarian national being engaged in gainful employment shall have the right of residence for a period of longer than three months.
(2) The right of residence for a period of longer than three months shall also extend to the family members of a Hungarian national if:
   a) they have sufficient resources for themselves or the Hungarian national has sufficient resources for such family members not to become a burden on the social assistance system of Hungary during their period of residence; and
   b) they have comprehensive sickness insurance cover for health-care services as prescribed in specific other legislation, or if they assure that they have sufficient resources for themselves and their family members for such services as required by statutory provisions.

31. Article 2(2) lit. b), d), f), g) and j) of the Freedom of Movement Act. Several other substantive provisions in the same Act provides for the assimilation of Hungarian nationals' third-country family members with Union citizens' family members as regards their legal status, rights, and entitlements.

(3) The right of residence for a period of longer than three months may be granted to a person who exercises parental custody of a minor child who is a Hungarian national, even in the absence of the requirements set out in paragraph (2).[32]

In the case in question paragraphs (2) or (3) are applicable, which means that the parents have the right of residence for a period of longer than three months. A third-country national family member who has the right of residence for a period of longer than three months is entitled to the same rights as an EEA-national as regards different benefits. That means that – as a main rule – this person may be entitled to all kinds of residence-based benefits as a family member. However, if (s)he is receiving particular means-tested social assistance benefits (e.g. benefit for people in active age, old-age allowance, or means-tested nursing fee), it can be examined if (s)he has sufficient resources not to become an unreasonable burden on the social assistance system of Hungary.

Furthermore, the Zambrano judgment also requires that a *work permit shall be granted* to such a person, otherwise (s)he 'would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.'[33] This obligation to ensure the right to work is implemented in Hungarian law by virtue of *Act No IV of 1991 on Job Assistance and Unemployment Benefits,*[34] granting free access to the labour market for all persons enjoying the right to free movement and residence, including third-country national family members of EEA nationals, irrespective of the grounds on which they have obtained this status.[35]

The *Zambrano* ruling has been actively discussed in Hungarian academic literature.[36]

32. Article 7 of the Freedom of Movement Act.
33. Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, Judgment of the CJEU (Grand Chamber) of 8 March 2011, para. 44.
34. *1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról* (promulgated in *Magyar Közlöny* No 20/1991 of 23 February 1991; the text in force can be downloaded from www.njt.hu).
35. Article 2(2) of the Act No IV of 1991.
36. Cf. e.g. Gyeney, Laura, Aki a bölcsőt ringatja, avagy az uniós polgárságú gyermeket nevelő, harmadik állambeli személy státusza a közösségi jogfejlődés fényében. In: *Iustum Aequum Salutare* II. 2006/1-2. 113-129. (http://www.jak.ppke. hu/hir/ias/200612sz/2006_1-2_2acta14.pdf – accessed on: 01.09.2013.); Gyeney, Laura, Uniós

As another consequence of the equal treatment by operation of law of Hungarian nationals' third-county family members with those of Union citizens, *there is no distinction of rights acquired under the Directive 2004/38/EC and the respective provisions of TFEU (Articles 20, 21)*, neither in codified legislation, nor in case law. When Hungarian nationals seek family reunification rights from their home county (i.e. in Hungary), their substantive rights and related procedures are incorporated in the Freedom of Movement Act. This is the case since 1 July 2007 (the entry into force of the aforementioned Act).

Question 8

The Hungarian Act on Nationality (Act No LV of 1993)[37] established certain facilitations regarding the acquisition of Hungarian nationality for persons enjoying the right of free movement and residence, i.e. in the Hungarian context for the Union citizens, their family members as well as third-county national family members of Hungarian nationals. One requirement for naturalization is a compulsory 'waiting period' (as a general rule, it is eight years) before applying for naturalization. This 'waiting period' starts being counted from the date when the foreigner establishes a place of *permanent residence* ('*lakóhely*') in Hungary. As the main rule, this only comes with obtaining the permanent residence permit, i.e. after *minimum three years of lawful residence* in Hungary. However, for Union citizens, their family members as well as third-country national family members of Hungarian nationals, the permanent residence ('*lakóhely'*) is established once they have been registered at the competent immigration authority (i.e. on the date of obtaining the registration certificate).[38] In other words, they *do not have to wait at least three years* before the official waiting period for naturalization (eight years) starts counting. This provision is in force since 1 July 2007, so from the date of our

polgárság: a piacorientált szemlélettől való elszakadás göröngyös útja. A Rottmann-, a Zambrano-, a McCarthy- és a Dereci-ügyek analízise. In: *Iustum Aequum Salutare* VIII. 2012/2. 141-164.; Töttös, Ágnes, Az Európai Bíróság legújabb ítélkezési gyakorlatának hatása az idegenrendészeti jogalkalmazásra. (http://www.pecshor.hu/ periodika/XII/tottos.pdf – accessed on: 01.09.2013.).

37. *A magyar állampolgárságról szóló 1993. évi LV. törvény* (the text in force can be downloaded from www.njt.hu and in English from http://allampolgarsag.gov.hu).
38. Article 23(1) lit. c) of Act No LV of 1993 (Nationality Act). Other conditions: clean criminal record, self-subsistence, knowledge of constitutional issues (nationality test), and no threat to Hungarian public security and national security.

EU accession (1 May 2004) till the entry into force of this provision, such a differentiation did not exist in favour of this privileged group of foreigners.

As regards the *direct implications of the Rottmann judgment*, we did not necessarily have to modify our nationality legislation because of this CJEU ruling, since withdrawal of nationality is only allowed in extremely restricted conditions under Hungarian law.[39] The basic rule is Article G) paragraph (3) of the Fundamental Law (our new Constitution)[40] (entered into force on 1 January 2012) according to which '*no one shall be deprived of Hungarian nationality established by birth or acquired in a lawful manner*'. Hungary has no right to arbitrarily deprive someone from his/her legally acquired nationality. Deprivation had been used as a strong political tool in earlier centuries; therefore, this instrument had to be eliminated from Hungarian law. In our opinion, in case of committing crimes against the State, committing other serious crimes or serious violation of civic allegiance the right of the State to prosecute by means of criminal law shall prevail over public law instruments such as deprivation of nationality, thus deprivation (withdrawal) shall not appear as sanction in such cases. As a result of these considerations, Hungarian nationality legislation reserves the right of withdrawal as an exceptional possibility only if the nationality has been acquired through unlawful means. Accordingly, as the Nationality Act stipulates:

> Hungarian nationality may be withdrawn if it was obtained through unlawful means, in particular, by the naturalized person's conduct aimed at misleading the authorities by disclosing false or untrue data, or by concealing any consequential data or information. Hungarian nationality may not be withdrawn after ten years from the date of acquisition.[41]

The existence of the fact resulting in the withdrawal of nationality shall be established by the decision of the authority dealing with nationality related matters (i.e. Office of Immigration and Nationality). The review of the decision can be requested from the Metropolitan Administrative and Labour Court

39. On the analysis of the *Rottmann* judgment in Hungarian legal literature see e.g. Ágnes Töttős, Állampolgársági feltételek – tényleg szuverén a tagállam? (http://www.pecshor.hu/ periodika/XI/tottos.pdf – accessed on: 01.09.2013.); Mónika Ganczer, *Állampolgárság a nemzetközi jogban – államutódlás esetén*. Ph.D. dissertation, Győr, 2013 [manuscript with the author], 68, 77, 91.
40. *Magyarország Alaptörvénye* (promulgated in *Magyar Közlöny* No 43/2011 of 25 April 2011, pages 10656-10682; the text in force can be downloaded from www.njt.hu; in English: http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary).
41. Article 9(1) of the Nationality Act. This provision was enacted later as a modification, entered into force on 1 July 2001.

(*Fővárosi Közigazgatási és Munkaügyi Bíróság*), thus the proper judicial review is ensured. Proportionality as a general principle of law in our administrative law is duly taken into account in these proceedings. As a natural consequence, the withdrawal of nationality cannot be expanded to the spouse or the child of the person concerned. The withdrawal of nationality is an exceptional and serious legal consequence; and it is appropriate to refer it to the authority of the President of the Republic. The procedure to revoke nationality is launched *ex officio* by the authorities. The President of the Republic makes a decision on the termination of the nationality by withdrawal, based on the proposal of the Minister of Interior. The decision on the withdrawal of the Hungarian nationality shall be published in the Hungarian Official Gazette (*Magyar Közlöny*) and the Hungarian nationality shall be considered terminated on the day of publication of the decision.[42]

Further to that, a *recent change* has been made in our Nationality Law, not because of the *Rottmann* ruling, but its aim and impact also helps to resolve situations in relation to the original nationality as occurred with Mr. Rottmann. According to this provision,

> [t]he person whose *renunciation of Hungarian nationality* was accepted may file a petition to the President of the Republic for reinstatement *within three years of the date of acceptance*, if the petitioner did not acquire nationality in another country.[43] (emphasis added)

This serves as a guarantee preventing a former Hungarian national to fall between two stools, i.e. to become stateless if changing his/her nationality was finally unsuccessful. Hungarian law did contain such a rule beforehand, too, but the period for reinstatement of the previous (Hungarian) nationality was shorter (only 1 year).

42. Article 9(2)-(4) of the Nationality Act. For such a withdrawal decision, being extremely rare, see Decision of the President of the Republic No 339/2013 (VII.19.) KE.
43. Article 8(4) of the Nationality Act (this new, modified provision entered into force on 1 March 2013).

Political rights of EU citizens

Question 9

The Fundamental Law of Hungary contains the basic rules on the voting rights of Union citizens in Article XXIII as follows:[44]

Article XXIII

(1) Every adult Hungarian national shall have the right to vote and to be voted for in elections of Members of Parliament, local government representatives and mayors, as well as of Members of the European Parliament.

(2) Every adult national of another Member State of the European Union with residence in Hungary shall have the right to vote and to be voted for in elections of local government representatives and mayors, and of Members of the European Parliament.

(3) Every adult person recognised as a refugee, immigrant or permanent resident in Hungary shall have the right to vote in elections of local government representatives and mayors.

(4) A cardinal Act may provide that the right to vote and to be voted for, or its completeness shall be subject to residence in Hungary, and the eligibility to be voted for shall be subject to additional criteria.

(5) In elections of local government representatives and mayors voters may vote at their place of residence or registered place of stay. Voters may exercise their right to vote at their place of residence or registered place of stay.

(6) Those disenfranchised by a court for a criminal offence or limited mental capacity shall not have the right to vote and to be voted for. Nationals of another Member States of the European Union with residence in Hungary shall not have the right to be voted for if they have been excluded from the exercise of this right in their State pursuant to a legal regulation, a court decision or an authority decision of their State.

(7) Everyone having the right to vote in elections of Members of Parliament shall have the right to participate in national referendums. Everyone having the right to vote in elections of local government representatives and mayors shall have the right to participate in local referendums.

(8) Every Hungarian national shall have the right to hold public office according to his or her aptitude, qualifications and professional competence. Public offices that shall not be held by members or officials of political parties shall be specified by an Act.

The rules on European Parliament elections are laid down in Act CXIII of 2003 on the Election of the Members of the European Parliament.[45] The Act

44. In English, see http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary (downloaded: 26.08.2013). The former Consitution (in force until 31.12.2011.) contained the same rules in its Article 70.

entered into force on 27 December 2003. There was no derogations from the Directive (neither special registration, nor prior residence requirement was required from Union citizens). The Act has been amended once by Act CCI of 2011 with effect from 1 January 2012. This amendment introduced the following rule:

Article 2/A

(1) Those persons can be voters and can be voted for who have a residence in Hungary.
(2) Persons who are in prison on the basis of a *res iudicata* court judgement or those who were imposed mandatory medical treatment cannot be voted for.

Pursuant to the above Act, the election takes place under a proportional voting system, through voting on the basis of lists, where the territory of Hungary constitutes a single constituency.

The right to vote shall be exercised under the following condition (Article 4 of the above Act).

At the election of the members of the European Parliament, within Hungary, the right of vote shall be exercised by:

a) any Hungarian voter unless such a voter has declared in another member state of the Union that he/she wishes to exercise the right of vote in that member state, and
b) any voter of the other Member States of the European Union if such a voter declares that he/she wishes to exercise the right of vote in the territory of Hungary and confirms that he/she has a place of residence in Hungary.

Each voter can exercise his/her right to vote in a single Member State of the European Union (Article 3 of the same Act.) Annex 5. of Ministerial Decree 6/2009. (II. 25.) ÖM on the implementation of Act C of 1997 on Electoral Procedures regarding the election of the members of the European Parliament contains the application form for EU citizens having residence in Hungary to enrol themselves in the voters list.[46] In this application they have to declare that, '*I declare that at the election of the members of the European Parliament I intend to exercise my right to vote in the Republic of Hungary, therefore I ask for enrol me into the voter register of my domicile in Hungary*.' (See the declaration in Annex I.) The usual process is that Hungarian and other EU citizens who are already in the residence (address) register are sent a letter informing them about their rights to vote. The criteria of the above

45. For more information see: http://www.valasztas.hu/en/ovi/198/198_0.html (downloaded: 26.08.2013).
46. See: http://www.valasztas.hu/en/ep2009/index.html (downloaded: 02.09.2013).

declaration (which is not required from Hungarian citizens) is laid down in Directive 93/109/EC, no other additional criteria is laid down in Hungarian law.

At the European Parliamentary elections, voters who have a place of residence in Hungary, yet reside outside of Hungary on Polling Day have been allowed to cast their votes at the embassies of Hungary, the election bodies at the elections of the members of the European Parliament also include the embassy election offices and the embassy ballot-counting committees. It is equally applicable for EU citizens.

There have been EP elections twice so far: in 2004 and in 2009. In 2009 only Hungarian nationals stood as candidates and were elected as members of the European Parliament. As regards EU citizens (other than Hungarian nationals) who were entitled to vote in Hungary the following statistics are available: the number of total (enrolled) voters were 8,023,217 out of which 5.542 were EU citizens.[47]

There has not been relevant case law in domestic courts.

The recent amendment of Directive 93/109/EC is subject to the regular order of legal approximation, no implementation has taken place.

Question 10

The implementation of Directive 94/80/EC is based on different legal norms that have changed in the past.

At present, *Article XXIII of the Fundamental Law of Hungary* lays down that,

> (2) Every adult national of another Member State of the European Union with residence in Hungary shall have the right to vote and to be voted for in elections of local government representatives and mayors as well as of Members of the European Parliament.'
> [...]
> (4) A cardinal Act may provide that the right to vote and to be voted for, or its completeness shall be subject to residence in Hungary, and the eligibility to be voted for shall be subject to additional criteria.

This cardinal Act is *Act No L of 2010 on the Election of Self-government Representatives and Mayors* that does not contain any differing rules from the Directive at present.[48]

47. See: http://www.valasztas.hu/hu/ep2009/14/14_0_index.html (downloaded: 02.09.2013).
48. Article 25: 'This Act serves compliance with the Council Directive 94/80/EC of 19 December 1994 declaring detailed rules on exercising suffrage and eligibility of

Yet, at the time of the last local governmental elections (Autumn 2010), the former Constitution that used to contain the following derogation was still in force:

Article 70
[...]
(2) Every adult Hungarian national and national of another Member State of the European Union with residence in Hungary shall have the right to vote and – if on the Poll Day they are staying in Hungary – to be voted for in elections of local government representatives and mayors. (...) The mayor and the Lord Mayor (mayor of the capitol) must be a Hungarian national.

Accordingly, Hungary has then opted for the derogation as provided in the Directive 94/80/EC to preserve the post of the mayors for Hungarian nationals.

In principle, however, the answer to the question, namely when the Directive 94/80/EC has been fully implemented, the answer is that the first Act that implemented it was Act No LXIV of 1990 on the Election of the Members and Mayors of Local Governments being in force during the 2006 local governmental elections.[49]

Altogether 68,008 candidates stood for the 2010 local governmental elections.[50] There are no statistics on the nationality of these candidates, nor about the nationality of the elected representatives.

Question 11

There is an additional franchise in Hungary for minorities which is regulated by Act CLXXIX of 2011 on the rights of minorities. It foresees rules on the election of minority governments.

Article 2 (2)
2. minority government: an organisation established on the basis of this Act by way of democratic elections that operates as a legal entity, in the form of a body, fulfils minority public service duties as defined by law and is established for the enforcement of the rights of minority communities, the protection and representation of the interests of minorities

Union citizens having domicile in a Member State other than their state of nationality, in local self-government elections.'

49. See: http://www.valasztas.hu/onkval2006/en/02/2_0.html (downloaded: 01.09.2013).
50. See: http://www.valasztas.hu//hu/onkval2010/467/467_0_index.html. (downloaded: 01.09.2013).

and the independent administration of the minority public affairs falling into its scope of responsibilities and competence at a local, regional, or national level.

Article 50
The individual minorities may, by way of direct voting, set up
a) local minority governments in localities, towns and the metropolitan districts and regional minority governments in the capital and in the counties (hereinafter collectively referred to as 'local'), and
b) national minority governments.

Articles 50-78 of the above Act lay down the rules on elections, mandates, and status, rights and obligations of minority governments.

According to Article 53 on franchise there is one additional eligibility criteria, namely the voter has to declare that he/she belongs to a minority, and one individual may only be recorded in a single minority register at any time.

Article 53
Electors recorded in the minority register shall be entitled to vote. The following shall be entered in the minority register on request:
a) individuals who have the right to vote at the election of local municipality board representatives and mayors,
b) individuals forming part of the minorities specified in this Act,
c) individuals who declare their affiliation with a minority with the content determined in this Act and as part of the procedure identified in the Act on the election proceedings.

As regards other criteria there are no differing rules from the rules on local governmental elections.

Question 12

As regards the voting rights of persons convicted of criminal offences or persons with mental impairments, the Fundamental Law lays down the following:

Article XXIII of the Fundamental Law
(6) Those disenfranchised by a court for a criminal offence or limited mental capacity shall not have the right to vote and to be voted for. Nationals of other Member States of the European Union with residence in Hungary shall not have the right to be voted for if they have been excluded from the exercise of this right in their State pursuant to a legal regulation, a court decision, or an authority decision of their State.

In our view there is *no difference* between the rules on Hungarian nationals and Union citizens.

Culture(s) of citizenship

Question 13

At the outset, right after our accession to the EU (1 May 2004), our national legislation on the right of free movement of EU citizens and their family members followed the traditional 'permission' based approach and the legal status of this privileged group of persons was understood as adjunct to the ordinary Hungarian immigration system. A clear sign of it was the incorporation of the rules pertaining to the entry and stay of Union citizens in the then Aliens Act (Act No XXXIX of 2001) as a separate chapter.[51] When this field of law has been recodified, as of 1 July 2007, in a separate Act (i.e. in the Freedom of Movement Act), the underlying, principal aim was *to make a shift from the former permission-based, document-centric approach* (which treated the persons enjoying the right of free movement as a sub-group, but as part and parcel of the ordinary foreigners) to the *rights-based approach*, reflecting the free movement legal culture as well as clearly distinguish between the legal status of this privileged group of people and that of third-country nationals (the latter being covered by Act No II on the Entry and Stay of Third Country Nationals[52]). This paradigm shift is also emphasized by the Explanatory Memorandum of the Freedom of Movement Act.[53]

Question 14

Based on the limited number of judgments and the received communication from national courts, *one cannot see any tangible role* of the EU Charter of Fundamental Rights so far in how the rights of EU citizens have been interpreted. As stated above, Hungarian sporadic case law does not really concern Union citizens and their family members, but rather third-county national

51. Articles 25-30 of the Act No XXXIX of 2001 on the Entry and Stay of Foreigners (*A külföldiek beutazásáról és tartózkodásáról szóló 2001. évi XXXIX. törvény*), not in force since 1 July 2007.
52. *A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény* (promulgated in *Magyar Közlöny* No 1/2007 of 5 January 2007, pages 36-64.; the text in force can be downloaded from www.njt.hu).
53. *Indokolás a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvényhez*, *Általános indokolás* (see: www.parlament.hu).

family members of Hungarian nationals. After having analyzed these judgments, we could not find any reference to the Charter of Fundamental Rights in them.[54]

Question 15

Generally speaking, issues connected to EU citizenship (freedom of movement, political rights, access to social benefits and social assistance, their national treatment etc.) *have not been regularly dealt with* in the Hungarian media. This may be due to the relatively low number of mobile EU citizens residing in Hungary[55] as well as because they are considered as 'unproblematic' according to the public perception.[56] People enjoying the right to freedom of movement are concentrated in the capital (Budapest) and in other bigger cities (Győr, Pécs, Debrecen, Nyiregyháza, Miskolc, Szeged), so they are also invisible for a great share of the Hungarian population. For instance, when the UK, NL, DE, and AT ministers of interiors raised the issue of abuses and fraud with the right to free movement in their joint letter addressed to the EU Council and the Commission is April 2013 (this was leading news in Western European media at that time), this topic was discussed by all EU ministers at the June 2013 JHA Council, but Hungarian media did not report on that issue. Similarly, no parliamentary questions have been asked in relation to EU citizenship in the last 3 years (since the last parliamentary elections in 2010).

However, to name a few sporadic examples, the right to free movement has been touched upon in the *Sólyom case* (*C-364/10 – Hungary v Slovakia*[57])

54. *Fővárosi Bíróság* 21.K.35.104/2008/11.; *Fővárosi Bíróság* 6.K.33.398/2010/10. For a general overview on the EU Charter's in Hungarian judicial practice see: Varga Zsófia: Az Alapjogi Charta a Magyar bíróságok előtt, Jogtudományi Közlöny LXVIII (2013), pages 553-563.
55. The number of EU citizens and their third-country national family members residing more than 3 months in Hungary was 85,988 in 2008, 100,632 in 2010, 113,289 in 2011 and 119,112 in 2012 (slowly increasing, but overall around 50 % out of all foreigners staying for more than 3 months in Hungary).
56. They are mainly from Germany, Romania, Slovakia (with regard to the nationals of two latter Member States they are principally ethnic Hungarians), and Austria. Source: Judit Tóth: *op.cit*. 23; www.bevandorlas.hu (accessed on 01.09.2013).
57. Case C-364/10, *Hungary v Slovakia,* judgement of 16 October 2012, ECJ EUR-Lex LEXIS 2465. For commentaries, see: *Harvard Law Review* 126 (2013), pages 2425-2434.; Mattia Filippin*,* A change for future intra-European diplomatic relations? Case C-364/10 Hungary v Slovakia, Judgment of 16 October 2012, not yet re-

when our then President of the Republic, Mr. László Sólyom was denied entrance into Slovakia in August 2009 to take part in a ceremony, and Slovakia, in a note verbale, invoked Directive 2004/38/EC as legal justification for prohibiting his entry into Slovak territory. In this case the issue at stake was whether a Head of State of an EU Member State, being also an EU citizen, enjoys the same rights attached to the freedom of moment as other EU citizens do; or given the specific characteristics of the high-rank office held, such a visit falls out of the scope of EU law *ratione materiae*, belonging to the realm of bilateral diplomatic relations, thus freedom of movement in such circumstances can be limited by rules of public international law (e.g. customary rules on *ad hoc* diplomatic missions or on the right of entry of Heads of State to other countries). The CJEU held that,

> [s]uch a specific character [being a Head of State] is capable of *distinguishing the person* who enjoys that status *from all other Union citizens*, with the result that that person's access to the territory of another Member State is not governed by the same conditions as those applicable to other citizens. [...] Accordingly, the fact that a Union citizen *performs the duties of a Head of State* is such as to *justify a limitation, based on international law*, on the exercise of the right of free movement conferred on that person by Article 21 TFEU.'[58] (emphasis added).

This case, the development of the proceedings and the judgement itself has been regularly reported by Hungarian media.[59]

Furthermore, another issue related to the free movement of EU citizens reported in Hungarian media, from a different point of view and focus, was the case of *dual Slovak-Hungarian nationals*, who, after having obtained Hungarian nationality in a simplified and facilitated procedure, *have been deprived of their Slovak nationality*. The legal problem was to define their legal status under EU law afterwards in Slovakia (having permanent residence in Slovakia where they were born and lived all their lives), i.e. to determine

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ported. *Maastricht Journal of European and Comparative Law* 20 (2013), pages 120-126.

58. *Ibid*, para. 50-51.

59. See e.g. a dossier about the case (http://kitekinto.hu/karpat-medence/solyom_ugy/); as well as reports, short news about the opinion of the AG and then the judgment (http://index.hu/belfold/2012/10/16/solyomugy_szlovakia_nem_sertett_unios_jogot/; http://hvg.hu/vilag/20120306_solyom_laszlo_eu_birosag; http://mno.hu/eu/solyom-ugy-magyarorszag-ragaszkodik-alla spontjahoz-1057676; http://www.hir24.hu/kulfold/2012/10/16/solyom-ugy-szlovakia-nem-sertett-unios-jogot/; http://videotar.mtv.hu/Videok/2012/10/16/21/Solyom_ugy_Szlovakia_nem_sertett_unios_jogot.aspx) (accessed on 01.09.2013).

whether they enjoyed the right to permanent residence as Hungarian nationals (EU citizens) in Slovakia.[60]

Finally, a third individual case to be mentioned and reported in the media was about a *German national, Mr G*, having worked and lived for seven years in Hungary at the time of the facts, *in Harkány* (where a well-known spa is operating). He wanted to use the benefits provided to local inhabitants of Harkány when using the spa. However, while Hungarian nationals having the permanent residence in the village were entitled to a 50 % reduction on the basis of a special card, this card was refused from Mr G and he had to pay full price to have access to the spa. He then submitted a claim to the Equal Treatment Authority and finally his case ended before the Metropolitan Court of Budapest. The case was also examined in a session of the European Parliament.[61]

Generally, the *interrelationship between free movement rights and rights to social benefits* is troubled by stereotypes and fears since the accession of Central and Eastern European (CEE) countries to the EU. Some issues are continuously on the agenda in Hungary as well, namely the posting of workers and the brain-drain in the field of health care workers. Posting of workers is still a sensitive issue;[62] hence several problems arise in connection with social security contribution payment and even with employer's criminal liabilities.[63] The emigration (short-term or long-term) of Hungarian health care personnel is also quite frequently on the agenda since better wages and career-possibilities often attract Hungarian doctors which creates a considerable

60. See e.g. http://www.atv.hu/kulfold/20111202_elvettek_a_szlovak_allampolgarsagot_egy_99_eves_magyar_asszonytol;http://www.ma.hu/kulfold/174569/Magyarszlovak_kettos_allampolgarsag_az_EPdontes_elgondolkoztatja_a_szlovakokat;http://kitekinto.hu/karpat-medence/2011/12/16/magyar_ossztz_a_szlovak_allampolgarsagi_torvenyre/#.UkID_RX-ldg (accessed on 01.09.2013).
61. Judit Tóth, *op.cit*. 120-121. See in the news e.g. http://index.hu/politika/belfold/harkany0612/?print; (accessed on 01.09.2013).
62. Éva Lukács Gellérné, Free movement of persons – a synthesis, in Réka Somssich – Tamás Szabados (Eds), *Central and Eastern European Countries after and before the Accession. Volume I*, Budapest, ELTE Faculty of Law, Department of Private International Law and European Economic Law, 2011 (http://jmce.elte.hu/docs/PersonsFreeMovement/PersonsFreeMovement.pdf – accessed on 01.09.2013).
63. Tuengerthal, Hansjiirgen Herrn Prof. Dr., '*Zum Stand der strafrechtlichen Verfahren gegen deutsche Unternehmen, die mit Werkvertragsunternehmen aus den neuen Mitgliedstaaten der EU tátig geworden sind, sowie deren auslandische Werkvertragspartner*', Referat, Seminar 'Werkvertrage Ost II' am 05.10.2007, Sheraton, Frankfurt, 3. (downloaded on 22.11.2010: http://werkvertrag-osteuropa.org/2007/Stand_strafrechtliche_Verfahren.pdf).

shortage here. Albeit, thanks to the efforts of the government, this process seems to stagnate.[64] Social dumping issues, namely that CEE nationals draw social benefits in Western countries are not highlighted in the media and usually the concrete cases are concerned with other CEE nationals.

Besides those specific cases, national reporting on EU citizenship issues in the media is almost non-existing (this year, a few short news appeared on the European Year of Citizens[65]); therefore, it is hard to assess its accuracy, but we could not find major mistakes. Moreover, we cannot detect any evidence of the influence of the media on national public discourse, since it does not seem to generate measurable interest in Hungary.

64. See: http://hvg.hu/itthon/20130715_Kevesebb_orvos_menne_mar_kulfoldre_az_all (accessed on 01.09.2013).
65. See e.g. http://www.hirado.hu/Hirek/2013/08/05/17/Plakatpalyazat_az_europai_polgarok_osszetartozasaert_.aspx; http://nol.hu/kulfold/20130122-unios_ polgar_vagyok_ na_es_(accessed on 01.09.2013).

ANNEX

KÉRELEM

APPLICATION / ANTRAG / DEMANDE

az Európai Unió Magyarországon lakóhellyel rendelkező állampolgárának névjegyzékbe vételéhez
for enrolling a European Union citizen having domicile in Hungary into the register
auf Aufnahme in das Wählerverzeichnis der in Ungarn über einen Wohnsitz verfügenden Staatsbürger der Europäischen Union
d'inscription sur les listes electorales pour les citoyens Europeens Resident en Hongrie

A kérelmező adatai / Applicant's particulars / Daten des Antragstellers / Données du demandeur :

(1) Családi neve:
Family name / Familienname / Nom de famille : .....
utóneve(i):
First name(s) / Vorname(n) / Prénom(s): .....

(2) Születési családi neve:
Family name at birth / Familienname bei der Geburt / Nom de jeune fille/de naissance
utóneve(i):
First name(s) / Vorname(n) / Prénom(s): .....

(3) Állampolgárság:
Citizenship / Staatsangehörigkeit / Nationalité: .....

(4) Születési hely:
Place of birth / Geburtsort / Lieu de naissance: .....

(5) Bejelentett magyarországi lakóhely:
Registered domicile in Hungary / In Ungarn gemeldeter Wohnsitz / Adresse en Hongrie:
postai irányítószám:
postal code / Postleitzahl/ Code postal: ⌊⌊⌊⌊
település + kerület:
settlement+district/ Ort + Bezirk/ Commune + arrondissement: .....
közterület neve, jellege (út/utca/tér stb.), házszám, épület, lépcsőház, szint (fsz., emelet stb.), ajtó:
name and type of public domain (road/street/square etc.), street-number, building, stairway, level (ground floor, floor etc.), door:
Name, Art der öffentlichen Fläche (Straße/Gasse/Platz/usw.), Hausnummer, Gebäude, Treppenhaus, Geschoss, (Erdg. Oberg. usw.) Tür:
Nom et type de la voie publique (avenue/rue/place etc.), numéro, bâtiment, escalier, étage (rez-de-chaussée, étage etc.), porte N°: …

(6) A személyi azonosítót és lakcímet igazoló hatósági igazolvány száma:
Number of the official certificate that verifies personal identity and address /
Nr. des Behördenausweises zum Nachweis der Personenidentität und des Wohnsitzes /
Numéros de la pièce d'identité et de la pièce contenant l'adresse: ⌊⌊⌊⌊⌊⌊ ⌊⌊⌊

(7) Személyi azonosító:
Personal identification number / Personenidentität / Numéro d'identité: ⌊ ⌊⌊⌊⌊⌊⌊ ⌊⌊⌊⌊

(8) Annak az állampolgársága szerinti településnek vagy szavazókörnek vagy választókerületnek a megnevezése, melynek névjegyzékében legutoljára szerepelt:
The name of the settlement or electoral district or constituency in accordance with citizenship, where you were recorded in the register last. / Bezeichnung des der Staatsangehörigkeit entsprechenden Ortes oder Wahlkreises oder Wahlbezirks, in dessen Wählerverzeichnis der Name zum letzten Mal aufgeführt war. / Nom de la commune ou de la section de vote ou de la circonscription électorale du pays de votre nationalité, dont la liste électorale comprenait votre nom la dernière fois:
település:
settlement / Ort / commune: .....
szavazókör:
electoral district / Wahlkreis / section de vote: .....
választókerület:
constituency / Wahlbezirk / circonscription électorale: .....

Nyilatkozat / Declaration / Erklärung / Déclaration

Kijelentem, hogy az Európai Parlament tagjainak választásán szavazati jogomat a Magyar Köztársaságban kívánom gyakorolni, ezért kérem a magyarországi lakóhelyem szerinti választói névjegyzékbe való felvételemet.
I declare that at the election of the members of the European Parliament I intend to exercise my right to vote in the Republic of Hungary, therefore I ask for enrol me into the voter register of my domicile in Hungary.
Ich erkläre, dass ich mein Stimmrecht zur Wahl des Europäischen Parlaments in der Republik Ungarn ausüben möchte, deshalb bitte ich um die Aufnahme in das Wählerverzeichnis entsprechend meinem ungarischen Wohnsitz.
Je déclare que c'est en Hongrie que je souhaite exercer mon droit de vote aux élections parlementaires européennes, pour cette raison je demande de m'inscrire sur les listes électorales de mon lieu de résidence en Hongrie.

Kelt / Date / Ort/Datum / Fait à: ……..…., (le) ⎿⎿⎿⎿ ⎿⎿ ⎿⎿ aláírás/ signature/ Unterschrift/ Signature

IRELAND

Patricia Conlan,[1] *Patrick McCann,*[2]
Eugene Regan[3] *and Ciarán Toland*[4]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Directive 2004/38/EC was transposed into Irish law by secondary legislation.[5] The language of the Directive is declaratory of the '*rights*' of citizens of the Union. The Irish implementing measure, S.I. No. 656 of 2006 (as amended) – called Regulations – has transformed such rights based language into the language of State licence: '*permission*', '*must satisfy the Minister*', '*may retain – subject to*'. The responsible Minister is the Minister for Justice and Equality (previously entitled the Minister for Justice, Equality and Law Reform).

The Regulations were amended to reflect the ruling of the Court of Justice in *Metock and Others* in relation, *inter alia,* to Articles 2(2), 3(1) and 5 of the Directive.[6] The earlier version had inserted a requirement of *prior lawful residence in another Member State*, for third country family members of citizens

1. Dr iur; Institute for the Study of Knowledge in Society, University of Limerick.
2. Senior Counsel, Bar of Ireland.
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4. Barrister, Bar of Ireland. Particular thanks are due to Jeff Walsh (Student Research Associate, Institute for International Immigration Studies, Trinity College Dublin) and to Andrew Flynn (LLM student, Harvard University).
5. European Communities (Free Movement of Persons) Regulations 2006, S.I. No. 226 of 2006 was revoked (and replaced) by European Communities (Free Movement of Persons) No. (2) Regulations 2006 (S.I. No. 656 of 2006) consequent upon the enlargement of the European Union on 1 January 2007. These latter Regulations have been amended by European Communities (Free Movement of Persons) (Amendment) Regulations 2008, S.I. No. 310 of 2008.
6. Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform,* ECR [2008] I-6241.

of the Union in order for them to come within the provisions of the Regulations.[7] This approach had been based on Ireland's view that there was a division of competence between the Member States, and the Community, as regards the admission of third country nationals coming from outside Community territory.[8]

The Court of Justice found that the requirement of prior lawful residence in another Member State for third country nationals was an incorrect transposition of the Directive.

The language of Regulations 4 and 5 in the Irish measure differs from that of Article 5 of the Directive. The Regulations speak of '*permission ... to enter'*, whereas the Directive speaks of '*right of entry*'. Regulation 4(b), speaks of '*if the Minister decides to issue an Irish visa*'. This language underlines the Irish emphasis on *permission,* associated with immigration in general, rather than the *direct rights* of the citizen of the Union and his/her family members. There is also some ambiguity in the use of 'his or her personal conduct *has been such*' which could suggest *past* conduct, rather than the requirement of *present* conduct (Article 27(2) of the Directive) in relation to public policy or public security. The health restrictions included in Schedule 1 of the Regulations do not reflect the Directive's provisions.

The different types of family relationships generally

The different types of family relationships have not been the subject of substantive case-law. Rather, Irish courts have been concerned with conditions precedent such as prior lawful residence of the family member in the Union. *Wang*[9] concerned a Hungarian minor child, her Chinese national mother (who had separated from her Hungarian husband-the child's father, who had returned to Hungary before the wife acquired Irish permanent residence under the Directive)[10] and the mother's Chinese national partner with whom the mother and child began living after the mother's separation from the Hungarian father. The household was resident in Ireland.

The High Court expressed the view that it was doubtful, at a preliminary hearing, that a three year old Union citizen could have a primary right of residence, and even if that were the case, that a Chinese national who has never

7. S.I. No. 656 of 2006, Regulation 3(2).
8. Case C-127/08 *Metock and Others,* paras 43-45.
9. *Wang v MJLR* [2012] IEHC 311.
10. *Wang v MJLR* [2012] IEHC 311 at para. 30.

been in either the child's country of nationality (Hungary)[11] or his own country (China)[12] a dependent of the child or member of the child's household could qualify as a family member, although he did fall to be considered in connection with the family's Article 8 ECHR rights.[13]

In respect of the mother, the Court found that '*an adult cannot be the dependant of a three year old child.*'[14]

As the *Wang* proceedings did not proceed to a full hearing the Irish courts did not have the opportunity to consider in a final way whether '*household*' under Article 3 could be established on the foundation a minor Union citizen. At the preliminary hearing the High Court considered this proposition arguable:[15] the Court stated that '*the notion may cover for example, an elderly housekeeper now retired who had lived with and been supported by the family over many years and thus was part of the household*.'[16]

The difference in treatment between Irish and other EU citizens

Consequences flow from the fact that the Directive is not applied to the family members of Irish citizens,[17] but only to non-Irish EU citizens exercising free movement rights. In particular, Irish citizens are, it may be argued, treated less favourably than other EU citizens.

The Irish High Court has found that the State cannot seek to prevent a marriage between a third-country national and a Union citizen from taking place, regardless of the status of the third country national's presence in the State and even if the marriage will have the effect of regularising his situation;[18] but, the same High Court judge found that the State can proceed with a deportation of a third-country national to an Irish citizen even if such an action will frustrate the marriage.[19]

11. *Wang v MJLR* [2012] IEHC 311 at para. 21.
12. *Wang v MJLR* [2012] IEHC 311 at para. 24.
13. *Wang v MJLR* [2012] IEHC 311 at para. 28.
14. *Wang v MJLR* [2012] IEHC 311 at para. 32, consistent with the Opinion of Advocate General Trstenjak at para. 34 of Case C-40/11 *Iida v Stadt Ulm*.
15. See *Wang v MJLR* [2012] IEHC 311, in particular para. 33.
16. *Wang v MJLR* [2012] IEHC 311 at para. 21.
17. *O & I v MJELR* [2009] IEHC 531, High Court (Cooke J) at paras 14-18.
18. *Izmailovic v MJELR* [2011] 2 IR 522, at para. 69.
19. *McHugh & Asemota v MJE* [2012] IEHC 110. At paras 25-26, the High Court (Hogan J) expressly drew attention to the difference in treatment between the rights of Irish and non-Irish EU citizens.

Similarly, the High Court regards the right of Union citizens exercising their Treaty rights to bring direct financially dependent ascendants to live with them as automatic,[20] whereas Irish citizens must prove social '*dependency*'.[21]

Metock

Article 2 and 3 case-law has concerned the residence requirements for family members. The Irish courts have interpreted the scope of the Directive's '*family members*' restrictively.[22] The Commission has noted that this practice has resulted in a high number of complaints.[23] In *Metock*,[24] the Court of Justice found that Article 3(1) of the Directive precluded the lawful residence rule, which was as set out above retroactively removed.[25]

20. *O'Leary v Minister for Justice* [2010] IEHC 256, High Court leave stage (Hogan J) at para. 46: *'The question of reverse discrimination under EU law also hovers over this case. It is not in dispute but that had Ms. O'Leary been a citizen of another EU state, she would have been entitled to have her dependent parents reside with her pursuant to the provisions of Directive 2004/38/EC. However, as she is an Irish citizen she is not permitted to invoke the provisions of the Directive within the realm of matters which are governed entirely by domestic law: see, e.g., Case C-43/90* Shirley McCarthy *(2011).'*
21. *TM v MJELR* [2009] IEHC 500, at para. 84: *'[D]ependency means some level of handicap, incapacitation, some disqualifying factor which makes one a dependent not simply financially but also socially, something that precludes one from completely independent living.'* However, in the substantive stage of *O'Leary v Minister for Justice* [2012] IEHC 80 Cooke J contextualised the wider dependence sought in an application for permission to reside under section 4(7) Immigration Act 2004 as one which in a proportionality assessment weighs various factors of private and family life (ie, rather than a test which requires a specific level of financial dependence, or, indeed, preclusion of independent living).
22. This policy commenced following the judgment in Case C-109/01 *Akrich*. Similar policies were commenced in the UK, Denmark and Finland. See the Commission Report to the Parliament on the application of Directive 2004/38/EC to Member States, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF.
23. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF.
24. *Metock & Ors v MJELR* [2008] IEHC 77. See in particular the views of the Court at paras 99-100.
25. By Article 3(a) of S.I. 310/2008 European Communities (Free Movement of Persons) (Amendment) Regulations 2008.

The Irish courts have applied *Metock* more broadly, finding that a spouse of a Union citizen worker cannot be deported from a Member State, regardless of the circumstances of their entry or residence in the State prior to the marriage.[26] However, residence of the Union citizen in Ireland as host Member State must be established for the Directive to avail family members.[27]

Article 5: procedural safeguards

In respect of Article 5, the High Court – in a case involving the 3-day detention of a Romanian national seeking to be accompanied by her Moldovan husband on foot of a family residence card – criticised the State's implementation and executive application of Article 5 of the Directive.[28]

Whether the procedural safeguards contained in Article 5 are to be viewed as effective will depend on the actual application in every instance. It can be noted that Regulation 4(5) does reflect the provisions of Article 5 of the Directive.

Question 2

In its Report on the application of Directive 2004/38/EC, the Commission noted that Ireland was one of 17 Member States that failed to transpose Article 7(3) of the Directive correctly. This, the Commission argued, has a restrictive effect on the citizen in terms of protection against expulsion as they

26. *L (O) v MJELR* [2009] IEHC 232, High Court (Irvine J) at page 9 of the unreported judgment.
27. *O & I v MJELR* [2009] IEHC 531, High Court (Cooke J) at para. 18. See generally Article 7 to 14, 16-18 and Schedule 2 of SI 656/2006 European Communities (Free Movement of Persons) (No 2) Regulations 2006.
28. [2011] IEHC 224. The High Court (Hedigan J) found that: *'While I am convinced that no personal blame should attach to either Garda McCormack and Sergeant Biggins – both of whom, it is plain, are conscientious and highly dedicated immigration officers – the same, unfortunately, cannot be said of the State and its policy with regard to the admission of the spouses of EU nationals who are third country citizens. It all too obvious that there have been significant and very serious breaches of EU law which, on the evidence, may well be continuing: the failure, for example, to have a visa processing service for such applicants, either at Dublin Airport or elsewhere within the State is openly at variance with the express language of Article 5(2) of the 2004 Directive. Nor have appropriate steps been taken to inform immigration personnel of the nature and importance of family residence cards.'*

were allowed to maintain their residence status but lost their status as a worker.[29]

The Commission also notes that Ireland is one of 13 Member States that do not exclude expulsion '*as an automatic consequence of recourse to the social assistance system.*'[30]

Very few decisions expelling EU citizens and/or their family members on any Article 7 grounds reach the Irish courts.[31]

Question 3

Articles 12-14 of the Directive have been transposed into Irish law by S.I. No. 656 of 2006, specifically Regulations 9-11.

In this instance, Regulation 9(1)(b), as qualified by Regulation 6(1)(b)(iii) is less prescriptive than the Directive (Article 12(1) second sub-paragraph) as qualified by Article 7(1)(c)). The Irish measure does not require the educational establishment where the EU citizen is enrolled to be accredited or financed by the State. Regulation 9(3) is also broader in scope than the Directive in that retention of the right of residence of children of a deceased or departed (from the State) EU citizen extends to include those enrolled in an educational establishment for the principal purpose of following '*... including a vocational training course'.*

There is no reference to 'registered partnership' in Regulation 10, although this category of person is listed in the interpretation Regulation 2(1)(d) as a 'permitted family member'.[32]

Regulation 11(1) could be seen as ambiguous as it requires the 'person residing in the State under Regulation 6(2), 9 or 10 to '*satisfy the Minister that he or she satisfies Regulation 6(2), 9 or 10'.*

29. Report of the Commission to the Parliament on the application of Directive 2004/38/EC, at 6 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF – last accessed 17 September 2013).
30. Report of the Commission to the Parliament on the application of Directive 2004/38/EC, at 7(available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0840:FIN:en:PDF – last accessed 17 September 2013).
31. In *Singh and Anor v Minister for Justice, Equality and Law Reform* [2010] IEHC 86 no expulsion order had been made, but rather a residence card was denied: the Court did not quash the Minister's refusal as the Applicant had not established any basis for an Article 7 entitlement.
32. The website of the Department of Social Protection refers to 'civil partners' of (various nationalities) – available at – http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx#condseekwork – accessed 23 September 2013.

General

Article 12 has been interpreted as only permitting the continued residence of third country nationals after the departure of their Union citizen spouse when such third country national is the primary carer of a child enrolled in full-time education, applying the principles from *Baumbast*, *Ibrahim* and *Teixeira*.[33] In all other cases, save irretrievable marital breakdown, the third country national must follow the Union citizen.[34]

Marriage

Articles 12 and 13 were analysed extensively by the High Court in *Lahyani v Minister for Justice and Equality*,[35] which found that the Articles required an assessment of the circumstances of the breakdown of the marriage in order that discretion can be exercised to award a continued right of residence to spouses of Union workers in circumstances where there is genuine irretrievable marital breakdown and the Union worker has left the State. The High Court found that its previous decision in *Shyllon v Minister for Justice, Equality and Law Reform*[36] was not binding upon it: there, the court held that a non-national had no continuing right of residence in a host Member State when the Union citizen whom he was in the process of divorcing had left the jurisdiction.

33. *Lahyani v MJE* [2013] IEHC 176, at para. 50.
34. *Lahyani v MJE* [2013] IEHC 176, at paras 52-54.
35. [2013] IEHC 176. See in particular at para. 60: *'It is therefore the view of this Court that Article 13 must be interpreted expansively to provide for the occasions where marriages and civil partnerships do not work out and where the Union worker simply deserts and quits the host state before matrimonial proceedings are contemplated. Each case must be determined by its own facts and a measure of discretion applied to allow for the almost infinite variations in the way that genuine relationships and marriages disintegrate. Having expressed that view, the Court is equally convinced that it cannot be the general rule as postulated by the husband that departure of the Union citizen worker confers either an indefinite or permanent right of residence while the deserted non-EU spouse considers his/her options and whether or not divorce is being contemplated. The wide interpretation of Article 13 – with due regard for human dignity and to prevent abuse – must be restricted to genuine marriages and genuine irretrievable breakdown of relationships. As the Court has already noted, if the relationship has not broken down irretrievably, the non-EU spouse is expected to leave the host state and travel with the Union citizen.'*
36. [2010] IEHC 153.

In *Lahyani*, the Court expressly applied the principles of *Diatta* and *Metock* such that the Directive cannot be interpreted restrictively and must be interpreted in the spirit of freedom of movement and human dignity.[37] Consequently, a flexible approach was taken in interpreting the various circumstances in which a right of residence might subsist on a personal basis: third-country nationals otherwise qualified under Article 13(2) are permitted to remain in the State while married to a departed Union citizen, provided that they satisfy Article 7 requirements, that the relationship has irretrievably broken down and that they seek a dissolution of the marriage within a reasonable period (assessed in light of the circumstances).[38] This was found to be necessary to ensure that the Directive is applied consistently across jurisdictions regardless of restrictive or permissive divorce regimes in the different Member States.[39]

Perhaps due to the length of time it takes to obtain a divorce in Ireland,[40] the residence rights of third country nationals separated from but still married to Union citizens is a live issue: a recent Article 267 TFEU reference has been made calling into question the meaning of the requirement to reside *with* the spouse under Article 16(2) of the Directive (compared with Article 10(3) of Regulation (EC) No 1612/68).[41]

In *Ismailovic v MJELR*, a case concerning the arrest of a third-country national prior to his marriage of convenience to a Union citizen, the High Court found that marriages of convenience were lawful under Irish law[42] and were not precluded by the Irish implementing measure. The Court noted that the CJEU in *Metock* had found that the Directive did not extend to spouses from '*marriages of convenience*' but found that the doctrine against '*horizontal direct effect*' precluded Ireland from claiming a discretion under EU law that it had declined to transpose into domestic law.[43]

37. *Lahyani v MJE* [2013] IEHC 176, at paras 71-74.
38. *Lahyani v MJE* [2013] IEHC 176, at paras 58 and 60.
39. *Lahyani v MJE* [2013] IEHC 176, at para. 59.
40. A minimum separation period of 4 out of the immediately previous 5 years.
41. *Ogierakhi v Minister for Justice* [2013] IEHC 133, in particular at para. 43.
42. *Izmailovic v MJELR* [2011] 2 IR 522, at paras 22-36.
43. *Izmailovic v MJELR* [2011] 2 IR 522, at para. 60. No amendments to the Regulations have been made since the judgment in *Izmailovic*.

Administrative formalities and proofs

The rights of family members under the Directive are subject to normal procedural rules[44] and proofs.[45] The High Court has confirmed that the right of residence is not conditional on administrative procedures such as the production of a residence card:[46] however, the State has been permitted to take reasonable steps to verify the circumstances attested by the documents,[47] and to revoke any permission issued for reason of fraud[48] (although only to review on a continuing basis where there is a legitimate cause for doubt).[49]

Where the conditions for residence of the EU citizen and the family member are not found to be unfulfilled *per se* but rather the Minister is unable to verify the conditions which require to be fulfilled, the Minister (prior to reaching his decision) must state clearly and plainly the reason why[50] and which documentary proofs are required.[51]

The Minister's failure to make decisions within the 6 month period required under the Directive has resulted in the issuance of mandatory orders.[52]

Question 4

Articles 16-21 of the Directive were transposed into Irish law by S.I. No. 656 of 2006, specifically Regulations 12-17.

In *B v Minister for Justice, Equality and Law Reform*,[53] the High Court held that Article 16 of the Directive requires a continuous period of 5 years lawful residence under Union law and that periods of residence prior to the applicability of Union law (in that case, prior to the accession of the relevant Member State) cannot count towards that 5 year period. In *Babington v Minis-*

44. In *L (O) v MJELR* [2009] IEHC 232, the substantive rights under Metock were found not to supersede the 14-day procedural time-bar on the bringing of applications for judicial review.
45. *Adedoja v MJELR* [2010] IEHC 406.
46. *Decsi & Ors v MJELR* [2010] IEHC 342.
47. *Lamazs & Gurbza* [2011] IEHC 50 at paragraphs 13 and 21; affirmed in *Saleem v Minister for Justice* [2011] IEHC 49.
48. *Tagni v MJELR* [2010] IEHC 85 at para. 7.1 *et seq*.
49. *Lamazs & Gurbza* [2011] IEHC 50 at para. 18.
50. *El Menkari v MJELR* [2011] IEHC 29 at paras 10-11.
51. *Lamazs & Gurbza* [2011] IEHC 50 at paras 18-21.
52. *Saleem v Minister for Justice* [2011] IEHC 49.
53. [2009] IEHC 447, at paras 18-20.

ter for Justice and Equality,[54] the High Court held, *inter alia*, that the entitlement to permanent residence is satisfied by continuous residence and not continuous conformity with one particular condition of Article 7 of the Directive.

Question 5

Article 24(2) of the Directive was transposed into Irish law by S.I. No. 656 of 2006 specifically Regulation 18(2)(a). Irish law distinguishes between those who could be described as 'working', which includes those seeking work, and those in 'education'.[55] Another distinction is between those entitled to 'benefits' and those entitled to *apply* for 'assistance'. For example, Jobseekers Allowance is a means tested payment to people who are unemployed, and who do not qualify for Jobseekers' Benefit.[56] There are several criteria to be met when applying for the Jobseeker's Allowance, one of which is to have been habitually resident in the country.[57] This would be relevant for the time line set down in Article 24(2) of the Directive.

We are not aware of any national case-law applicable to the question of whether Article 24(2) has displaced the Court of Justice's 'real link' case law. The *Bidar* and *Collins* case-law in this respect has not been the subject of detailed judicial consideration in Ireland.[58]

Question 6

We are not aware of any national case-law addressing the application of the public policy, public health and public security concepts contained in Articles 27 and 28.

54. High Court (Cooke J), 12th March 2013 at para. 16.
55. http://www.citizensinformation.ie/en/social_welfare/social_welfare_payments/back_to_education/social_welfare_payments_and_the_student_maintenance_grant_for_the_2010_11_academic_year.html#lfa027 – accessed 23 September 2013.
56. http://www.welfare.ie/en/Pages/Jobseekers-Allowance.aspx#condseekwork – accessed 23 September 2013.
57. http://www.welfare.ie/en/Pages/Habitual-Residence-Condition--Guidelines-for-Deciding-Offic.aspx#7.1- accessed 23 September 2013.
58. See *Douglas v Minister for Social Protection* [2012] IEHC 27 at para. 12.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

The Irish courts make extensive use of CJEU case-law in dealing with cases of EU citizenship. The Courts distinguish between rights acquired under Directive 2004/38 and Articles 20 and 21 in all cases reviewed. The scope of *Chen, Texeira* and *Ibrahim* on the one hand, and *Zambrano, Dereci*, *McCarthy* and *O, S & L* on the other, are the subject of regular debate before the national courts: however, only a small number of these cases have reached judgment.

The Courts appear willing to apply the genuine enjoyment of the substance of the rights of Union citizens/Zambrano test to purely internal situations where freedom of movement has not been exercised by the Union citizen[59] and the Union citizen will – by virtue of a refusal to grant a right of residence or a work permit causing the absence of a family member required for care and social and/or financial[60] support – be forced to depart the territory of the Union.[61] This is a strict criterion which must be evidenced.[62]

Where – as in *Wang*[63] – other Union citizens are claiming derivative rights for family members notwithstanding that they have not exercised freedom of movement (eg, a non-Irish Union citizen child born in Ireland), the Directive's application has been expressly considered.

Related rights of family members

The Irish High Court has found that the right of family members under the Directive to employment does not derive from the Treaty but from Article 23 of Directive 2004/38/EC.[64]

59. *Troci v Minister for Justice and Equality* [2012] IEHC 542 at para. 46.
60. *Troci v Minister for Justice and Equality* [2012] IEHC 542 at para. 46.
61. *AO v Minister for Justice* [2012] IEHC 79 (Hogan J) at paras 19-20; *Gilani v Minister for Justice and Equality* [2012] IEHC 193 (Cooke J) at paras 15-21; *EO v Minister for Justice and Equality* [2014] IEHC 30.
62. *Gilani v Minister for Justice and Equality* [2012] IEHC 193 (Cooke J) at paras 19-20.
63. *Wang v MJLR* [2012] IEHC 311.
64. *Decsi & Ors v MJELR* [2010] IEHC 342 at paragraph 29.

Moreover, *Chen* (unlike *Texeira*) is interpreted as requiring the Union citizen to have sufficient resources.[65]

The High Court has further found that the right derived from Regulation (EC) No 883/2004 to social security and social assistance is dependent upon the establishment of a right to reside, and if Union Citizens seek to obtain access to the social welfare system, they have become a financial burden contrary to the requirement to have sufficient resources.[66]

Notwithstanding this, applications have been brought by *Chen* and *Texeira* primary carers claiming that Union primary law grants primary carers a right to work and/or to access social assistance, which proceedings await hearing.

S.I. 417/2012 Immigration Act 2004 (Visas) Order allows for visa free entry into the State for holders of a permit under Article 10 of Directive 2004/38/EC. Despite the *Metock* judgment being handed down before the promulgation of S.I. 453/2009 Immigration Act 2004 (Visas) (No. 2) Order 2009, provision was not made therein for family members of Union citizens to enter the State without a visa. S.I. 146/2011 Immigration Act 2004 (Visas) Order 2011 provided for visa free entry into Ireland for holders of a '*Residence card of a family member of a Union citizen*'.

The Immigrant Council of Ireland (ICI) (an Irish based NGO advocating on behalf of immigrants) has been critical of the lack of *Irish national legislation* dealing with family reunification, and points out that Ireland is the only EU Member State not to have such *rules enshrined in legislation.* The ICI views the wide discretion of the Minister with regard to granting of family reunification to Irish nationals and legally resident migrants as leading to inconsistencies and a lack of transparency of the decision making process.[67] The current Minister has committed himself to 'developing a comprehensive approach to family reunification or settlement'; however, the promised legislation is still in the parliamentary process.[68]

We are not aware of any cases specifically addressing the Immigration Act 2004 Orders.

65. *Wang v MJLR* [2012] IEHC 311 at para. 34.
66. *Genov & Gusa v Minister for Social Protection* [2013] IEHC 340.
67. See too, answer to question 15.
68. For a comprehensive examination of the issues raised in this question (and brief answer, due to space constraints), see the contribution of the Immigrant Council of Ireland at the 2013 Burren Law School, available at http://www.immigrantcouncil.ie/research-publications/publications/691-burren-law-school-2013 – accessed 19 September 2013.

Question 8

The Twenty Seventh Amendment to the Constitution was passed by the People in 2004: it reversed the broad scope of the Nineteenth Amendment to the Constitution passed in 1999 and restricted the *ius soli* entitlement to Irish citizenship. This may have been in response to disquiet over the phenomenon of 'anchor babies', compounded by the Opinion of Advocate General Tizzano in the *Chen* case that Ireland could, by restricting its citizenship laws, avoid a conflict between its domestic laws concerning the rights of residence for non-citizen parents and those in EU law.[69]

Under the Irish Nationality and Citizenship Act 2004, certain EU nationals (along with other EEA nationals and nationals of the Swiss Confederation) enjoy special treatment. They can acquire citizenship through a statutory declaration that their parents have resided in Ireland for a prescribed period of time.[70]

There is a limited amount of Irish case law dealing with the acquisition or revocation of citizenship that correlates with EU citizenship. In *Mallak v Minister for Justice*, the Irish High Court distinguished *Rottmann* and held that EU law was not invoked in decisions concerning the acquisition of citizenship.[71] The Supreme Court reversed this decision as a matter of Irish law and declined to consider whether a decision on the acquisition of citizenship invoked EU law.[72]

Following the Constitutional Referendum on Citizenship in 2004, which was influenced by the *Chen* case,[73] there are now three main ways by which Irish citizenship can be acquired:[74] Automatically at birth, by descent or by

69. EUDO Observatory on Citizenship, Ireland – Country Report at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Ireland.pdf (last accessed 15 September 2013), at p. 9; see also a NIRSA Working paper on the issue, available at http://www.nuim.ie/nirsa/research/documents/WPS30.pdf (last accessed 17 September 2013).
70. EUDO Observatory on Citizenship, *Ireland – Country Report* at http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Ireland.pdf (last accessed 15 September 2013), at p. 12.
71. *Mallak v Minister for Justice, Equality and Law Reform* [2011] IEHC 306, at paras 25-31. See also http://eudo-citizenship.eu/news/citizenship-news/755-mallak-case.
72. *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, at para. 78.
73. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925. See Hilkka Becker and Catherine Cosgrave (Becker and Cosgrave), EUDO Citizenship Observatory, *Naturalisation ProceduresforImmigrants Ireland,* March 2013, p. 3 – available at http://eudo.citizenship.eu – accessed 14 August 2013.
74. Becker and Cosgrave, p. 2.

naturalization if certain conditions are met.[75] It should be noted that naturalization is not a *right* enjoyed by non-Irish individuals. Non-Irish persons legally resident in Ireland may *apply* for Irish citizenship if they meet the statutory eligibility criteria; granting of citizenship remains at the *absolute discretion* of the Minister.[76]

Citizenship acquired at birth *cannot be withdrawn.* On the other hand, a certificate of naturalization may be revoked by the Minister when *he is satisfied* that one of a number of situations has occurred. This includes, where the certificate was acquired through fraud, misrepresentation (regardless whether innocent or fraudulent), or concealment of material facts or circumstances.[77] There is a procedure laid down in relation to any revocation by the Minister, including giving notice of the Minister's intention and the right to apply for an inquiry.[78]

Political rights of EU citizens

Question 9

Directive 93/109/EC on European Parliament elections was originally transposed into Irish law by the European Parliament Elections (Voting and Candidature) Regulations, 1994 S.I. No. 14 of 1994. Subsequently, the European Parliament Elections Act 1997 was enacted.[79]

The most recent Report from the Commission on the transposition and operation of Directive 93/109/EC found difficulties in relation to measures to

75. Handoll, p. 10. See too, answers to question 15.
76. Becker and Cosgrave.
77. Handoll, p. 14. See too in relation to apparent lack of revocation of naturalization certificate, as well as indications of possible changes in the Minister's thinking on the issues.
78. Handoll, p. 15.
79. According to the Minister for the Environment, Community and Local Government, Deputy Phil Hogan, the 1997 Act transposed Directive 93/109/EC into Irish law – see http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2013071900020?opendocument – accessed 13 September 2013. In addition to S.I. No.14 of 1994 and the European Parliament Elections Act 1997, there have been some general statutes which have included provisions with relevance for this topic.

prevent double voting.[80] It was noted that, *inter alia,* in Ireland considerable numbers of non-Irish EU citizens could not be identified.[81] For example, in Ireland only 208 nationals were identified out of the 4,795 notified. The Report also noted that Ireland was one of the Member States indicating late receipt of data required. This assessment was acknowledged in the 2010 Report as deficiencies of the Directive, and as needing to be addressed. This was done by the adoption of Directive 2013/1/EU. The Electoral, Local Government and Planning Act 2013, enacted on 22 July 2013, provides for the changes required by Directive 2013/1/EU.[82]

All would be voters have to apply to be registered to vote. Non-Irish EU citizens, other than UK citizens, now have to apply to be registered by completing the application paper in the form dictated by the Minister. They also have to provide the Registration Authority with a statutory declaration stating his/her nationality; address at which normally resident in the State; locality or constituency in his/her home state, where the EU citizen was last on the electoral roll, and the intention to vote in Ireland, only.[83]

We are not aware of any national case law on this question.

Question 10

Ireland transposed Directive 94/80/EC by means of the Local Elections Regulations, 1995, S.I. No. 297 of 1995. According to the Commission, in examining the transposition of, and compliance with, the Directive, Ireland was one of those Member States whose domestic measures complied with the Directive.[84] There was an increase in Ireland in the participation of non-Irish

80. Commission, *Report on the election of Members of the European Parliament (1976 Act as amended by Decision 2002/772/EC, Euratom) and on the participation of European Union citizens in elections for the European Parliament in the Member State of residence (Directive 93/109/EC,)* /* COM/2010/0605 final */ – available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0605:FIN:EN:HTML – accessed 20 September 2013.
81. COM/2010/0605 final, para. 4.2
82. Available at http://www.irishstatutebook.ie. This statute deals with issues which are both related, and unrelated, to the topic, as can be inferred from its full title. See Minister Hogan in the Seanad debate on the Second Stage of the Electoral, Local Government and Planning andDevelopment Bill (now Act) 2013, 19 July 2013 – available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2013071900020?opendocument – accessed 13 September 2013.
83. Section 6 of the 1997 Act.
84. European Commission, *Report from the Commission to the European Parliament and the Council, on the application of Directive94/80/EC on the right to stand and*

nationals in local elections in the period 1991-1999, following the implementation of the Directive, which the Commission attributed to the specific information campaigns.[85] In commenting on the actual participation in local elections in Ireland, the Commission refers to the historical reciprocal parliamentary voting rights for British/Irish citizens in their respective home countries.

We are not aware of any relevant national case law on this question.

Question 11

As has been pointed out,[86] historically, British citizens resident in Ireland and Irish citizens resident in the UK enjoy reciprocal rights to vote in *parliamentary* elections; this relates to *Dáil* (Lower House) elections (in Ireland).[87] This reciprocal right predates EU citizenship and the active and passive electoral rights arising from this status. However, both the active and passive franchise for the Seanad (Upper House) is confined to Irish citizens – including the six University seats.[88] This means that non-Irish graduates of the two Universities (National University of Ireland and University of Dublin, Trinity College) are at a disadvantage vis-à-vis their Irish fellow graduates. The Government has produced the heads of a Bill proposing to merge these constituencies and extend the franchise to graduates of other educational institutions, but not to other nationals.

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vote in municipal elections, COM (2002) 260 final, Brussels, 30.05.2002*,* para. 4.2 – available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0260:FIN:EN:PDF accessed 18 September 2013. See too follow up European Commission, *Report from the Commission to the European Parliament and the Council, on the application of Directive 94/80/EC on the right to stand and vote in municipal elections by citizens of the Union residing in a Member State of which they are not nationals,* COM (2012) 99 final, Brussels, 9.3.2012, available at http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_en.pdf – accessed 18 September 2013.

85. Para 9.
86. See answer to question 10.
87. See, *inter alia,* Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM (2012) 99 final, footnote 27, available *at http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_en.pdf* – accessed 22 August 2013.
88. See Constitution of Ireland, Articles 16.1 and 18.2.

Presidential elections and referenda are confined to Irish citizens.[89] Non-EU residents may stand and vote at local elections. All EU citizens may vote at European and local elections.[90] There are no other regional elections in Ireland.

Two common requirements must be met by each category of the electorate; the individual must be registered to vote, and be resident and present (except for a few exceptions, such as diplomats) in Ireland.

Question 12

Persons undergoing a prison sentence of more than six months, undischarged bankrupts or persons of 'unsound mind' are disqualified from *election to* both Houses of the Oireachtas (Parliament).

The tensions between EU law and national provisions limiting the scope of the franchise are limited. The Electoral (Amendment) Act, 2006 gave prisoners the right to vote in all elections in the State (provided they are otherwise eligible, such as having been resident in Ireland prior to being imprisoned)).[91] Wards of Court (other than minors) (i.e. persons whose care is entrusted to the courts) are automatically excluded from voting: whilst a candidate for permanent or temporary wardship will be individually assessed prior to wardship,[92] this may fall below the bar set for individualised assessment of political participation required by the ECtHR in *Kiss v Hungary* (Application No. 38832/06). The authors note the request to consider FRACTIT data in relation to the national laws on electoral rights: however, the national report for Ireland has not yet been written.

In the 2012 Commission Report on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, Ireland is noted as one of the Member States that does not automatically en-

89. http://www.environ.ie/en/LocalGovernment/Voting/PublicationsDocuments/FileDownLoad,1866,en.pdf – accessed 18 September 2013.
90. As noted in the Report from the Commission to the European Parliament and the Council (COM) 2012 99 final, footnote 27, Ireland (and Spain) permitted EU citizens to vote in municipal elections under certain conditions.
91. The previous legislative bar on prisoner-voting was upheld as a matter of national constitutional law in *Breathnach v Ireland* [2001] IESC 59.
92. Lunacy Regulation (Ireland) Act 1871; Order 67 Rules of the Superior Courts 1986.

roll voters on the Electoral Register. While this is not compulsory, the Commission does look on the practice of automatic registration favourably.[93]

The EUDO Country Report for Ireland, 2012, does not highlight any issues relating to Irish implementation of EU electoral legislation.

Culture(s) of citizenship

Question 13

Ireland has often been characterised as having a homogenous population – historically.[94] Ireland has also long been a country of *emigration*. Coinciding to a certain degree with the time periods prior to the accessions of the twelve new Member States (2004 and 2007), and the ensuing inflow of citizens of the new Member States into the State, Ireland experienced an unprecedented increase in asylum seekers/refugees, mainly from areas outside Europe. Many of those seeking refugee status have experienced protracted periods of delay pending decisions on their legal status in the State; this situation has attracted media coverage.[95] This background has probably contributed to the generalised usage of '*immigration*' or '*immigrant*' when discussing issues relating to non-Irish citizens, rather than distinguishing between *immigrants* in the international law sense, and citizens of the Union.[96]

Turning to the national legislators, a report from the Joint Committee on European Affairs in April 2006 conveys a sense of the attitudes of some

93. EU Commission Report application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, available at http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_en.pdf (last accessed, 16 September 2013).

94. http://www.oireachtas.ie/documents/committees29thdail/europeanaffairsreports/Immigration_Best_Practices.doc – (Report 2007), Foreword – accessed 12 September 2013.

95. See *inter alia,* http://www.migrationinformation.org/Feature/display.cfm?ID=740 accessed 17 September 2013.

96. For a systematic analysis of attitudes towards third country immigrants outside the EU see McGinnity, Frances / Quinn, Emma / Kingston, Gill / O'Connell, Philip (UCD), *Annual Monitoring Report on Integration 2012*, Dublin: ESRI/The Integration Centre, 2013.

members of the Oireachtas.[97] The title itself is illustrative of these views: *Report on Migration – an Initial Assessment of the Position of EU Migrant Workers post 2004.* The overwhelming impression conveyed by this report it might be argued, is an apparent lack of understanding of citizenship of the European Union and confusion with this status and free movement.

A follow-up report in 2007 looks at best practice in other Member States. In so doing it continues the emphasis on immigration and immigrants, as can be seen from its title *Report on Migration and Integration Policy in Ireland.*[98] Reference is made to the change from a relatively homogenous native population to a multi-ethnic community, with approximately 10 per cent of the population being foreign born.[99] It refers to the 2007 accessions of Bulgaria and Romania, and comments on the numbers of '*immigrants'* from the two new Member States, who moved to Ireland shortly after accession. Positive comments are made in relation to the contribution of the *immigrants* from the 2004 accession Member States to the Irish economy. The body of the Report refers to *immigrants* and *foreign nationals* and lessons to be learned (from other Member States with a longer history of *immigration).* There is no sense of an understanding of the distinction to be made between *citizens of the Union* and their family members, and third country *immigrants* in general.

Irish transposition of Directive 2004/38/EC conveys a sense of the focus being on *immigrants* in general rather than on any significance of citizenship of the Union and the ensuing *rights* and freedoms – not just for citizens of the EU, but also for their (third country) family members. A parliamentary (written) question regarding the right of citizens of other Member States with serious criminal records to travel into or remain in Ireland was answered by the (then) Minister[100] He described it as 'difficult in EU law, for a Member State to *impede* the free movement of EU citizens' and expressed the desire that this '*privilege'* (sic) not be abused.' A recent written parliamentary question, coming under the heading of 'Immigration Policy' asked about '*quotas* for *recently joined* Member States'. The Minister confirmed that '*EU nationals enjoy* Free Movement Rights in Ireland and no quotas apply'.[101] It is an inter-

97. http://www.oireachtas.ie/documents/committees29thdail/europeanaffairsreports/Migration.pdf – (Report 2004) – accessed 12 September 2013.
98. (Report 2007) – accessed 12 September 2013.
99. Foreword to *Report* (2007).
100. *Dáil* Debates Vol. 645 No. 2 Col. 2462/08 31 January 2008,
101. *Dáil* Debates, [46554/12], 24 October 2012, question 182 – accessed 17 September 2013

esting question, some six years plus after the entry into force of the Directive, and five years plus after the last accession.

As has been mentioned previously, the current Minister (in office since 2011) has been active in improving the *process* of naturalisation or acquisition of Irish citizenship.[102] For example, he has introduced Citizenship ceremonies and put them on a statutory basis – in the authors' opinion a significant and laudable political and cultural innovation. This is mainly relevant for third country nationals, many of whom may have acquired refugee status. The Minister has acknowledged the wider benefits of Irish citizenship. He has referred to it being a 'major step for the State which confers certain *rights* and *entitlements not only* within the State but also at *EU level'*.[103]

Question 14

The Irish courts were (albeit infrequently) prepared to consider the 2000 version of the EUCFR when appropriate in interpreting EU law prior to its entry into force with the Lisbon Treaty.[104]

Since coming into force, the EUCFR has joined the Irish Constitution and the ECHR in the complex network of human rights protection in Ireland. There is evidence that the courts, while acknowledging that these three sources are not identical in their obligations,[105] will in practice consider claims invoking these various provisions as substantially equivalent.[106]

There are, however, some instances where the EUCFR has been considered independently of other rights:[107] these typically concern Article 47

http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2012102400088#N4

102. Becker and Cosgrave.
103. *Dáil* DebatesVol. 773 No. 2 18 July 2012 (Written answer – Citizenship applications) – referred to by Becker and Cosgrave, p. 12.
104. *MN v RN* [2009] 1 IR 388, at paras 25-27, 30; *N v N* [2008] IEHC 382, at para. 25.
105. *EB v Minister for Justice* [2013] 4 JIC 3002, at para. 54.
106. *EB v Minister for Justice* [2013] 4 JIC 3002, at paras 56-57; *JMcB v LE* [2010] 4 IR 433, at paras 141-142; *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251, at paras 57-61, 72; *Minister for Justice, Equality and Law Reform v Adam* [2011] IEHC 68.
107. *Okunade v Minister for Justice and Equality* [2012] IEHC 134, at para. 16; *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251, at para. 62; *JCM v ML* [2012] 10 JIC 1205, at paras 27-30; *VN v Minister for Justice and Law Reform* [2012] 2 JIC 1603, at para. 21; *AA v Minister for Justice* [2012] IEHC 222, at para. 13.

EUCFR in the context of the Procedures Directive 2005/85/EC (with the notable exception of *Digital Rights Ireland*[108] concerning privacy).

In *Minister for Justice and Equality v RPG*, the High Court (Edwards J) interpreted the applicable EUCFR provisions by sole reference to ECtHR case law, but noted in extended *obiter* his potential support for a more extensive interpretation of the EUCFR provisions by reference to its own text.[109]

The Irish Courts have been making use of Article 51 in denying relief under the Charter due to the inapplicability of Union law.[110] In *IS & Ors v Minister for Justice*,[111] the High Court (Hogan J) held that the EUCFR is not freestanding and must be interpreted in light of the EU law being implemented. Prior to the judgment in *Zambrano*, the High Court found that the Charter was not applicable to deportation of a third-country national to a non-EU country which was a national matter.

Question 15

In general, citizenship of the Union *per se* does not appear to be a salient issue in the national media in Ireland; this would also appear to be the case in relation to the *rights* arising for citizens of the Union (and their family members). '*Immigration*' or '*immigrants*' tend to be used without distinction when reporting on non-Irish national, whether or not they are 'citizens of the Union', third country family members of a citizen of the Union, or migrants in general, or even refugees or asylum seekers.[112]

Ius soli had been an important issue in the *Chen* case, as well as in a number of domestic cases, and these were weighing on the minds of the Irish authorities. There had been fears that there would be consequences for Ireland if the provisions on the acquisition of citizenship were not changed. An article by the (then) Minister in the *Sunday Independent* on 14 March 2004 gives some indication of the thinking at the time, with references not just to the impact for Ireland but also to *the EU rights arising for third country parents*.[113]

108. *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251.
109. [2013] IEHC 54, at pp. 78-81. See also *Minister for Justice, Equality and Law Reform v DL* [2011] IEHC 248.
110. *Lofinmakin (an infant) & Others v The Minister* [2011] IEHC 116, per Cooke J; *Troci v Minister for Justice and Equality* [2012] IEHC 542, per O'Keeffe J at paras 39-39; *IS, AS & AS v Minister for Justice & Ors* [2011] IEHC 31, per Hogan J at para. 31.
111. [2011] IEHC 31.
112. See too, answer to question 13 for a brief historical overview of non-Irish citizens in Ireland. In this regard, see Handoll.
113. http://www.inis.gov.ie/en/INIS/article.pdf/Files/article.pdf.

Following the constitutional amendment on 11 June 2004, the constitutional provisions on Irish citizenship were changed. People born in (sic) the island of Ireland would not have a constitutional right to be an Irish citizen, unless at the time of their birth, one of their parents was an Irish citizen or was entitled to be an Irish citizen.[114]

A review of print media coverage of the 2004 Citizenship Referendum is helpful in considering the question raised here. According to Breen et al, while editorial treatment (and opinion pieces) was balanced, the dissemination of unanalysed and unchallenged quotations of politicians, mainly in favour of the referendum, led to a flawed, prejudiced and inadequate debate on the issues. '*Loophole*' became part of the normalised vocabulary, they asserted. '*Loophole*' and '*abuse of Irish citizenship*' were used in tandem. '*Loophole*' referred to Ireland's *ius soli* approach to citizenship and nationality and the ensuing benefits for third country national parents of Irish citizens, who were also EU citizens. While the EU benefits associated with being (third country) parents of an EU citizen (family member) were mentioned, the emphasis in the coverage was on Irish citizenship.[115]

In the intervening period the influx of asylum seekers (and thereby of refugees) has abated, and media coverage of these issues has also reduced. However, the economic crisis in Ireland has had an impact on the numbers of citizens from other Member States in the State and more recent print media coverage continues the trend already identified, of generalised usage of 'immigrant', immigration' – regardless of the nationality. For example, *The Irish Times,* a broadsheet newspaper. on 29 June 2013 carried an article entitled '*The growth of intolerance*.' The article discussed a report on '*immigrants'*. References to the persons concerned fluctuated between '*immigrant'*, '*non-nationals*', '*foreign-born population*', '*foreign nationals*', and then various

114. http://www.refcom.ie/en/past-referendums/irish-citizenship/ – accessed 17th September 2013. See too, answer to question 8.

115. Michael Breen, Amanda Haynes and Eoin Devereux, *Citizens, Loopholes and Maternity Tourists: Irish Print Media of the 2004 Citizenship Referendum,* available at http://dspace.mic.ul.ie/bitstream/10395/1300/2/Breen,%20M.J.,%20Haynes,%20A.%20and%20Devereux,%20E.%20(2006),'Citizens,%20Loopholes%20and%20Maternity%20Tourists%3A%20Irish%20Print%20Media%20Framing%20of%20the%202004%20Citizenship%20Referendum'.(Book%20Chapter).pdf – accessed 9 September 2013. Also of interest, albeit not necessarily falling within the status of 'national media', is http://indiamond6.ulib.iupui.edu:81/chencasemeehan.html. This article refers, *inter alia*, to nightly television current affairs programmes and draws on print media treatment of the benefits flowing from EU citizenship once Irish citizenship is acquired, referring to the *Chen* case and the Citizenship Referendum.

nationalities as well as all-embracing reference to '*Africans*'. Citizenship was mentioned only in the context of a time span in which '34,500 people from outside the EU were given Irish citizenship.' The conflation of '*foreign nationals*' and '*EU rules on immigration*' and references to nationalities within and without the EU, does not indicate an understanding of the difference (in legal status as regards citizenship of the Union and the *rights of the EU citizen* compared to a third country national migrant).

The Irish Times, on 2 September 2013, carried two substantial reports on Irish citizen children, and their third country parents. In many cases the third country parents had been refused residency in Ireland; some had left voluntarily, and taken their Irish citizen children with them.; some parents had been deported and taken, or been accompanied by, their Irish citizen children. While one article deals with 'case studies' of individual Irish citizen children, the other article addresses the overall policy – both in theory and, as the article shows, in practice. There is reference to the *Zambrano* ruling, and its potential impact for Irish citizen children, and their third country parents. The dominant theme is of deportation/departure from Ireland of the third country parents, and the impact on the *Irish citizen* children.

A recent report carried out for the European Commission's Representation in Ireland examines experiences of, and attitudes to, citizenship of the Union.[116] It found that there is a strong correlation between levels of knowledge about the EU, and feelings of EU citizenship, among Irish citizens. In relation to media coverage of EU affairs, (not specifically citizenship of the Union), the assessment of the (objectivity of the) coverage was seen as in line with EU averages.[117]

In sum, we find generalised usage of language when referring to non-Irish citizens, without distinguishing between those who benefit from citizenship of the Union and others. It could also be inferred that the media treatment (of the issues arising from the *Chen* case) during the Citizenship Referendum had an impact on public discourse, as instanced in the outcome of that Referendum (*ius soli*).

116. European Commission's Representation in Ireland, *Public Opinion in the European Union Autumn 2012 National Report Ireland Standard Eurobarometer 78 /Autumn 2012 – TND Opinion and Social – available at* http://ec.europa.eu/public_opinion/archives/eb/eb78/eb78_ie_en_nat.pdf – accessed 26 August, 2013.
117. P. 19.

ITALY

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Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Directive 2004/38/EC has been transposed into the Italian legal system through Legislative Decree 6-2-2007 no. 30, in force from 11-4-2007, as subsequently amended by Legislative Decree 28-02-2008, no. 32, Law 2-8-2011 no. 128 and Law 6-8-2013 no. 97.

Legislative Decree no. 30 of 2007 reproduces Directive 2004/38/EC in order to define the members of the family: Article 2 gives the same definitions as the Directive, Article 3 lists the beneficiaries. Both Article 2 and Article 3 repeat Articles 2 and 3 of the Directive literally.

Under Article 2(1) b of Legislative Decree no. 30 of 2007, a member of the family is:

1) the spouse,
2) 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the condition laid down in the relevant legislation of the host State',
3) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point 2);
4) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point 2).

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Under Article 3 of the Legislative Decree, family members as defined in Article 2(1) b enjoy the right to enter and stay, while the host State shall facilitate entry and residence for the following persons:

a) any other family members, irrespective of their nationality, not falling under the definition in Article 2(1) b, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
b) 'the partner with whom the Union citizen has a durable relationship duly attested with official documents'.

As to the partner, the durable relationship shall be officially attested. Please note, however, that Italy (the host State under Articles 2 and 3 of the Legislative Decree) neither regulates registered partnerships nor equates them to marriage. The partner with whom the Union citizen has an officially attested durable relationship will therefore fall under article 3 (members of the family for whom the State shall facilitate entry and residence).

As to the different types of family relationships outlined in Articles 2 and 3, one of the most controversial issues has concerned *same sex spouse*. Although same-sex spouses are not able to marry in Italy nor is it possible to have such a marriage transcribed,[3] it is increasingly frequent for the foreigner to request a residence permit on the grounds of being one of a couple where the other is an Italian national. The court of Reggio Emilia has acted as a trail-blazer in quashing the decision to refuse the permit by the police authority on the basis of the fact that the capacity of spouse acquired in the country where the marriage was celebrated should have effect in Italy as well if only for the purposes of the issue of the residence card (Order 13-2-2012, the judgment is final because not appealed by the State Counsel). The Court of Pescara recognized 'spouse' in accordance with Legislative Decree no. N. 30 of 2007 also the citizen of a country outside the European Union who has married abroad a EU citizen of the same sex, with consequent entitlement to the issuance of a residence permit and / or residence card. In 2012, the Ministry of the Interior issued a circular in which, while recalling that Legislative Decree no. 30 of 2007 does not permit the issue of a residence card pursuant

3. Going against its previous case-law, the Supreme Court has stated that the marriage of two Italians of the same sex celebrated abroad would be without force and effects in Italy, but not contrary to public order: judgment 15-3-2012 no. 4184.

to Article 10 to a spouse of the same sex, in effect acknowledged the practice of those police authorities which had issued a residence document as legitimate (Circular 26-10-2012, no. 400/C/2012/8996/IIdiv). The question of recognition of same sex marriages for purposes of family reunification remains, however, open.

Art. 5 of Legislative Decree no. 30 of 2007 basically reproduces art. 5 of the Directive. Legislative Decree 2008 no. 32 added a new para. 5 bis to Article 5 of Legislative Decree 2007 no. 30. Before the amendment, Legislative Decree did not require the Union citizen to report his/her presence within the Italian territory. Following the 2008 amendment, the Union citizen may report his/her presence to a police office. The provision is not drafted as to impose an obligation, but if the Union citizen has not reported to the police office, s/he shall be regarded as having stayed in Italy for more than three months, unless s/he can prove otherwise (see Article 5 para. 5-bis of Legislative Decree 2007 no. 30).

Legal scholars have much criticized that provision in relation to its compatibility with EU law. In fact, while the Union citizen has no obligation to report, not doing so entails negative consequences for them. If they did not report, and are unable to prove that they had been in Italy no longer than three months (a proof very difficult to provide), they would be deemed to have infringed the obligation to register their residence with the municipal authority. In other words, the provision results in imposing additional documents not requested by the Directive, since the Union citizen can legally stay in Italy for less than three months if he/she can show, in addition to an identity card or passport, the document issued by the police stating that he/she reported his/her presence.

EU citizens who stay in Italy for more than three months have to register their residence with the municipal authorities of the place of domicile. The application has proved difficult sometimes, because some Municipalities have asked for more documents than allowed (a birth certificate, for example). A number of Mayors, acting in their capacity as chiefs of the registry office, have issued some orders hardly in line with EU law. These decisions have then been annulled by Courts.

Question 2

There is no evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds in the decisions of national courts and/or tribunals.

As far as economic resources are concerned, Law Decree no. 89 of 2011 amended the original provision contained in Legislative Decree 2007/30. Before the amendment, the legislative decree asked for a fixed amount of resources as a condition for registration of residence for non active EU citizens. After the amendment, it was added that in any case, the personal situation of the person concerned shall be taken into account in order to appreciate whether his/her economic resources are adequate.[4] It is explicitly stated that recourse to the social assistance system is not a sufficient reason for adopting an expulsion order for lack of resources.[5]

Question 3

Articles 12-15 of the Directive have been transposed in compliance with EU law, basically reproducing the text of these provisions. Some differences concern the following points:

Art. 13, para. 2, point c). The directive refers to 'particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting'. The Italian transposing norm is apparently more restricted 'the concerned person is the offended party in criminal proceedings, pending or defined by a judgment of conviction for crimes against the person committed within the family', thus requiring a criminal lawsuit.

The decree, however, is more favorable than the Directive in predicting that the family member that does not meet the requirement of a prior one-year residence, in case of death, or the conditions laid down in the event of dissolution, may retain the right to stay under art. 30, para. 5 of Legislative Decree 25.7.1998, no. 286 (i.e. The Single Text on immigration). This provision specifies that 'in case of death of the family member who meets the requirements for reunion and in case of legal separation or dissolution of marriage or, for the child who can not obtain a residence permit, at the age of eighteen years, the residence permit can be converted into a residence permit for employment, self-employment, or study, in compliance with the minimum age requirements for the performance of work activities'.

These provisions have not raised particular problems before the Courts.

4. New Article 9, para. 3-bis, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. c, of Decree-Law no. 89 of 2011.
5. New Article 21, para. 1, of Legislative Decree no. 30 of 2007, as amended by Article 1, lit. h, of Decree-Law no. 89 of 2011.

Question 4

Articles 16-21 of the Directive have been transposed into national law in line with EU Law. No data on the volume of applications to date for the status of permanent residence are available.

The provisions on permanent status for EU citizens did not give rise to any particular issues within national courts or tribunals.

Question 5

Art. 24(2) of the Directive has been transposed in the following terms by art. 19(3) of legislative Decree no. 30 of 2007:

'Notwithstanding paragraph 2 (which establishes the principle of equality of treatment of EU citizens), and if not attributed independently by virtue of the exercised activity or other provisions of law, the citizen of the Union and their family do not enjoy the right to social assistance during the first three months of residence or, in any circumstance, in the cases provided under Article 13, para. 3, letter b),[6] unless this right is automatically recognized by virtue of the exercised activity or by other law provisions.'[7]

In light of the above, as a matter of principle, job seekers do not enjoy the right to social assistance and are equated to EU citizens during the first three months of residence.

This provision did not give rise to special issues.

Question 6

Art. 20 (1) of Legislative Decree 2007 no. 30, states that except for the case that the conditions grounding the stay in Italy do no more subsist, the right of entry and residence of Union citizens or their family members, whatever their nationality, may be restricted only for: reasons of state security, imperative grounds of public security, and other reasons of public policy or public security.

a) *State security*. The grounds of State security include facts that affect the stability of State institutions (for example, a terrorist attack or espionage activity). These grounds therefore include the case of the person being part

6. I.e. EU citizens who have entered Italy with the purpose of seeking a job.
7. Article 19, para. 2, of Legislative Decree no. 30 of 2007.

of a terrorist organization or when there are reasonable grounds for believing that his/her stay in Italy could favor a national or international terrorist organization or its activities in any way (Article 20 (2) of Legislative Decree 2007 n. 30 as amended). To this purpose, any convictions handed down by an Italian court for one or more crimes related to those set in Book II, Title I of the Criminal Code, shall be taken into account (i.e. crimes against the State)

b) *Public security*. Imperative grounds of public security subsist when the behavior of the person to expel amount to a genuine, effective, and serious threat affecting the fundamental human rights, or public safety, making his/her expulsion urgent because his/her stay is irreconcilable with orderly society. To this purpose it should be taken into account of previous criminal convictions decided by Italian or foreign judges, for one or more intentional crimes, committed or attempted against the life or health of people and preventive measures or expulsion orders decided by foreign authorities (Article 20 (3) of Legislative Decree 2007 n. 30 as amended.).[8] Criminal convictions for a number of crimes are also taken into account. Among these, some are serious crimes (murder, rape) while others are offences that are not, as such, evidence of a social danger (e.g. counterfeiting).
c) *Other reasons of public policy or public security.* It is also provided for a removal for other reasons of public policy or public security: it is adopted by the Prefect of the place of stay or residence of the recipient and relates to situations of people that do not fit into the circumstances described above, but nevertheless constitute a serious and present risk to state institutions or civil society. The Administration may use this type of measure in respect of a person whose presence on Italian territory is considered a serious threat to civil society or the institutions of the State, even if its situation is not one of those that legitimize the adoption of an expulsion decision on grounds of public order or security of the State, or an expulsion on imperative grounds of public security. The conditions for this measure have been criticized in that they appear too general and therefore, this type of measure would not comply with EU requirements.

Art. 20 (4) of Legislative Decree 30/2007, as amended by the Law of 2011, provides that removal orders must be adopted in accordance with the principle of proportionality and cannot be motivated by economic reasons, or by

8. This provision corresponds to Article 4 (2) of Decree-Law 2007 no. 249 which by its part elaborated on Article 20 (7-ter) as amended by Decree-Law 2007 no. 81.

reasons unrelated to the individual behavior of the person concerned representing a real, genuine, and sufficiently serious threat to public order or public safety. The existence of criminal convictions shall not in itself justify the adoption of such measures.

In taking an expulsion measure, it must also be taken into account the length of stay in Italy, the age, the family status and economic situation, the state of health, the social and cultural integration in the national territory, and the importance of the ties with the country of origin of the concerned person.

The holders of the right of permanent residence may be expelled from the national territory only on grounds of national security, on imperative grounds of public security, or for other serious reasons of public policy or public security.

The beneficiaries of the right of residence who have stayed in the country during the previous ten years or who are minors may only be removed for reasons of national security or for reasons of public security, unless the expulsion is necessary in the interests of the child, as required by the Convention on the Rights of the Child of 20 November 1989, ratified by 27 May 1991, n. 176.

It should therefore be noted that the greater the attachment of the Union citizen with the host State (represented by the length of residence), the more limited the power of the State. So the Union citizen having the right of permanent residence (that is acquired after five years of residence) may only be expelled for reasons of State security, for imperative reasons of public security, or for other serious reasons of public policy or public safety (par. 6 of art. 20). The citizens of the Union residing for ten years or minors may only be expelled on grounds of national security or for reasons of public security (par. 7 of art. 20). The Union citizen who does not fall into the categories above can then be expelled for all four reasons.

Diseases or infirmities that may justify restrictions on freedom of movement within the national territory are only those with epidemic potential as identified by the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to Italian nationals. Diseases that occur after entry into the territory cannot justify expulsion.

Courts have effectively applied these principles on the expulsion of Union citizens or their family members.

By decree of the Court of Milan 8.10.2008 an expulsion measure motivated with a criminal record of the person was canceled, because the documentation produced by the Police was not capable of proving the existence of such precedents. The Judge noted that the documents filed by the Administration

was such as to justify the adoption of a removal order for the cessation of conditions of stay, but not a removal for reasons of public order or security.

By decree of 9.3.2009, the Rome Court annulled the expulsion order, considering the tenuous nature of the alleged facts of the crime and enhancing the integration of the EU citizen in the country.

By decree of 4.7.2008, the Florence Court noted that failing registration, the absence of work and the lack of economic resources are all irrelevant circumstances or irrelevant for the purposes of determining the existence of grounds of public security.

By decree of 16.1.2008, the Court of Bologna ruled that some precedents, such as a conviction for theft and some reports for trespassing were not likely to represent a real threat, effective and serious threat to human dignity, the fundamental rights of the person or public safety.

Judicial expulsion

The Italian legal system regulates the expulsion of foreigners found guilty of particular offences (crimes against the State: Article 312 of the Criminal Code; serious crimes related to drugs: Article 86 of Decree of the President of the Republic no. 309 of 1990) or sentenced to a term of imprisonment of a certain length (Article 235 of the Criminal Code). In those cases, expulsion is a security measure, which is a measure enacted against a person who represents a danger for the general public, in order to prevent him from committing further crimes. Therefore, expulsion is not automatic, but depends on a specific analysis of the danger that the offender represents, made by both the judge who convicts him and the supervising court after the person has served his term of imprisonment. In order to ascertain if the person represents a danger, the judges have to take into account the offence committed, the circumstances in which the offence took place, and the personality of the offender. In doing that, the judge was not expressly committed to take into account the general principles laid down by Articles 27 and 28.1 of Directive 2004/38/EC. An amendment was brought in 2009 stating that expulsion of Union citizens is to be carried out according to Article 20 of Legislative Decree 2007 no. 30 (implementing Articles 27 and 28.1 of the Directive). Thanks to the amendment, it is now clearer than any expulsion as security measure is to be carried out according to Article 20 of Legislative Decree 2007 no. 30, and the judge has to take into account all the factors that EU law requires before deciding on the expulsion of a Union citizen under Articles 235 and 312 of the Criminal Code.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

Purely internal situations did not give rise to particular issues. In this regard, please note that Legislative Decree no. 2007/30 also applies to the members of the family of Italian citizens.[9] Hence, Courts or the administration do not need to resort to EU law when dealing with the reunification of family members of an Italian citizen. The *Chen* case does not raise particular issues: although there is no rule on the point, the principles affirmed therein are respected in the practice. The case of *Ruiz Zambrano* is not relevant to Italy, because pursuant to Italian law (art. 19 Single Text on immigration) the expulsion of the parents of an Italian citizen is prohibited and, is therefore not necessary to apply EU law.

Question 8

Italian citizenship by naturalization may be granted to a EU citizens residing legally in Italy for four years, instead of 10, as it is required for third country nationals (Article 9 of Law no. 91/1992). EU citizens benefit of a preferential treatment as to the acquisition of nationality.

The Italian Law on citizenship does not provide for the revocation of citizenship in case of fraudulent acquisition. Citizenship is automatically revoked under the following circumstances:

– in case of revocation of adoption due to causes attributable to the adoptee;
– for not having complied with the Government request to abandon a public office or military service in another state.

No evidence of application of *Rottmann* principles in practical cases.

9. Pursuant to Art. 23, the provisions of Legislative Decree no. 30/2007, if more favorable, also apply to non-Italian family members of Italian citizens.

Political rights of EU citizens

Question 9

As far as the election of the members of European Parliament is concerned, art. 40 of Law no. 18 of 1979 already entitled nationals of EC member States who were in Italy at the time of EP elections to vote for candidates of their country of citizenship, in accordance with bilateral agreements that had occurred between those countries and the Italian Government, and on a reciprocity basis.

Council Directive 93/109 of the European Union Council of 6 December 1993 was implemented in Italy by Law Decree 24 June 1994, no. 408 (Urgent provisions for elections to the European Parliament), converted into law, with amendments, by the law 3 August 1994, no. 483, amended by Law 24 April 1998, n. 128.

EU citizens residing in Italy may, upon request, exercise their right to vote, and to stand for elections, as Italian representatives to the European Parliament; in this case, however, since the right to vote in European elections may not be exercised more than once in the same election, those who vote for the election of the Italian representatives to the European Parliament waive the same voting rights in their country of origin.

To vote and to stand for elections in Italy, EU citizens must enroll in an electoral additional list within the Municipality of residence. This registration in additional electoral lists is effected upon request of the concerned person, while for Italian citizens it is automatically carried out by the Municipality.

In submitting their application, EU citizens must declare expressly:

a) their willingness to exercise the right to vote in Italy only;
b) their nationality;
c) the address in the municipality of residence and in the home member State;
d) the capacity to vote in the home member State; e) the absence of a court order, criminal or civil, stating that he/she has been deprived of the right to vote in his/her home Member State.

A national of another Member State of the Union who intends to stand for elections as Italian representative in the European Parliament must provide the Registry of the competent Court of appeal, at the time of filing the list of

candidates, in addition to the documentation required for Italian candidates, a formal statement containing the following information:

A) the nationality and address in Italy;
B) the municipality or district of the State of origin in whose lists he/she is enrolled;
C) that he/she is not a candidate and does not present its candidature for the same election of the European Parliament in any other Member State.

The declaration must be accompanied by a certificate from the competent authority of the country of origin stating that the concerned person is entitled to electoral rights in the same State.

The Court of Appeal shall inform the applicant of the decision concerning the admissibility of the application. In case of rejection of the application, the applicant is entitled to the same forms of judicial protection allowed, in similar cases, for Italian candidates.

The appeal court shall inform the competent authorities in the countries of origin of the names of their citizens who have applied to stand for election in Italy.

There has not been relevant case-law in domestic jurisdiction.

As far as the new Directive 2013/1/EU is concerned, the main changes concern the introduction of a measure of simplification of the procedures for exercising the right of standing for elections, providing for the substitution, for the purpose of submitting the application, of the certification proving the requirements that he/she has not been deprived of the right to stand as a candidate in the home Member State through an individual judicial decision or an administrative decision, with a simple statement.

Question 10

Legislative Decree no. 197/1996, implementing Directive 94/80/EC, lays down detailed rules governing the exercise of the right to vote and stand in Municipal and District elections, for EU citizens residing in another Member State.

To vote and to stand for elections in Italy, EU citizens must be at least 18 years old by the day fixed for the vote and enjoy political rights. It is also imperative that they enroll in an electoral additional list within the Municipality of residence. This registration in additional electoral lists is effected upon request of the concerned person, while for Italian citizens it is automatically carried out by the Municipality.

Article 1, paragraph 5, of the Decree of 12 April 1996 no. 197, provides that the registration allows EU citizens to exercise their right to vote for the election of the mayor, the Council of the municipality and the district in whose lists they are recorded. Moreover they are entitled to be elected as counselors and member of the council of the municipality, with the exception of the office of deputy mayor and mayor.

There have not been derogations so far and these rules did not give rise to particular litigation.

Question 11

EU citizens are granted electoral rights (to vote and to stand as a candidate) in relation to municipal elections (Elezioni comunali), by means of Act n. 52 of 6 February 1996 and Legislative Decree no. 197 of 12 April 1996.

There is no franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law.

Question 12

There are no specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise.

Culture(s) of citizenship

Question 13

The theme of the treatment of citizens of the European Union in recent years has been mainly dealt within a key policy of repression and control, rather than focusing on access to rights profiles. After the first transposition of 2007, subsequent changes made to the rules in force were centered mainly on the issue of expulsion and how to test the length of stay.

After the murder of an Italian woman by an undocumented EU citizen in November 2007, EU citizens in an irregular position (most of them were Romanian citizens of Roma origin) became the focus of strong Italian concern. A cornerstone of emergency-response strategy has been the argument that repressive turn was necessary to prevent spontaneous reactions.

Measures and legislative initiatives on the matter of migration were thus incorporated in a ‘security package’, a diverse set of measures that have in

common the purpose of making the action to prevent and combat macro and micro crime more efficient and effective. As a reaction to the above mentioned serious criminal acts of which irregular migrants were found guilty, amendments to legislation in force were adopted in order to tighten the rules on removal.

Question 14

There is no evidence that the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals.

Question 15

Please refer to the remarks in question 13 above. Media have been accused of fuelling a culture of fear and blame around in public opinion against undocumented migrants, especially Roma. EU citizens in general are not the target of media criticism, but special negative attention has been directed to people of Roma origin.

MALTA

Natasha Buontempo[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Directive 2004/38 was transposed into Maltese Law by Legal Notice 191 of 2007, as amended by Legal Notices 427 of 2007, 329 of 2011 and 107 of 2012.

Article 2 of the Directive on Definitions has been transposed into Article 2 of the national legislation concerning definitions, ad litteram, except for the following:

(a) The definition in Article 2(2)(b) of the Directive concerning registered partnerships has been excluded from the national legislation because Malta does not have any legislation on registered partnerships.

Article 3(1) of the Directive on Beneficiaries has been included in Article 1(4) of the national legislation ad litteram and specifies that the Order also applies to 'third country nationals' who are family members of the Union citizen and who accompany or join him or her.

Article 3(2) of the Directive has been transposed into Article 2 of the national legislation concerning definitions, under the definition of the term 'other family members'. The definition under Article 2 reflects that under Article 3(2) of the Directive but again excludes a partner who has a duly attested durable relationship with the Union citizen.

Article 5(1) of the Directive on Right of Entry has been transposed into Article 3(2) of the national legislation and allows a Union citizen and his family members who are also Union citizens to 'enter and leave Malta' with a

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valid identification card. This also applies to family members of the Union citizen who are third country nationals in possession of a valid passport.

Article 5(2) and 5(3) of the Directive and its proviso have been transposed into the proviso to Article 3(2) of the national legislation. The proviso is in accordance with Article 3(2).

Article 4 of the Directive on the right to a reasonable opportunity to produce valid travel documents/visa has been transposed into the proviso of Article 3(2) of the national legislation.

Article 5(5) of the Directive on reporting one's presence when no valid travel documents/visa have been produced does not feature in the national legislation. This is a facultative concession which the State may grant to the person concerned. Malta has opted not to adopt this procedure.

How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3?

In the case Ogunyemi Kehinde Olusegum & Sandra Wetterich v Director of Public Registry and the Advocate General,[2] a third country national from Nigeria and a German resident in Malta applied for the publication of their marriage banns. Olusegum had been working in Malta with a valid visa and working permit. However, when the visa expired he was refused renewal. Subsequently, when they applied for the publication of their marriage banns, the Director of Public Registry refused to issue the banns on the basis that Olusegum was in fact residing illegally in Malta. The issue was taken before the Constitutional Court on the basis that the decision of the Director of Pubic Registry violated their fundamental right to marry and start a family. Their claim was based both on the European Convention on Human Rights and Fundamental Freedoms, Article 8, as well as Directive 2004/38 particularly the right of third country nationals who are married to Union citizens to reside with their spouse. No claim was based on Article 3(2)(b) which obliges Member States to 'facilitate entry and residence for ... the partner with whom the Union citizen has a durable relationship, duly attested'.

In this case, the Court's decision was mainly focused on the definition of 'family' as developed by the European Court on Human Rights (ECrtHR). The Court did recognise that the European Court has defined 'family' in a broad manner to include 'two persons, male and female, who have the inten-

2. Application No. 54/2008, Civil Court First Hall (Constitutional Jurisdiction), 24th May 2010.

tion of getting married or to cohabit for a considerable period of time'. However the Court felt that the plaintiffs had not submitted sufficient proof that the couple had 'a long and well established family life in Malta'.

What is significant in this judgment is that the Court focused only on the international obligations of the State on the basis of the ECHR quoting DJ Harris, M O'Boyle u C Warbrick in 'Law of the European Convention on Human Rights' page 313:

> It should be noticed at the outset that the obligation on the state is to respect family life: it does not allow persons to claim a right to establish family life, e.g. by marrying or having the opportunity to have children, nor a general right to establish family life in a particular jurisdiction.

The Court did not consider the obligation of the Member States to 'facilitate entry and residence for ... the partner with whom the Union citizen has a durable relationship, duly attested' (Article 3(2)(b)) as well as the spirit of Clause 6 of the Preamble to the Directive.

The Court predominantly considered the issue from the ECHR point of view and very minimally from the European Union point of view and Directive 2004/38. When it came to considering Directive 2004/38 the Court referred to the definition of 'family member' envisaged by Article 2 of the Directive only, excluding consideration of the other 'beneficiaries' envisaged by Article 3 including 'the partner with whom the Union citizen has a durable relationship, duly attested'. The Court held that Olesegun did not qualify under the definition of 'family member' envisaged by Article 2(2) of the Directive.

The line of reasoning which the Constitutional Court undertook was the definition of 'family' as a point of departure under both the ECHR and the Directive.

Yes, the procedural safeguards contained in Article 5 provide effective protection.

Question 2

There is no evidence of expulsions of EU citizens from Malta for failure to satisfy conditions related purely to economic grounds.

Question 3

Articles 12, 13, 14, and 15 have been transposed into national legislation by means of Legal Notice 191 of 2007 (as explained above).

Articles 12 and 13 have been transposed into Articles 5; the first proviso to Article 13(2) has been transposed into the second proviso to Article 6.

Article 14(1) has been transposed into the proviso to Article 3(3) of the national legislation and the proviso to Article 14 into Article 4(2) of the national legislation. Article 14(3) and (4) have been transposed into proviso 1 and to Article 13 of the national legislation.

Article 15 has been transposed into Article 14 of the national law whereas Article 15(2) has been transposed into Article 13(6) of the said law.

There is no evidence that disputes on the interpretation or application of these provisions have arisen before the Maltese Courts.

Question 4

Articles 16, 17, and 18 have been transposed into Article 6 of the national legislation.

Article 19 has been transposed into Article 7(8) of the national legislation.

Article 20 has been transposed into Article 7(6), 7(9), 7(10) of the national legislation.

There is no evidence that data on the volume of applications for the status of permanent residence has been published.

There is no evidence that issues relating to Article 16 to 21 have been the subject of litigation in the Maltese Courts. The Immigration Appeals Board, however, does not publish its decisions and therefore, it is very difficult to obtain such information. From the Immigration Appeals Board, there is the faculty to appeal to the Court of Appeal in its inferior jurisdiction. To date, the Court of Appeal (Inferior) has not delivered any judgments on the above-mentioned articles and/or their interpretation.

Question 5

Article 24(2) has been transposed into the second proviso to Article 3 of the national legislation. In addition, Article 3(4) of the national legislation allows the three month period to be extended to six months in the case of a person who is seeking employment.

The national law does not distinguish between social assistance as envisaged by Article 24(2) of the Directive and a benefit or advantage which helps facilitate access to the labour market as per the CJEU judgment in Collins. Job-seeker's allowance does not form part of Maltese policy.

There is no evidence of litigation on the basis of Article 24(2) and the CJEU's 'real link' case law in the Maltese Courts.

Question 6

There is no evidence that the Courts have entertained the interpretation of the terms 'public policy, public security, or public health' in the context of Articles 27 and 28 of the Directive or the corresponding national legislation.

The Court has not pronounced itself on the principle of proportionality in the context of the above-mentioned articles.

There is no evidence that the Court has entertained considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin on the basis of Directive 2004/38.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

There is no evidence that the Court has rejected arguments on EU citizenship rights on the basis that the matter involves a 'purely internal situation'. No such dispute has arisen before the Maltese courts.

In both Chen and Zambrano, a child was born to third country national parents in a Member State of the European Union and in both cases, by the mere fact of ius soli, the child acquired citizenship of the Member State wherein they were born. Under Maltese law,[3] a child who is born in Malta to parents who are both third country nationals will not automatically acquire Maltese citizenship. Following the 1989 amendments to the Maltese Citizenship Act, a child will acquire Maltese citizenship if at least one of the parents was a citizen of Malta at the time of birth of the child.[4] Therefore, the situation which arose in Chen and in Zambrano cannot arise in Malta because the principles of both ius soli and ius sanguini are applied. A child in such a situation will be treated as a third country national.

3. Maltese Citizenship Act, Chapter 188 of the Laws of Malta.
4. Buttigieg E, Country Report: Malta, EUDO Citizenship Observatory (2013) at http://eudo-citizenship.eu, accessed on 2 Sept. 2013.

There is no evidence that disputes regarding rights acquired under Directive 2004/38 and those under Articles 20 and 21 TFEU in terms of EU citizens seeking family reunification rights have arisen before the Maltese courts.

Question 8

Article 14 the Maltese Citizenship Act states:

(1) Subject to the provisions of this article, the Minister may by order deprive of his Maltese citizenship any citizen of Malta who is such by registration or naturalisation if he is satisfied that the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact.

In addition, the Minister has the power to deprive citizenship by registration or naturalisation in other specified circumstances envisaged by Article 14(2)-(5).[5]

Article 14(4) states:

Before making an order under this article, the Minister shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it

5. (2) Subject to the provisions of this article, the Minister may by order deprive of his Maltese citizenship any citizen of Malta who is such by registration or by naturalisation if he is satisfied that the citizen –
(a) has shown himself by act or speech to be disloyal or disaffected towards the President or the Government of Malta; or
(b) has, during any war in which Malta was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war; or
(c) has, within seven years after becoming naturalised, or being registered as a citizen of Malta, been sentenced in any country to a punishment restrictive of personal liberty for a term of not less than twelve months; or
(d) has been ordinarily resident in foreign countries for a continuous period of seven years and during that period has neither -
(i) been at any time in the service of the Republic or of an international organisation of which the Government of Malta was a member; or
(ii) given notice in writing to the Minister of his intention to retain citizenship of Malta.
(3) The Minister shall not deprive a person of citizenship under this article unless he is satisfied that it is not conducive to the public good that that person should continue to be a citizen of Malta and, in the case referred to in subarticle (2)(c), it appears to him that that person would not thereupon become stateless.
(5) The Minister may make rules for the practice and procedure to be followed in connection with a committee of inquiry appointed under this article, and such rules may, in particular, provide for conferring on any such committee any powers, rights or privileges of any court, and for enabling any powers so conferred to be exercised by one or more members of the committee.

is proposed to be made and of his right to an inquiry under this article; and if that person applies in the prescribed manner for an inquiry, the Minister shall refer the case to a committee of inquiry consisting of a chairman, being a person possessing judicial experience, appointed by the Minister and of such other members appointed by the Minister as he thinks proper.

Legal Notice 40 of 1991 establishes the composition and function of the committee of inquiry the role of which is to make an inquiry into a complaint brought forward by an aggrieved person and to take a decision by majority vote.[6]

Political rights of EU citizens

Question 9

Directive 93/109/EC was promulgated into Maltese law by means of Act XVI of 2003, as amended by Legal Notices 42 of 2007, 308 and 426 of 2012. It was adopted on the 1 January 2004 (the day Malta officially acceded to the European Union).

Every person whose name appears in the national Electoral Register and the EU Electoral Register is entitled to vote.[7] The national Electoral Register lists all Maltese citizens who are entitled to vote whereas the EU Electoral Register lists all EU citizens who are entitled to vote in local council elections and European Parliament elections.

The criteria for inclusion in the national Electoral Register are envisaged by the General Elections Act.[8] A person is entitled to be included in the national Electoral Register and registered as a voter if he satisfies the following:

1. he must be a citizen of Malta;
2. he must be 18 years of age;
3. he must reside in Malta and must have done so for six months or aggregate of six months during the eighteen months immediately preceding his registration.[9]

6. Article 10(1), LN 40 of 1991.
7. Article 10, European Parliament Elections Act, Ch. 467 of the Laws of Malta.
8. Ch. 354 of the Laws of Malta.

The criteria which EU citizens must satisfy in order that they may qualify to be included in the EU Electoral Register and to consequently vote in European Parliament elections are as follows:

1. the person must be a national of a Member States whose name does not appear in the Electoral Register;
2. he must be in possession of a legally valid identification document;
3. he must be over the age of 18;
4. he must be resident in Malta for at least a period of six months or aggregate of six months in the eighteen months preceding his registration.[10]

Persons who are included in the Electoral Register and the EU Electoral Register have a right to stand for election as a member of the European Parliament.[11] There are no additional conditions imposed on EU citizens.

There has not been any court cases on the issue, but for a short period of time there seems to have been unequal treatment in the way in which registration to vote took place as EU citizens resident in Malta were required to enrol in the EU Electoral Register within a given period of time whereas such a rule was inapplicable in the case of Maltese citizens.[12] Today the issue has been resolved and there is no time period which limits enrolment of EU citizens on the EU Electoral Register following discussions between the European Commission's Directorate-General for Justice and the Maltese authorities in 2011.

What additional changes will be required by the December 2012 amendments to Directive 93/109/EC?

The following are the changes required by the amendments to Directive 93/109/EC:

Preamble 9
To facilitate communication between national authorities, Member States should designate one contact point to be responsible for the notification of information concerning such candidates.

9. Article 15, General Elections Act, Ch. 354 of the Laws of Malta.
10. Article 11, European Parliament Elections Act, Ch. 467 of the Laws of Malta.
11. Ibid Art. 18.
12. DeBono D, Access to Electoral Rights Malta, EUDO Citizenship Observatory, June 2013, found at http://eudo-citizenship.eu, accessed on 7 October 2013.

and

Article 1(c) of the amending Directive states:

For the purposes of paragraph 2 of this Article, the Member State of residence shall notify the home Member State of the declaration referred to in Article 10(1). To that end, the relevant information that is available from the home Member State shall be provided in any appropriate manner within five working days from the reception of the notification or, where possible, within a shorter time-limit, if so requested by the Member State of residence. Such information may include only details which are strictly necessary for the implementation of this Article and may be used only for that purpose.

If the information is not received by the Member State of residence within the time-limit, the candidate shall none the less be admitted.

Question 10

Directive 94/80/EC on local elections became part of Maltese Law with the accession of Malta to the EU. The Local Councils Act[13] was amended to ensure transposition of the Directive in Maltese Law.

No, there have not been any derogation.

EU Citizens resident in Malta are not required to register in order that they may vote in local council elections. In Malta, non-national EU citizens are automatically entered in the Local Council election rolls, once they are included in the EU Electoral Register.[14]

There has not been any relevant case law on the matter.

Question 11

In Malta EU Citizens are granted the right to vote in and to run for local council elections and European Parliament elections, reflecting Directives 93/109/EC and 94/80/EC respectively. They are not allowed to participate in any manner in general elections. Third country nationals resident in Malta are not allowed any voting rights at any level.

No, there is no franchise for EU citizens that go beyond the local and EP electoral rights required under EU law.

13. Chapter 363 of the Laws of Malta.
14. http://ec.europa.eu/justice/citizen/files/com_2012_99_municipal_elections_en.pdf.

What have been the reasons for extending such rights specifically to EU citizens?

n/a

Question 12

There is no evidence of any case law which deals with tensions between EU law and national provisions.

Culture(s) of citizenship

Question 13

The implementation of EU citizenship in Malta seems to rest on the idea of 'permission' rather than the idea of a constitutional right emanating from the Treaties and other subsidiary legislation such as the Citizens' Rights Directive, transposed into Maltese Law by means of Legal Notice 191 of 2007. The 'permission' mentality is reflected in the way in which EU legislation on citizenship has been implemented in Malta, generally by amending our immigration laws.[15] Legal Notice 191 of 2007, which transposes the Citizens' Right Directive, makes ample reference to the Immigration Act and the Immigration Appeals Board. Cases of citizenship are dealt with by a single Directorate for Citizenship and Expatriate Affairs, irrespective of whether the persons concerned are EU citizens or third country nationals. Any complaints or objections raised concerning citizenship are dealt with by the Immigration Appeals Board.[16]

Question 14

There is no evidence that the Maltese Courts have pronounced themselves on the rights of EU citizens on the basis of the Charter of Fundamental Rights of the EU.

15. See for example, Article 1(2) of Legal Notice 191 of 2007 (Free Movement of European Union Nationals and Family Member Order).
16. See Legal Notice 191 of 2007 (Free Movement of European Union Nationals and Family Member Order).

Question 15

There have been incidents of alleged discrimination against EU citizens related to the charging of bus fares[17] and utility bills. It has been alleged by a number of EU citizens residing in Malta that they are being made to pay 35 % and 60 % more in bills of electricity and water respectively, than their Maltese counterparts.[18] A constitutional case has been recently lodged in the Maltese Courts.[19] Another incident reported in the local newspapers concerns an English woman who has been living in Malta for two years, together with her husband and children, and who had to go through considerable red tape to register her younger child at a government school because her old identity card had expired.[20]

Issues relating to EU citizenship are generally reported in the national media when they involve discrimination or discriminatory rules against non-nationals, as in the cases mentioned above. Issues of EU citizenship are dealt with by the Directorate of Citizenship and Expatriate Affairs and are not made public. Objections to decisions taken by the Directorate may be lodged before the Immigration Appeals Board, but decisions of such board are not usually made public. As a consequence, it is not very easy to determine the kind of issues that arise unless those concerned contact the media to make their case publicly known. It is also quite difficult to determine whether national reporting of EU citizenship is accurate or otherwise.

17. *Times of Malta,* 'Expats put Adverts on 'discriminatory' Buses', 19 August 2013. http://www.timesofmalta.com/articles/view/20130819/local/Expats-put-adverts-on-discriminatory-buses.482392#.UlOyuhbx34w, accessed on 8 October 2013.
18. *The Malta Independent,* 'EU Nationals in Malta 'Up in Arms',' 14 July 2013, found at http://www.independent.com.mt/articles/2013-07-14/letters/eu- nationals-in-malta-up-in-arms-2068054019/, accessed on 8 October 2013.
19. *Times of Malta,* 'Expats take tariff fight to the Court', 1 October 2013, found at http://www.timesofmalta.com/articles/view/20131001/local/Expats-take-tariff-fight-to-the-court.488469#.UlOyJBbx34w, accessed on 8 October 2013.
20. *Times of Malta* 'Expat anger as schools won't accept old ID card', 2 September 2013, found at http://www.timesofmalta.com/articles/view/20130902/local/Expat-an ger-as-schools-won-t-accept-old-ID-card.484469#.UlPFYRbx34w, accessed on 8 October 2013.

THE NETHERLANDS

J. Langer and A. Schrauwen[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

The relevant framework in this regard consists of the Aliens Act 2000 (*Vreemdelingenwet 2000*), Aliens Decree 2000 (*Vreemdelingenbesluit*), and the Aliens Circular (*Vreemdelingencirculaire*). Article 1(e) Aliens Act 2000 defines the term 'Community subject' as either a national of a member state who has the right based on primary EU law to enter and remain in the Netherlands (paragraph 1), or a third-country national family member of a person who has the right based on secondary EU legislation to enter and remain in the Netherlands (paragraph 2). Article 9(1) of the same act provides that the persons mentioned in paragraph 2 of Article 1(e) shall be issued a residence card.

The main thrust of the legal framework consists of Articles 8.7-8.25 Aliens Decree 2000. These articles are intended to implement Directive 2004/38. Article 8.7 provides in essence that the Aliens Decree is applicable to EU nationals and the family members enumerated in Article 2(2) of the Directive 2004/38. It is noteworthy that in the Netherlands the term 'spouse' is interpreted widely, as civil marriage under Dutch law also includes same-sex marriages. Likewise, a foreign and legally registered partnership is acceptable under Article 8.7. Article 8.7(3) declares the section to be applicable to the family members enumerated in Article 3(2)(a) of the Directive. Article 8.7(4)

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declares the section to be applicable to the *de facto* partners provided for by Article 3(2)(b) of the Directive. It also goes somewhat farther than the Directive in additionally providing for applicability of the section to the direct descendant of such a partner who is *18 or under*. Article 8.9 implements Article 5(2) of the Directive. Article 8.11 implements Article 5(1) of the Directive. It additionally provides in Art. 8.11(1)(b) that proof of an EU citizen's identity and nationality can be provided by means other than a valid passport or valid identity card.

Until January 2009, unmarried and unregistered partners of EU citizens enjoyed a right of residence by complete analogy to the immigration facilities made available by Dutch immigration law to the *de facto* partners of Dutch citizens and third-country nationals. This (national) practice was an implementation of the *Reed* decision by the ECJ requiring non-discriminatory access for Community workers.[2] In January 2009, the Government introduced a new policy rule changing the basis of rights of residence for *de facto* partners from the non-discrimination principle to the Directive provision (Art. 3(2)(b)) on '*durable relationship[s], duly attested*'.[3] The new policy rule stated that sufficient proof of a durable relationship was provided, in any case, if the two partners had had a child together or if they could prove that they had already cohabited for six months. If they had cohabited in the Netherlands, the proof could only be provided by a common municipal address registration. On the other hand, if they had cohabited in another country a joint rental contract or joint utility bills would provide proof. The Council of State has been critical in its case law regarding these policy rules. According to the Council, evidence could not be limited to common registration in the municipal address register as proof of prior cohabitation in the Netherlands, as this indirectly imposes a requirement of prior legal residence on a third-country national.[4] The Council has accepted that alternate satisfactory evidence of a durable relationship can be provided if the two persons involved are interviewed separately and provide matching answers to questions about their relationship.[5] As a consequence, on 1 June 2013 a new version of the Aliens Circular came into effect. This version contains the same policy as introduced in January 2009, but with the explicit comment that in all matters of EU law, the relevant authorities will not limit the means of evidence that can be used.

2. Case 59/85 *State of the Netherlands* v *Ann Florence Reed* [1986] ECR 1283.
3. Chapter B10/1.7 Aliens Circular as amended on 31 January 2009.
4. Raad van State, 6 September 2011, ECLI:NL:RVS:2011:BS1678.
5. Raad van State, 24 February 2012, case 201011515/1/V4.

Question 2

There is in the case law limited evidence of expulsion decisions taken on the ground of non-fulfilment of the conditions imposed by the Directive. The following court decisions are noteworthy in this regard. The District Court of Amsterdam ruled on 21 February 2013 in a case concerning the request for allowance by a Bulgarian national that municipalities are under an obligation to assess *themselves* whether the EU citizen has a right of residence. They cannot rely on the residence status as recorded by the immigration authorities (IND).[6] According to the Court, this obligation derived from the fact that the right of residence of EU citizens flows directly from the Treaty. Therefore, it ruled that in the case at hand, the Bulgarian citizen did not have a right of residence based on Article 7 of the Directive. Consequently, he was not entitled to an allowance. The Court refrained from ruling on alternative grounds for the residence status. On 18 March 2013, however, the Administrative High Court (the highest court in social security matters) ruled that municipalities, when deciding on allowances, may not refuse these allowances with the argument that the recourse to social assistance is proof of the absence of the right to stay in the Netherlands.[7] The Court stressed that the recourse to social assistance cannot automatically result in expulsion: the IND decides on the residence status and the municipalities decide on allowances.

In mid-2013, the Minister of Social Affairs announced the start of a pilot project in Rotterdam.[8] This pilot will commence as of 1 October 2013 for a period of six months. Local authorities and immigration authorities will collaborate closely in cases where an EU citizen applies for social assistance. The plan is that the IND will on short term verify the residence status of the applicant. If the applicant has no right under EU law to stay in the Netherlands, the IND will accordingly inform the local authorities. If the applicant was either employed or self-employed for over a year, social assistance will be granted. The same applies to economically non-active EU citizens who have resided in the Netherlands for more than five years.

6. Rechtbank Amsterdam, 21 February 2013, ECLI:NL:RBAMS:2013:BZ5689.
7. Centrale Raad van Beroep, 18 March 2013, ECLI:NL:CRVB:2013:BZ3853, BZ3854, BZ3855, see also Centrale Raad van Beroep, 19 March 2013, ECLI:NL:CRVB:2013:BZ3857.
8. Letter of the Minister of Social Affairs, 10 July 2013, reference: 2013-0000091692, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/07/10/pilot-verblijfsbeeindiging-eu-burgers-rotterdam.html>.

Question 3

Article 12 of Directive 2004/38 has been fully transposed in, respectively, Articles 8.14, 8.15(2) sub a and b, 8.15(5) and (6) of the Aliens Decree 2000.

Article 13 of the Directive has been transposed in respectively Article 8 and Article 8.15(4) of the Aliens Decree 2000. The Decree provides that an ex-spouse (or ex-civil partner) of a EU citizen is eligible for permanent residency after five years of legal residence in the Netherlands on the basis of EU law if the marriage lasted at least three years, of which one of those years was in the Netherlands. With the implementation of the Directive, the Netherlands has explicitly chosen to treat the non-registered partners of EU citizens in a similar way to spouses or registered partners (Article 8.7(4) Aliens Decree 2000).

The Council of State decided on 4 May 2012 that an unmarried partner of a EU national could make a claim for entitlement to permanent EU-residency with regard to compelling humanitarian reasons, in case of a (former) durable relationship duly attested with an EU citizen.[9] The District Court of The Hague determined that unmarried third-country national partners of EU citizens have a right to continued residency in case that their relationship ends if the third country national ex-partner is able to prove that he or she had a durable relationship for at least three years with an EU citizen, at least one of which was spent living legally in the Netherlands.[10]

Article 14 has been transposed in Article 8.16 of the Aliens Decree 2000. Verification of conditions is not carried out systematically, only when the EU citizen applies for a sticker in his passport to prove legal residency in the Netherlands on the basis of Article 7 of Directive 2004/38.[11]

Question 4

Article 16 of the Directive has been transposed in Articles 8.17(1) and (2) and 8.18 sub a) of the Aliens Decree 2000. Legal residence for a continuous period of five years is presumed if the relevant authorities have not withdrawn the residence permit.[12]

9. Raad van State, 4 May, 2012, ECLI:NL:RVS:2012:BW5523.
10. Rechtbank Amsterdam, 27 March 2013, ECLI:NL:RBAMS:2013:4271.
11. See also question 2.
12. Centrale Raad van Beroep, 18 March 2013, ECLI:NL:CRVB:2013:BZ3857. See also question 2.

Article 17 of the Directive has been transposed in Article 8.17(3)-(7) of the Aliens Decree 2000. In general, Article 18 has been transposed in Article 8.15(2) and (4) of the Aliens Decree 2000. It should be noted, however, that the '*particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting*' (Article 13(2) sub c of the Directive) has been translated in Article 8.15(4) sub d as '*compelling reasons of a humanitarian nature*'. The element '*and for as long as is required*' in Article 13(2) sub d has not been copied into Article 8.15(4) sub c. Article 19 has been transposed in Article 8.19 of the Aliens Decree 2000.

In general, Article 20 has been transposed in Article 8.20(1) of the Aliens Decree 2000. In contrast to the provision of the Directive, the implementing rules do not mention that the permanent resident card should be issued within 6 months after the application has been filed. Deciding within 6 months was already the general administrative law practice, and the modern approach further reduced that timeframe to 3 months. The implementing rules also do not stipulate explicitly that the card expires after 10 years, and that it is automatically renewable after that period. The practice is that the residence card is indeed automatically renewable, but it is issued for five years. Failure to comply with the requirement to apply for a permanent residence card may lead to administrative fines.[13]

Article 21 of the Directive has been partly transposed in Article 8.21 of the Aliens Decree 2000: it provides that continuity of residence is broken from the moment the alien has left the Netherlands. Article 8.21 does not explicitly mention means of proof. In this regard, the liberal rules on evidence generally adhered to in Dutch administrative law apply.[14] In practice, enrolment in the municipal register for an uninterrupted period of five years is proof of continuity of residence.

The IND publishes annual reports providing information on the overall number of residence permits issued to EU citizens.[15] No specific information is provided on the number of applications for the permanent residence status on the basis of Directive 2004/38/EC. In February 2013 the Central Bureau for Statistics published an overview of EU-nationals and nationals from can-

13. Article 108 Aliens Act.
14. See Aliens Circular 2000, Chapter B10/1.7. See also Rechtbank 's-Gravenhage, 26 January 2012, ECLI:NL:RBSGR:2012:BV2627, on various statements and documents as proper proof of the existence of a durable relationship.
15. See http://www.rijksoverheid.nl/documenten-en-publicaties/jaarverslagen/2012/03/20/ de-ind-belicht-jaarverslag-2011-van-de-ind.html.

didate member states residing or working in the Netherlands for the period 2007-2012.[16] The report also contains data on the duration of enrolment in municipal databases, and number of persons per nationality.

Relevant case law has been limited. Reference can be made to a ruling by the District Court of The Hague of 17 December 2009.[17] The applicant in this case requested the IND to take a binding decision determining the exact moment in time the right to permanent residence comes into being. The applicant argued that the IND has the power to take such a decision on the basis of Directive 2004/38. The District Court rejected this claim. The Court stated that the IND does not have such competence under Dutch law. The competence was neither created by Articles 16-20 of Directive 2004/38. This ruling was subsequently upheld in appeal.[18] In another judgment, the District Court of The Hague stressed that a permanent resident status does not have to be conferred in cases where a continuous period of five years on the territory of the Netherlands has not been completed, and where the prolonged absence of the claimant also exceeded the limits of Article 16 paragraph 4.[19]

A decision by the District Court of The Hague of 27 March 2013 is also noteworthy.[20] This case concerned a Ghanaian applicant who had been in a registered partnership with an EU citizen, but did not meet the requirement of having stayed in the Netherlands for five consecutive years, as required for the acquisition of a right of permanent residence. It was not disputed, however, that the registered partnership had lasted for more than three years. Therefore, the District Court considered that she had nonetheless retained a residence right as such on the basis of Article 8.15 of the Aliens Decree 2000, since that provision also applies to non-registered partners.

Question 5

Article 11(1) of the Dutch Act on Employment and Social benefits provides a general right for social benefits for all residents in the Netherlands who lack sufficient means to be able to support themselves. Article 11(2) states that this right equally applies to all foreigners who legally reside in the Nether-

16. See: http://www.cbs.nl/nl-NL/menu/informatie/beleid/publicaties/maatwerk/archief/2013/130212-migrantenmonitor-fase-2-2007-2012-mw.htm, esp. table 1 and table 4A.
17. Rechtbank 's-Gravenhage, zittingsplaats Assen, 17 December 2009, ECLI:NL:RBSGR:2009:BK7600.
18. Raad van State, 21 February 2011, ECLI:NL:RVS:2011:BP5947.
19. Rechtbank 's-Gravenhage, 17 July 2012, ECLI:NL:RBSGR:2012:BX2779.
20. Rechtbank Amsterdam, 27 March 2013, ECLI:NL:RBAMS:2013:4271.

lands. This also includes EU citizens who stay in the Netherlands on grounds of EU law. Article 24(2) of the Directive is transposed in Article 11(2) by means of a direct reference: foreigners in '*situations as described in Article 24(2) of the Directive*' are *not* entitled to social benefits. As regards maintenance aid for studies, the exception of Article 24(2) is laid down in Article 3a(1) of the Student Finance Decree 2000. EU students can only obtain maintenance aid for studies after they have stayed in the Netherlands for over 5 years (long term residence as provided in Article 16 of the Directive).

National law does not distinguish between the categories specified in Article 24(2) and job seekers. Just like the categories specified in Article 24(2) of the Directive, job seekers do not have a right to receive social benefits.

Article 24(2) has not entirely displaced the Court of Justice's 'real link' case law before national courts or tribunals. The 'real link' test is still used as an additional test, in order to verify whether there are grounds on which a right to social benefits or maintenance aid for studies may not be denied to a EU citizen under Article 18 TFEU.[21]

Question 6

Article 67 of the Aliens Act 2000 confers upon the Minister of Immigration and Asylum the possibility to declare an alien unwanted. Articles 8.18 and 8.22 of the Aliens Decree 2000 follow almost verbatim the text of the Directive.

When applying the public order and public security exceptions, Dutch courts frequently refer to the 2009 Commission's guidelines on the implementation of the Directive.[22] Generally, Dutch courts carry out a proportionality check when reviewing expulsion decisions. They also check whether the expulsion is respecting the fundamental rights. Interestingly, the latter is almost exclusively done in relation to Article 8 ECHR, and not (yet) with the EU Charter of Fundamental Rights.

Following a pilot in 2008, the Minister of Social Affairs announced in 2011 that the accumulation of offences (that individually would not reach the threshold of constituting a threat to a fundamental interest of society) could

21. Centrale Raad van Beroep, 18 December 2009, ECLI:NL:CRVB:2009:BK8135 (maintenance aid for studies); Centrale Raad van Beroep, 29 June 2009, ECLI:NL:CRVB:2009:BJ1015 (maintenance aid for studies); Centrale Raad van Beroep, 21 August, 2008, ECLI:NL:CRVB:2008:BF0366 (job seekers).
22. COM(2009) 313 final, following the 2008 report on the implementation of the Directive (COM(2008) 840 final).

together be considered to meet the threshold.[23] The Commission did not raise any objections to this new approach, whereas the judiciary has been careful to check whether the behaviour of the individual concerned still constitutes a genuine and sufficiently serious threat to a fundamental interest of society.[24] With respect to EU citizens, a ruling by the District Court of The Hague in 2011 considered that multiple minor offences could not be seen as justifying expulsion for '*serious*' reasons of public policy.[25] The Court held that it was required to suspend the expulsion order indefinitely given that the effectiveness of EU law was to be respected.

It seems as if the distinction between the existence and degree of the threat to the public order and the existence of personal conduct constituting a sufficiently serious threat is sometimes blurred. The Dutch courts seem to take into account the nature of the offence committed, the nature of the penalty prescribed by law, the penalty actually imposed, and the time-span within which offences have been committed.[26] Occasionally, reference has been made to the *Tsakouridis* case, but solely to reaffirm the need for imperative grounds of public policy in case of expulsion of an EU citizen with a permanent residence right and the fact that organized drug trade can be considered as such a ground.[27]

As to multiple minor offences, the penalty actually imposed on the individual concerned is relevant, as well as whether or not the public prosecutor chose to apply its internal guidelines in relation to multiple offenders as an aggravating circumstance.[28] Recently, the Council of State considered that in case an expulsion order is issued in case of multiple minor offences the competent authorities must duly motivate what the concrete threat to society is, why expulsion is necessary despite the fact that minor penalties were imposed and they must take into account the circumstances under which the offences were committed.[29] In case of multiple offences, the competent authorities cannot combine factors pertaining to different occurrences in order to prove that all elements of the threat are present.[30]

23. Letter of 14 April 2011, Parliamentary Documents II 2010/11, 29407, nr. 118.
24. Case C-349/06, Polat [2007] ECR I-8167, para. 35.
25. Rechtbank 's-Gravenhage, 21 March 2011, ECLI:NL:RBSGR:2011:BP8895.
26. Rechtbank 's-Gravenhage, 19 July 2012, ECLI:NL:RBSGR:2012:BX2790.
27. Case C-145/09, *Tsakouridis* [2010] ECR I-11979. See e.g. Raad van State, 5 October 2011, ECLI:NL:RVS:2011:BT8385 and Rechtbank 's-Gravenhage, 21 March, ECLI:NL:RBSGR:2011;BP8895.
28. Rechtbank 's-Gravenhage, 15 February 2013, ECLI:NL:RBSGR:2013:CA1559.
29. Raad van State, 18 June 2013, ECLI:NL:RVS:2013:62.
30. Rechtbank 's-Gravenhage, 13 January 2011, ECLI:NL:RBSGR:2011:BP2584.

The existence of a present and actual threat can continue to exist also after a prison sentence has been served. Good behaviour during detention was found to be irrelevant.[31] At the same time, the authorities were not allowed to shift the burden of proof of the existence of a present threat to the detained EU-national.[32] With reference to the *Orfanopoulos* case, the intensity and magnitude of the illegal trade in drugs and the dependency of the EU citizen in question formed important elements to conclude that a present, threat persisted.[33] Once a national court accepts that there is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of Dutch society, the next step is to see whether the decision by the competent authority is in line with the considerations as laid down in Article 28(1) of the Directive.

The principle of proportionality is also a general principle in Dutch administrative law. It is generally applied by administrative authorities as well as by Dutch courts in administrative procedures. Authorities have an obligation to weigh the interests directly involved. The adverse consequences of a decision may not be disproportionate to the purposes to be served by the decision. Any decision (initial decision and decision on appeal) must be based on proper reasoning. This means that the authorities must gather the necessary information concerning the relevant facts and the interests to be weighed. Before an administrative authority decides on an objection, it shall give the interested party the opportunity to be heard. The decision of the authority must show that the principle of proportionality and in particular the considerations as laid down in Article 28(1) were taken into account. If not, it can lead to the annulment of the decision, due to a failure to state reasons.[34]

Although national courts review the decision in light of Article 28(1) of their own motion, the individual is expected to demonstrate elements that can support an argument that the decision is disproportionate in the light of Article 28(1) of the directive. If no elements linking the individual to Dutch society are brought forward,[35] or if the individual explicitly stated that there is no reason for staying in the Netherlands,[36] national courts generally accept

31. Rechtbank 's-Gravenhage, 14 September 2012, ECLI:NL:RBSGR:2012:BX9061.
32. Rechtbank 's-Gravenhage, 26 January 2013, ECLI:NL:RBSGR:2013:BV3857.
33. Rechtbank 's-Gravenhage, 8 July 2008, ECLI:NL:RBSGR:2008:BD7243.
34. Rechtbank 's-Gravenhage, 18 March 2010, ECLI:NL:RBSGR:2010:BL9840; Rechtbank 's-Gravenhage, 6 March 2007, ECLI:NL:RBSGR:2007:BA0549; Rechtbank 's-Gravenhage, 26 August 2008, ECLI:NL:RBSGR:2008:BF0172.
35. Rechtbank Den Haag, 11 June 2013, ECLI:NL:RBDHA:2013:CA3247.
36. Rechtbank 's-Gravenhage, 23 September 2008, ECLI:NL:RBSGR:2008:BF3214.

that the principle of proportionality was respected.[37] When elements are brought forward individuals must provide sufficient evidence to support the claim.[38] In balancing the interest of the individual and the interest of society, the reasoning of national courts varies; it is sometimes elaborate,[39] and sometimes brief.[40] We have not found any cases where the elements brought forward are found to be sufficient to quash the decision.[41] Examples of considerations that were not accepted as sufficient:

– having a relationship with a person living in the Netherlands;
– the desire to work in the Netherlands;
– good behaviour in prison;
– birth of a child/ back on the right path;
– desire to stay in the Netherlands pending criminal trial;
– light forms of medical treatment;[42]
– economic situation in the country of origin;[43]
– no longer welcome with relatives in the country of origin.

In some cases, individuals invoke Article 8 ECHR. Courts have reviewed such claim with reference to the so-called 'guiding principles' as stipulated in the Boultif and Üner decision of the ECHR.[44] It is often in this review that national courts give a more elaborate reasoning with regard to the principle of proportionality.[45]

37. Rechtbank 's-Gravenhage, 8 July 2008, ECLI:NL:RBSGR:2008:BD7243.
38. Rechtbank Den Haag, 17 July 2013, ECLI:NL:RBDHA:2013:10529.
39. Rechtbank 's Gravenhage, 8 November 2011, ECLI:NL:RBSGR:2011:BU5206.
40. Rechtbank Den Haag, 10 Janury 2013, ECLI:NL:RBDHA:2013:BY8148.
41. Rechtbank Den Haag, 17 July 2013, ECLI:NL:RBDHA:2013:10529.
42. Rechtbank 's-Gravenhage, 12 July 2012, ECLI:NL:RBSGR:2012:BX1255.
43. Rechtbank 's-Gravenhage, 18 March 2010, ECLI:NL:RBSGR:2010:BL9840.
44. Boultif v Switzerland, no. 54273/00, ÜNER v. The Netherlands, no. 46410/99.
45. Rechtbank 's-Gravenhage, 8 November 2011, ECLI:NL:RBSGR:2011:BU5206.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

There is growing case law in relation to Article 20 TFEU.[46] Generally, Dutch courts accept that EU citizens are only deprived of the '*genuine enjoyment of the substance of rights*' if they have no 'real' other possibility to stay within the territory of the EU. The fact that a family has to split up in order for the children to reside in the EU does generally not endanger this according to the case law. In one illustrative case, authorities refused a residence permit to a mother from Kosovo. Given the absence of a permit, she had to leave the Netherlands. But, after she gave birth to a daughter, her deportation was postponed for six weeks, though in the end she never left the country. After she gave birth to a second child, her partner, a Dutch national, made a declaration of paternity in relation to both children holding Dutch nationality. The mother claimed a right to stay in the country in the light of the Zambrano judgment. The District Court of The Hague ruled that her situation differed from that in Zambrano, since her children could still enjoy residency in the EU, with their father, who had Dutch nationality.[47]

Another set of cases concern the situation that the Dutch parent is (partly) unable to take care of the children. It was ruled that a Moroccan father did not have a derived right to stay in the Netherlands, because the Dutch mother could not take care of the children and the children were forced to stay in a foster home. The Court ruled that in these circumstances, the children were not obliged to leave the territory of the EU.[48] Another example is a case where the Dutch parent was mentally ill and could not take care of the children. It was also held that there was no derived residence right to the other parent with the third country nationality.[49]

There are also instances where a Zambrano claim has been accepted. An example is a case concerning a Turkish father and a Dutch mother with a Dutch child. The Dutch mother was in the position to take care of her child. Nevertheless, due to the mental illness of the father, the Council of State

46. Up until June 2013, 39 cases have been published online on www.rechtspraak.nl.
47. Rechtbank 's-Gravenhage, zittingsplaats Roermond, 28 March 2011, ECLI:NL:RBSGR:2011:BQ0062.
48. Rechtbank 's-Gravenhage, 11 July 2011, ECLI:NL:RBSGR:2011:BR1625LJN.
49. Rechtbank 's-Gravenhage, 31 August 2011, ECLI: NL:RBSGR:2011:BR7035.

ruled that the Turkish father had a derived right to reside in the Netherlands. There were indications that a deportation to Turkey would lead to so much psychological suffering that his Dutch spouse and child had no other choice than to join the father and thus to reside outside the EU. Another example is the situation that the children would be placed under supervision if the third country national parent were to be deported.[50] In this context, it is interesting to note that Dutch courts seem to require clear evidence that the Dutch parent is not in the position to take care of the children involved. The mere declaration that the Dutch parent would not provide the necessary care is not sufficient to trigger the scope of Article 20 TFEU.[51] The fact that the presence of the third country national parent is important for the psychological health of the Dutch parent is insufficient if others like family members could provide support to the Dutch parent as well.[52] The dependency of the EU citizen on the third country national to reside in the EU is decisive, the desire to stay with the whole family within the European Union is not sufficient to trigger the scope of Article 20 TFEU.[53] Also noteworthy is the decision by the District Court of Arnhem ruling that the national authorities are obliged to grant an allowance in order to facilitate the residency of the dependent Union citizens.[54] In this case, the mother is Venezuelan and the father is Dutch. The father did not take care of the daughter. The mother was not granted an allowance. The Court ruled that if the daughter were to be granted the effective enjoyment of her EU citizenship rights, her Venezuelan mother should have sufficient financial resources to take care of her family.

Generally, Dutch courts have not turned down residence claims based on Article 20 TFEU with the argument that the dispute involves an internal situation.[55] When turning down these claims, courts tend to do so because the EU citizens involved have not been deprived of their essential rights. A judgment by the District Court of The Hague of 12 January 2012 is illustrative in this regard. The case concerned a national of Nicaragua, who requested a residence permit in the Netherlands, and who had a relationship with a Dutch national and a child with Dutch nationality. Later, she had a child with another Dutch national with whom she subsequently had a second child. This (second) child has the Nicaraguan nationality. The Court held that this case

50. Raad van State, 26 April 2013, ECLI:NL:RVS:2013:BZ9025.
51. Raad van State, 12 June 2013, ECLI:NL:RVS:2013:CA3605.
52. Raad van State, 6 August 2012, ECLI:NL:RVS:2012:BX5044.
53. Raad van State, 18 July 2013, ECLI:NL:RVS:2013:425.
54. Rechtbank Arnhem, 10 July 2012, ECLI:NL:RBARN:2012:BX3418.
55. Rechtbank 's-Gravenhage, 12 January 2012, ECLI:NL:RBSGR:2012:BV2012.

was not an internal situation, even though the right of free movement was not exercised. Referring to the Zambrano judgment, the Court stressed that no internal situation will arise in the case that national measures have the effect that EU citizens are deprived of the effective enjoyment of the substance of their EU rights.[56] This line of reasoning has also been applied in other (similar) cases.[57] According to the Council of State, it is possible to rely upon Article 20 TFEU independently from other EU Treaty provisions.[58] Consequently, the Council of State held that the possession of a residence permit based on national law may not be imposed as a condition prior to invoke Article 20 TFEU.[59] Furthermore, the Council ruled that a residence card based on Article 9 Aliens Act (which provides for issuance of a residence card based on Directive 2004/38) shall also be issued to family members of EU citizens who derive rights from Article 20 TFEU. Whether legislative changes are needed to accommodate the Zambrano ruling is (still) under discussion.

There is also case law in relation to family members of Dutch citizens being denied a right of residence after the Dutch citizen involved has made use of his mobility rights within the EU and returned to the Netherlands. Various reasons have been invoked for denial of analogous application of Directive 2004/38: the use of Treaty rights of residence was considered to be too short-term, usually less than 3 months,[60] or the Dutch citizen had not furnished convincing substantive proof of '*genuine and effective residence*' in the host member state.[61] In another case, the Court held that the Dutch national involved was not the provider of services in the sense of the Carpenter ruling. Moreover, the Court argued that the (adult) Dutch national had *de facto* used his free movement rights, and that it is not tenable that he is being deprived of the genuine enjoyment of the substance of his EU citizenship rights.[62] In this case, the use of free movement rights seemed one of the factors blocking reliance upon Article 20 TFEU, even if the use did not lead to 'genuine and effective residence' necessary for analogous application of Directive 2004/38.

56. Rechtbank 's-Gravenhage, 12 January 2012, ECLI:NL:RBSGR:2012:BV2011.
57. Rechtbank 's-Gravenhage, 12 January 2012, ECLI:NL:RBSGR:2012:BV2012 and Raad van State, 7 March 2012, ECLI:NL:RVS:2012:BV8623.
58. Raad van State, 17 October 2012, ECLI:NL:RVS:2012:BY0833.
59. Raad van State, 9 August 2013, ECLI:NL:RVS:2013:725.
60. Rechtbank 's-Gravenhage, zittingsplaats Amsterdam, 13 September 2010, ECLI:NL:RBSGR:2010:BO7110.
61. Raad van State, 17 December 2012, ECLI:NL:RVS:2012:BY7401; also Rechtbank 's-Gravenhage, zittingsplaats Zwolle, 9 March 2012, ECLI:NL:RBSGR:2012: BV8504.
62. Rechtbank 's-Gravenhage, zittingsplaats Haarlem, 26 April 2011, ECLI:NL:RBS GR:2011:BQ5774.

Meanwhile, the Council of State has asked preliminary questions to the Court of Justice to clarify under what circumstances long-term, but intermittent residence in a host Member State can be considered to constitute the necessary use of Treaty rights by a Union citizen, and how long after the EU-national's return the family member can still derive rights from EU law.[63]

As to Directive 2004/38, courts seem to distinguish between citizens using their free movement rights and those who do not. One example concerns a Dutch national who is married with a third country national and who has not used her free movement rights. In that case, she could not rely upon Directive 2004/38.[64] A recent ruling of the Council of State made clear that in the context of Directive 2004/38, a third country national taking care of a minor EU-national (who is making use of free movement rights) and having sufficient resources has the right to reside with the child in the Netherlands regardless of the origin of the resources. In such a situation, the fact that the third country national is the child's primary carer is decisive. This differs from the situation under Article 20 TFEU, where the dependency of the minor EU-national (who is not making use of free movement rights) on the third country national is decisive.[65] With regard to family members of Dutch nationals returning to the Netherlands, the Council of State identifies the right of residence so established as based on an *analogous* application of Directive 2004/38. Lower courts seem to be less cautious and often refer directly to Directive 2004/38 as the (potential) source of rights in such a case.

Question 8

Articles 14 and 15 of the Kingdom Act on Netherlands Nationality regulate the loss of Dutch Nationality. According to Article 14(1), the acquisition or grant of Dutch nationality may be revoked if it is based on a false declaration made by the person concerned or fraud and/or on concealment of any fact relevant to the acquisition or grant. The revocation has retroactive effect to the time of the acquisition or grant of Dutch nationality. In addition, Dutch nationality can be withdrawn if the person concerned is convicted for certain criminal offences referred to in the Criminal Law (Article 14(2)). Moreover, a person who is of full age shall lose his or her Dutch nationality if the person

63. Raad van State 5 October 2012, ECLI:NL;RVS:2012:BX9567; pending at the ECJ with case number C-456/12.
64. Rechtbank 's-Gravenhage, zittingsplaats Zwolle, 9 March 2012, ECLI:NL:RBSGR:2012:BV8504.
65. Raad van State, 3 September 2013, ECLI:NL:RVS:2013:1068.

concerned has failed, after his or her naturalisation, to make every effort to divest himself of his or her original nationality (Article 15(1)(d) and (f)) or if he renders voluntary military service to a hostile state (Article 15(1)(e)). With the exception of Article 14(1), Dutch nationality may not be lost if this would lead to statelessness.

As to the possible implications of the Rottmann ruling, it is generally accepted that the grounds to revoke Dutch nationality are not contrary (as such) to EU law. Nevertheless, it is for the national courts to ascertain in each individual case whether the withdrawal decision observes the principle of proportionality in light of EU law. Generally, the principle of proportionality also applies in Dutch national law. The 'Guide to the Netherlands Nationality Act' even explicitly states that no withdrawal decision will be taken if this would be disproportionate.[66] As for the application of the Rottmann-based proportionality test, it could be argued that it only applies in those cases where the person concerned has lost the nationality of another Member State that he/she originally possessed. On the other hand, it could be argued that national courts should apply the Rottmann-based proportionality test in all individual cases where Union citizenship is in danger of being lost. However, the Dutch courts have so far refused such a broad application of the Rottmann judgment.[67]

For example, in a case involving a Somali national who acquired Dutch nationality on the basis of false (identity) information, it was ruled that the naturalisation decision based on false information had no legal effect and the Somali national had never acquired Dutch nationality. Therefore, the rights attached to Union citizenship were not lost, since the rights were never acquired. Consequently, the Rottmann ruling did not apply.[68]

Certain aspects of the Dutch rules governing the loss of Dutch nationality arguably require closer scrutiny in light of the principle of proportionality as set out in Rottmann. For example, the proportionality test as formulated by the Court in Rottmann (in particular paras 56-58) implicates that this requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin. The courts should assess whether EU citizens deprived of their Dutch nationality are afforded

66. See the Handleiding Rijkswet op het Nederlanderschap 2003, paras 2.2, 2.3 and 4.2.
67. Rechtbank 's-Gravenhage, 7 April 2011, ECLI:NL:2011:BQ0863; Rechtbank 's-Gravenhage, 4 October 2012, ECLI:NL:RBSGR:2012:BY0139; Rechtbank 's-Gravenhage, 26 January 2012, ECLI:NL:RBSGR:2012:BV3372 and Rechtbank 's-Gravenhage, 13 December 2012, ECLI:NL:RBSGR:2012:BZ0382.
68. Rechtbank 's-Gravenhage, 7 April 2011, ECLI:NL:2011:BQ0863.

such a reasonable period when their Union citizenship is in danger of being lost entirely.[69]

Political rights of EU citizens

Question 9

The transposition of Directive 93/109 was effectuated by 1 April 1993.[70] Under Dutch law, the requirement of Article Y 37 Elections Act (now repealed) that a candidate had to produce credentials from his national authorities proving that he has not been deprived of the right to stand as a candidate was implemented by requiring that candidates should produce their credentials after the elections. The Commission contested this way of transposition of the Directive. According to the Commission, the credentials should be produced when applying as a candidate. As a result, the Dutch Elections Act was changed in 1999 to the effect that candidates not having provided for the right documentation are taken off the list of candidates.[71] Nationals of other Member States must have their actual place of residence in the Netherlands to be eligible to be a member of the European Parliament. EU citizens must, unlike Dutch nationals, have their actual place of residence in the European part of the Kingdom of the Netherlands on nomination day. In the original transposition of the Directive, all Dutch nationals living abroad had both active and passive electoral rights for the European Parliament, except those residing on Aruba and the Antilles, who had only passive voting rights. Following the *Eman and Sevinger* ruling, Dutch nationals living in Aruba and the Antilles were enfranchised for European elections in 2008.[72] Non-Dutch EU-nationals living in non-European parts of the Kingdom of the Netherlands are not allowed to participate in the Dutch election of the European Parliament.[73]

69. In one case the Court has found that there were no reasons to afford more than a 7 months period to take steps to recover the former (third-country) nationality, regardless of the applicability of the judgment in Rottman. See Rechtbank Breda, 7 January 2011, ECLI:NL:RBBRE:2011:58.
70. Stb. 1993, 75.
71. Article Y 35a Elections Act.
72. Case C-300/04, *Eman and Sevinger*, ECR [2006] p. I-8061.
73. Residence in the non-European part of the Netherlands is not presumed to be residence 'in a Member State of which he is not a national' under article 22 TFEU, TK 2008-2009, 31956, nr. 3, par. 7.5.

The implementing law of Directive 2013/1 is pending and expected to enter into force before 2014. The law proposal uses the discretionary possibility laid down in Art. 6(3) to shorten the deadline for provision of information on disqualification from standing for election to less than 5 days as currently applied to candidatures from Dutch nationals.[74]

Question 10

Directive 94/80 was transposed by amendments to the Elections Act and the Municipal Act on 3 July 1996.[75] Parliament decided that only one amendment was necessary: the condition that non-nationals had to reside in the Netherlands for five years prior to the elections, was abolished with regard to EU citizens.

EU citizens who reside in the Netherlands have the right to vote and to stand for election in municipal elections under the same conditions as Dutch citizens. These conditions are quite straightforward. The right to vote is reserved to persons who:[76]

- are residents of a municipality (i.e. persons who have their actual place of residence in one of the 400 municipalities); and
- have attained the age of eighteen years on polling day; and
- are not disqualified from franchise or standing for election by a final decision of a court (B5 Elections Act and 10 Municipalities Act).

Voting is not compulsory in the Netherlands. EU citizens deprived of their right to stand as a candidate under the law of their home state can nonetheless take part in municipal elections in the Netherlands.

Question 11

In the Netherlands, elections are organized with regard to the following general representative assemblies: municipal, provincial, national, and European as well as the election of the General Management of the District Water Boards. Elective rights for the District Water Boards and municipal council are on the basis of residence, regardless of the nationality of the person in-

74. TK 2012-2013, 33586, Arts. Y 35b and Y 38 Elections Act.
75. Stb. 1996, 392.
76. Article B3 Elections Act (vote) and 10 Municipal Law (stand).

volved.[77] On the other hand, participation in the national and provincial elections is subject to the possession of Dutch nationality.[78] The nationality condition in provincial elections can be explained by the indirect elections of the Upper House via the provincial councils.

Question 12

According to the Dutch Constitution, electoral rights of anyone (including EU-nationals) can be restricted by Court order.[79] In practice, this has not happened after the Constitutional changes in 1983.[80] People who are lawfully deprived of their liberty on polling day are not excluded from the right to vote or to stand as a candidate. They can exercise the franchise by voting by proxy.[81] In other words: they can exercise the right in law and in fact.

The Dutch Constitution contained the provision that anyone who has been deemed legally incompetent by irrevocable judgment of a court because of mental disorder was not entitled to vote. This provision was withdrawn in June 2008 following a ruling of the Council of State.[82] The Council of State ruled that categorical exclusion as such is not an unreasonable restriction of the right to vote in the meaning of Article 25 International Covenant on Civil and Political Rights, but that it could be in individual cases. The legislator reacted by withdrawing the constitutional exclusionary provision for this category of voters.[83]

Culture(s) of citizenship

Question 13

The relevant articles of the Aliens Decree 2000 implementing Directive 2004/38 start from the presumption that movement within the EU is free: EU

77. Articles 15-17 Act on District Water Boards of 6 June 1991, Stb 1991, 379, Article 10 Municipalities Act.
78. Article 56 Dutch Constitution, Article 10 Provincial Law.
79. Articles 54.2, 129, 130 Constitution.
80. TK 33586 nr. 3 para. 3.
81. Article B6 Elections Act.
82. Raad van State, 29 October 2003, ECLI:NL:RVS:2003:AM5435.
83. TK 30 471, nr. 3.

citizens and their family members 'have lawful residence'.[84] We note in this regard the terminology used for lawful residence of foreigners not falling under the scope of the Directive: these aliens are 'permitted to reside' in the Netherlands (Article 3.3 Aliens Decree 2000).

Dutch courts generally follow the presumption of lawful residence. The case law repeatedly referred to the ruling earlier discussed that municipalities must assume lawful residence until the IND has decided differently. The case law referred to under Question 6 illustrates that national courts duly take account of the more protected status of EU citizens with a permanent resident right. National case law on residence rights for third-country national family members referred to under Question 7 shows a strict application of the 'genuine enjoyment of the substance of rights' criterion. Although one could argue that the approach in the case law is more one of strict immigration control than a rights-based approach, the basic presumption of the courts remains that EU citizens may not be forced to leave the territory of the EU.

National administrative actors follow the free movement culture, but there is more focus on enforcement of the conditions for lawful residence. In that regard, it is to be noted that fulfilment of the conditions for lawful residence of economically inactive EU citizens is assumed as long as no social welfare or student aid is requested. In addition, certain norms (14.4 hours work per week and an income of 50 % of the relevant subsistence norm) *must* be fulfilled in order to qualify as a worker or self-employed under EU law (Article B10 under 2.4 Aliens Circular).

Not all EU citizens apply for registration when they stay for a period longer than three months, and the government is aiming at improving registration facilities.[85] In February 2013, the Dutch government published a policy document outlining its view on migration.[86] The document contains plans for language and integration courses for EU citizens, as well as the intention to investigate the possibility of a 'participation agreement'. The plans and intentions are still under discussion.

The plans start from the presumption of lawful residence of EU citizens, but focus on stricter enforcement of conditions for migration (e.g. better information for EU migrants, better registration, adequate housing, and incen-

84. E.g. Articles 8.11, 8.12, 8.13 and 8.17 Aliens Decree.
85. Letter from the Minister of Social Affairs and Employment on *Migrantenmonitor 2007-2012* ref. 2013-0000024987.
86. *Agenda Integratie*, bijlage bij kamerstuk 32824, nr. 7, and Ministry of Social affairs and Employment, Beleidsnota *Agenda Integratie*, bijlage bij kamerbrief agenda integratie, 2013-0000015514, 19 February 2013.

tives for language training). In this respect, the open letter of the Minister of Social Affairs, claiming 'code orange' for labour migration within the EU, and in which he argues for a European solution to combat abuses of EU-workers is instructive.[87]

Question 14

The binding effect of the EU Charter of Fundamental Rights has played a role in how rights of EU-nationals are being interpreted, although it has rarely led to a more favourable result for the claimant. Articles 7 and 24 of the EU Charter have been invoked in situations where a right to stay in the Netherlands is claimed on the basis of the Zambrano case law. Dutch courts generally argued that when there is no deprivation of the genuine substance of rights, EU law does not apply, and consequently the EU Charter is not applicable. It is noteworthy to mention that the District Court of The Hague in several of these cases remarked that Articles 7 and 24 of the EU Charter do not belong to the 'substance of rights' of EU citizens, and consequently concluded that the EU Charter did not apply in the situation at hand, as it fell outside the scope of EU law.[88] However, in January 2013, the Council of State accepted the claimant's grounds of appeal that the District Court should have considered Article 8 ECHR and Article 3 ITRC *ex officio* where the applicant had invoked Articles 7 and 24 of the EU Charter. Yet, it could not lead to another outcome in the case at hand, as the document that the applicant applied for had only declaratory status.[89] Article 7 of the EU Charter has also been invoked in situations where third-country nationals claimed residence rights as family members on the basis of Directive 2004/38. The Council of State has confirmed that non-existence of a durable relationship or marriages of convenience do not imply family life, and hence, Article 7 of the Charter is not violated.[90] We found two cases regarding expulsion orders based on Article 27, where Articles 47 and 45 of the EU Charter have been invoked. In both

87. Lodewijk Asscher and David Goodhart, 'Code Oranje voor vrij werknemersverkeer binnen EU' *De Volkskrant*, 17 August 2013 and 'So much migration puts Europe's dykes in danger of bursting', *The Independent*, 18 August 2013.
88. Rechtbank 's-Gravenhage, 8 July 2011, ECLI:NL:RBSGR:2011:BR0795; Rechtbank 's-Gravenhage, 31 August 2011, ECLI:NL:RBSGR:2011:BR7035; Rechtbank 's-Gravenhage, 14 July 2011, ECLI:NL:RBSGR:2011:BR1625.
89. Raad van State, 3 January 2013, ECLI:NL:RVS:2013:BY8254.
90. Raad van State, 18 December 2012, ECLI:NL:RVS: 2012:BY7389; Raad van State, 28 June 2012, ECLI:NL:RVS:2012:BX0165.

instances, the Courts found that there was a sufficiently serious threat to a fundamental interest of society, and that the expulsion orders were compatible with respectively Article 47 and Article 45 of the EU Charter.[91]

Question 15

In the Netherlands, media discussion of issues connected to EU citizenship generally follows events related to national politics.[92] Issues related to EU citizenship have not been very salient, they hardly ever make it to the front page of journals[93] and very few editorials are dedicated to EU-citizenship issues.[94] The national newspapers *NRC Handelsblad*, *Volkskrant*, and *Trouw* cover EU citizenship issues at least twice as much as popular and more eurosceptic national newspaper *De Telegraaf* or local newspapers. Focus is very often on the national implementing policies, responsible national politicians, and enforcement failures. Landmark cases on residence rights (Chen, Jia, Metock) and access to student support (Bidar, Förster) are covered as well. Newspaper coverage does not always use the term 'EU citizens'.[95]

Several themes are recurring, in general whenever certain issues or policy plans recur on the national political scene. For instance, media reported on possibilities of language requirements and integration courses for EU migrants whenever Dutch government members suggested their introduction.[96] Also, the rulings of the Administrative High Court of March 2013 (see answer to Question 2) on EU citizens' claims to social assistance led to a number of newspaper articles. Coverage in newspaper articles using the concept of 'welfare tourism' appeared following the announcement of the Dutch dep-

91. Raad van State, 19 April 2012, ECLI:NL:RVS:2012:BW4915; Rechtbank Den Haag, 11 June 2013, ECLI:NL:RBDHA:2013:CA3247.
92. The answer to this question is largely based on a Dutch news database search in LexisNexis Academic NL. The search word EU-burgers (EU citizens) resulted in 934 hits, from November 1994 till July 2013. The choice for newspapers as source is based on the fact that print media remain a crucial line of communication See R. Koopmans and P. Statham, 'Theoretical Framework, Research Design and Methods' in R. Koopmans and P. Statham (eds), *The Making of a European Public Sphere. Media Discourse and Political Contention*, Cambridge University Press, 2010, pp. 34-59, at p. 50.
93. Only 9 out of 934 articles.
94. A search in the digital archives of *NRC Handelsblad* resulted in 5 editorials containing the term 'EU citizens'.
95. Search term 'Meldpunt Polen' resulted in 997 hits, but only 15 of these also included the term 'EU citizens'.
96. Asscher in 2013, Leers in 2011, Verdonk in 2004.

uty minister of justice to address, together with Germany, Austria, and the United Kingdom, their concerns about the abuse of welfare benefits. Coverage was not front-page, and included the remark that the number of abuses was unknown. Welfare tourism as such has been covered before, notably when previous Dutch ministers announced to implement stricter controls 'to prevent welfare tourism'.[97] The launch of a website to collect complaints on migrants from Middle and Eastern Europe by the right-wing PVV, an opposition party which at the time was tolerating the minority government, led to front page coverage, but here the focus was especially on the position of the Dutch prime minister, who refused to formally distance himself from the website. The position of labour migrants from Middle and Eastern Europe figures regularly in Dutch newspapers, and is usually connected to news coverage of local discussions on housing of labour migrants and perceived nuisance caused by migrants. In some newspapers, coverage of perceived negative issues related to EU citizenship (welfare benefit tourism, criminality) is not dealt with as linked to 'EU citizenship', but to migration from Middle and Eastern Europe. Family migration became an issue in newspapers when family reunification under Dutch law became more stringent, in 2004, and when the Court ruled in the Metock case in 2008. At that time, the deputy minister of Justice announced stricter measures against the so-called 'Belgium route' and newspapers reported on this route and the so-called 'Europe route', and on how Dutch attempts to strengthen family migration conditions in European directives were doomed to fail. Expulsion of EU citizens was covered in newspaper articles following the ECJ's ruling in Commission/Netherlands (C-50/06) on article 67 of the Aliens Act and the connection between criminal conviction and measure of expulsion, and several months later when newspapers covered expulsion of Roma by Italy.

In the 1990s, a dominant theme related to EU citizenship in Dutch newspapers was voting rights, especially voting rights for EU citizens in Belgium. Unsurprisingly, in 2000 and 2001 more was written on fundamental rights for EU citizens and on EU citizens' support for the euro. As of 2002, enlargement and labour migration become more salient issues, and in 2003, the first newspaper articles appeared on limiting labour migration from the new Member States. Since 2005, EU (labour) migration from Middle and Eastern European States has been the most dominant theme. Issues covered are (lack of) good housing, abusive practices, perceived nuisance, and expulsion. The

97. E.g. Minister Kamp in February 2012.

newspaper articles on this subject do not always use the term 'EU citizenship' or 'EU citizens', but often use nationality indications.

As to media influence on national public discourse, this was paramount for instance when in April 2013 a television newscast reported on a welfare benefit-draining scheme, in which Bulgarian nationals were transported to the Netherlands in order to falsely obtain a residence number. Subsequently, they were transported back to Bulgaria, while the schemers used their residence number to claim welfare benefits antedate. This fraud led to the near-downfall of the deputy minister of finance and to a project to revise the Dutch welfare benefit system. It seems that the focus of the national public discourse did quickly turn away from EU citizenship rules as source of the fraud towards political responsibility of Dutch politicians and badly designed and complicated Dutch legislation on welfare benefits. Apart from 'obvious' cases of influence on the national debate, national media might have influence through editorials (newspapers) or news frames (television), as politicians or activists pay close attention to these. It is argued that framing strategies may have an impact on how salience of an issue is enhanced.

One of these strategies is to use the economic consequences frame,[98] which might explain the dominance of public discourse on the cost-benefit of EU-citizenship for Dutch society. Another example could be the use of specific nationalities (Polish, Romanian, Bulgarian) when 'problems' of migrant EU citizens are reported, or when newspaper headlines use words like 'large flux' or 'flood' of immigrants form Eastern Europe. It could be influential on the perception of pros and cons of EU citizenship in The Netherlands, but the writers of this report do not have the expertise to analyse the existence of such influence.

98. De Vreese, C., Framing Europe. Television News and European Integration, Aksant, 2003, p. 122.

POLAND

Monika Szwarc[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

1. Directive 2004/38/EC is implemented by the 'Act on entry, stay, and departure from the territory of Republic of Poland of EU citizens' and their family members ('*Act on EU citizens' and their family members*', enacted in 2006). The *Act on EU citizens' and their family members* defines 'family member' as:

- spouse being the EU citizen,
- direct descendant of the EU citizen or of his spouse, under the age of 21 or dependent of the EU citizen or his spouse and
- direct relatives in the ascending line, dependent of the EU citizen or his spouse [implementation of art. 2 point 2) of Directive 2004/38/EC].

Partnerships or any other form of cohabitation different from marriage are not recognized in the Polish legal system, thus a 'partner' is not recognized by the law on EU citizens transposed into national law.

2. The family members (as defined above) are beneficiaries of the right of entrance and residence under the *Act on EU citizens' and their family members* when they accompany the EU citizens or join them [implementation of art. 3(1) of Directive 2004/38/EC]. This condition applies without distinction to all EU citizens' family members who are EU citizens and third country nationals.

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3. In the present state of law, Article 3(2) of Directive 2004/38/EC, which obliges the Member States to facilitate entry and residence of family members other than explicitly mentioned in article 2 point 2), has not been implemented into Polish legal system. However, the Polish Parliament proceeds a considerable amendment of the *Act on EU citizens' and their family members*, which contains proposal of a provision implementing Directive 2004/38/EC in this aspect. The proposed provision will enable the national administration to grant a right of residence in the territory of Poland to family members (other than these explicitly mentioned above) who accompany the EU citizens or join them, for the reasons of: 1) existing constant and stable relations between them, 2) financial dependence, or 3) serious health grounds, which necessitate a personal care over the EU citizen, residing in the territory of Poland.

It will be possible to grant a right of residence to family members of EU citizens (amendment of *Act on EU citizens' and their family members*) and family members of non-EU citizens (new *Act on foreigners)*.

It is also worth mentioning that the legal structure of proposed provisions is such that the national administration will not be authorized to deny a right of residence to a person, when the above-mentioned conditions are met. This means that the margin of discretion of national administration will be limited only to verification whether one of the above-mentioned conditions is met. A potential denial of right to residence in the territory of Poland must take a form of administrative decision and is subject to a judicial control by the administrative courts.

Although definition of a 'partner' does not appear explicitly in the draft provisions, the introduction of a condition of 'existing constant and stable relations between them' aims at enabling the Polish administration to facilitate stay of 'partners' from other Member States, even if the Polish legal system does not recognize partnerships as such.

4. EU citizen may enter the territory of Poland with a valid travel document or any other valid document stating his identity and nationality, there are no visas or equivalent formality requested [implementation of article 5(1) of Directive 2004/38/EC].

Family members who are not EU citizens may enter the territory of Poland with a valid travel document and visa (when necessary). From the visa requirements are exempted:

– third country nationals, who benefit from a partial or total resignation of visa requirement according the Regulation 539/2001

– family members who are third country nationals, holding a valid document which is equivalent to the documents of residence or permanent residence, according to the *Act on foreigners* (which is the national law implementing i.a. the EU directives concerning the third country nationals).

These provisions implement article 5(2) of Directive 2004/38/EC. However, the Polish administration is entitled to check, whether the marriage is not fictional.

5. There are no specific provisions aimed at implementing the procedural safeguards, stemming from Article 5(4) and (5) of Directive 2004/38/EC. Yet, the structure of relevant provisions of the *Act on EU citizens' and their family members* is such as to enable the national administration to demand additional information or relevant documents from an interested person. The *Act on EU citizens' and their family members* requires such person to have a valid travel document or any other document, confirming his/her identity and citizenship (EU citizen) or valid travel document (a family member). When an application for a residence card is submitted to the national administration – an interested person is obliged to present a valid travel document, but an EU citizen may present any other document certifying his/her identity and citizenship. This means that the national administration is obliged to accept any document, which will prove the identity and nationality of an interested person. In any case, a denial to grant the right of residence takes form of an administrative decision, which is subject to judicial control by the administrative court.

6. There is no evidence of particular problems with application of these provisions in the national courts. There is interesting judgment of the Supreme Administrative Court[2] in a case concerning the expulsion decision of a third country national (as a result of criminal conviction for possession of drugs, which was a serious threat to public order), who was a spouse to a Polish citizen.[3] The Polish legal system reflects the dichotomy existing in the EU law, consisting in different regulation of third country nationals being the family members of EU citizens. A third country national, who is a family member of

2. The judicial control of administrative decisions in Poland is based on two instances: I instance of control is effectuated by the regional administrative courts and the II instance is effectuated by the Supreme Administrative Court, the rulings of which are final.
3. Judgment of 24.11.2008, II OSK 1344/07.

EU citizen moving from home Member State to host Member State, falls under the provisions of Directive 2004/38/EC (when he accompanies or joins an EU citizen). These provisions are implemented by the *Act on EU citizens' and their family members.* However, a third country national, who is a family member of EU citizen who has never exercised his/her right of free movement (in this case a Polish citizen who resides in Poland), falls under national provisions concerning third country nationals. These EU provisions are implemented by the *Act on foreigners.* The most important difference of treatment which stems from this dichotomy is that the deportation of a third country national, who acquired the right of permanent stay in Poland, is allowed – according to the provisions of *Act on EU citizens' and their family members* – only on the grounds of 'serious threat' to public order or security, whereas on the basis of the *Act on foreigners* – 'reasons of public order or security' are sufficient. In addition the *Act on foreigners* does not require the national administration to consider the particular personal and family situation as well as the existing link with the host Member State and a degree of integration of a third country national, before a deportation from the territory of Poland is ordered. The administrative decision in this particular case was based on relevant provision of the *Act on foreigners*, but the claimant argued that this provision breached i.a. the principle of equality as guaranteed by the Polish Constitution.

The Supreme Administrative Court rightly pointed out that the *Act on EU citizens' and their family members*, which implements Directive 2004/38/EC, applies only to the family members (EU citizens and non-EU citizens) of EU citizens, who accompany or join them. For this reason the *Act on EU citizens' and their family members* applies only to third country nationals who are family members of EU citizens who moved in and reside in Poland, but may not apply to family members of Polish citizens residing in Poland (case C-127/08 Metock was invoked in this respect).

Interestingly, then the Supreme Administrative Court analyzed the case in the light of the constitutional principle of equality. It stated that the situation of the third country national, who is a spouse of EU citizen residing in Poland is actually better that the situation of a third country national who is a spouse of a Polish citizen. This is a consequence of different relevant provisions: on the basis of the *Act on EU citizens' and their family members* in case of a third country national being a family member of EU citizen the national administration must consider additional circumstances (this reflects art. 28(1) of Directive 2004/38/EC); whereas on the basis of the *Act on foreigners* there is no such requirement. The Supreme Administrative Court ruled in this case that a condition of a 'serious threat to public order' which is a condition of

deportation in case of a third country national being a family member of an EU citizen, could be an example of 'reverse discrimination' of a third country national being a family member of a Polish citizen who is subject to a deportation decision only when this third country national would fulfill all conditions required for the permanent stay on the territory of Poland'. As the claimant could not prove that he had been a resident in Poland for the preceding 5 years before the deportation decision was issued he could not effectively argue that he was subject to reverse discrimination.

However, this case is an interesting example of the reasoning, because it in a way undermines the dichotomy which is a result of different EU law legislation.

Question 2

The *Act on EU citizens' and their family members* implements art. 27(1) of directive 2004/38/EC properly, as it excludes the denial of residence on purely economic grounds. There is no evidence that there ever been expulsion of EU citizens on purely economic grounds.

Question 3

1. A family member being EU citizen retains his right of residence in case of divorce, annulment of marriage [implementation of Article 13(1) of Directive 2004/38/EC], death, or departure from the territory of Poland [implementation of Article 12(1) of Directive 2004/38/EC].

As Poland does not recognize the partnerships or any other forms of cohabitation, the termination of registered partnership mentioned in Directive 2004/38/EC was not implemented into Polish law.

2. A family member being a third country national retains the right of residence in the following cases:

a) death of EU citizen, if he has been residing in the territory of Poland for the period of at least on year before the death of EU citizen [implementation of Article 12(2) of Directive 2004/38/EC]
b) divorce or annulment of marriage with EU citizen, when
   i) the marriage lasted at least three years before the initiation of the procedure of divorce or annulment, including 1 year of residence of EU citizen in the territory of Poland

ii) as an ex-spouse of EU citizen has custody of the EU citizen's children, by agreement between spouses
iii) there are particularly important circumstances, including the domestic violence during the marriage was subsisting
iv) as an ex-spouse of the EU citizen he has a right of access to a minor child, by agreement between spouses or by court's order; provided that from the agreement or an order in stems that the visit must take place in the territory of Poland

[implementation of Article 13(2) of Directive 2004/38/EC].

3. In case of death or departure of EU citizen from the territory of Poland, a child of EU citizen, residing in the territory of Poland and enrolled at school or university, and his parent having custody of that child, retain the right of residence until the completion of education or studies [implementation of Article 12(3) of Directive 2004/38/EC]. It needs to be underlined that the relevant provision of the *Act on EU citizens' and their family members* takes into account widely understood education, both obligatory education at school as well as studies, which seems to be connected with higher education at the university.

4. Article 14 (1) of Directive 2004/38/EC, which grants the right of residence up to 3 months under condition that persons do not become an unreasonable burden on the social assistance system of the host Member State, is not explicitly implemented into the *Act on EU citizens' and their family members*. According to the national law EU citizens and their family members may reside in the territory of Poland up to 3 months without necessity to fulfill the conditions laid in the *Act on EU citizens' and their family members* itself. At the same time it must be stated that from other provisions of national law (referred extensively in the answer to Question 5) the right to social aid benefits is granted to EU citizens or their family members when they reside in the territory of Poland. So the non-discriminating treatment is granted only to these EU citizens, who obtained document of residence (residing at least 3 months and thus are obliged to obtain a residence card), which does not go beyond the margin of discretion left to the Member States under Article 14(1) of Directive 2004/38/EC.

5. Under the *Act on EU citizens' and their family members*, at the submission of an application for a residence card, EU citizen is obliged to present documents certifying the fulfillment of relevant conditions (which are implemen-

tation of conditions from Article 7 of Directive 2004/38/EC) and declare that he possesses sufficient financial sources for himself and his family members not to become a burden on the social assistance system. Proof of having sufficient financial sources may include in particular a credit card or a certification of having funds at a bank or other financial institution confirmed by a seal and a signature of an authorized officer of the bank or institution, issued one month before submitting an application for registration of a stay at the latest.

The national administration is entitled to verify, whether the condition of sufficient resources is fulfilled, before a residence card is issued. However, once the card of residence is granted, it may not be retired on economic grounds. The residence card may be annulled only in exceptional cases, namely when it was obtained as a result of submitting false documents or fraudulent information.

The expulsion for economic reasons is not possible under the *Act on EU citizens' and their family members,* including the potential reason consisting of 'recourse to the social assistance system'. The analysis of the relevant national provisions leads to the conclusion that in general EU citizens, who are lawfully resident in the territory of Poland, are entitled to social aid as if they were Polish citizens. The expulsion from the territory of Poland is allowed, under the *Act on EU citizens' and their family members,* only on the grounds of public order, public security, and public health (see answer to Question 6 below) [implementation of Article 14(2) of Directive 2004/38/EC].

6. In the present state of law there is no specific provision implementing Article 14(4) of Directive 2004/38/EC, which obliges Member States to take into consideration a particular situation of a job-seeker. Yet, the proposed amendment to the *Act on EU citizens' and their family members,* which is proceeded in the Polish Parliament, aims at introducing a provision, which will enable the residence in the territory of Poland for a period longer that 3 months to an EU citizen 'who entered the territory of Poland for the purposes of seeking for a job – for a period of up to 6 months, unless after that period of time he can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

7. The procedural safeguards, mentioned in article 15 of Directive 2004/38/EC, are fully implemented into the *Act on EU citizens' and their family members.* Denial of residence card or annulment of residence card takes form of an administrative decision and may be subject to judicial control before the administrative court.

Question 4

1. The provisions of Directive 2004/38/EC concerning the right of permanent residence are properly implemented. EU citizen acquires the right of permanent residence after 5 years of continuous stay in the territory of Poland, without any other conditions to be fulfilled.

A family member who is a third country national acquires a right of permanent residence after 5 years of continuous stay in the territory of Poland with the EU citizen [implementation of Article 16(2) of Directive 2004/38/EC].

The residence in the territory of Poland is considered to be 'continuous' when the interruptions do not exceed in total 6 months in a year. The 'continuous' residence is not considered as interrupted, if the territory of Poland is left for a period longer than 6 months in a year because of: carrying out a compulsory military service or important personal situation, in particular pregnancy, childbirth, sickness, studies, vocational training, or delegation requiring stay outside Poland, provided that such period is no longer that 12 consecutive months [implementation of Article 16(3) of Directive 2004/38/EC].

In addition the *Act on EU citizens' and their family members* states that the execution of a decision on expulsion of EU citizen shall be considered as discontinuation of the residence in the territory of Poland [implementation of Article 21 of Directive 2004/38/EC].

2. The *Act on EU citizens' and their family members* also implements Article 17 of Directive 2004/38/EC concerning the possibility of acquiring the right of permanent residence before 5 years-period in the territory of Poland.

3. Article 18 of Directive 2004/38/EC considering the particular situation of family members being the third country nationals is also properly implemented into the *Act on EU citizens' and their family members.* A family member who is a third country national, who has resided continuously in the territory of Poland for a period of 5 years and who retained his right of residence (under the provision implementing article 12(2) and 13(2) of Directive 2004/38/EC) – acquires the right of permanent residence.

4. As to administrative formalities, which may be required under national law in accordance with Articles 19-21 of Directive 2004/38/EC, it should be noted that they are mostly implemented.

The permanent residence card shall be issued upon application by the interested EU citizen or a family member of EU citizen. The permanent resi-

dence card for the EU citizen shall be issued as soon as possible, and for the family member – within maximum 6 months of the submission of the application.

A permanent residence card is valid for 10 years. The new document shall be issued upon the application of EU citizen or family member [implementation of article 19 and 20 of Directive 2004/38/EC].

The permanent residence card for a family member may be annulled when the family member not being EU citizen left the territory of Poland for a period exceeding two consecutive years [implementation of Article 20(1) of Directive 2004/38/EC].

There is no evidence on any disputes on the interpretation or application of these provisions before national courts.

Question 5

1. There is no general provision in the *Act on EU citizens' and their family members* implementing Article 24(2) of Directive 2004/38/EC and the answer to this question necessitated the analysis of the Polish laws concerning different forms of social assistance, namely: forms of social aid (point 2), unemployment allowance (point 3), and financial aid for students (point 4). The retirement pensions and family allowances were not considered, because they fall in the scope of application of the EU system of coordination of social security systems.

2. The social benefits may be granted under:

1) *Act on social aid* – which is addressed to persons, who are in difficult financial situation;
2) *Act on social pension* – which is addressed to persons, who became incapable of working before they could even enter the labour market.

In both cases the benefits are granted to EU citizen having place of residence and being actually present in the territory of Poland, and having right of residence or right of permanent residence (in the meaning of Directive 2004/38/EC), under condition that the objective requirements are met (difficult material situation of an applicant). The structure of both *Acts* is similar – they introduce: formal/administrative conditions (the right of residence or permanent residence, granted on the basis of the *Act on EU citizens' and their family members*, implementing Directive 2004/38/EC) and factual condition of 'having place of residence' and 'actual presence in the territory of Poland'.

The Constitutional Tribunal interprets these clauses in the following way: 'having place of residence in the territory of Poland' means the presence with the intent of permanent residence; whereas 'actual presence in the territory' – is only factual situation without the intent of the interested person to make this place her center in life and interest.[4]

It seems that in the context of non-discrimination these national provisions do not exceed the margin of discretion left to the Member States in Article 24(2) of Directive 2004/38/EC. The social benefits are granted to EU citizens who reside in the territory of Poland and it is not required to prove at least 5 years residence (permanent residence). This means that Poland did not decided to limit in more restrictive way the categories of beneficiaries. Probably for this reason there is no evidence of any disputes concerning the 'real link' before national courts, (but see 'real link' argument in the context of Polish citizens moving within EU, answer to the Question 7).

3. As to job-seekers, the *Act on promotion of employment* simply states that EU citizens who intend to find employment are entitled to benefits granted under this *Act*, after fulfilling the objective criteria. There is no particular demand of minimum period of stay in Poland. Still, it must be remembered that the most important unemployment allowance may be granted after an interested person has worked for the minimum 365 days in the preceding 18 months in the territory of Poland. This means that any EU citizen may be registered in the administration responsible for the employment immediately after he/she has arrived in the territory of Poland, but the right to allowance may be granted only after an interested person has worked for some time before. The right to allowance which was obtained in other Member States is realized under the EU system of coordination of social security systems.

4. It seems that the national provisions make a distinction in the meaning of Article 24(2) of Directive 2004/38/EC only in respect to students and the Polish law may be considered in the framework of this provision. According to the *Act on Higher Education* EU citizens and their family members having the right of permanent residence should be treated in the same way as Polish citizens, including the access to all forms of financial aid granted students (it includes in particular social pension for persons in difficult financial situation, pension for handicapped persons as well as allowance in all other unex-

4. See to this effect judgment of the Constitutional Court of 25.06.2013, P 11/12, which is also referred to in the answer to question 7.

pected circumstances, resulting in the difficult financial situation of a beneficiary). All other EU citizens and their family members (thus those who hold a residence card) may undertake studies in Poland, when they have sufficient financial sources, with no right to any form of financial aid as mentioned above. It seems that this is in accordance with the exemption granted to Member States under article 24(2) of the Directive 2004/38/EC.

Question 6

1. Articles 27 and 28 of Directive 2004/38/EC were implemented into *Act on EU citizens' and their family members.* An expulsion decision of an EU citizen (or a family member who is not EU citizen) may be lawfully issued only when the residence of a person concerned in the territory of Poland constitutes a threat to public order or public security or public health [implementation of Article 27(1) of Directive 2004/38/EC].

When a person concerned benefits from the right of permanent residence a decision of expulsion may be issued only when his/her residence in the territory of Poland constitutes a serious threat to public order or public security [implementation of Article 28(2) of Directive 2004/38/EC].

When an EU citizen concerned with a possible expulsion, has resided in the territory of Poland for a period exceeding 10 years, the expulsion decision may be issued only when his/her residence in the territory of Poland constitutes a threat for the security of the state or public security as a consequence of a threat to peace, humanity, sovereignty of Poland or as a result of terrorist activities [Implementation of Article 28(3) of Directive 2004/38/EC].

An expulsion decision shall be issued with respect to principle of proportionality and be based exclusively on the individual conduct of the person concerned, which constitutes genuine, present, and sufficiently serious threat to the social interest. Previous criminal conviction shall not constitute a sufficient basis for a decision of expulsion. Threats mentioned in the *Law* may not be invoked for economic reasons [Implementation of Article 27(2) of Directive 2004/38/EC].

2. The judicial practice of administrative courts seems to properly reflect the understanding of these phrases in the light of EU law (even if particular rulings of the ECJ are not cited in this context). There is a series of cases where the administrative courts reviewed administrative expulsion decisions of EU citizens on the ground that an interested person was subject to criminal conviction and imprisonment (in particular for sexual abuse of minors).

The administrative courts considered in particular that expulsion from the territory of Poland of EU citizen who has not a permanent residence therein may be lawfully based only when strict requirements are met (these constituting the national implementation of Article 27 of Directive 2004/38/EC). A decision taken by the national administration must be exercised with a certain margin of appreciation left to the national immigration administration. However, administration courts consequently underline that national administration is obliged to respect specific requirements stemming from provisions implementing Article 27(2) of the Directive 2004/38/EC, in particular the principle of proportionality and individual conduct of a person concerned.

For these reasons the administrative courts in several cases annulled administrative decisions of expulsion for the reason of breaching the above mentioned provisions of national (and EU) law. For example, in judgment of 26.04.2010 the Regional Administrative Court in Warsaw ruled that decision of expulsion was illegal, because it was based on the information gathered in the criminal proceeding against interested person, which took place 5 years before the administrative proceedings leading to expulsion. The court was of the view that the national administration could not rely on the experts' opinions expressed in the criminal process, which resulted in 5 years of imprisonment, but should – after the custodial penalty was terminated – exercise its own analysis of the situation and check, whether this EU citizen still constitutes a real threat for the social interest and that this threat is serious enough to justify an expulsion decision.[5] In another case the Regional Administrative Court in Warsaw ruled that the national administration illegally issued a decision of expulsion, while an interested EU citizen was still in prison as a consequence of the criminal conviction and that in this case the decision of expulsion was in breach of national (and EU) law, because it was issued as a means of individual prevention,[6] which is generally prohibited.

There have been no disputes before administration courts so far, concerning the difference in treatment between EU citizens – residents in the territory of Poland and those who hold the right to permanent residence.

5. Judgment of the Regional Administrative Court in Warsaw of 26.04.2010 r., V SA/Wa2047/09; judgment of the Regional Administrative Court in Warsaw.
6. Judgment of the Regional Administrative Court in Warsaw of 11.05.2010, V SA/Wa 1451/09.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

1. The rights of individuals, guaranteed by Treaties, were early recognized by the Constitutional Tribunal. The Constitutional Tribunal recognized the principle of non-discrimination, enshrined in Article 18 TFEU (Article 12 TEC), in its ruling on the Accession Treaty.[7] In the particular procedural context of this case (review of constitutionality of the international treaty) the Constitutional Tribunal ruled on the relation between EU standard on equality (Articles 18 and 19 TFEU (Articles 12 and 13 TEC respectively) and constitutional standard enshrined in Articles 32 and 33 of the Polish Constitution, establishing the general principles on equal treatment. The Constitutional Tribunal confirmed that there is no conflict between constitutional and European standards on the equality (as claimed the appellants).

2. Article 21 TFEU is taken into consideration by national courts in various context of the cases. Analysis of the jurisprudence of the regional administrative courts and the Supreme Administrative Court leads to conclusion that Article 21 as well as TFEU provisions on internal market freedoms are effectively taken into account by national judges, in particular in cases concerning the disputes with the tax authorities.

2.1. The case *Rüffler* concerned a dispute of a German national, residing in Poland and receiving a German retirement pension. The dispute with the Polish tax administration was raised on the basis of the national tax provision, which made it impossible to grant to Mr *Rüffler* a reduction of income tax by the amount of health insurance contributions paid in another Member State (Germany), although such a reduction is granted to a taxpayer whose health insurance contributions are paid in Poland. The decision of tax administration, refusing him a reduction, was reviewed by the Regional Administration Court in Wroclaw, who raised doubts as to the conformity of the provision in question with EU law and referred a question to the ECJ. The Court of Justice confirmed the doubts of the national court, ruling that:

'*Article 18(1) EC [Article 21(1) TFEU] precludes legislation of a Member State which makes the granting of a right to a reduction of income tax by the amount of health insur-*

7. Judgment of 11.05.2004, K 18/04.

ance contributions paid conditional on payment of those contributions in that Member State on the basis of national law and results in the refusal to grant such a tax advantage where the contributions liable to be deducted from the amount of income tax due in that Member State have been paid under the compulsory health insurance scheme of another Member State.'[8]

The national tax provision was amended after this judgment and also as a consequence of the judgment of ECJ in case *Filipiak* and judgment of the Constitutional Tribunal referred to in point 2.2.

2.2. The case *Filipiak* concerned a dispute of a Polish national who was subject to unlimited tax liability in Poland with the national tax administration, which was raised on the basis of the national tax legislation on income tax. The national provisions made it impossible to grant entitlement to tax advantages in respect of the payment of social security and health insurance contributions in the tax year, in the case where the contributions were paid in a Member State other than the State of taxation, even though such tax advantages are granted to taxpayers whose contributions are paid in the Member State of taxation. As Mr Filipiak paid the respective social security and health insurance contributions in the Netherlands and could not include these expenses in his year tax declaration he brought a case to the Regional Administrative Court in Poznan, who referred a question to the ECJ. The reasoning of the Regional Administrative Court, who raised doubts as to the conformity of the national tax provision with the EU law, in particular Article 49 TFEU (Article 43 TEC), was confirmed by the ECJ who ruled that:

'*Articles 43 EC and 49 EC preclude national legislation under which the possibility for a resident taxpayer to obtain, first, a deduction from the basis of assessment in the amount of social security contributions paid in the tax year and, second, a reduction of the income tax which he is liable to pay by the amount of health insurance contributions paid in that period, exists solely when those contributions are paid in the Member State of taxation, while such advantages are refused in the case where those contributions are paid in another Member State, even though those contributions were not deducted in that other Member State*.'[9]

It is interesting to see that when this case was pending before the ECJ, the national tax provision in question was also reviewed by the Constitutional Tribunal. In its ruling of 7.11.2007 (so long before the judgment of the ECJ) the Constitutional Tribunal ruled that this provision was in breach of the principle

8. Judgment of 23.04.2009, C-544/07 Rüffler.
9. Judgment of 19.11.2009, C-314/07.

of equality, guaranteed by Article 32 of the Constitution and thus declared it invalid[10] and the national legislation had to be amended.

2.3. The Supreme Administration Court also reviewed an administrative decision, which was issued on the basis of the national legislation, enabling to reduce the contributions liable of the expenses for the education of a child of a tax-payer only when they were paid to the Polish education establishment, with exclusion of the education expenses paid abroad. The dispute between a tax-payer and the tax administration was decided first by the Regional Administrative Court, which properly considered Article 21 TFUE as a standard of control for the national legislation. During the review procedure the Supreme Administration Court considered that Article 21 TFEU was of application in this case and that in the light of the jurisprudence of the ECJ the national tax provision in question may indirectly discourage Polish citizens to exercise their right to free movement. It provoked a situation that the risk that a tax-payer will be deprived of the right to tax benefit may considerably influence a choice of the place, where a child of the tax payer should be educated. In this context, the Court remarked, the choice of school for a child outside the territory of Poland may be particularly important from the point of view of an EU citizen, who resides in Poland and for this reason he is subject to income tax in Poland.[11] However it must be underlined that the dispute in this case was raised on the basis of provisions in force in 2007. During the proceedings the provisions in question were amended with the effect from 1 January 2009 in order to bring the national legislation into conformity with the EU law requirements.

2.4. Article 21 TFEU was also taken into consideration by the Supreme Administration Court in the review of the administrative decision on the legacy and donations tax.[12] The appellant claimed in this case that i.a. the national taxation law, stating that acquisition of property situated abroad by an acquirer holding Polish citizenship or having a permanent residence in the territory of Poland, breaches Article 21 and 63 TFEU. The Supreme Administrative Court was thus called to consider whether the national tax provision constitutes a breach of EU law, when it does not differentiate the situation of a Polish citizen (whether he is a resident or not) and at the same puts a tax obligation on a resident not being Polish citizen. The Supreme Administrative Court referred to the jurisprudence of the ECJ on Article 21 TFEU, but also to the ECJ ruling in case *Turpeinen* on taxation. On the basis of these consid-

10. Judgment of 7.11.2007, K 18/06.
11. Judgment of 26.09.2011, II FSK 546/10.
12. Judgment of 29.08.2012, II FSK 1236/11.

erations the Supreme Administration Court took the view that national provision under review does not breach the EU law, in particular Article 21 TFEU.

3. There is also interesting jurisprudence of the Supreme Court[13] and the Constitutional Tribunal in cases concerning the situation of Polish citizens, who exercised the right of free movement and moved into another Member State. Article 21 TFEU is mostly considered in cases where the Polish legislation grants particular social benefit, but limits the categories of beneficiaries on the ground of solidarity clause.

3.1. The most known case is *Nerkowska,* a case initiated before the District Court in Koszalin by a Polish citizen, residing in Germany. The case concerned the interpretation of Article 5 of the *Act on provision for war and military invalids and their families*, which stipulated that the benefits provided for by that Act are to be paid to the person entitled to them whilst he-she is resident in the territory of Poland. In the preliminary ruling, being a consequence of a reference made by the court in Koszalin, the ECJ ruled that '*article 21(1) TFUE is to be interpreted as precluding legislation of a Member State under which it refuses, generally and in all circumstances, to pay to its nationals a benefit granted to a civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State*'. As a consequence of this ruling, the questioned national provision was repealed with effect from 1.01.2010.

Even before this provision was eliminated from the national legal system, the conclusion of the ECJ in case *Nerkowska* was properly applied by the Supreme Court reviewing a similar case. On 8.12.2009 the Supreme Court ruled that the denial of granting the disability pension for a person being a civilian victim of war was unlawful.[14]

3.2. The ECJ ruling in case *Nerkowska* was also invoked by the Constitutional Tribunal in proceedings on constitutionality review of a provision contained in Act *on social pension* (referred to in answer to question 5), which stipulates that a social pension may be granted if a potential beneficiary has a place of residence and is actually present in the territory of Poland. This provision was subject to constitutionality review by the Constitutional Tribunal in the light of the constitutional principle of equality (Article 32(1)) and the right of access to social security scheme (Article 67(1)).

13. The Supreme Court is a last instance court in the system of common courts (competent for civil, criminal, and labour cases).
14. Judgment of 8.12.2009, I BU 6/09.

In its reasoning the Constitutional Tribunal stated that the system of social pension is based on the principle of social solidarity to larger extent than the national system of retirements and pensions, as the social pension is granted to persons who have never worked, because their incapability existed before they could ever enter the labour market. It noticed that Polish law intends to limit the number of persons entitled to this benefit only to those who fulfill the objective criteria and who are bound by the 'sufficiently close link with the Polish society and state'. In consequence, according to the Constitutional Tribunal the requirement of 'having the place of residence and actual presence in the territory of Poland' constitutes the reflection of the degree of integration of these persons with the Polish society – in this connection the Constitutional Tribunal invoked *mutatis mutandis* the ECJ judgment in *Nerkowska.*

At the same time the Constitutional Tribunal was of the opinion that the principle of social solidarity does not require that the potential beneficiary was integrated to this degree with the Polish society, because the link of citizenship *ex definitione* constitutes the link between the person and the Polish State. The Tribunal did not analysed the requirement of having place of residence but only the requirement of actual presence and only in this second aspect, this judgment should be referred to. The Constitutional Tribunal did in fact take into consideration the reality of free movement of persons in the EU and accepted that Polish citizens may move freely in the EU. According to the judges the requirement of having the residence in the territory of Poland reflects the sufficient degree of integration with the Polish state and society, because this place of residence is intended to be for an interested person the center of life interests. Putting on these persons additional burden of actual presence in the territory of Poland is not proportionate to the principle of social solidarity, because the requirement of having a place of residence is sufficient in order to meet requirements of this solidarity.

In addition the Tribunal remarked that the requirement of actual presence is not in conformity with the aim of the right to social pension, because it actually demands the permanent presence in the territory of Poland – resulting with the loss of entitlement to this pension even in case of temporary presence on the territory of any other state, for example for studies. What is more, in the opinion of the Tribunal this requirement makes it impossible for the beneficiaries to exercise the right of free movement, which is guaranteed by EU law.

Question 8

1. According to Article 34(1) of the Constitution of Republic of Poland (1997) Polish citizenship may be acquired by birth to parents who are Polish citizens (which is the reflection of *ius sanguinis* principle*)*. Other forms of acquisition of Polish citizenship are defined in the *Act on Polish Citizenship* (2009, entered into force in 2012). Article 34(2) of the Constitution guarantees that no one can be deprived arbitrarily of Polish citizenship. This is only possible when an interested person decides to renounce Polish citizenship.

The Constitution also states (Article 137) that it is the prerogative of the President of the Republic of Poland to confer Polish citizenship and to give consent to renounce Polish citizenship.

2. *Act on Polish Citizenship* (2009)[15] states the principle of continuity of Polish citizenship ('on the day of the entry into force of this Act, Polish citizens are considered to have acquired Polish citizenship as under relevant provisions in force', Article 2). Polish citizenship may be acquired: 1) by force of the law (*ex lege*, which means by birth); 2) through conferment; 3) through acknowledgement of citizenship; 4) through restitution of citizenship (Article 4 of the *Act on Polish Citizenship).*

Under *Act on Polish Citizenship* dual citizenship is not prohibited, but at the same time this *Act* reflects the principle of exclusivity of Polish citizenship. Namely according to Article 3 of the *Act on Polish Citizenship* a Polish citizen who is also the citizen of another country enjoys the same rights and is liable to the same duties in respect of Poland as any other person holding Polish citizenship only.

3. Loss of Polish citizenship is possible only when an interested Polish citizen expresses his/her will to renounce it (submits an application), and only upon consent of the President of the Republic of Poland (Article 46 of the *Act on Polish Citizenship).*

4. As to the judicial control of the actions undertaken by the Polish administration it must be stated that it depends on the mode of acquisition of Polish citizenship.

15. The 2009 Act on Polish Citizenship replace a statute adopted in 1962 – for a comprehensive historical background see A. Górny, D. Pudzianowska EUDO CITIZENSHIP OBSERVATORY. Country Report: Poland, revised and updated June 2013; http://eudo-citizenship.eu/country-profiles/?country=Poland (consultation 31.08.2013).

Firstly, conferment of Polish citizenship by the President of the Republic of Poland is entirely discretionary, because no objective conditions apply. This is the prerogative of the President to confer or refuse to confer Polish citizenship. As this is discretionary power of the President, which is exercised in the form of order, there is no judicial control whatsoever. The same by the way applies to the prerogative of the President to give or refuse consent to renouncement of Polish citizenship (also in the form of order, which is not subject to any judicial control).

Secondly, acknowledgement of Polish citizenship is exercised by the *Voivod* (who is a regional representative of the government-executive power), after objective criteria are met, in the form of an administrative decision. The objective criteria are precisely defined, for different categories of persons, including third country nationals possessing the status of long-term resident (in the meaning of directive 2003/109) and EU citizens possessing the right of permanent stay. The administrative decision issued by the *Voivod* may be subject to judicial control before administrative courts, but there is no evidence that there have been so far any disputes on this ground with EU law elements. However, it is worth noting that Article 30 of the *Act on Polish Citizenship,* which enumerates the conditions of acknowledgment of Polish citizenship, was subject to constitutionality's control by the Constitutional Tribunal. The Tribunal applied as a standard of control only Article 137 of the Constitution, but it recognized the 'EU integration circumstances'. Namely it considered that acquisition of the Polish citizenship may seem more attractive for third countries nationals nowadays, when Poland is a Member State of the EU and acquisition of the Polish citizenship automatically leads to acquisition of the EU citizenship. Article 30 of the *Act on Polish Citizenship* was declared in conformity with the Constitution.

Thirdly, restitution of Polish citizenship is exercised by the Minister of the Interior. The restitution may be exercised upon application if Polish citizenship had been lost before 1.01.1999 under provisions which were in force since 1920 (this is Act from 1920, then Act from 1951 and Act from 1962), when Polish citizens could also be deprived of Polish citizenship for political reasons. In the present state of law restitution of Polish citizenship is exercised in the form of an administrative decision, which may be subject to judicial control.

5. Referring now to the case *Rottmann* it is necessary to consider two different situations: 1) a deprival of citizenship as a consequence of acquisition of citizenship of another country (Austrian point of view); 2) possible annulment of a decision, which was issued illegally (German point of view). The

first situation could not occur in the Polish state of law, because dual citizenship is admissible and there is no 'sanction' for acquiring citizenship of any other country. Yet, it must be remembered that principle of exclusivity of Polish citizenship applies. As to the second situation it must be concluded that Polish administrative court could be faced with a similar dispute as in case *Rottmann* before German court. Administrative decisions issued on the basis of provisions of *Act on Polish Citizenship* may be subject to judicial decisions and in general (without entering into details) administrative court is authorized to annul an administrative decision which was issued on the basis of fraud or crime or fraudulent information. However, it seems that there is no need to introduce any amendments to the *Act on Polish Citizenship* as a consequence of the ECJ's ruling in case *Rottmann* because this was rather a case of application of national law in a concrete individual case and not a case of a general non-conformity of national law with EU rules on EU citizenship. What is more, in *Rottmann* the ECJ explicitly held that a Member State is entitled to withdraw from a citizen of the Union the nationality of that State acquired by naturalization when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality. In the Polish context application of the principle of proportionality would also be rather the role of the administrative court in the course of judicial control than the role of the national legislator to amend *Act on Polish Citizenship.*

Political rights of EU citizens

Question 9

Directive 93/109 was implemented on 1 March 2004, even before the accession to the EU, by the *Electoral law to the European Parliament* (2004). There were no derogations envisaged. This *Electoral law to the European Parliament* granted rights for EU citizens not holding Polish nationality to vote and to stand as a candidate in EU elections held in Poland.

The Constitutional Tribunal considered the EU parliament elections twice. First, in more general way the Tribunal expressed his view in case K 18/04 concerning the Accession Treaty, saying that the Polish constitutional legislator may, in a sovereign manner, regulate the process of elections to State authority organs and elected organs of local self-government within the territory of Poland, but such regulations must take account of the Treaty principle,

arising in consequence of the existence of citizenship of the European Union, that the right to vote and to stand as a candidate at European Parliament elections is enjoyed by all European citizens within the territories of all Member States and not only by citizens of the State on whose territory the voting takes place.[16]

Secondly, the Constitutional Tribunal was asked to review the constitutionality of the *Electoral law to the European Parliament* implementing Directive 93/109/EC. These provisions were challenged before the Constitutional Tribunal as breaching Article 4(1) of the Constitution of the Republic of Poland which proclaims the principle of sovereignty of the Polish people.[17] This was an important case in which the Constitutional Tribunal presented its understanding of the role of citizenship, rights of EU citizens and the constitutional context of the EP elections held in Poland, even if it ruled that the *Electoral law to the European Parliament* was not in breach of national Constitution. First, the Constitutional Tribunal assumed that the Polish Constitution uses the notion of the Nation in a political, rather than an ethnic sense. The concept of the Nation denotes a community comprised of the citizens of the Republic. The Constitutional Tribunal remarked that the right of EU citizens to participate in EP elections, regardless of the Member State in which they reside, is one of fundamental rights stemming from the Treaties and recalled the EU acts concerning the EP elections, namely the Act of 1976 and Directive 93/109/EC. It also recalled that the challenged *Electoral law to the European Parliament* implements this EC Directive. Then it stated that the phrase 'members of the European Parliament are representatives of the Nations of the States of the European Union' contained in Article 4 of the *Electoral law to the European Parliament* should be understood in the sense that '*the constituency of the European Parliament is not a homogenous society, but rather a collective body comprising the various Nations of the Union's Member States. This, however, does not imply that the electoral rights in EP elections may only be exercised exclusively within the national community with which the person is bound by national citizenship*'.

Electoral Law to the European Parliament (2004) was replaced by the *Electoral Code* (from 1 August 20011), but no substantial changes to electoral rights of EU citizens were introduced. In the Polish legal system EU citizen is authorized to vote in EP elections in the territory of Poland when he

16. Judgment of 11.05.2005, K 18/04, http://trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf.
17. Judgment of 31.05.2004, K 15/04, http://www.trybunal.gov.pl/eng/summaries/documents/K_15_04_GB.pdf.

is 18 years old and has a place of residence in the territory of Poland. Other conditions are equally applied to Polish and EU citizens, because no right to vote for a person who was deprived of public rights, voting rights, or was incapacitated by force of a judicial decision.

The right to be elected in EP elections is granted to each person who has a right to vote, who is 21 years old and has resided for at least 5 years in the territory of Poland or in the territory of any other Member State of EU.

Article 6 of Directive 93/109/EC (before amendment by Directive 2013/1/EU) was implemented in such a way that a candidate to stand in EP elections, who is not a Polish citizen, shall submit a declaration that he does not stand in EP elections in any other Member State and a certificate issued by administration of the Member State nationality of which he holds, that he was not deprived the right to stand in EP elections in this country. Directive 2013/1 will necessitate amendments to the *Electoral Code.* Firstly, it puts much more emphasis on the cooperation between the Member States as regards the exercise of the right to stand in EP elections, in particular necessitates establishing a contact point in each Member State. Secondly, it introduces a new structure, when an interested person may be excluded from standing in EP elections. For that reasons the Polish law will be amended, the draft law is under preparation. The proposed amendments concern only procedural solutions, in particular establishing a contact point, required by the Directive 2013/1.

Question 10

Directive 94/80 was implemented on 1 May 2004, by the amendment to the *Local Electoral Law.* There were no derogations envisaged. This *Local Electoral Law* introduced right to vote and right to stand in local elections for EU citizens who are 18 years old and have residence in the territory of the concerned municipality, which is in conformity with the Directive 2004/90/EC. However additional condition was also introduced, that a person who intended to vote had to be entered in a permanent register of voters not later than 12 months before the date of elections. This amendment to *Local Electoral Law* was subject to constitutionality review twice.

First, the Constitutional Tribunal reviewed the issue of granting the right to vote and to be elected in municipal elections to EU citizens in the case concerning the constitutionality of the Accession Treaty. This was a case decided in the specific context of constitutionality control of the international

agreement, so the Constitutional Tribunal was authorized to review the Treaties in the light of the Polish Constitution.[18] In the context of the local elections the argument raised by the claimants based on the reasoning that art. 19 (1) TEC (art. 22(1) TFEU) breaches art. 62 (1) of the Polish Constitution, which states that a Polish citizen is entitled to vote in referendum, to elect the Presidents, deputies and representatives in local bodies when he turns 18 years old. This, in the opinion of appellants breached the Polish Constitution, because the citizens' rights granted to a Polish citizens are unlawfully extended to other persons, which limits the political rights guaranteed by the Constitution to Polish citizen.

Yet, the Constitutional Tribunal did not find the collision between the two provisions. It ruled that the right to vote and to be elected in the local elections, which is guaranteed in art. 22(1) TFEU do not breach art 62(1) of the Constitution. According to the Tribunal the Polish Constitution does not make the participation in a local community conditional upon the Polish citizenship. The participation in the local community depends only on a place of residence (center of life activities), which is the basic link with the community. The Tribunal invoke Directive 94/80/EC, which does not define the question of 'place of residence', and in consequence each Member State regulates in a sovereign way the issues of 'resident' and 'place of residence'. It also underlined that right to vote and to be elected in the local elections, which is granted under art. 22(1) TFEU is also the consequence of EU citizenship, the practical reflection of application the principles of non-discrimination as well as a consequence of the EU right to free movement and residence in the territory of any EU Members State. In addition, the Member States consent to establish free movement would be deprived full practical effect without the right to participate in local elections in the place of residence (and this with application of voting rights as established by the host Member State). The Constitutional Tribunal ruled that 'the right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19(1) of the EC Treaty) does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the State as a whole may not be adopted within local self-government (cf. Article 16 of the Constitu-

18. Judgment of 11 May 2005, K 18/04, http://trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf.

tion). Furthermore, granting foreign EU citizens the right to vote and to stand as a candidate at local elections does not contradict Article 62(1) of the Constitution, which guarantees Polish citizens the right to elect, inter alia, their representatives to organs of local self-government. The aforementioned constitutional right is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States. '

Secondly, the Constitutional Tribunal reviewed the provision of the *Local Electoral Law,* which made the right to vote and to stand in local elections conditional upon being entered, not later than 12 months prior to the date of vote, in the permanent register of voters kept in the respective commune.[19] A person who failed to obtain the respective registration by that deadline was not permitted to vote, nor stand as a candidate, in local elections within the territory of the respective commune. The Constitutional Tribunal decided this proviso was in breach of the Polish Constitution. In the context of EU citizens' political rights the Tribunal expressed the view that electoral rights of EU citizens not holding Polish nationality and residing permanently within the territory of any specific commune in Poland are not expressly envisaged in the Polish Constitution. However such rights constitute a consequence of Poland's obligations stemming from its EU membership, in particular the obligations specified in Article 19(1) TEC.

In the present state of law, the *Local Elections Law* was replaced by the *Electoral Code* (from 1 August 2011). See further answer to the next question.

Question 11

There are three levels of self-government in Poland and three directly elected organs respectively: 1) commune (*gmina*) – commune council; 2) district (*powiat)* – district council; 3) region (*województwo*) – regional assembly.

EU citizens are authorized to vote in elections for commune councils, district councils, and regional assemblies when they are 18 years old on the day of elections and reside on the territory of the respective community. But additionally, EU citizens are also authorized to vote in elections for executive organs of the communities on each level, who are elected by direct universal

19. Judgement of 20.02.2006, K 9/05, http://trybunal.gov.pl/eng/summaries/documents/K_9_05_GB.pdf.

suffrage: 1) head of commune (*wójt*); 2) mayor (*burmistrz)*; 3) president of the city. This regulation goes beyond Directive 94/80/EC.

EU citizens are also authorized to stand as a candidate in elections to elected organs of self-government: commune councils, district councils, and regional assemblies – which is implementation of Directive 94/80. Yet, they were not granted the right to stand as a candidate for the head of commune, mayor nor president of the city – this right is reserved only to the Polish citizens.

Question 12

There are no specific tensions in this area. There is a general ban to stand as candidate in elections for persons with criminal convictions.

Culture(s) of citizenship

Question 13

EU citizenship is being part of the constitutional culture – the rights stemming from the EU citizenship were recognized by the Constitutional Tribunal starting early on with the ruling on Accession Treaty. It is interesting to see that the Constitutional Tribunal reviews the national laws in the light of the constitutional standard, but at the same time the constitutional judges take into account particular circumstances issuing from the fact that Poland is a Member State of the EU and Polish citizens – exercise their freedom to move guaranteed by the EU law.

Polish citizens are more and more aware of their rights stemming from the fundamental status of EU citizens and they claim their rights before national courts. This pro-active approach is reflected by cases *Nerkowska* and *Filipiak,* where the national courts were then in a way called upon to apply TFEU. The rights of EU citizens residing in Poland are also effectively enforced as in case *Ruffler*.

The general impression is that in general national laws and regulations passed after the accession of Poland to the EU recognize the fundamental status of EU citizens, who choose Poland as a place of residence. The national law, which was enacted before the accession, and often even before the association with the Communities in early nineties of the XX century, happens to ignore the requirements stemming from the EU citizenship. Such examples

are still evidenced, for example the national law on political parties, which makes it impossible to found a political party by a person not having the Polish citizenship (at the moment the government prepares an amendment to this law). Due to proactive approach of individuals and the jurisprudence of the Constitutional Tribunal, administrative courts and common courts, including the Supreme Court, the particular national provisions, which do not take into consideration the requirements of the EU citizenship, are gradually amended.

It is also evident that the EU citizenship is subject to dynamic interpretation by the Court of Justice of EU and the national jurisdictions are called to respond to this interpretation in their judicial practice.

Question 14

There is no evidence that the national courts interpret the provisions of the Charter of Fundamental Rights. It seems that Polish courts are still quite reluctant to use the Charter as a ground for the interpretation of EU law. As was reported earlier the provisions of the TFEU are sufficient grounds for national courts to rule on conformity of national law with the EU law.

Question 15

National media are mostly not interested in the EU citizenship topics. After the accession of Poland to the EU a considerable number of Poles emigrated to EU Member States, mostly Great Britain and Ireland – countries which opened the labor markets just after the accession in 2004. The economic issues were the dominant topic in the reports in national media. It seems that media are more concerned with the European politics when the European Parliament elections are approaching, but also – mostly in the national context of who from the national parliament members will choose to stand in the European Parliament elections.

PORTUGAL

J.N. Cunha Rodrigues[1]

La citoyenneté *dans le cadre* de la Directive 2004/38/CE – La stabilité de résidences des citoyens de l'Union et des membres de leurs familles

Question 1

La directive 2004/38/CE a été transposée en droit interne portugais par la Loi 37/2006, du 9 août. La définition de « membre de la famille » figure à l'article 2 de cette loi. Selon ladite Loi, est partenaire celui qui vit en union de fait constituée aux termes de la loi de l'Etat d'origine du citoyen de l'Union et la personne avec laquelle le citoyen maintient une relation permanente dûment certifiée. En ce qui concerne le partenariat enregistré, la Loi 37/2006 en reconnaît l'existence à condition qu'il s'agisse d'une « relation permanente dûment certifiée par l'entité compétente de l'Etat membre de résidence ».

Du rapport de la Commission européenne au Parlement et au Conseil sur l'application de la Directive, il résulte que le Portugal a procédé à une transposition correcte de ces notions. Il en découle également que le Portugal est parmi les Etats membres qui reconnaissent aux couples du même sexe les pleins droits de libre circulation et séjour. Une étude élaborée par le « Serviço de Estrangeiros e Fronteiras – SEF », intitulée « Estudo REM 2012 » souligne l'existence en droit portugais d'un principe général d'égalité concernant le mariage et l'union de fait.

Le contenu de l'article 3 de la Directive a été transposé par l'article 3 de la Loi. Celle-ci s'applique à tout citoyen de l'Union qui se rend ou séjourne au Portugal et aussi à toutes les personnes correspondant à la notion « membre de la famille » qui l'accompagnent ou le rejoignent. Elle s'applique, d'autre part, aux personnes qui remplissent la notion de « tout autre membre de la famille », pour autant que, en termes généraux, elles soient à charge du citoyen de l'Union bénéficiaire du droit de séjour à titre principal, fassent partie

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du ménage de celui-ci ou soient à sa charge pour des raisons de santé graves. L'article 3, paragraphe 4, de la Loi 37/2006 s'applique aux nationaux des Etats de l'EEE et à la Suisse.

Enfin, le paragraphe 5 de l'article 3 de la Loi prévoit l'application de celle-ci aux membres de la famille des citoyens portugais indépendamment de leur nationalité.

L'article 4 de la Directive a été transposé par l'article 5 de la Loi 37/2206 de façon presque littérale. Les dispositions relatives aux documents d'identification et voyage figurent dans la Loi 33/99, du 18 mai, telle que modifiée par la Loi 7/2007, du 5 février, et par la Loi 83/2000, du 11 mai.

L'article 5 de la Directive a été transposé par les articles 4 et 5 de la Loi 37/2006. En application du paragraphe 5 de l'article 5 de la Directive, cette Loi exige que le membre de la famille originaire d'un Etat tiers signale sa présence sur le territoire portugais, le non-respect de cette disposition étant punissable selon la Loi des étrangers.

On n'a pas trouvé de jurisprudence relative aux différents types de relations familiales. De même, la question de savoir si les garanties procédurales prévues dans l'article 5 assurent une protection efficace n'a pas fait objet de décisions de justice. Ceci donne à penser que les autorités compétentes se livrent généralement à de bonnes pratiques.

Question 2

Selon les informations collectées auprès des autorités compétentes, jamais un citoyen européen n'a été expulsé du territoire portugais pour des motifs purement économiques.

Question 3

Il y a lieu de remarquer que, en ce qui concerne le maintien du droit de séjour des membres la famille en cas de décès ou de départ du citoyen de l'Union (article 12 de la Directive), la Loi portugaise (Loi 36/2007) est plus généreuse que la Directive. Tandis que cette dernière ne vise que le parent qui a effectivement la garde des enfants, la Loi portugaise comprend toute personne qui a cette garde (« garde effective »).

L'article 13 a été transposé par l'article 8 de la Loi 37//2006. En cas de divorce, annulation du mariage ou cessation d'union de fait, la Loi ne fait pas référence aux conditions de l'article 13, 2, de la Directive. Encore une fois, la Loi portugaise est plus favorable que la Directive.

L'article 9 a transposé l'article 14 de la Directive.

Il convient de signaler que la disposition du paragraphe premier de l'article 14 de la Directive n'a pas de correspondance dans l'article 9 de la Loi 37/2006. Celui-ci concerne seulement le droit de séjour de plus de trois mois. Ce silence peut être interprété comme signifiant que la nature même du droit de séjour jusqu'à trois mois implique implicitement la condition prévue à l'article 14, 1, de la Directive.

L'article 15 de la Directive a été transposé par l'article 9, paragraphes 5 et 6 de la Loi 37/2006.

Aucune jurisprudence n'a été trouvée sur l'application des dispositions visées par la question.

Question 4

Dans l'essentiel, les normes portugaises tendent à reproduire celles de la Directive.

L'article 16 de la Directive a été transposé par l'article 10 de la Loi 37/2006. L'article 17 de la Directive a été transposé par les articles 11 et 12 de la Loi 37/2006. La transposition semble adéquate. Ceci est également valable pour les articles 18, 19, 20 et 21 de la Directive qui ont été transposés respectivement par les articles 13, 16, 17 et 10, 6 et 7, de la Loi 37/2006.

En ce qui concerne l'article 20 de la Directive, le régime de transposition est plus favorable que celui de la Directive en ce que qu'il prévoit (article 17, 2, de la Loi 37/2006) un délai de trois mois pour la délivrance de la carte de séjour. La transposition de l'article 21 est également plus favorable dans la mesure où l'article 17, 4, établit que les interruptions de séjour n'affectent la validité de la carte de séjour permanent qu'à partir de trente mois.

Question 5

L'article 24, 2, de la Directive a été transposé par l'article 20, 3 à 6 de la Loi 37/2006. Aux termes desdites dispositions, la loi portugaise ne fait aucune distinction entre les catégories décrites à l'article 24, 2, de la Directive et les demandeurs d'emploi. On n'a pas trouvé de jurisprudence en la matière.

Question 6

La recherche de jurisprudence relative à l'application des articles 27 et 28 de la Directive qui ont été transposés par les articles 27 et 28 de la Loi 37/2006 ne nous a pas permis de constater l'existence de véritables cas d'espèce. Dans certains arrêts, les cours et tribunaux ont invoqué l'existence « d'une menace

réelle, actuelle et suffisamment grave qui affecte un intérêt fondamental de la société ». Ainsi, dans l'arrêt de la Cour Suprême de Justice, du 29 octobre 2009 (affaire 508/05.1GBLLE.S1) imposant à deux nationaux roumains la peine accessoire d'éloignement pour la pratique des crimes de vol qualifié et homicide qualifié, la Cour Suprême a fondé l'application de cette peine aux condamnés (les deux en situation irrégulière sur le territoire portugais) sur la motivation suivante : crimes pratiqués avec grande violence, la personnalité des condamnés étant révélatrice d'un degré élevé de dangerosité sociale et une réinsertion sociale au Portugal n'étant pas prévisible, tout ceci constituant une menace réelle, actuelle et suffisamment grave affectant un intérêt fondamental de la société.

Dans des termes pareils, la Cour d'Appel de Lisbonne a décidé, dans l'arrêt du 2 novembre 2011 (affaire 24/10.OGAIDN.C1) condamnant plusieurs personnes pour le crime de trafic de stupéfiants, d'imposer la peine accessoire d'éloignement suite à l'exécution de la peine de prison.

Dans l'arrêt du 21 juin 2012 (Affaire 527/11.9JAPRT.P1.S1), la même Cour Suprême a considéré que la simple application d'une peine de prison, bien que pour le crime de trafic de stupéfiants, ne pouvait pas justifier l'expulsion. Motivant sa décision, la Cour a expliqué que la liberté de circulation dont bénéficient les citoyens de l'Union, impose que les restrictions à cette liberté soient absolument exceptionnelles et dûment alléguées, identifiées et prouvées : raisons d'ordre public, sécurité publique ou santé publique.

Finalement, l'arrêt de la Cour Suprême de Justice du 19 avril 2007 (Affaire 06P4701) peut être résumé de la manière suivante : « les mesures prises pour des raisons d'ordre public ou de sécurité publique doivent être en conformité avec le principe de proportionnalité et doivent se baser exclusivement sur le comportement de la personne concernée, celui-ci devant constituer une menace réelle, actuelle et suffisamment grave qui affecte un intérêt fondamental de la société, les justifications sans rapport avec le cas individuel ou basées sur des principes de prévention générale ne pouvant être acceptées ».

Il faut remarquer qu'il existe une jurisprudence significative concernant la peine accessoire d'expulsion dans le cadre de la « loi des étrangers », tant à l'abri du Décret-Loi 244/98, du 8 aout modifié ultérieurement, qu'à l'abri de la Loi 23/2007, du 4 juillet, qui a abrogé la législation antérieure. Cette jurisprudence est importante pour cerner les critères selon lesquels les cours et tribunaux ont interprété les concepts d'ordre public et sécurité publique et ont invoqué et appliqué le principe de proportionnalité.

La Cour Suprême de Justice a énoncé la *règle de proportionnalité* en tant qu'expression d'une pondération qui concilie « l'intérêt de l'Etat dans le non maintien à l'intérieur de ses frontières de celui qui viole les valeurs commu-

nautaires avec l'intérêt qui rend inconsistant, pour la gravité des faits, inexcusable pour nuisible et potentiellement dangereux, l'accueil et la présence dans le pays étranger » (arrêt du 7 novembre de 2012 – Affaire 2/10 .9SHLSB-A .S1). Dans cet arrêt, prononcé au regard de la Loi 23/2007, concernant une personne sans un titre de résidence de longue durée ayant aucun lien avec le Portugal, la Cour Suprême a considéré que, tenant compte du principe de proportionnalité en matière d'expulsion, seulement dans des cas exceptionnels qui, pour la gravité des faits rendent intolérable la présence du citoyen étranger justifie l'éloignement de celui-ci de l'espace territorial souverain. L'arrêt invoque l'article 134, 1, alinéa f) (qui permet l'expulsion de l'étranger à l'égard duquel existent des raisons sérieuses de croire qu'il a commis de graves actes criminels ou qu'il a l'intention de commettre de tels actes notamment sur le territoire de l'Union) et aussi l'alinéa e) de la même disposition (expulsion d'étranger qui a pratiqué des actes qui, si fussent connus de l'Etat portugais, auraient empêché l'entrée sur le territoire portugais), l'article 135 (limites au pouvoir de l'Etat concernant d'expulsion), l'article 151, 2 (applicabilité de la peine accessoire d'expulsion à l'étranger résidant dans le pays, prenant en compte les critères légaux tels que la gravité des faits, la personnalité de l'étranger, une éventuelle récidive, le degré d'insertion sociale, la prévention spéciale et la durée de résidence au Portugal) et l'article 151, 3, (applicabilité de la peine à un étranger avec résidence permanente lorsque son comportement constitue une menace suffisamment grave pour l'ordre publique ou la sécurité publique). Tous ces dispositions figurent dans la Loi 23/2007, modifiée par la Loi 29/20122, du 9 août.

Plus spécifiquement en ce qui concerne les conditions prévues à l'article 151, 3 – expulsion d'étranger avec résidence permanente, en cas de grave menace pour l'ordre public ou la sécurité nationale – la Cour Suprême a considéré les faits comme graves (trafic de stupéfiants commis dans un 'établissement pénitentiaire) et la récidive prouvée. Nonobstant, la personne concernée étant fortement insérée dans la société portugaise, la Cour a décidé qu'il n'y avait pas d'éléments suffisants pour conclure que le comportement, globalement considéré, constituait une menace suffisamment grave pour l'ordre public et la sécurité publique justifiant l'application de la peine accessoire d'expulsion (arrêt du 16 janvier de 2008 (Affaire 07P4638). Pour ce qui concerne les limites à l'expulsion (article 135, alinéa b) interdisant l'expulsion de citoyens étrangers qui ont effectivement à leur charge des enfants mineurs de nationalité portugaise résident au Portugal), la Cour Suprême a déclaré qu'un impératif constitutionnel exige que les raisons d'ordre public qui fondent la peine accessoire cèdent devant l'intérêt de préserver l'unité familiale, dès que sont remplies les conditions établies par cette disposition. Dans ce contexte,

la Cour a jugé que les conditions énoncées à l'article 135, notamment dans son alinéa b), n'étaient pas remplies, dans un cas où la relation entre père et fis était très faible, le père ne contribuant pas, économique et affectivement, à l'éducation de son fils (arrêt du 14 avril 2011 (Affaire 40/08.1PJCSC). L'arrêt du 17 février 2011 (Affaire 66/06.OPJAMD-A.S1) va dans le même sens stipulant qu'il faut prouver que « la relation entre le père et le fils entraîne un préjudice matériel ou psychologique significatif ».

Appréciant l'expulsion du citoyen étranger non résident, aux termes de la Loi 23/2007 et notamment de son article 151, 1, et ladite expulsion étant appliquée en tant que peine accessoire, la Cour d'Appel de Lisbonne a considéré qu'une décision d'expulsion, constituant une ingérence dans la vie de la personne concernée, présuppose toujours une évaluation du juste équilibre, du caractère raisonnable, de proportionnalité et de *fair balance* entre l'intérêt public, la nécessité de l'ingérence et la réalisation des finalité indiquées à l'article 8, 2 de la CEDH, et les droits de l'individu contre l'ingérence des autorités publiques dans sa vie et dans ses relations familiales qui peuvent être sérieusement affectées par l'expulsion, surtout lorsque le degré d'intégration dans le pays de résidence coupe ou affaiblit les liens avec le pays d'origine (arrêt du 14 avril 2011 (Affaire 44/10.4PJSNT.L1-9).

L'arrêt de la Cour Suprême de Justice du 10 décembre 2008 (Affaire 08P2147) a rappelé une jurisprudence obligatoire selon laquelle la peine accessoire d'expulsion en cas de trafic de stupéfiants ne peut pas constituer une conséquence automatique la condamnation et a cité, à titre d'exemple, des arrêts prononcés jusqu'en juin 2008 dont il résulte que « nonobstant les changements de législation, la Cour Suprême de Justice a mis en relief la pondération, le caractère raisonnable, la nécessité, l'adéquation et la proportionnalité immanentes à son application ».

Le principe de proportionnalité est également présent dans la jurisprudence administrative prononcée en appel de décisions administratives d'éloignement du territoire national à l'abri de l'article 150 de la Loi 23/2007. À cet égard, on peut mentionner les arrêts de la Cour Centrale Administrative du Nord du 5 avril 2013 (affaire 0001/13.9BEBEBRG) et de la Cour Centrale Administrative du Sud du premier juin de 2011 (Affaire 07608/11) qui ont accepté les référés sur le fondement notamment de considérations de proportionnalité, aux termes de l'article 120 du Code de Procédure des Tribunaux Administratifs.

Depuis la transposition de la Directive, la jurisprudence a suivi l'approche selon laquelle les mariages blancs violent l'article 15 de la Loi 37/2006 et, partant, la Directive.

Les cours et tribunaux ont estimé que le *ratio legis* de cette disposition est la protection de l'intérêt de l'unité familiale, cette protection étant impérative dès lors que le noyau familial existe de fait, l'existence d'une simple apparence d'union n'étant pas suffisante.

En principe, l'abus de droit ou la fraude justifient l'application d'une sanction ainsi que le refus et le retrait des droits de résidence et des allocations sociales. Il convient d'ajouter que la personne concernée doit être notifiée de façon à ce qu'elle comprenne la décision et puisse la contester.

La citoyenneté *au-delà* des dispositions de la directive 2004/38/CE – Etudier l'application, au niveau national, du droit primaire européen

Question 7

On n'a pas trouvé de jurisprudence en matière de regroupement familial qui soulève ces questions. Certaines données ont pourtant été recueillies et figurent dans un document élaboré par le « Serviço de Estrangeiros e Fronteiras » de 2012. Ainsi, en ce qui concerne l'impact de la jurisprudence de la Cour de Justice en matière de regroupement familial, ce document informe que les décisions récentes de la Cour de Justice n'ont pas eu un impact significatif au Portugal. Cependant, selon le même document, il importe de souligner que l'exercice du droit de libre circulation obéit aux principes découlant de la jurisprudence de la Cour européenne des droits de l'homme relative à l'article 8 de la Convention et des Directives 2003/86/CE et 2004/38/CE. Il est encore utile de remarquer que la jurisprudence et les pratiques administratives sont très attentives à la jurisprudence des Cours européennes.

Question 8

La loi portugaise sur la perte de nationalité s'éloigne de celle qui est en vigueur dans l'Etat membre où les faits appréciés dans l'affaire *Rottmann* ont eu lieu. Au Portugal, la perte de nationalité n'opère qu'au cas où la personne concernée déclare qu'elle ne veut pas garder la nationalité portugaise. Le régime juridique en vigueur au Portugal est compatible avec les exigences particulières de la citoyenneté européenne.

Les droits politiques des citoyens européens

Question 9

Les citoyens européens résidents et inscrits sur la liste électorale au Portugal jouissent de capacité électorale active et passive dans les élections locales et au Parlement européen, conformément aux Directives 93/109/CE et 94/80/CE.

En ce qui concerne les élections au Parlement européen, ce droit est encadré par l'article 15, 5, de la Constitution de la République Portugaise qui prescrit : « La loi peut encore accorder, dans des conditions de réciprocité, aux citoyens des Etats membres de l'Union européenne résidents au Portugal le droit d'élire et d'être élu députés au Parlement européen ». La Loi électorale relative au Parlement européen (Loi 14/87, du 29 avril), rectifiée par la Déclaration du 7 mai 1987 et modifiée par la Loi 4/94 du 9 mars et par les Lois Organiques du 1/99, du 22 juin, 1/2005, du 5 janvier et 1/2011 du 30 novembre) confère capacité électorale active et passive aux citoyens de l'UE, non nationaux de l'Etat portugais, recensés au Portugal. La même capacité est reconnue aux citoyens portugais résidents dans un Etat membre qui optent de ne pas y exercer leur droit de vote.

L'inscription sur la liste électorale de citoyens étrangers est volontaire et exige que ce citoyen réside au Portugal. L'identification de la personne concernée est effectuée par le biais d'un titre d'identification en cours de validité. Au 31 décembre 2012, 11.504 citoyens de l'Union non portugais étaient inscrits sur la liste électorale (en 2003, ce nombre était de 7.028).

Les restrictions applicables dans les élections au Parlement européen sont identiques à celles imposées par le droit interne visant les nationaux. Lors de l'inscription sur la liste électorale, le citoyen étranger doit présenter une déclaration formelle indiquant notamment qu'il n'est pas privé du droit de vote dans l'Etat d'origine et qu'il opte pour exercer le droit de vote au Portugal. Les fausses déclarations sont sanctionnées avec une peine de prison et une amende. La loi prévoit un processus d'échange d'information entre les autorités portugaises et celles des autres Etats membres en vue d'assurer l'unicité de l'inscription et des candidatures au Parlement européen.

Les dispositions des lois indiquées respectent strictement les Directives applicables.

Question 10

La Directive 93/109/CE a été transposée par la Loi 4/94 du 9 mars qui a modifié la Loi électorale antérieure et est entrée en vigueur le 10 mars 1994. La transposition a été faite sans dérogations ou impositions supplémentaires.

Les rapports produits par la Commission européenne sur l'application de cette Directive concernant les élections au Parlement européen de 1999 et 2009 ont détecté des difficultés au niveau de l'application du système institué en vue de la prévention du double vote. En 2009, par exemple, le Portugal n'aurait identifié que 38.619 nationaux des 83.556 notifiés.

On n'a pas trouvé de jurisprudence sur cette question.

Question 11

Le droit de vote dans les élections locales et au Parlement européen est reconnu, comme indiqué ci-dessus, selon les dispositions des Directives.

Les citoyens des Etats de l'Union qui s'inscrivent seulement en tant qu'électeurs aux élections locales sont dispensés de déclarer qu'ils ne se trouvent pas privés de droit de vote dans leurs pays d'origine.

Dans les mêmes conditions, le Portugal ne subordonne pas l'exercice du droit de vote ou l'éligibilité de citoyens de l'Union à des conditions telles que la résidence pendant une certaine période sur le territoire national ou sur le territoire de l'entité locale concernée. La loi ne réserve pas non plus aux citoyens portugais l'éligibilité à des fonctions de président ou de membre d'organe collégial exécutif.

En outre dans les élections locales, le Portugal reconnaît la capacité électorale active et passive aux citoyens d'autres pays hors des Etats membres, sur condition de réciprocité. Ainsi, sont électeurs et éligibles dans les élections locales les nationaux du Brésil et de Cap Vert. Peuvent également voter les citoyens d'Argentine, Chili, Islande, Norvège, Pérou, Uruguay et Venezuela, dès que résidents de plus de trois ans. La loi portugaise admet finalement la possibilité de reconnaissance de capacité électorale passive aux citoyens d'autres pays non membres de l'UE ou de pays de langue officielle portugaise, résidents au Portugal plus de cinq ans, sur condition de réciprocité. Cette possibilité ne trouve pas à s'appliquer à présent.

Question 12

Tant aux élections au Parlement européen qu'aux élections locales, la capacité électorale active et passive n'est limitée (indépendamment de la nationalité de la personne concernée) que dans les cas suivants :

1. Interdiction par décision juridictionnelle passée en chose jugée. Il convient d'observer que, aux termes de l'article 65 du Code Pénal, aucune peine n'implique comme effet nécessaire la perte de droits civils, professionnels ou politiques. Toutefois, aux personnes condamnées pour la pratique de crimes électoraux peut être imposée la peine accessoire d'incapacité pour l'élection du Président de la République, de membre du Parlement, pour les élections locales et pour membre du jury, pour une période de 2 à 10 ans;
2. Ceux reconnus notoirement comme malades mentaux, bien que non interdits par décision juridictionnelle, dès lors qu'internés en des établissements psychiatriques ou déclarés comme tels par une formation de deux membres (trois en cas d'élections locales);
3. Ceux qui sont privés de droits politiques, par décision juridictionnelle passée en chose jugée.

L'existence de ces incapacités est communiquée à un organisme central par les autorités compétentes.

Les limitations s'appliquent aussi bien aux citoyens portugais qu'à ceux d'autres Etats membres. En outre, lors de leur inscription sur les listes électorales, ces derniers doivent déclarer formellement qu'ils ne sont pas privés de droit de vote dans leur Etat d'origine, déclaration dispensée s'il s'agit d'élections locales. Aucune tension n'existe, dans ce domaine, entre le droit portugais et la législation de l'Union.

Les tendances d'opinion exprimées récemment au sein de la société civile sur des matières connexes à la citoyenneté européenne ont été influencées par la question de l'application du mémorandum signé avec la *Troika* et le rôle des institutions et des partenaires européens dans la crise économique et financière qui affecte le pays. Selon une étude publiée en Automne 2012 (Eurobarómetro Standard 78), la majorité des enquêtés a exprimé un sentiment de citoyenneté européenne (59 %, pourcentage inférieur aux 63 % correspondant au taux moyen de l'Union), quoique ce sentiment soit plus accentué chez les cadres supérieurs (83 %), les jeunes (73 %) et les individus avec un niveau plus élevé de scolarité (71 %). Les personnes âgées, les habitants des zones rurales et les domestiques semblent être ceux qui se sentent moins européens.

Etant donné que, chez tous les groupes analysés, le sentiment de citoyenneté est partagé par 50 % ou plus des enquêtés, on peut conclure que le Portugal est une société où le sentiment de citoyenneté européenne est relativement transversal.

Cependant, encore selon ladite étude « ce sentiment de citoyenneté n'est pas accompagné par la connaissance des droits associés à la citoyenneté européenne ni par la volonté d'en savoir d'avantage ». Seulement 35 % des enquêtés affirment connaître leurs droits en tant que citoyens européens face à 45 % dans l'ensemble de l'Union. Il n'y a que la Romanie, la France et l'Italie qui présentent des chiffres inférieurs. Toutefois, en contraste avec ces derniers Etats membres, beaucoup de Portugais ne trouvent pas qu'il vaille la peine d'en savoir d'avantage. Le Portugal a le taux le plus bas de nationaux qui aimeraient connaître mieux leurs droits de citoyens européens (35 %), ce qui correspond au taux le plus faible de toute Union.

À l'instar de la majorité des européens lorsqu'enquêtés sur quels droits ils aimeraient obtenir plus d'information, les Portugais ont fréquemment indiqué la possibilité de travailler (20 %) (21 % dans l'Union), de vivre dans un autre Etat membre (16 % au Portugal contre 15 % pour la moyenne européenne) ou la possibilité de recevoir des soins médicaux (14 % au Portugal, 18 % dans l'Union)

La cause est – me semble-t-il – le sentiment répandu que :

a) La crise est en grand partie le résultat de la politique monétaire commune;
b) L'Europe n'a pas encore achevé une véritable intégration;
c) Il y a un manque de solidarité européenne.

Il y a aussi une opinion dominante qui soutient que les politiques d'investissement public que le pays a développées dans les années 2000 et suivantes ont été suggérées par l'Union européenne elle-même et sont à l'origine de l'actuel endettement auquel le pays ne peut pas faire face.

Enfin, un sentiment général de frustration européenne a envahi la majorité des populations, surtout la classe moyenne et moyenne basse. Ainsi 21 % des enquêtés n'ont pas répondu à la question ou n'aimeraient pas savoir d'avantage sur les droits découlant de la citoyenneté européenne. Ce chiffre est presque le double de celui concernant l'ensemble de l'Union européenne.

Quant à la perception des bénéfices découlant de la citoyenneté européenne, l'étude montre que, chez les Portugais, la libre circulation des personnes et des marchandises est le résultat le plus positif de l'Union (22 %), suivi de la paix entre les Etats membres (12 %) et du niveau de bien-être social (10 %). Plus de 14 % considèrent que la citoyenneté européenne n'ap-

porte aucun bénéfice (le double de la moyenne européenne qui est de 6 %) et 11 % ne sont pas en mesure d'identifier les bénéfices (face à 5 % dans l'ensemble de l'Union).

Ces indications peuvent être expliquées, en partie, par le fait que les Portugais sont considérablement moins exposés à la réalité des autres Etats membres que leurs congénères européens, si l'on prend en compte le pourcentage de personnes qui affirment n'avoir pas visité les autres pays ou lu les journaux publiés dans d'autres pays ou avoir socialisé avec les ressortissants de ces pays dans les douze derniers mois.

En ce qui concerne le rôle des médias, l'étude conclut que les Portugais utilisent surtout la télévision pour s'informer (65 % face à 58 % dans l'ensemble de l'Union). Seulement 4 % utilisent la presse écrite et l'internet, face à 11 % et 12 % de la moyenne européenne. Un pourcentage élevé des Portugais (24 %, comparé avec 10 % de l'ensemble de l'Union) ne cherche pas à s'informer d'avantage. Les personnes âgées (31 %), les habitants des lieux ruraux (33 %) et les moins scolarisés, les domestiques et les retraités (27 %) sont ceux qui affirment avec plus de conviction ne pas demander plus d'information.

Culture(s) de la citoyenneté

Question 13

Je dirais que la compréhension dominante partage des deux éléments. D'une part, la citoyenneté est observée en tant lien culturel qui reconnaît à chaque individu, outre le statut de national, le statut d'européen. Une enquête d'été a été réalisée à ce sujet par un journal de référence. Les réponses sont diverses mais presque toutes reflètent un noyau matriciel qui est lié à l'histoire et à la culture commune. Il y a même des réponses qui confèrent une priorité identitaire à la citoyenneté européenne, au détriment de la nationalité. Je serais tenté à dire que l´élément migration n'est pas si visible. La raison est que les flux migratoires sont connus, depuis longtemps, par les Portugais et ne sont pas normalement associés au statut de citoyenneté. Ce qui est plus visible est l'émigration. L'immigration existe mais concerne surtout des nationaux des anciennes colonies portugaises et des nationaux des pays de l'Est. Une synthèse de ces deux éléments saurait être définie par un concept d'intégration qui fusionne plusieurs conditions et statuts.

J'ajouterais que l'idée de citoyenneté revêt d'une dimension constitutionnelle qui découle de la hiérarchie du droit de l'Union mais aussi de la perception des peuples qui ont assimilé les traits des cultures classiques en Europe. Je ne peux m'empêcher d'observer que l'évolution du statut de « citoyenneté européenne » dans la jurisprudence de la Cour de Justice semble incorporer ces éléments. L'affirmation que la citoyenneté a vocation à être le statut fondamental des nationaux des Etats membres ne peut que signifier que, outre les droits concrètement consacrés, il y a un noyau dur qui doit être affirmé et préservé. Ce noyau a une dimension constitutionnelle et s'inspire des valeurs qui structurent l'Union dont le respect des droits fondamentaux et de l'Etat de droit.

Une définition plus claire et objective dépendra du dépassement d'un obstacle qui me semble plutôt méthodologique : la notion de « situation purement interne ».

Question 14

L'acquisition de force juridique a non seulement donné plus de visibilité à la Charte mais aussi attiré l'attention des cours et tribunaux. Trois arrêts récents de la Cour Suprême Administrative en attestent. Dans ces affaires, des questions ont été soulevées ayant trait à la légitimité des membres de la famille des requérants de demander à la justice administrative une injonction visant à la protection de droits, libertés et garanties. Des demandes initiales avaient été présentées auprès du Ministère des Affaires Etrangères pour que celui-ci ordonne l'émission urgente de visas de résidence, afin que les requérants puissent rejoindre leurs familles. Face à l'opposition du Ministère, les demandes ont été rejetées. Les requérants ont fait appel. Quelques mois après, la Cour Suprême Administrative a prononcé un arrêt définitif accordant le regroupement.

La synthèse des décisions est la suivante :

1. Dans le cadre du regroupement familial, le visa de résidence existe en fonction du regroupement;
2. Dans la relation matérielle en cause qui est d'émission/non émission du visa, le titulaire du regroupement familial est considéré comme partie, bien qu'il ne soit pas lui-même, naturellement, titulaire du visa;
3. Il est considéré comme partie, en tant que partie principale dans la relation;
4. Pour cette raison, il jouit de légitimité pour agir.

Quelques mois après, un arrêt en pourvoi a été prononcé. En résumé, ce dernier arrêt affirme que, en cas de retard dans l'émission de visa pour les membres de la famille, la demande de regroupement familial ayant été différée, le fait que le droit au regroupement familial devient caduque si la demande n'est pas présentée dans le délai de trois mois, impose que le conjoint qui réside déjà au Portugal et dispose d'un visa de résidence a légitimité pour demander l'émission. Les arrêts citent notamment l'article 8 de la Charte et les articles 7, 15, et 33 de la Charte des Droits Fondamentaux.

Cette jurisprudence montre l'existence de bonnes pratiques chez les autorités administratives.

Question 15

Le débat dans les médias peut être analysé selon trois aspects principaux :

1. Politico-législatif : altération de mesures politiques et législatives relatives à l'immigration et la sécurité;
2. Technique : publication de rapports, des statistiques ou d'autres informations;
3. Individuel : décisions juridictionnelles et pratiques administratives.

En tant qu'exemple, on pourrait indiquer les discussions autour de la transposition de la Directive « Retour », notamment à propos du changement des régimes de nationalité et d'immigration. Les deux autres aspects ont été illustrés par l'attention faite aux phénomènes de mutilation génitale féminine et le manque de soutien aux réfugiés et aux requérants de protection internationale.

Il y a à remarquer, en ce qui concerne l'impact, une tendance d'amélioration des pratiques par les agents concernés et une plus claire volonté d'augmenter la diffusion d'information.

Les années significatives à cet égard sont celles de 2001 et 2003, période qui signale un flux massif d'immigrants et la publication d'une certaine régularisation (avec la prévision d'autorisations de séjour pour des immigrants en situation irrégulière mais possédant un contrat de travail, dès lors qu'ils faisaient preuve du paiement de cotisations pour la sécurité sociale).

SLOVENIA

Verica Trstenjak[1] *and Petra Weingerl*[2]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

With respect to a Union citizen's family members, Articles 2, 3, and 5 of the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[3] (hereinafter: Directive 2004/38) have been transposed into Slovenian legislation by the number of provisions contained in the Aliens Act,[4] which has originally been adopted in 1999 (ZTuj-1), but the new Aliens Act (ZTuj-2) is in force since October 2011.

The definition of the Union citizens is governed by the twelfth indent of Article 2 of the Aliens Act, providing that Union citizen is every alien having a nationality of another Member State. This definition is repeated in Article 117(2) of the Aliens Act, specifying in Article 117(3) that provisions concerning EU citizens are applicable also to the citizens of the EEA.

The definition of family members of the EU citizens is governed by the provisions of Article 127 of the Aliens Act and is in principle transposing the provisions of the Directive 2004/38 without substantial modifications. It takes

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3. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, OJ L 158, 30.4.2004.
4. Zakon o tujcih (ZTuj-2), Official Gazette of the Republic of Slovenia No 50/11 and the following. The Aliens Act contains the provisions applicable to EU citizens and their family members, as well as the provisions applicable to third country nationals and their family members.

into account the Slovenian regulation of the 'family' pursuant to the Marriage and Family Relations Act[5] and the regulation in The Registration of a Same-Sex Civil Partnership Act.[6] Thus, the definition in the Aliens Act encompasses also a partner with whom the EU citizens resides in a long-term partnership, as well as descendants and ancestors of such partner under the conditions set out in the Directive 2004/38 (children under the age of 21, those whom the EU citizen or the Slovenian citizen or the spouse, registered partner or partner with whom the EU citizen or the Slovenian citizen has resided in a long-term partnership is obliged to maintain or actually maintains in accordance with the legislation of the state of which he is a citizen).

The provision on beneficiaries laid down in Article 3 of the Directive 2004/38 is transposed with the provisions in the Chapter XIII of the Aliens Act, with the title 'Entry and residence of citizens of EU Member States, their family members and family members of Slovenian citizens'. Article 117(1) of the Aliens Act provides that the provisions of this chapter are applicable to EU citizens, their family members and the family members of Slovenian citizens. The other provisions of the Aliens Act shall apply to the stated categories only if they are more favourable to them or if so stipulated.[7]

The circle of beneficiaries under the Aliens Act is wider than the one under the Directive 2004/38, as the Aliens Act does not prescribe the exercise of free movement rights as a prerequisite for the Aliens Act to be applicable to EU citizens and their family members. It is thus applicable to persons regardless of their exercise of free movement rights, i.e. to 'dynamic' and 'static' citizens and their family members alike. Since nationals of another Member States are in principle exercising their free movement right by moving to or residing in Slovenia, this provision is specifically important with respect to Slovenian citizens who do not exercise free movement rights, as the Aliens Act goes beyond the Directive 2004/38, these provisions of the Aliens Act being applicable also to Slovenian nationals and their family members, thereby excluding the potential of the reverse discrimination effect.

The provisions of the Chapter XIII of the Aliens Act govern entry of EU citizens and the family members from third countries into Slovenia as well. The entry of EU citizens is regulated by the Article 118 of the Aliens Act, providing that an EU citizen shall not require any entry permit, i.e. a visa or

5. Zakon o zakonski zvezi in družinskih razmerjih (ZZZDR), Official Gazette of the Socialist Republic of Slovenia No 15/76 and the following.
6. Zakon o registraciji istospolne partnerske skupnosti (ZRIPS), Official Gazette of the Republic of Slovenia No 65/05 and the following.
7. Article 117(1) of the Aliens Act.

residence permit, for entry into Slovenia. The entry of their family members is regulated by the second and third paragraph of Article 127 of the Aliens Act, transposing the provisions of the Directive 2004/38. Concerning the entry of family members from third countries, the Aliens Act provides that they may, for the purposes of family reunification with an EU citizen or a Slovenian citizen, enter Slovenia with a valid passport containing a visa issued by the competent authority of the Republic of Slovenia or by another state party to the Convention implementing the Schengen Agreement of 14 June 1984, unless he is a citizen of a state for which the Republic of Slovenia has cancelled visas, or with a valid travel document and residence permit issued by another EU Member State, unless stipulated otherwise by an international agreement.[8]

The Aliens Act provides that the border control authority shall decide on a refusal of entry in accordance with the provisions in the Aliens Act. An EU citizen may lodge an appeal against the refusal of entry within eight days.[9]

The case law of the national courts dealing with the different types of family relationships outlined in Articles 2 and 3 of the Directive 2004/38 is not vast. An interesting judgement by the Administrative Court concerns the definition of an ancestor who a Slovenian citizen is obliged to maintain.[10] The factual background of the case concerns a Slovenian national and her mother, a Bosnian citizen applying for the temporary residence permit for the purposes of the family reunification. Her mother would be granted temporary residence permit pursuant to the Aliens Act if Slovenian national would be obliged to maintain her pursuant to the law. Pursuant to Article 124(1) of the Marriage and Family Relations Act, the child who has reached the majority is obliged to maintain his parents, if they do not have sufficient means of subsistence. The application was rejected on the grounds that her mother receives a pension in Bosnia and Herzegovina, which suffices for her needs, and thus has a sufficient means of subsistence. Consequently, her mother is not a family member for the purposes of family reunification pursuant to the Aliens Act and in the sense of Article 2 or 3 of the Directive 2004/38.

8. Article 127(3) o the Aliens Act.
9. Article 118(5) of the Aliens Act.
10. Administrative Court judgement III U 88/2011, issued on 23.9.2011. The judgement was issued on the basis of the Article 93.k of the old Aliens Act (ZTuj-1), regulating the position of EU citizens and Slovenian nationals' family members. Its provision on ancestors is substantially the same as in the new Aliens Act (ZTuj-2).

Question 2

There is no data on the expulsion of Union citizens (and/or their family members) on purely economic grounds in publicly accessible[11] decisions of national courts.

With respect to the expulsion of Union citizens or their family members, the general impression steaming out of the available case law is that the national courts are engaged in the disputes concerning family members with a thematic concern about stability of residence for EU citizens and their family members. When the expulsion of the family member is in question, the national courts tend to rule against it with the reasoning that the expulsion may lead to the dissolution of the family members, limiting the exercise of their right to a private and family life, leading to irreparable harm.[12] The expulsion would often lead to the dissolution of the family members as they attend school or work in Slovenia, have friends and family there, and most likely would not join the family member subject to the expulsion in the other country. On the other hand, the family member being subject to the expulsion usually does not have assets in the other country and the apartment for him and his family. The Supreme Court has held that the dissolution of the family itself represents the irreparable harm.[13] It held that it should not be expected from the family member subject to expulsion to prove those negative (inexistent) facts for the decision on expulsion to be nullified. It has noted that in the case of expulsion there is a likelihood of the dissolution of the family, which in itself constitutes an interference with human rights and fundamental freedoms, and the possible consequences of such dissolution are difficult to argue and to be proven before they actually occur.

It may be deducted from the cited case law that the stability of residence for Union citizens and their family members is generated by the reliance on the right to private and family life.

11. In Slovenia, decisions of the courts of the second and third instance are publicly accessible online, as well as decisions of the Supreme Court and of the Constitutional Court.
12. See for example the Supreme Court Order I Up 168/2012, issued on 5.4.2012; the Administrative Court Order I U 1337/2012, issued on 20.9.2012.
13. The Supreme Court Order I Up 168/2012, issued on 5.4.2012.

Question 3

Articles 12-15 of the Directive 2004/38 have been transposed into national law with Article 129 of the Aliens Act with respect to the retention of a temporary residence permit for a family member.

A permanent residence permit shall be issued to a family member for an unlimited period of time, so no provisions on retention of the permit are needed.[14] Nevertheless, with respect to a permanent residence permit for a family member who is a third-country national, there is a special provision governing the situation when the EU citizen dies during his legal residence in Slovenia and was employed or self-employed in Slovenia, but had not yet obtained a permanent residence permit. In such event his family members may be issued with a permanent residence permit prior to the expiry of the five years period if the EU citizen had resided as an employed or self-employed person in the Republic of Slovenia continuously for two years before his death or the death of the EU citizen was caused by an accident at work or occupational illness regardless of the duration of his residence in the Republic of Slovenia.[15]

There is no publicly available case law of national courts addressing the interpretation or application of these provisions.

Question 4

Articles 16-21 of the Directive have been transposed with several provisions governed by the Aliens Act, with the main provision found in the Article 126. It stipulates in the first paragraph that a permanent residence permit may be issued to an EU citizen who has resided in Slovenia continuously for five years on the basis of his residence registration certificate, a receipt stating that an application was submitted for the issuance or renewal of the residence registration certificate or his valid identity card or a valid passport, if there are no reasonable grounds to believe that his residence in Slovenia would present a serious and actual threat to public order and safety or the international relations of Slovenia, or if there are no grounds to believe that his residence in the country would be associated with terrorist or other violent acts, illegal intelligence activities, trafficking in drugs, or with the commission of any other criminal acts.

14. See Article 130(10) of the Aliens Act.
15. Article 130(6) of the Aliens Act.

Further, Article 126 sets out the absences that shall not affect the period of five years of continuous legal residence. It also sets out the events in which a permanent residence permit may be issued prior to the expiry of the period of five years. Article 127 of the Aliens Act governs a permanent residence permit for a family member who is a third-country national.

Article 137 of the Aliens Act governs the manner of issuing, content, and form of a residence registration certificate and residence permit. A residence registration certificate for an EU citizen, a temporary and permanent residence permit for a family member and a permanent residence permit for an EU citizen shall be issued in the form of a card. This certificate must contain a photograph of the person to whom it is issued and information specified by the Aliens Act. In September 2013, the Ministry for Foreign Affairs has proposed a new Residence Registration Act.

The Ministry for Internal Affairs has published the statistical data on the volume of issued permanent residence permits at the end of the year 2012.[16] On 31 December 2012 there were 1,759 nationals of EEA having a permanent residence, which is only slightly over 3 % of all permanent residence permits issued in 2012.[17] In the year 2011, there were 243 permanent residence permits issued to citizens of the EEA and 1,035 permanent residence permits to family members of the citizens of EEA or family members of Slovenian citizens.[18] 4 applications of the citizens of EEA for permanent residence were rejected in 2011, while 5 procedures were stopped.[19]

There is no data on disputes on interpretation or application of these provisions in publicly accessible decisions of national courts.

Question 5

Social assistance is governed by the Financial Social Assistance Act[20] and the Exercise of Rights to Public Funds Act.[21] A person is entitled to public funds

16. See Poročilo o delu direktorata za upravne notranje zadeve, migracije in naturalizacijo za leto 2012, available at http://www.mnz.gov.si/nc/si/medijsko_sredisce/novica/article//7868/.
17. Ibid., p. 5.
18. See Poročilo direktorata za migracije in integracijo za leto 2011, available at http://www.mnz.gov.si/fileadmin/mnz.gov.si/pageuploads/DMI/Statisticno_porocilo_-_SLO_zadnja_verzija_-_popravljena.pdf, p. 23.
19. Ibid, p. 25.
20. Zakon o socialno varstvenih prejemkih (ZSVarPre), Official Gazette of the Republic of Slovenia No 61/10 and the following.

if his income does not exceed the statutory income limit for individual rights to public funds, while at the same time meeting the other criteria provided for in the regulations governing individual rights. The Union citizens are entitled to financial social assistance if they reside in Slovenia with a permanent residence permit, they do not have sufficient means for survival nor assets or savings to ensure survival, and they are actively seeking solutions to their social problems.

All categories specified in Article 24(2) of the Directive holding a permanent residence permits are entitled to seek financial social assistance as long as they fulfil the conditions. National law does not distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits.

Financial social assistance is normally granted for a limited period, depending on the circumstances that serve as the basis for the allocation and level of financial social assistance.

Question 6

The concepts found in Articles 27 and 28 of the Directive have been transposed with Article 136 of the Aliens Act, entitled 'termination of residence'. There is a scant case law on those concepts. In judgement III U 150/2011[22] the Administrative Court interpreted the concept 'public policy, public security, or public health'. The applicant has brought an action against the decision of the competent authority to reject the application for the temporary residence permit of the applicant's husband. The application was rejected on the grounds of the threat for public order and safety, as her husband was convicted for robbery and also entered into the Schengen Information System (SIS). In its reasoning, applying the principle of proportionality, the competent authority took into account the fact that the husband committed the offense prior to the filing of application and the fact that the rejection of an application for a temporary residence permit only temporarily limited his right to private and family life. Consequently, the priority should be given to the rights of others to public safety and national security of the Republic of Slovenia.

21. Zakon o uveljavljanju pravic iz javnih sredstev (ZUPJS), Official Gazette of the Republic of Slovenia No 62/10 and the following.
22. Administrative Court judgement III U 150/2011, issued on 20.04.2012. The judgement was issued on the basis of the old Aliens Act (ZTuj-1), with the relevant provisions being substantially the same as in the new Aliens Act (ZTuj-2).

In another decision the court rejected the action brought upon the rejection of application for temporary residence permit of the family member of Slovenian national, as he was convicted for several crimes during the period 2001-2008, ranging from drug trafficking, domestic violence, thefts to inflicting minor bodily harm.[23] As far as the application of the principle of proportionality is in question, the court held that the applicant was repeatedly convicted of crimes and that evidence gathered confirms suspicions that his residence could pose a threat to public order and safety, and that the gravity of the offense is such that it represents a danger to public order.

There is no available case law on the interpretation of the concepts of 'serious grounds of public policy or public security' and 'imperative grounds of public security'.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

EU citizenship rights conferred upon the EU citizens with the Directive 2004/38 are granted to the citizens exercising their free movement rights, i.e. 'dynamic citizens', moving or residing in a Member State other than that of which they are nationals.[24] These rights also include the family reunification rights. As far as 'static citizens' are concerned, they cannot rely on the rights conferred by the Directive 2004/38, as the mobility is the prerequisite for its application. In cases where such 'internal situation' is concerned, the EU citizenship rights can be, under conditions shaped by the case law of the CJEU, conferred upon the EU citizens through the direct application of the Treaty provisions on EU citizenship (Articles 20 and 21 of the TFEU). So far, the case law of Slovenian courts on disputes involving 'purely internal situation' has not been reported.

The regulation in the Aliens Act is the same for EU citizens and Slovenian nationals, thus eliminating the potential of reverse discrimination. The Slovenian legislator undertook the approach of releasing the rights of citizenship

23. Administrative Court judgement I U 1922/2011, issued on 11.4.2012. Also this judgement was issued on the basis of the provisions of the old Aliens Act (ZTuj-1).
24. See Article 3 of the Directive 2004/38.

from the economic considerations attached to freedom of movement in the realm of the internal market, granting those rights to 'static' nationals.

Family reunification is regulated in Slovenia through two separated pieces of legislation. In case when the persons are entitled to international protection, the family reunification is governed by the provisions found in the International Protection Act.[25] If no international protection is granted to the persons concerned, the family renunciation is governed pursuant to the provision contained in the Aliens Act, which is relevant also in case of the EU citizens and their family reunifications.

The Aliens Act provides that a family member who is an EU citizen may enter Slovenia with a valid identity card or a valid passport without an entry permit irrespective of the purpose of residence in the Republic of Slovenia.[26] A family member who is not an EU citizen may, for the purposes of family reunification with an EU citizen or a Slovenian citizen, enter Slovenia with a valid passport containing a visa issued by the competent authority of the Republic of Slovenia or by another state party to the Convention implementing the Schengen Agreement of 14 June 1984, unless he is a citizen of a state for which the Republic of Slovenia has cancelled visas, or with a valid travel document and residence permit issued by another EU Member State, unless stipulated otherwise by an international agreement.[27]

Question 8

The conditions for the acquisition and loss of nationality come within the competence of each Member State. However, in the judgement *Rottmann*,[28] the CJEU has held that the situation of a citizen of the Union becoming stateless as a result of withdrawal of his nationality comes within the ambit of EU law. In such situation, the person concerned loses the status of citizen of the Union conferred by Article 20 of the TFEU, which is intended to be the fundamental status of nationals of the Member States. Therefore, a decision to withdraw nationality is amenable to judicial review carried out in the light of EU law, checking whether the decision in question is justified by a reason relating to the public interest and whether it respects the principle of proportionality.

25. Zakon o mednarodni zaščiti (ZMZ), Official Gazette of the Republic of Slovenia No 111/07 and the following.
26. Article 127(2) of the Aliens Act.
27. Article 127(3) of the Aliens Act.
28. C-135/08 *Janko Rottmann v Freistaat Bayern*, judgment of 2 March 2010.

The main piece of legislation regulating the acquisition of citizenship in Slovenia is the Citizenship Act,[29] which is supported by three other documents: Regulation on the Criteria of Assessing the Conditions and Circumstances of Acquisition of Citizenship of the Republic of Slovenia in the Process of Naturalization, Rules on the Procedure and Manner of the Solemn Act of Oath Taking, and the Decision Establishing the Commission to Perform the Slovenian Language Test.[30]

Slovenian citizenship is acquired by origin, by birth in the territory of Slovenia, by naturalization (admission to citizenship on the basis of an application), and in compliance with international agreement.[31] Under the *ius sanguinis* principle there are two modes of acquiring Slovenian citizenship: *ex lege* and by registration. The registration has a constitutive character and retroactive effect (*ex tunc*).[32]

There are four ways to cease Slovenian citizenship: by release (by dismissal), by resignation, by suppression and loss of citizenship through international agreements.[33] Citizenship can also be lost by the nullification of naturalization.[34]

One of the conditions for the person to lose Slovenian citizenship by release is that the person can prove or has proof that he/she will be granted foreign citizenship.[35] A release guarantee may be issued to a person who has applied for release of citizenship of the Republic of Slovenia although he/she does not fulfil this condition. If a person to whom the guarantee referred to was issued does not provide proof within a period of two years after such guarantee was handed over that he/she has actually moved from Slovenia and that he/she was guaranteed foreign citizenship or that he/she has already acquired foreign citizenship, it shall be considered that he/she has withdrawn his/her application.[36] Moreover, the authority that decided on the release of citizenship may revoke the decision on release if the person so requires and if

29. Zakon o državljanstvu Republike Slovenije, Official Gazette of the Republic of Slovenia No 1/91-I and the following.
30. See also Kovič Dine, M.: EUDO Citizenship Observatory, Naturalisation Procedure for Immigrants: Slovenia, EUI 2013, p. 1.
31. Article 3 of the Citizenship Act.
32. For more information on the modes of the acquisition of Slovenian citizenship see Medved, F.: EUDO Citizenship Observatory, Country Report: Slovenia, EUI 2013, p. 12.
33. Article 17 of the Citizenship Act.
34. Article 16 of the Citizenship Act.
35. See point 7 of Article 18(1) of the Citizenship Act.
36. Article 19 of the Citizenship Act.

he/she within one year subsequent to the receipt of the decision did not acquire foreign citizenship. The application for revocation of the decision on the release may be filed within one year after the handing over of the decision.[37]

Regarding similar situation to the factual background in the judgment *Rottmann*, where the citizenship was lost with the withdrawal of naturalization due to fraudulent obtainment, also the Citizenship Act provides that the competent body issuing the decree of granting citizenship by naturalization may cancel the decree within three years after its issuance. Though, this is possible only if it is stated and proved that naturalization was obtained with false statement or by intentional concealing or substantial facts or circumstances that would have affected the decision.[38]

However, there is a safety net provision preventing the same consequences as in the judgement *Rottmann*, where the citizen concerned was rendered stateless with the withdrawal of naturalization. The Article 16(2) of the Citizenship Act provides that decree cannot be cancelled if the person obtaining citizenship of Slovenia by naturalization remains without citizenship. Thus, the Slovenian regulation on the acquisition and loss of citizenship comes fully in line with the CJEU jurisprudence on this topic and to its full extent reflects the implications of the particular requirements of EU citizenship.

Political rights of EU citizens

Question 9

The Directive 93/109/EC on European Parliament elections was transposed into Slovenian legal order with the Election of Slovenian Members to the European Parliament Act[39] (hereinafter: the European Parliament Elections Act), adopted in 2002. It has been fully implemented with amendments of the European Parliament Elections Act in 2009. With those amendments the requirement of permanent residence for the EU citizen to be entitled to vote has been abolished.

37. Article 21 of the Citizenship Act.
38. See Article 16 of the Citizenship Act.
39. Zakon o volitvah poslancev iz Republike Slovenije v evropski parlament, Official Gazette of the Republic of Slovenia No 96/02 and the following.

In principle, the EU citizens have the electoral rights to the European Parliament under the same general conditions as Slovenian nationals. The additional condition imposed on EU citizens compared to national citizens to have the right to vote and to stand as a candidate in elections to the European Parliament is now solely the certificate of residence registration, provided that their electoral rights have not been revoked and that they have been entered into the electoral register.[40] The entry into the electoral register is made only upon request of the EU citizen. The request can be filed at any time.

There has been no relevant case law in domestic courts regarding the EU citizens' right to vote and to stand as a candidate in elections to the European Parliament.

The December 2012 amendments to Directive 93/109/EC will not require substantial additional changes to the electoral legislation in Slovenia. The Voting Rights Register Act regulates the substance covered with the amendments.[41] The Voting Rights Register Act provides that the competent authority shall check whether the citizens of the Union who have expressed a desire to exercise their right to stand as a candidate there have not been deprived of that right in the home Member State.[42] The mode of deprivation in the home Member State is not specified, therefore it might encompass both the deprivation by an individual judicial decision and by an administrative decision provided that the latter can be subject to judicial remedies, as it is laid down by the December 2012 amendments to Directive 93/109/EC. The draft of the amendments to the Voting rights Register Act required by the December 2012 amendments is already prepared by the Ministry for Foreign Affairs and has been published in May 2013.[43]

Question 10

Directive 94/80/EC has been transposed into Slovenian legal order with several acts, the main being the Local Elections Act[44] with the implementing provisions adopted in 2002. It has been fully implemented with the last

40. Article 10 of the European Parliament Elections Act.
41. Zakon o evidenci volilne pravice, Official Gazette of the Republic of Slovenia No 52/02 and the following.
42. Article 13(5) of the Voting Rights Register Act.
43. It may be accessed at: http://www.mnz.gov.si/si/zakonodaja_in_dokumenti/predlogi_predpisov/.
44. Zakon o lokalnih volitvah, Official Gazette of the Republic of Slovenia No 72/93 and the following.

amendments to the Local Elections Act, adopted in 2012, after the European Commission noted in its Report to the European Parliament and the Council on the application of Directive 94/80/EC of 9 March 2012[45] (hereinafter: Commission's Report) that Slovenia seemed to have transposed Articles 3 and 4 of Directive 94/80/EC incorrectly. The Commission noted that in Slovenia, along with Lithuania, EU citizens are granted the right to vote or stand as a candidate in municipal elections only after a minimum period of residence, without such requirement being imposed on nationals. The Commission has included in this report that the Slovenian authorities have recently informed the Commission that they agree to amend their domestic legislation to ensure full compliance with Directive 94/80/EC.[46] As aforementioned, those amendments were adopted a few months later in 2012.

The Local Elections Act provides in Article 5 that every citizen of the Republic of Slovenia turning 18 years old on the voting day has a right to vote and to be elected as a member of the municipal council. The same right is also granted to EU citizens who are either permanent residents in Slovenia or those who have obtained a certificate of residence registration and who have registered a temporary residence in the territory of Slovenia.

The EU citizens also have the right to vote for the mayor; however, they do not have a right to be elected as a mayor, as this right is conferred solely on Slovenian nationals.[47]

There has been no relevant case law in domestic courts regarding the EU citizens' right to vote and to stand as a candidate in local elections. This is not surprising, taking into account that according to the survey on participation of non-nationals EU citizens in municipal elections in their Member States of residence, which has been published in Commission's Report in 2012, the lowest number of these citizens actually exercising their electoral rights in the municipal elections is in Slovenia (1,426 compared to 54,159 in the Czech Republic, 108,367 in Austria, or 2,238,641 in Germany).[48]

45. Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final.
46. Ibid, p. 8.
47. Article 103 of the Local Elections Act.
48. Commission's Report (see fn 19), p. 6.

Question 11

The Slovenian electoral system does not have regional elections or other elections in which EU citizens residing in the country would be granted particular electoral rights under national law.[49]

Question 12

There is no specific area where tensions exist between EU law and national provisions limiting the scope of the franchise. The difference exist in relation to the right to stand as a candidate in mayor elections, as this right is granted only to Slovenian citizens under the Local Elections Act. However, there is no provision limiting the scope of the franchise of the rights granted both to Slovenian nationals and EU citizens.

Culture(s) of citizenship

Question 13

We consider that the implementation of EU citizenship at the national level in Slovenia is understood to a certain extent as part of the permissions-based immigration law, and to some extent as part of the rights-based EU law. This approach towards EU citizenship may be seen through the nomotechnical approach undertaken by the Slovenian legislator, who has regulated different aspects of the EU citizenship in different acts.

The aspects of entry and residence of EU citizens is governed by the Aliens Act, where also the provisions on the entry and residence of third country nationals are found, so this can be viewed through the lenses of the permissions-based immigration law. Other aspects of the EU citizenship, like political rights of EU citizens, are governed by laws regulating elections, and are mostly seen through the lenses of the rights-based EU law.

49. See also Accetto, M.: Access to Electoral Rights: Slovenia, EUDO Citizenship Observatory, EUI 2013, p. 6.

Question 14

There is no available case law on interpretation of the rights of EU citizens by the national courts indicating that there is a difference in interpretation after the Charter of Fundamental Rights of the European Union was given binding effect.

Question 15

The general tone of the national debate in media is regarded as positive and generally informative, providing information on different rights that EU citizenship confers on individuals and also information on elections in the European Parliament. Also, according to the survey conducted by the Eurobarometer, Slovenian nationals to the large extent feel as being EU citizens, as 68 % replied in this manner. This is above the EU average, which is at 63 %.

Media tend to report in a positive manner on the rights conferred upon EU citizens and are reporting regularly on developments in this area.[50] This can clearly be seen through the newspaper articles dedicated to the European Year of Citizens 2013 with newspaper titles such as 'EU citizenship offers a lot. Take the advantage of it.'[51]

Lately, the media has reported mainly on the voting rights of the EU citizens in Slovenia or the voting rights of Slovenian nationals in other Member States.[52] In the time of completion of this report, articles were published

50. See for example article published on 16 September 2012 in newspaper Delo: EU: kako vrniti zaupanje državljanov? (article on European Parliament's and Commission's campaign before the 2014 elections in European Parliament, focusing on convincing EU citizens to vote in those elections), available at: http://www.delo.si/novice/politika/eu-kako-vrniti-zaupanje-drzavljanov.html.
51. Article published on 6 January 2013 on the web portal MMC of the national television RTV SLO: Evropsko državljanstvo ponuja veliko. Izkoristite ga. Available at: http://www.rtvslo.si/evropska-unija/evropsko-drzavljanstvo-ponuja-veliko-izkoristite-ga/299584.
52. See for example article published on 27 June 2012 in newspaper Dnevnik: Državljani EU takoj na lokalne volitve v Sloveniji (article on EU citizens' right to vote in local elections without having to fulfil the permanent residence requirement), available at: http://www.dnevnik.si/slovenija/v-ospredju/1042538402; article published on 24 November 2012 on web portal Siol: Državljani EU bodo po novem lažje kandidirali na evropskih volitvah (article on new draft EU legislation making it easier for EU citizens to stand as candidates in 2014 EU elections), available at: http://www.siol.net/novice/svet/2012/11/drzavljani_eu_bodo_po_novem_lazje_kandidirali_na_evropskih_volitvah.aspx.

mainly on the novelties that elections in European Parliament in 2014 will bring, for example the online application MyVote2014 and other activities promoting the elections and raising the awareness among EU citizens.[53] The information presented in media tends to be accurate, mostly summarizing acts of the institutions of the EU or the press releases issued by those institutions.

As there are no salient issues related to EU citizenship in the national media, no evidence of the influence of the media on national public discourse on EU citizenship has been detected.

53. See for example article published on 18 September 2013 in weekly magazine Mladina: Z spletnim volilnim pripomočkom na evropske volitve 2014 (European elections 2014 with the online voting application), available at: http://www.mladina.si/148429/z-spletnim-volilnim-pripomockom-na-evropske-volitve-2014/; article published on 27 September 2013 in newspaper Delo: Evropske volitve malo drugače (European elections a bit differently), available at: http://www.delo.si/novice/svet/evropske-volitve-malo-drugace.html; article published on 23 May 2013 in weekly magazine Demokracija: Evropski poslanci za volitve v EU že konec maja 2014 (European MPs for the elections in EU already in the end of May 2014), available at: http://www.demokracija.si/tujina/politika/21204-evropski-poslanci-za-volitve-v-eu-e-konec-maja-2014.

SPAIN

Ana Salinas de Frías[1]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Introductory remarks

Directive 2004/38/EC has been transposed into Spanish domestic legal system through *Royal Decree No. 240/2007 of 16 February 1007, on the entry, free movement and freedom to reside within Spain of citizens of EU member states and other states parties to the Agreement on the European Economic Area*. It constitutes the latest consolidated version of Spanish legislation on this matter and incorporates amendments further introduced by different and subsequent legal instruments such as Royal Decree 1161/2009, of 10 July 2009, OJ 23/07/2009; Royal Decree 1710/2011, of 18 November 2011, OJ 26/11/2011; Royal Legal Decree 16/2012, of 20 April 2012, OJ 24/04/2012; and Royal Decree 1192/2012, of 3 August 2012, OJ 04/08/2012. Consequently, with regard to Articles 2, 3, and 5 of the said Directive, they have been transposed into the Spanish legal system through the aforementioned amended Royal Decree 240/2007.[2]

However, it should be remarked that a major amendment of this domestic ruling has taken place after the Spanish Supreme Court judgment of 1 June 2010.[3] This decision has annulled different articles and conditions established by the Decree that were considered to be more restrictive than those settled down by the EU Directive. This judgment was the result of the application made on behalf of a federation of *pro* immigrants NGOs in Andalusia called

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2. Spanish Oficial Journal (BOE) no. 51, of 28.02.2007.
3. See Spanish Oficial Journal (BOE) no. 266, of 03.11.2010.

'Andalucía Acoge' and the association 'Asociación Pro Derechos de Andalucía'. The Spanish Supreme Court Decision of 1 June 2010 implies the widening of the original conception of the term 'family member' within the Spanish legislation; an important amendment in order to eradicate discrimination against Spanish nationals not having exercised their freedom of movement, but trying to benefit from the right to family reunification; and the elimination of some undue restrictions on third countries nationals' right to reside on Spanish territory.

Question 1

Article 2 of the Directive concerning the definition of the term 'family member', and Article 3 concerning beneficiaries are transposed through Article 2 of the Royal Decree as it has been amended after the said Spanish Supreme Court's Decision of 2010. In particular Article 2 of the Spanish Royal Decree deals, in the same vein of Article 2 of the Directive, with the Decree's personal scope of application; in general terms it is addressed to UE citizens' family members, leaving aside those family members of the EU citizen who have the nationality of a third country not belonging to the EU or to the EEA, that are dealt with in Article 11 of the Royal Decree.

At the time of defining what the term 'family member' means, and of establishing the different existing categories of family members, it has to be noted that Article 2 of the Spanish Royal Decree recalls some restrictions concerning these beneficiaries, i.e. when the marriage is declared null and void or the couple is divorced. Spain regulates and insists on those limits in two different Articles of the Decree, as they are specifically dealt with not only in Article 2, but also in Article 9 of this Royal Decree. This denotes a *a priori* defensive approach to this freedom on the side of Spain.

In general terms it has to be underlined that the Supreme Court, at the time of reviewing the correct interpretation an implementation of the Royal Decree 240/2007 by domestic courts, is sensitive to arguments previously developed by the ECJ case law. In this regard, the Court invokes in different judgments some ECJ leading cases whose progressive reasoning have allowed itself to widen its previous and more restrictive case law, e.g. in the field of definition of a dependant family member in the sense of Article 2.2.c) of the Directive.[4]

4. In particular case of Aissatou Diatta v Land of Berlin, 267/83, of 13 February 1985; and case Baumbast and Others v Secretary of State for the Home Department, C-413/99, of 17 September 2002. According to the case-law of the Court, the status of 'dependent' member of the family of a holder of a right of residence is the result of a

In particular and as far as beneficiaries are concerned, the first impugned restriction had to do with the reference that Article 2 of the Royal Decree made to the possibility of becoming beneficiaries for those relatives of a EU citizen *from another member state or from a state party to the European Economic Area Agreement*. The wording of this provision closed the door for those Spanish nationals' relatives having the nationality of a third state, because a Spanish national was not *another* EU member state citizen or a citizen from a state of the EEA; in fact such a wording constituted a discrimination against Spanish nationals. The Supreme Court in its aforementioned judgment of 2010 considered that the way in which the Directive had been transposed into Spanish domestic law constituted an undue restriction of its personal scope of application and, therefore, it was contrary to EU law.

There are a number of cases having being adjudicated by the Spanish Supreme Court on this particular problem. All of them deal with the non issue of the required visa to a Spanish national's relative with the nationality of a third country, which could be considered as a beneficiary of the right to family reunification according to Article 3 of the Directive. Domestic courts rejected this right, not because they were relatives of Spanish nationals who had not in fact exercised their right to free movement and who stayed within Spain's territory, as it was the case before the judgment of 1 June 2010. These were cases of Latin American nationals – mostly from Colombia, Ecuador, Santo Domingo, and Cuba – having acquired the Spanish nationality according to Spanish domestic law, and wishing to benefit from the right to family reunification by bringing their direct ascendants from their home third countries.

Spanish domestic courts dismissed several visa applications on grounds of Article 2.2.c) of the Directive in the understanding that those were not absolutely dependent from an economic point of view of the Spanish national exercising his or her right to family reunification and, therefore, doing a narrow interpretation of the Directive's wording.

The Spanish Supreme Court relied on the literal wording used by the ECJ in order to decide on those cases.[5] And additionally, it went on with a progressively wider interpretation, declaring that 'as far as the freedom of movement constitutes an essential part of the EU citizenship and taking into

factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence.

5. In particular it referred to case Yunying Jia v Migrationsverket, C-1/05, of 9 January 2007.

account that this European citizenship statute is intended to be in of the basements of the EU, it has to be construed in an extensive manner'.[6]

However, the Court takes further into account the fact that there are different directives and different requisites regulating first, the right to family reunification in the case of a third country national who is the relative (descendent, ascendant) of a third country citizen legally residing in an EU member state; and second, an EU citizen's relative with the nationality of a third country. The Supreme Court reaches two crucial conclusions: first that it is imperative although not unconditional the recognition of an EU citizen's right to family reunification; and second, that the reunification not only relies on economic dependency, but also on other factors and circumstances, because at the end of the day the main object of such a protection is the EU citizen's family and its deep social meaning.[7]

The Spanish Supreme Court considers that the ultimate goal of protection meant by Article 2.2 of the Directive is but the protection of family life; this is so even if the domestic legislation has not included another factor taken into account by the Directive in order to recognize such a right in favor of an EU citizen's relative in the ascending line, such as the case of an ill national from Ecuador, father of a Spanish national, who not only periodically received remittances from his sons and his daughter in Spain, but whose four out of five sons lived in Spain and whose solitude and limited capacity for work was taken into account by the Supreme Court in order to grant the required visa that domestic courts had initially denied, as they didn't consider him as a dependent relative uniquely on the basis of economic reasons.[8]

Even more, in a case of dismissal of a visa with the aim of family reunification on the side of a Colombian lady who tried to bring her mother to Spain, the domestic court of first instance refused to grant the visa with a very succinct justification which aimed at a non economic dependent status. Yet, the Supreme Court not only annulled the visa dismissal, but reasoned in a '*reverse*' way in order to widen this possibility, and concluded *a contrario* that:

'Más bien al contrario, desde el momento que la propia Administración no ha discutido realmente que entre el reagrupante y el reagrupado no existiera la relación de dependencia

6. STS 7339/2011, para.43.
7. See STS 7339/2011, para. octavo and noveno; STS 8359/2011, para. quinto.
8. See STS 8677/2011, para. tercero. In the same vein see cases STS 1470/09, of 20 October 2011; STS 1046/2010, of 22 November 2011; STS 129/2011, of 23 March 2012; and STS 8826/2012, of 26 December 2012.

que se enmarca dentro del concepto 'estar a cargo' que, por lo demás, a la vista de los datos concurrentes, y con la perspectiva casuística que es inherente a esta materia, puede considerarse justificada.'[9]

Some other cases concerned the refusal of a visa with the aim of family reunification of a son over 21, but still dependent from the holder of the right of residence. Arguments in that case dealt with before the domestic court of instance had mainly to do with the minimal amount required in order to consider the person in question as economically dependent from the EU citizen. The Supreme Court annulled the judgment and declared that in those circumstances the economic dependence of the affected person was clear enough. The elements taken into account for reaching such a conclusion in that case were varied: the frequency of remittances; the absence of incomes on the side of the third national; the cost of life in his country; and the fact that his parents and his sister already lived in Spain. The Supreme Court concluded that:

'Los vínculos familiares que tutela el instituto de la reagrupación familiar exigen una interpretación de sus requisitos legales en atención a las circunstancias expresadas.'[10]

This is undoubtedly a very progressive way of reasoning on the part of the highest judicial instance in Spain that clearly demonstrates a very positive attitude towards a full, effective, and wide implementation of the EU citizen's rights and, in particular, of the rights enshrined in the Directive 2004/38. However, there have also been some doubtful cases where perhaps this reasoning should not automatically be applied. It is e.g. the case of a Senegalese citizen who later acquired the Spanish nationality and whose very young children were denied a visa, applied for as a previous step for benefiting from family reunification. In the first instance, domestic court dismissed the application for the visa considering that they lived with their mother in Senegal, their father was married again in Spain with a second spouse and had a new family with two more children, and considering also that the granting of the visa would deprive them of a normal family life and would mean to separate them from their mother and to bring them into a very different family atmosphere. The court added that the main purpose of the right to family reunification was precisely to unify, but not to separate families. Nevertheless, the father applied before the Supreme Court insisting on the better possibilities that their family life in Spain would give them.

9. STS 1883/2012, para. séptimo *in fine*.
10. STS 3863/2012, para. tercero *in fine*.

The Supreme Court automatically used the same reasoning explained *supra*, reinforced by the fact that the mother had accepted in a written document to decline her right on her children in favour of the husband. But the Supreme Court did not wonder about other possible particularities of this case, such as the young age of the children and the fact that the gentleman had repudiated his first spouse who therefore had less economic possibilities and resources and who was, in fact, illiterate. In this vein the Court did not take any guarantee in order to assure that the mother had not been forced to sign or that she could perfectly understand the document that she had signed with her fingerprint.[11] These shortages were underlined by one of the magistrates in her dissenting opinion.[12]

One can agree or disagree with it, but it is true that the Supreme Court – contrary to several Spanish domestic courts of instance – has invariably accepted and adjudicated in favour of almost all cases concerning a generous conception of those beneficiaries envisaged in article 2 of the Directive without taking into account possible important differences or nuances.

Secondly, still in the text of Article 2 of the Royal Decree, the Spanish government initially excluded from beneficiaries not only those already mentioned within the Directive, but it also made reference to the separated spouses, an existing different legal category in Spanish domestic law whose inclusion would mean a widening of those excluded beneficiaries and, in that sense, a restrictive transposition of the Directive itself. The Spanish Supreme Court, in making reference to the ECJ case *Aissatou Diatta c. Land Berlin*,[13] made clear the distinction between divorced spouses and separated spouses and decided that this latter category should not be included in the Spanish transposition decree as it would constitute a restrictive implementation of the EU Directive.[14]

A third restriction has been removed after the Supreme Court's judgment, as the original ruling only considered as a beneficiary a partner with whom the UE citizen had contracted a registered partnership, whenever the country in which the registration had taken place counted only on a single and unique public registry, an additional condition not included in Article 2 of the Directive and that the Spanish Supreme Court has annulled.

11. STS 1485/2012.
12. See *ibíd*., dissenting opinion of magistrate María Isabel Perelló Domenech.
13. Case 267/83, of 13 February 1985.
14. See STS 114/2007 *supra*, tercero.

Finally, it is also important to recall that the Royal Decree forgets to include among beneficiaries to those included in Article 3.2(a) *in fine* of the Directive:

'... any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen'.

This autonomous category of family member is not reflected in the already mentioned Spanish law, something that could have been problematic and also could have been considered as an incomplete or insufficient transposition of the Directive 2004/38/EC.[15] This particular case has been dealt with by the jurisprudence of the Supreme Court that, in a case concerning the dismissal of a visa application of an over 21 year old daughter who could not demonstrate economic dependency from their parents, now Spanish nationals, refused to annul the judgment of the first instance court considering that the requisite of suffering from particularly grave health problems was not present in those circumstances.[16]

As far as transposition of Article 5 of the Directive is concerned, it has been incorporated to Spanish domestic law through Article 4 of the aforementioned 240/2007 Royal Decree, which includes the right of entry of the EU citizen's relatives considered as beneficiaries, and to obtain a visa if necessary according to EC Regulation 539/2001. Procedural guarantees included in this provision – that mainly concern requirements and assistance in order to get a visa – have been taken into account and faithfully reflected in the domestic legislation. The guarantee of issuing the visa free of charge is also specifically foreseen in Article 47 of the general law applicable to third states nationals – *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*[17] – that remarks in par-

15. It should be recalled here that Spain was already condemned by the ECJ by judgment 2009/143/ECJ, of 14 May, as Council Directive 2004/81/CE of 29 April wasn't properly applied and Spain didn't issue a residence card to third country nationals who were victims of traffic on human beings or those third country nationals having been used by illegal immigration mafias who co-operate with Spanish authorities.
16. STS 3020/2013.
17. Spanish Oficial Journal no. 10, of 12.01.2000, consolidated text available at: http://www.boe.es/buscar/pdf/2000/BOE-A-2000-544-consolidado.pdf, last visited on 17/09/2013.

ticular that visa applications made by a EU citizen's family members owing the nationality of a third country and being beneficiaries of the freedom of movement and residence in the EU would be exempt from paying any fare.

In this regard some cases by the Spanish Supreme Court should be mentioned, both relating to the fact of denying a visa to Romanian citizens, applied for before 2007 and having been dealt with by Spanish authorities under the restrictions temporarily established on Romanian and Bulgarian citizens as far as free movement of workers was concerned. The Spanish authorities denied the visa to the aforementioned Romanian nationals considering that they could neither reside nor work in Spain according to those adopted restrictive measures under the safeguard clause included in their accession treaties. However the Supreme Court reasoned in the opposite way, its response being grounded on the fact that, after the entry of Romania and Bulgaria in the EU with full effects from 1st January 2007 onwards, a right of freedom of movement and residence should be granted as an essential part of the European citizenship statute (Article 18 TEU) which implied a wider conception and protection of this freedom than the mere free movement of workers foreseen in Article 39.1 TEU.[18]

Question 2

Originally, and as far as the right to reside in Spain by EU citizens' relatives holding the nationality of a third country is concerned, the transposition of the Directive was not correct, as the Spanish Decree included a more restrictive approach when it required them in order to be exempted from the requisite to

18. See STS 2525/2004, of 12.02.2008; STS 2110/2004, of 13.02.2008; STS 1767/2004, of 15.02.2008; and STS 4268/2011, of 29.06.2011. Such a reasoning was also applied even in those cases were the applicants were considered by instance courts as guilty of a crime of illegal immigration punished by the Spanish penal code. The Supreme Court considered that once Poland or Romania had become EU member states the most favorable law should be applied and those EU nationals should be allowed to stay in Spain. The Spanish Supreme Court declared that EU citizens' right to free movement is an essential freedom protected by TUE, and made a crucial difference between the right to freedom of movement of workers and of citizens: in the former case an EU member state might apply a safeguard clause, in the later it is a fundamental right applicable to everyone since the very entry of his or her member state to the EU and no restriction could be imposed upon him or her. See STS 4019/2007; STS 4840/2007; STS 5061/2007; STS 6645/2007; STS 7662/2007; STS 2037/2008. See STS 2623/2008. Also in the case where an expulsion sanction was ordered as a consequence of the expiry of the visa. See STS 630/2008; STS 628/2008.

have a visa, that they had obtained their family residence card issued by an EU member state in which Schengen agreements were fully applied. This implied a discriminatory treatment for those coming with a family residence card issued by an EU member state that did not fully apply the Schengen Agreements. The 2010 Supreme Court judgment annulled this provision.[19]

The right to reside in an EU member state for more than three months is envisaged in particular in Article 7 of the Spanish Royal Decree. Nevertheless, it must be clarified that the reference made to labour rights of the Directive's beneficiaries within the Spanish domestic regulation (Article 3.2) was annulled by the Supreme Court judgment already mentioned *supra*, as it denied the right of those relatives dependent from the Spanish national being over 21 to exercise a remunerated activity.

Apart from these general remarks, no specific jurisprudence has been developed yet by Spanish domestic courts on this matter. The cases that have been reviewed by the Supreme Court deal mainly with the economic resources enjoyed by a Spanish citizen's relative from a non EU country applying for the family reunification benefit, in order to decide if he or she was a dependent person, as it has already been explained *supra*.

In any case, Article 7.7 of the Royal Decree specifically establishes that the terms 'sufficient economic resources' cannot be interpreted to mean that national authorities may decide on a fixed amount of money beforehand, but that such an appreciation should be made on a case by case basis,[20] although the amount decided will never be higher than the one considered by Spain as the minimum income under which social aid is prescribed in favour of Spanish citizens; or it would never be under the minimum Spanish retirement pension.

Question 3

Articles 12 to 15 of the Directive, concerning the retention of the right of residence in general and in particular in the event of death and/or departure of the Union citizen, and in the event of divorce, annulment of marriage or termination of registered partnership, as well as procedural guarantees, have been faithfully transposed into Spanish domestic legal system *via* Article 9 and Article 9 *bis* of the Royal Decree. In particular Articles 12 and 13 of the Directive have their correspondence in Article 9 of the Royal Decree. It has

19. See STS 1 June 2010 *supra*, séptimo.
20. In accordance with the ECJ case law. See e.g. case Kunqian Catherine Zhu and Others v Secretary of State for the Home Department, of 19 October 2004.

to be recalled that Article 9 of the Royal Decree was partially annulled and amended by the Supreme Court judgment of 1 June 2010, eliminating the restriction concerning those partners 'legally separated', a category which was not included in the Directive's wording, as it has been explained *supra*. Also, another provision within this article was annulled as it required those relatives of the dead EU citizen who had not previously acquired the right to permanent residence to be granted a card residence complying with conditions established by the domestic applicable law to third country nationals in general,[21] only available once it was demonstrated that the applicant was employed or self-employed person; he or she had sufficient economic resources; or he or she was integrated within another family complying with the two mentioned requisites. The Spanish Supreme Court considered the transposition of the Directive made in this case as a restrictive one and annulled this provision.[22]

As far as minimum duration required in case of death or annulment of the marriage or partnership the periods of time established in both systems are the same.

Question 4

The right of permanent residence enshrined in Articles 21 to 26 of the 2004/38 Directive has been transposed into Spanish domestic law mainly through Articles 10 and 11 of Royal Decree 240/2007, some general provision having also been included in Articles 12 and 13, as far as procedure and issue of residence cards are concerned. It must be said that the Royal Decree provisions faithfully reproduce the regulation made by the Directive, and that in some cases domestic procedural steps are even more favourable than the corresponding Directive provision. This is the case e.g. of the deadline established in order to apply for the residence card: meanwhile the Directive lays down a maximum period of six months for the residence card to be issued in the case of a UE citizen's relative from a third country (Article 20), the parallel Spanish provision speaks of a period of only three months (Article 11.1 of the Royal Decree). However, when dealing with the application for a residence card once the previous one has expired, the Royal Decree introduces a requirement establishing that renovation of such a card should be applied for one month before its expiration date, or in the next three months although in

21. See Spanish Law 4/2000, cit. supra.
22. Supreme Court judgment 114/2007, octavo.

this late case, renovation could be subject to the appropriate and proportional administrative sanction. This possibility of late applying for the residence card subject to a proportionate administrative sanction is shared in both EU and domestic regulation, yet the Spanish provision (Article 11.1 *in fine*) is more restrictive, since it establishes that late application should be done in a fixed maximum period of three months, something that the Directive does not say (Article 20.2). This could be problematic in the near future.

Additionally, the Spanish Royal Decree complies with the requirement of gratuity or at least non-discrimination with regard to the issue of residence cards foreseen in Article 25.1 of the Directive, as it establishes in its Article 14.1 that fares will be applicable to the issue of such cards, but that their cost will be the same as fares duly paid by Spanish citizens when applying for issue or renovation of their identity cards.

Controversial aspects discussed before Spanish domestic courts have mainly had to do with the condition of being a relative dependant on the EU citizen, already explained in Question no. 1. Or they were cases in which expulsion has been decided by Spanish first instance courts as a result of the absence or the expiry of the identity card, visa, or residence card allowing those relatives to stay. When those cases were brought before the Spanish Supreme Court it has privileged the application of different criteria: first, a narrow understanding of Article 15 of the Royal Decree that would allow expulsion only as a very aggravated sanction in cases of public policy, public security, or public health; and second, considering that the main fact to be taken into account in order to adjudicate on the case was that such a behaviour did no longer constitute a crime punished by the Spanish penal code, once the individual had become citizen of an EU member state.[23]

Finally, and with regard to data on the volume of applications to date for the status of permanent residence having been published by Spanish authorities, it must be underlined that there is great information published concerning the number of EU citizens holding a residence card or a permanent residence card issued by the Spanish authorities. This information is recorded and published in a report every three months.[24] The report considers specifically residence cards and permanent residence cards delivered to EU citizens in its Part II that classifies those citizens by nationality, sex, province, or age. However, no publication or Spanish public record exist on the number of ap-

23. See STS 628/2008, of 13 February 2008, in a case of a Bulgarian national; and STS 630/2008, of 12 February 2008, in a case of a Romanian national.
24. See http//extranjeros.empleo.gob.es/es/Estadisticas/operaciones/con-certificado/index.html.

plications made to Spanish authorities for a residence card or a permanent residence card by a EU citizen or, in general, those considered to be beneficiaries of Directive 2004/38. It has also not been possible to find that information in the Spanish national reports in eudo-citizenship.eu/databases.[25]

Question 5

Article 24 (2) of the Directive deals with the equal treatment principle, that clearly plays a crucial role in the effective and real implementation of rights enshrined in it. In this regard the principle has been expressly included in Article 3.4 of the Royal Decree, guaranteeing an equal treatment of EU citizens and their relatives – either EU citizens or third countries nationals benefiting from the right to residence and/or permanent residence – to treatment of Spanish citizens.

However, the possibility of EU member states partially derogating from this principle – as far as some types of social assistance are concerned and within the limits and possibilities established by the ECJ case law[26] – has not been expressly included in this domestic rule, and there is no signal of this faculty of the Spanish authorities having been implemented until now, or at

25. See http:// eudo-citizenship.eu/databases, then: PROMINSTAT, Country Reports, in http://www.prominstat.eu/drupal/?q=node/2.

26. See e.g. case C-209/03, Dany Bidar and London Borough of Ealing, Secretary of State for Education and Skills, of 15 March 2005, concerning social aid limited to students established in a EU member state; case C-158/07, Jacqueline Förster and Hoofddirectie van de Informatie Beheer Groep, of 18 November 2008, on the possibility of limiting the availability of social aids to migrant EU member states' students having previously resided for a minimum period of time in that state. The ECJ has been much stricter in the case of free movement of students and their access to social aids in their state of residence than in the case of job-seekers, that have been, first of all, considered by the Court as workers in the sense of the case law developed by the Court; and second, cannot see their access to social aids offered by a EU member state constrained to the condition of having their usual residence in that given state. However, and in order to avoid any abuses, the ECJ has required those candidates to such social aids from a EU member state to have a real link with the labour market of that state e.g. to effectively search for a job in the given EU country or to be available for a job offer in that country. There have been no decisions from Spanish domestic courts on this matter; the majority of cases discussed before the Spanish Supreme Court concerning labour matters are related to calculation of the retirement pension in a case of a worker having contributed to the social security system of different EU member states. See e.g. STS 3650/2005, of 17 July 2007; STS 1044/2007, of 30 September 2008; STS 4056/2009, of 15 September 2010; STS 1510/2011, of 29 February 2012.

least any signal of the existence of contentious cases on this specific matter brought before the Spanish Supreme Court or the Spanish Constitutional Court to date.

Question 6

Restrictions on the right of entry and of residence of EU citizens and their relatives included in the group of beneficiaries of Directive 2004/38 are very few and narrowly construed by the ECJ in order to make the fundamental citizenship right of freedom of movement as wider as possible. Article 27 of the Directive lays down general principles governing the most important existing restriction on this right: public policy, public security and public health. Meanwhile public health is a better defined concept, the ECJ case law has had the opportunity to define as sharply as possible those generic concepts of public policy and public security, the former having mainly to do with the maintenance of public order and being protected by Article 28.2 of the Directive; the later having to do mainly with the internal and external security of the state and allowing the adoption of expulsion measures against the given beneficiary.[27] No differences can be appreciated as far as the transposition of the Directive into Spanish domestic legal system is concerned. Thus, article 15 of the Royal Decree reproduces the same cases and guarantees foreseen in the corresponding provisions of the Directive Articles 27 and 28.

Taking into account the extremely grave consequences on this right of a measure such as expulsion, the Court has developed some interpretation parameters such as the proportionality principle and the necessity of taking into account links with that member state of the beneficiary to be expelled from the EU member state (degree of integration, number of years of residence, etc).

The jurisprudence produced by Spanish domestic Courts up to date has not dealt with this specific aspect. In fact, only in a few cases could such an argument be discussed, concerning either the illegal entry within the Spanish territory of Romanian nationals, constituting a crime of illegal immigration according to the Spanish penal code, or in the aggravated case of either Romanian or Lithuanian nationals forcing some women of the same nationality to prostitution. However, the Supreme Court did not take those crimes into account due to the fact that by the time of adjudicating both Lithuania and

27. See case C-145/09, Land Baden-Württemberg and Panagiotis Tsakouridis, of 23 November 2010; case C-348/09, P. I. and Oberbürgermeisterin der Stadt Remscheid, of 22 May 2012.

Romania had become EU member states and, therefore, the Court dismissed the expulsion orders.[28]

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

As it has been explained *supra*, the ECJ frequently recalls the dual dimension of the freedom of movement in EU law: a freedom guaranteed in favour of all workers, but also a fundamental right included within the EU citizenship statute that enjoys an enhanced protection. In this vein, the Court has often invoked direct effect of Articles 20 and 21 TFUE in its jurisprudence in order to widen as much as possible the protection of this right. In so adjudicating, the ECJ clearly distinguishes when it is applying EU derived law – Directive 2004/38 – and when it is directly recalling authority and direct rights derived from EU primary law.[29]

Yet, opposite to this practice, Spanish Supreme Court case law reviewed on this matter does not make such a clear distinction either between both legal instruments or between their respective legal consequences, but it just makes sure that the ECJ interpretation is literally reproduced and followed by magistrates, and that their judgment does not contravene ECJ case law, even if the Spanish Court also accepts this dual meaning of freedom of movement.[30]

28. See STS 4019/2007; STS 4840/2007; STS 5061/2007; STS 6645/2007; STS 7662/2007; STS 2037/2008, *supra*.
29. See e.g. case C-85/96, María Martínez Sala and Freitstaat Bayern, of 12 May 1998, paras 60 ss; case C-34/09, Gerardo Ruíz Zambrano and Office national de l'emploi (ONEm), of 8 March 2011, paras 42 ss.
30. See e.g. STS 4019/2007; STS 4840/2007; STS 7662/2007; and STS 2037/2008, *supra*.

Question 8

Spanish citizenship (*nacionalidad*) and, in particular, acquisition and loss of it, has been regulated by the Spanish civil code since 1889.[31] The most relevant amendment to this regulation concerning our topic is the one implemented in 2002.[32] According to it, and as far as acquisition of citizenship is concerned, there are two different possibilities: automatic acquisition of nationality, by which Spain mainly embraces 'an unqualified *ius sanguinis*, although the system also contains certain *ius solii* elements';[33] and four different modes of non-automatic acquisition of nationality, namely by option;[34] by discretionary naturalization when extraordinary circumstances concur;[35] a mode of residence-based acquisition;[36] and finally, acquisition based on possession in good faith of the status for a period of at least ten years.[37]

As far as we can gather from this regulation, other EU member states' nationals as well as third country nationals complying with those specific requirements could acquire Spanish citizenship (nationality); however, unless he or she is included within one of the so-called privileged groups,[38] the applicant, and in particular all EU member states' nationals – with the sole exception of Portugal – will be additionally obliged to renounce his or her previous citizenship (nationality).[39]

31. Spanish citizenship (nationality) is currently regulated by Articles 17 to 28 of the Spanish Civil Code. Further on the distinction between nationality and citizenship see PÉREZ VERA, E.: 'Citoyenneté de l'Union européenne, nationalité et condition des étrangers', 261 Recueil des Cours de l'Academie de Droit International Public (1996), 243.
32. Ley 36/2002, de 8 de octubre, de modificación del Código Civil en materia de nacionalidad, BOE núm. 242, of 09.10.2002.
33. As it is stated by the EUDO Citizenship Observatory in the Spain's Country Report, p. 2. Report available at: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Spain.pdf; last visited on 27.09.2013.
34. The only will of the applicant will suffice, although this mode is available only to certain categories of citizens with special links with Spain. See Articles 19 and 20 of the Spanish Civil Code.
35. By discretionary conferral, that can be denied by Spanish authorities on grounds of public order or national interests. See Spanish Civil Code, Article 21.1. In this case, ten years of uninterrupted legal residence are required, but they can be shortened in certain special groups of nationals (Spanish Civil Code, Article 22).
36. Spanish Civil Code, Articles 21.2 and 22.
37. Spanish Civil Code, Article 18.
38. Latin American countries, Andorra, Philippines, Guinea Equatorial, and Portugal.
39. Spanish Civil Code, Article 23.b.

On the other hand, the loss of Spanish citizenship (nationality) in the case of those having applied for and acquired it is considered in three different situations: when the individual has only effectively used the previous nationality that he or she was supposed to have renounced for a period of three years; when the given individual by his own will enters to the military forces or exercises a political position in a foreign state against the express prohibition of the Spanish government; or, when there is a definitive judgment stating that the applicant has engaged in falseness, concealment, or fraud in the acquisition of Spanish nationality nullifies that acquisition.[40]

It means that, in the context portrayed by the ECJ judgment in Rottmann, the Spanish domestic regulation of citizenship (nationality) could still provoke a similar situation as the one applying to Mr Rottmann, as any EU citizen having illegally acquired Spanish nationality would be deprived of it and could consequently become a stateless person, taking into account that Spanish law requires him or her to previously renounce to his or her nationality. Therefore, we could infer from this that Spanish domestic legislation on acquisition and loss of citizenship would not fully respect EU law, as far as the rights derived from the European fundamental citizenship statute would be unavailable for such EU citizen.

Nevertheless, Article 26 of the Spanish Civil Code allows those who are not by birth Spanish and have lost Spanish nationality to recover it, although uniquely by previous rehabilitation discretionally given by the Spanish Government. It would be necessary then to decide on a case by case basis whether Spanish legislation on acquisition and loss of nationality (citizenship) would fully comply with EU citizens' rights taking in due account the requirements established by the ECJ in the said Rottmann case: gravity of the behaviour; period of time elapsed between the acquisition and the revoking decision; and possibility that the EU citizen recovers his or her nationality of birth.

Be that as it may, it should be concluded that Spanish regulation on this point is not sensitive enough to an effective enjoyment of EU citizenship's rights, all the more so because EU citizenship was a proposal approved at the Maastricht summit at the instances of the Spanish government and that the last major amendment of this legislation took place in 2002, long after the entry into force of the EU citizenship provisions.

40. Spanish Civil Code, Article 25.

Political rights of EU citizens

Question 9

Political rights in Spain, and in particular rights to vote and stand for elections, have been regulated after the end of the dictatorship and the entry into force of the 1978 Constitution by the General Electoral Law.[41] Therefore, any modification concerning the rights so enshrined necessarily had to be done through the amendment of the aforementioned law. It is well known that originally Spanish domestic legal order only granted such rights to Spaniards and that, by the time of the entry into force of the Maastricht Treaty Spain, as some other EU member States, had to amend the Spanish constitution for the first time, in order to include the electoral rights derived from the European citizenship by adding not only the possibility of 'active' eligibility rights, but also 'passive' ones.[42]

Consequently, the Council Directive 93/109/EC of 6 December 1993 was transposed into Spanish domestic law in a first stage by organic law 1/1987 of 30 March 1994,[43] that added to the elections contemplated within the General Electoral Law and the elections to the European Parliament, unknown until then for Spanish nationals. And in a second stage, those provisions of the Directive still to be transposed into Spanish law were implemented by the adoption of the organic law 13/1994 of 30 March[44] and Royal Decrees no. 157/1996 of 2 February,[45] and no. 147/1999 of 29 January,[46] regulating such a crucial aspect as the requirements needed in order to proceed to registration of EU citizens in the Spanish electoral register. In this vein, some additional requirements were laid down in the case of EU citizens: nationality, a specific statement of his or her will to vote for the elections to the European Parliament in Spain, and the last electoral circumscription to which he or she last belonged, with the main aim of avoiding that the EU citizen can vote in more than one member state. These conditions were reproduced in the case of pas-

41. Ley Orgánica del Régimen Electoral General 5/1985, of 19 June, Spanish Oficial Journal no. 147, of 20.06.1985
42. See Rodríguez, A., 'Access to Electoral Rights. Spain. EUDO Citizenship Observatory, June 2013, available at http://eudo-citizenship.eu; last visited 23.09.2013.
43. Spanish Oficial Journal no. 80, of 03.04.1987.
44. Spanish Oficial Journal no. 76, of 30.03.1994.
45. Spanish Oficial Journal no. 44, of 20.02.1996.
46. Spanish Oficial Journal no. 26, of 30.01.1999.

sive suffrage and have remained practically unaltered until now, the fact of acknowledging binding legal effect to the EU Charter of Fundamental Rights after the entry into force of the Lisbon Treaty having meant no changes on this matter.[47]

On the other hand, as far as conditions related to residence are concerned, Spanish legislation clearly complies with EU derived law, as it expressly declares to apply the same residence requisites to both Spanish and EU citizens.[48] Hence, Directive 93/109/EC has been fully implemented after the adoption of the law 13/1994, from 31 March 1994 onwards.

However, difficulties derived from the requisite of attesting the fact of not falling under any of the circumstances preventing an individual from being elector or eligible person, often dissuade potential EU non national candidates from taking part in the elections as an eligible candidate. In order to fight this inconvenience Directive 2013/1/UE of the Council, of 20 December 2012 was adopted.[49] The Directive has not formally been transposed into Spanish domestic law yet, nonetheless, a resolution adopted by the Board of the Electoral Register on the 12 April 2013 partially simplifies such a procedure as laid down by the Directive.[50] Yet, the crucial aspect of certifying the fact that the EU citizen wishing to stand as a candidate does not come under any of the prohibitions legally established by his or her home country has not been dealt with by this resolution and, therefore, this difficulty remains. Moreover, another indirect restriction limiting passive suffrage still remains, since the Spanish law on political parties allows foreigners to participate in a political party, but it only entitles Spaniards to create a political party. Considering the fact that electoral candidates are presented mainly by political parties and not in an autonomous way, EU citizens in Spain would need to enrol in an already existing political party if they want to profit from public financial assis-

47. Viciano Pastor, R. & Durban, I., Artículo 30. Derecho de sufragio activo y pasivo en las elecciones al Parlamento Europeo', in Monereo Atienza, C. & Monereo Pérez, J.L. (Dir.): La Europa de los Derechos. Estudio sistemático de la Carta de los Derechos Fundamentales de la Unión Europea', Comares, Granada, 2012, 1109.
48. See Liñán Nogueras, J., 'El estatuto de la ciudadanía de la Unión', in LIÑÁN NOGUERAS, J. & MANGAS MARTÍN, A.: 'Instituciones y Derecho de la Unión Europea', Tecnos, Madrid, 2012, 151. Therefore, it also clearly complies with the ECJ case law as it has been stated e.g. in case C-300/04, of 12 September 2006, Eman and Sevinger v College van burgemeester en wethouders van Den Haag.
49. See OJ L 26, of 26.01.2013.
50. See Resolución de 12 de abril de 2013, de la Oficina del Censo Electoral, Spanish Oficial Journal no. 126, of 27.05.2013.

tance and access to the media in his or her electoral campaign.[51] These two handicaps still need a solution on the part of Spain.

Question 10

Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals has been transposed into Spanish domestic legal order by the organic law 1/1997,[52] that modifies the General Electoral Law. Thus, transposition of the Directive took place once the transposition period had expired, as Spain was one of the reluctant states that were included in the group of 11 EU member states to which the Commission delivered a reasoned opinion on non-compliance, according to Article 258 TFEU. Only Belgium was brought before the ECJ by the Commission, the other ten member states having ended their internal transposition procedures by 1999.[53]

This delay in transposing the said Directive originated the decision of the High Court of Justice of Valencia Region (Tribunal Superior de Justicia de la Comunidad Valenciana) to declare direct effect of Article 8.B.1 of the EC Treaty (current Article 22 TFUE), in the local elections held in May 1995, in a case of two French citizens residing in Valencia who were not allowed to vote and could not invoke the right to vote in local elections derived from the Directive. The domestic Court annulled the elections held in that precise case and voting had to be repeated, allowing those two French nationals to exercise their right.[54]

Amendments to the initial transposition law have taken place by means of the same domestic rules that have updated domestic norms transposing the right to vote for and stand as a candidate in European Parliament elections. The same aforementioned shortages and limitations also apply to the case of municipal elections, the solution of the two main problems commented on *supra* – delay in receiving attestation of not falling under any excluding cir-

51. See Ley Orgánica de Partidos Políticos 6/2002, of 28 June, Spanish Oficial Journal no. 154, of 28.06.2002, Article 1.1.
52. Organic Law 1/1997, of 30 May, Spanish Oficial Journal no. 130, of 31.05.1997
53. See OLIVIER LEÓN, B., 'El derecho de sufragio como elemento estructural de la ciudadanía europea', 4 Revista de derecho constitucional europeo (2005), 197.
54. See BLÁZQUEZ PEINADO, M.D., La ciudadanía de la Unión: los derechos reconocidos en los artículos 8.A a 8.D del TCE, Tirant lo Blanch, Valencia, 1998, 185.

cumstance in order to be eligible, and impossibility of creating a new political party – are still to be adopted.

Question 11

Spanish domestic legal order only allows EU member states' citizens residing on Spanish soil to take part either as a eligible candidate or as a voter in local elections and European Parliament elections, as it is ruled by the European citizenship statute, Articles 20.2.b and 22 TFEU. No right to take part in national or regional elections, neither from an active nor a passive perspective, is franchised to EU citizens as currently Spanish General Electoral Law stands. In fact Article 13.2 of the Spanish Constitution does not mention this possible extension; consequently only Spaniards can vote and stand as a candidate in regional elections.

However it should be underlined that some recently amended Statutes of Autonomy mandate regional authorities to involve EU citizens residing in the region and to promote their taking an active part in political life and political affairs, although the adoption of regional laws enfranchising EU citizens in regional elections will not take place unless Article 13 of the Spanish constitution is amended.

Question 12

Directives implementing the EU citizens' electoral (political) rights analyzed *supra* recourse to domestic legislation and sent to those national provisions in order to regulate deprivation of voting rights in certain cases. In this regard Article 6 of Directive 93/109/EC and Article 5 of Directive 94/80/EC establish that deprivation of electoral rights of other EU citizens in their EU state of residence will depend on domestic regulation either in their EU home country or in the EU member state of residence where he or she intends to vote or to stand as a candidate.

In this vein, Article 3 of the Spanish General Electoral Law (LOREG) lays down that citizens can be forfeited of their electoral rights by a court or tribunal as a result of a criminal offence, either as a main or an accessory penalty, during the term of their conviction. It is also foreseen the lost of electoral rights for those persons expressly considered as unable by a judgment; and also for those who are in an institution for mentally ill persons. Additionally, Article 559 of the Spanish criminal code has clarified this specific punishment, and it has established that only eligibility rights may be forfeited to a convicted criminal and that the main punishment to deprive individuals from

the exercise of their civic rights will be a period within two to six years. Moreover, Article 6.2 of the General Electoral Law (LOREG) establishes that those condemned to deprivation of liberty cannot stand as a candidate while in prison. In conclusion, any person condemned to prison in Spain will compulsorily and accessorily be deprived of his eligibility rights. However they will recover these rights once they serve their prison sentence. This has been e.g. the case for two Romanian citizens sentenced to prison in Spain for forcing young Romanian girls to prostitute themselves in Spain and who also have been forfeited of their eligibility rights.[55] Such a penalty is not currently under debate in Spain and there has not been any controversy as far as public opinion is concerned.

Culture(s) of citizenship

Question 13

A preliminary distinction should be made in order to answer this question: there is a perception of EU citizenship on the part of the public instances of the State, mainly judges and legal operators in general; and there is another different perception of it on the side of population in general and public opinion.

As far as the first is concerned, the way in which public powers invoke and apply any European or domestic rule concerning EU citizenship transpires a deep rooted conscience of being in presence of a current right added to domestic constitutional rights by virtue of the European integration process. Attention paid to, care for, and importance recognized to either EU law (directives and primary norms) and to the case law of the ECJ clearly show the higher conviction at this level of the importance of the right to freely move within EU granted by the EU citizenship, and its primacy.

This perception is not that clear as far as public opinion in general is concerned. From this viewpoint, citizenship rights are less known, and in particular with regard to free movement of persons they are rather seen as an artificial door opened to other EU nationals in order to avoid application of immigration law, that is, a citizens' rights culture disappears and the fact is instead

55. The Supreme Court found this accessory penalty compatible with Royal Decree 240/2007 analysed supra. See Spanish Supreme Court judgment 1038/2008, of 05.02.2008.

perceived as an illegitimate attempt to profit from exemptions on visa and immigration controls at any cost, or the feeling of being imposed others EU citizens' privileges that could be potentially harmful in a generalized economic crisis scenario.

Finally, politicians practice a dual discourse at domestic and European level on European integration in general and, therefore, also on citizens' rights. Thus, in times of general elections stress in set on fighting EU political instances in order to have a stronger and more dominant position for supporting national interests and, in so acting, the population perceives the European integration process as something that could be negative *per se*, and that should be curb and adapted to national needs, citizenship included. And in times of European elections politicians recall the invaluable advantages of belonging to the EU; however, participation in European elections decreases more and more, particularly in times of domestic political and financial crises. This other side of the medal does not counterpart the negative effect of the behaviour described in campaigns for general elections.

Question 14

It must be said that either the Supreme Court or the Spanish Constitutional Court have often invoked the EU Charter of Fundamental Rights since it was adopted in 2000, even long before acquiring its current binding legal status. It is used in arguments of the parties when their cases are discussed before Spanish domestic courts, and it has continued to be so after the entry into force of the Lisbon Treaty on the 1st December 2009.

There have not enough elements to clearly support that the fact of the Charter having been recognized the same legal status as the EU constitutive treaties has changed the way in which domestic courts conceive, interpret, or apply EU law in general, and citizenship provisions in particular. Courts and tribunals mainly make reference in their decisions to EU primary and secondary law, and additionally they may also cite the EU Charter, but this fact does not mean that it reinforces or amplifies the way in which citizens' rights are construed.

Question 15

In order to answer this question we need to transcend the current situation of general economic crises that completely overshadows the debate on any European affair on the media. Despite this, and perhaps due to the fact that in any country – and also within EU member states – mass media are a *de facto*

power in the shadow, counterbalancing the *de jure* political power, and also due to the fact that the ultimate addressee of media are citizens generally considered, media tend to be in a sense sensationalistic and alarming. It also reflect the action and discourse of political powers and, in the case of Spain as it has been underlined in question no. 13, this discourse also tends to be opportunistic and politically biased.

Once this has been said, the following will be better understood: most reflections on European integration on the media that have been done during the last twenty years – that is, since the Maastricht Treaty – aiming directly to the citizens would not encourage or strengthen a positive view of this integration process as they mostly pay attention to the possibilities opened for third country nationals to become Spaniards (e.g. the remarkable case of Latin American nationals) and to remain in Spain after having entered as immigrants. Moreover, this situation has appeared at the same time that Spain has turned out to be an immigration country, instead of a traditionally emigration country, as well as EU exterior frontier reinforced with the creation of the European Freedom and Security area. This is also directly linked to the notorious absence of any specific positive remark on EU citizenship in electoral programs of main political parties adopted for national or regional electoral campaigns. In these cases specific mentions to citizenship appear only in some of them, and when they do, it is usually in the form of more demands and petitions for the EU, rights and advantages brought by the integration process being considered as insufficient.

Or the problem created as a consequence of the different level of social and sanitary protection within EU member states that has had as a result the so called '*health tourism'*, an increasingly worrisome affair for the public expenditure in some regions (comunidades autónomas) in Spain such as Andalucía, where there is an extensive catalogue of very expensive health treatments, surgery, etc paid by the public budget and available to other European citizens, that they would have to pay themselves in their own home states. In this vein, it has to be underlined that information transmitted to citizenship through the media is in most cases inaccurate and politically biased also, as far as editorials or transcript politicians' declarations are concerned. Obviously, such situation provokes a negative reaction within the audience, which is in turn perceived by politicians and then transformed again in a 'nationalistic' discourse.

It should also to be noted that no specialized private or public organizations blogs have been found in Spain, but some radio channels, mainly regional ones, count on some specialized programs on EU in general, and some of them on EU and the citizen. Nevertheless, it must be pointed out that most

of them do not take place in prime-time hours, but rather very early in the morning or at night. As far as the press is concerned, only major national newspapers have a permanent section on EU news, but not necessarily on EU and the citizen or on citizens' rights. These are e.g. the cases of El País, El Mundo, ABC, La razón, La Vanguardia o El Periódico de Cataluña.

SWEDEN

Hedvig Bernitz[1] *and Jaan Paju*[2]

Citizenship *within* Directive 2004/38/EC – stability of residence for Union citizens and their family members

Question 1

Directive 2004/38/EC has been implemented mainly through the Aliens Act (*utlänningslagen*, 2005:716) and the Aliens Ordinance (*utlänningsförordningen*, 2006:97).[3]

The Aliens Act lacks provisions that are applicable only to Union citizens. Consequently, there is no definition of 'Union Citizen' in the Act. The provisions implementing the Directive are instead applicable to all EEA citizens. According to the Aliens Act (Chapter 1, Sect. 3b) an EEA citizen is every alien who is a national of an EEA state.

'Family member' of an EEA citizen is defined in the Aliens Act (Chapter 3a, Sect. 2). The provision corresponds on the whole with Art 2(2) of the Directive. As Swedish legislation, according to the Aliens Act (Chapter 5 Sect. 3), normally grants residence permit to aliens cohabiting with a Swede, the definition of 'family members' also includes cohabiting partners of EEA nationals.

Since 2009 same sex marriages are treated equally as marriages between man and woman.[4]

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3. This report is based on the current provisions in the Swedish legislation in October 2013. In 2012 a Commission of Inquiry (SOU 2012:57, *Tydligare regler om fri rörlighet för EES-medborgare och deras familjemedlemmar* [More distinct rules on Free Movement for EEA citizens and their family Members], betänkande av Utredningen om utlänningslagen och EES-medborgare) has proposed a new grouping of the provisions concerning entry, stay, work, retained residence rights, refused entry, and expulsion. The proposed amendments have not yet been realized.
4. Marriage Code (*Äktenskapsbalken* 1987:230), Government proposition 2008/09:80.

Both descendants and ascendants are included in the definition of family members according to the Aliens Act if they are 'dependant' on the EEA citizen, the spouse, or the cohabiting partner.

The right of entry of EEA citizens' family members is regulated in Chapter, 2, Sect. 1 in the Aliens Act, which states that an alien entering or staying in Sweden must have a passport. According to the Aliens Ordinance (Chapter, 2 Sect. 17), EEA citizens may instead of passport provide an ID-card. Third country family members do not, however, have that opportunity.[5]

The facilitated entrance of certain family members in Art 3(2) of the Directive is implemented through the Aliens Act (Chapter 5, Sect. 3, 3a and 3c on residence permit). As to facilitating visas, every state mentioned in Art 2 in Regulation 539/2001 is exempted from the visa requirement through the Aliens Ordinance (Chapter 3). Aliens with residence permit or residence card are also exempted (Aliens Ordinance, Chapter 3, Sect. 1). There are no provisions in the Aliens Act or in the Aliens Ordinance on accelerated procedure. Accelerated procedure is instead regulated through instructions to the relevant Authorities.

As far as the national rapporteurs have been able to find out the protection of the safeguards in Art. 5 of the Directive seem effective. There is some interesting case law from the Migration Court of Appeal (*Migrationsöverdomstolen*); In MIG 2009:14, for example, a third country citizen married to an EEA citizen could claim the right to oral proceeding in court (normally the procedings are administrative). In MIG 2009:37 it was laid down that a third country family member was exempted from the requirement that a residence permit must have been granted before entering the country. In case No UM 8595-12 (2013-10-02), the Migration Court of Appeal concluded that a third country national had not received the help she was entitled to according to Art 5 in the Directive and the Community Code on Visas.

There are also some interesting cases from the Migration Court of Appeal regarding family relationships. Several cases concern the definition of 'cohabitant'. In for example MIG 2011:17 a person who became cohabitant with a foreign EEA citizen *after* the arrival in Sweden was considered to be a family member according to the definition. Marriage after the arrival has also been accepted (Migration Court of Appeal, case No UM 3289-08 (2009-01-29). In MIG 2009:11 a pro forma marriage was, however, not accepted and the person in question was not considered to be a family member.

5. Government proposition 2005/06:77 p. 63.

Question 2

The possibility to expel or refuse entry for those who do not fulfill Art. 7 in the Directive is implemented through Chapter 8 in the Aliens Act. Chapter 8, Sect. 2 states that aliens who cannot support themselves may be refused entry. The provision may not, according to its wording, be applied on EEA citizens unless they prove to be a burden to the Swedish social welfare system (workers and self-employed exempted). According to Chapter 8, Sect. 3 an alien who has the right of residence may not be refused entry. Chapter 8, Sect. 7 states that an alien who cannot be refused entry may be expelled if he or she lacks relevant permissions to stay in the country.

There is some case law concerning EU citizens' fulfillment of the conditions in Art 7,[6] but as far as the national rapporteurs have been able to find out there is no evidence that EU citizens or their family members have been expelled on purely economic grounds. In decisions on expulsion taken by relevant authorities, the grounds for expulsion have, however, not always been clearly discussed from an EU perspective. There are for example situations were Union citizens have been expelled from Sweden because of begging[7] or prostitution,[8] in both cases because of dishonest self-support. Yet, neither begging nor to work as a prostitute is criminal in Sweden. In those decisions, the line between public order and lack of resources is not easy to draw.

Question 3

Article 12-13 of the Directive are implemented through the Aliens Ordinance Chapter 3a, Sect. 2 (death or departure of the Union citizen), Sect. 3 (educational establishment), and Sect. 4 (divorce etc.). There is no reported case law.

Article 14 is implemented through the exemptions and safeguards in the Aliens Act (Chapter 8). Article 14(1) is implemented through the Aliens Act

6. To be a burden to the Swedish social welfare system includes only the receiving of social welfare according to the Social Services Act (*socialtjänstlagen*, 2001:453). In MIG 2011:19, the Migration Court of Appeal concluded that a Union citizen who received a certain kind of pension was not lacking sufficient recources, as the pension in question was not granted according to the Social Services Act, but according to other legislagtion.
7. The Parliamentary Ombudsmen (*Justitieombudsmannen*), Dnr 6340-2010 (2011-06-28).
8. The Parliamentary Ombudsmen (*Justitieombudsmannen*), Dnr 4468-2011 (2012-11-01).

Chaper 8, Sect. 2 which states that EEA citizens may not be refused entry unless they prove to be a burden to the Swedish social welfare system (workers and self-employed exempted). Article 14(2) is implemented through the Aliens Act Chapter 3a, Sect. 5, which states that the right of residence exists as long as the conditions are fulfilled.

The safeguards against automatic expulsion measures against Union citizens and their family members in Art 14(3), and the exemptions from the provisions on expulsion in Art 14(4) are, according to the preparatory work,[9] implenented through the Aliens Act (Chaper, 8 Sect. 2 § 3). This provision states that EEA citizens other than workers, self-employed, job-seekers, and their family members may be expelled if they, after the entry, prove to be a burden to the Swedish welfare system according to the Social Services Act (socialtjänstlagen, 2001:453) The Aliens Act (Chapter 8, Sect. 3) states that an EEA citizen with right of residence may not be expelled.[10]

The procedural and administrative safeguards in Art 15(1) of the Directive are protected in the Code of Judicial Procedure (*rättegångsbalken* 1942:740), the Administrative Procedure Act (*förvaltningslagen*, 1986:223), and the Administrative Court Procedure Act (*förvaltningsprocesslagen*, 1971:291). There are also safeguards in the Aliens Act (Chapter 13-14 and 16). The parties are given far reaching rights to control the desicion and the grounds for the decision, as well as a right to appeal instructions, right to interpreter, etc. The Migration Court of Appeal has in MIG 2011:30 laid down that a decision not to enforce a legally binding decision on expulsion could be appealed to a migration court because of the direct effect of Art 15(1) and 31 of the Directive. In MIG 2009:14 The Migration Court of Appeal laid down that an oral procedure must be held in a case that concerned the expulsion of a third country family member of an EEA national.

Question 4

Art 16-21 of the Directive are implemented through the Aliens act (Chapter 3a, Sect. 6-9),[11] and the Aliens Ordinance (Chapter 3a).

The Aliens Act (Chapter 3a, Sect. 6), states that an EEA national who has stayed at least five years in Sweden legally and without interruption has the right of permanent residence. Chapter 3a, Sect. 7 corresponds to Art 16(2) of the Directive and Chapter 3a, Sect. 8 corresponds to Art 16(3). Chapter 3a,

9. Government proposition 2005/06:77 p. 192.
10. Government proposition 2005/06:77 p. 73.
11. Government proposition 2005/06:77 p. 186.

Sect. 9 implements Art 16(4). The Aliens Ordinance, Chapter 3a Sect. 5-11 correspond to Art 17-21 of the Directive.

The Swedish Migration Board (*Migrationsverket*), the authority that is responsible for the registration of permanent residence rights, gives information on the volume of applications on request. In 2012 the number of registred permanent rights of residence was 1,886. For 2013 (until 17 October) the number is 962.

There is some case law from the Migration Court of Appeal concerning permanent residence. According MIG 2012:10 a third country family member must have fulfilled the conditions for right of residence for five years to have a permanent right of residence. In MIG case No. 10802-10 (2012-05-10) a family member did not fulfil the five year requirement because of a divorce. He did not fulfill the conditions for a derived right of residence nor for retension of the right of residence. In MIG 2010:8 a man who had failed to prolong his EEA-permit was still considered to fulfil the requirement of legal stay and was entitled to permanent residence. In MIG 2010:14 a man whose EEA-permit had expired before the implementation of the 2004/38 Directive was considered having a right to permanent residence.

Question 5

Article 24(2) of the Directive deals with two separate issues; under what circumstances it is possible for a Member State to refuse to grant social benefits respectively when maintenance aid for studies can be denied visavi a union citizen.

Sweden has implemented Article 24(2) in two laws: the Aliens Act and the Law on Maintenance Aid for Studies (*studiestödslagen* 1999:1395).[12]

The Aliens Act makes a clear distinction between non-economical active union citizens and job-seekers. As regards the latter group, Chapter 3a, Sect. 3 § 2 Aliens Act respects the Directive and ECJ case law and declares that the job-seekers have right of residence for six months or as long as the job-seeker can show that he/she applies for jobs and has a chance to get employment. With right of residence comes equal treatment with regard to social benefits.

The equal treatment with regard to social benefits vis-à-vis union citizens is, in large, respected by the social aid agencies as their thorough guidelines[13] follow the ECJ case law and relevant EU-law.

12. The latter amended by SFS 2010:441.
13. EG-rätten och Socialtjänsten, National Board of Health and Welfare (*Socialstyrelsen*), 2008-126-3.

As job-seekers are treated equally to workers and self-employed in Sweden the diving line has been on who is seen as a job-seeker and who is seen as a non-economical union citizen.[14] Therefore, national case law evaluates the chances to get employment and for how long one shall be seen as a job-seeker. Those cases have been decided case-by-case. In general the case law seems to be focusing on evaluating the personal chances and not applying a general time-limit. The case law also follows the Swedish unemployment laws and no difference is made between Swedish citizens and migrating union citizens.[15]

The Directive's Article 24(2) regarding maintenance aid for studies has been implemented into Swedish law in the Law on Maintenance Aid for Studies (*studiestödslagen* 1999:1395). The relevant part of this law is based on the Directive's article 24(2) which do not entail the ECJ's case-law idea of establishing a 'real-link'. However, the Law on Maintenance Aid for Studies entails a 'real link' test ever since the 1970s which has resemblances with the courts case law on a 'real link'. A real link can, under national law, be established if a student has been living in Sweden for at least two years and has been working half-time, has been married, or co-habitant with a Swedish citizen for at least two years, or has children with a Swedish national.

The national authority responsible for maintenance aid for studies, the National Board for Financial Aid for Studies *(Centrala Studiestödsnämnden, CSN)*, respects the Court's case law in its guidelines where the authority

14. As regards non economical union citizens the law, Chapter 3a, Sect. 3 § 4 of the Aliens Act foresees – in line with the Directive – right of residence in so far as a union citizen has sufficient resources and a comprehensive sickness insurance. There is no equal access to social aid for union citizens not meeting the requirements.

15. See for instance Administrative Court of Appeal (*Kammarrätten i Jönköping*) 27 September 2007, case No 3248-07 where the court found that the fact that a person had not found employment in three months' time did not disqualify him as a job-seeker. In Administrative Court of Appeal (*Kammarrätten i Jönköping*) 3 April 2013, case No 1823-12 the court found that two job-seekers could not longer be seen as job-seekers after two years active job-seeking since there could not be any genuine chances of getting work. A person cannot restrict himself/herself to seek certain jobs, but has to try to get employment on the whole job-market; Administrative Court of Appeal (*Kammarrätten i Jönköping*) 7 juni 2011, Case No 594-11. Administrative Court of Appeal (*Kammarrätten i Jönköping*) 9 juni 2011, mål 959-11 emphasises that it is not sufficient to simply register as an unemployed person to be seen as a job-seeker. See also Administrative Court of Appeal (*Kammarrätten i Stockholm*) 10 september 2012, Case No 7678-11 as well as Administrative Court of Appeal (*Kammarrätten i Göteborg*) 24 oktober 2011, Case No 1304-11.

states that a union citizen can be eligible for a study grant either on the basis of an employment or a real link based on the ECJ case law.[16]

The national 'real link' test seems to stand in the way for an EU-law assessment on a real link for the National Board of Appeal for Student Aid (*Överklagandenämnden för Studiestöd)* which is the responsible tribunal for maintenance aid for students. The case law in the area of study grants is primarily focused on the definition of a worker as it being one way of receiving study grants. The decided cases have followed the ECJ's case law in this respect.[17] The pattern seems to be that tribunal has in its initial reasoning initially ruled out the national real link-test regarding a union citizen due to the facts in the cases, hereinafter has the tribunal decided the case on whether a union citizen has qualified as a worker according to the EU-law. There has not been any additional assessment of a real link out of an EU-law perspective. However the number of cases are so small that one cannot rule out that the tribunal will apply the ECJ real-link in the future.

Question 6

The national rapporteurs have not come across case law where the difference between public policy, public security, or public health has been at stake. The existing case law has all focused on the concept public security.

The Migration Court of Appeal has understood the concept of 'public security' in its widest sense in MIG 2009:21. The case dealt with the Croatian citizen 'A' who had had a residence permit in Denmark since 1995. In 2004 the Croatian citizen 'A' was sentenced to 3,5 years prison for a drug related crime when captured with 0,5 kg heroine. In 2006 the Croatian citizen 'A' was evicted to Croatia. In January 2007 'A' was investigated by the Swedish police. The Croatian citizen 'A' was now living together with his wife, a Danish citizen resident in Sweden. As married to a Danish citizen having a residence permit in Sweden the Croatian citizen 'A' was found to derive a right to reside in Sweden under EU law. The Migration Court (*Migrationsdomstolen*, the court of first instance in migration matters) found in 2008 that the drug related crime was, despite being serious, carried out some years back and that the Croatian citizen 'A' was now leading a normal life with good social contacts. The Migration Court of Appeal, in its judgment in 2009

16. The Guidelines have not been made public. The national rapporteurs have however been allowed access to them for this FIDE-report.
17. See: Decision (*beslut*) 2013-04-22/Dnr. 2013-00747 and Decision (*beslut*) 2013-01-28/Dnr. 2012-05577.

refers to the Swedish National Asylum Law, Chapter 8, Sect. 7a in the Aliens Act when deciding whether the Croatian citizen 'A' could be considered as a serious threat against public security.

Migration Court of Appeal declares in its judgment that the concept 'public security' is a common EU-definition. The Migration Court of Appeal refers to the ECJ-cases, Case 41/74 *Van Duyn,* case 36/75 *Rutili,* 30/77 *R v Bocherau* where the ECJ has held that eviction based on public security grounds have to be proportionate and of essential importance to uphold a society. Furthermore, the threat has to be real and serious. The Migration Court of Appeal found, irrespective of the EU-definition which emphasises that eviction on public security grounds is an exception, that the convicted crime (in Denmark) five years back in time was a sign that the Croatian citizen 'A' (still) was a serious threat against (now) the Swedish society and therefore there was a ground for eviction. The court did in its judgment not take into account that the Croatian citizen 'A' had been living in Sweden for more than two years and had only been caught for exceeding a speed limit. The court did not take into account that the Croatian citizen 'A's' wife was expecting their first child. The ECJ case law as well as the Directive 2004/38 (Article 28(1) and the European Convention and Human Rights (Article 8(1)) points in a different direction where eviction should not be carried out in such circumstances. The Migration Court of Appeal still argued that the drug related crime indicated that the Croatian citizen 'A' was a serious threat to the Swedish society and evicted him.[18]

In stark contrast the national rapporteurs have come across the case law of the appellate criminal courts where the courts require serial-crime of some length and seriousness combined with crime carried out in Sweden not relating too long back in time.[19]

18. Compare the appelate criminal courts that require serial-crime of some length and seriousness combined with crime carried out in Sweden not relating too long back in time; Court of Appeal *(Hovrätten för Västra Sverige),* 24 May 2006, B 2390-06, Court of Appeal (*Hovrätten för Västra Sverige*), 6 May 2013, B 2067-13, and Court of Appeal (*Svea Hovrätt),* 13 August 2013, B 6770-13.
19. Court of Appeal (*Hovrätten för Västra Sverige*), 24 May 2006, B 2390-06, Court of Appeal (*Hovrätten för Västra Sverige*), 6 May 2013, B 2067-13, and Court of Appeal (*Svea Hovrätt*), 13 August 2013, B 6770-13.

EU citizenship *beyond* Directive 2004/38/EC – exploring national application of primary EU Law

Question 7

The Migration Court of Appeal has decided upon a carbon copy of the *McCarthy*-case. Furthermore, the Migration Court of Appeal has found that the lower courts should have applied *Chen* when deciding on residency. Finally, the Migration Court of Appeal has developed *Zambrano* in the sense that eviction could only be carried out within the EU (to Spain) and not to Colombia.

In MIG 2011:17 the issue was whether a Pakistani citizen could derive a residence permit from his wife who had dual citizenship (Swedish & Polish). The Migration Court of Appeal referred to C-434/09 *McCarthy* and found that the situation was purely internal as the wife had not been crossing a border of another Member State, but been living in Sweden her whole life.

In MIG 2009:22 the Migration Court of Appeal finds that the first instance, the Migration Court (*Migrationsdomstolen*), has not taken into account C-200/02 *Zhu & Chen* when deciding whether a Japanese citizen could have a derived right of residence through her daughter. The Migration Court did decide on eviction upon the fact that the Japanese citizen was now divorced from a migrating Union Citizen. However, the Migration Court of Appeal emphasised that their mutual child could have a residency permit on her own and thereby providing the mother with a residency permit. The case was referred back to Migration Court for a new trial.

In MIG 2012:15 the Migration Court of Appeal found that a family (mother and minor daughter) irrespective of sufficient resources could not be found having a residency permit since they were lacking sickness insurances. The Migration Court of Appeal therefore held that the family was to be evicted. Referring to C 34/09, *Zambrano*, the court emphasised that eviction was not possible to the mother's state Colombia as the daughter had become a Spanish citizen by birth. Since the daughter was a Spanish citizen the family was to be evicted to Spain in order not to deprive her union citizen's rights.

The national rapporteurs have not come across any case law where Swedish national courts distinguish between rights acquired under the Directive and the TFEU.

Question 8

Swedish legislation seems to fulfil the requirements that have been laid down by the ECJ. No changes in Swedish nationality law are needed.

According to the ECJ, any national decision to deprive a person of his or her citizenship must take into consideration the general principles of EU-law (for example the principle of proportionality, the principle of non-discrimination, and human rights). A decision regarding citizenship is viewed in Sweden as being a favourable administrative decision which means that a decision on citizenship can never be annulled. According to the Swedish Constitution (Instrument of Government (*regeringsformen)* Chapter 2, Sect. 7) no citizen who is domiciled in the realm or who has previously been domiciled in the realm may be deprived of his or her citizenship. This prohibition is absolute, and there is no possibility to deprive such a person of his or her Swedish citizenship on any grounds (even if the citizenship was, for example, acquired by fraud or threat, on false information, or if the person later turns out to be threat to national public security).[20] The Rottmann situation can thus not occur in Sweden. The provision aims at protecting both citizens living in the country, as well as citizens who have left the country.

In 2006 a Commission of Inquiry submitted a report that recommends the introduction of denationalisation. Relevant referral bodies have put forward their comments and suggestions on the proposed amendment, and there has been little opposition. As a constitutional amendment is needed, the question must, however, be dealt with together with other constitutional changes in the future. When the Instrument of Government was revised in 2011 the provision in Chapter 2, sect. 7 was not amended. The report from 2006 is still valid and the result is yet to be seen.[21] There is nothing in the *Rottmann* case that prevents the proposed legislation. If the proposal is realized in the future, the Government is well aware of the fact that the provisions must include a proportionality test as regards Union citizens and their family members.

According to the ECJ the Member States may not limit the EU rights of foreign Union citizens (for example the free movement rights) by ignoring

20. Supreme Administrative Court (Högsta *förvaltningsdomstolen*) RÅ 2006 ref. 73. See also case B637/89 where the Court of Appeal (*Svea hovrätt*) concluded, in a case concerning narcotics crimes, that a decision on naturalisation regarding a man who had acquired his citizenship through false identity was not a nullity.
21. SOU [Swedish Government Official reports] 2006:2 *Omprövning av medborgarskap* [Reconsideration of Citizenship]. Betänkande av Utredningen om omprövning av medborgarskap.

the person's national citizenship (*Micheletti* etc.). There is no Swedish legislation that gives Swedish authorities the possibility to ignore another Member State's decision to grant somebody the nationality of that state.

As EU law is in constant development a Commission of Inquiry, that proposed a revision of the Citizenship Act in 2013, discussed how the ECJ decisions on citizenship could influence the national competence of Sweden in this legal area.[22] In this context Sect. 14 of the Citizenship Act was discussed. According to Sect. 14 a person loses his or her Swedish citizenship automatically after the statutory limitation at the age of 22 if the person was born abroad, has never been domiciled in Sweden, and has never been in Sweden under circumstances that indicate a link with the country. People with no ties to Sweden are thus not considered entitled to retaining Swedish citizenship. A person who risks losing his or her citizenship can however apply for permission to retain it, an application that may be turned down by the authorities if the link to Sweden is considered insufficient. The loss of citizenship does not apply if it would result in the person becoming stateless. The loss also includes his or her children, unless the other parent still holds Swedish citizenship and the child also derives Swedish citizenship from him or her. Loss after statutory limitation is the only way that Swedish citizenship can be lost involuntarily. Applications concerning permission to retain citizenship are examined by the Swedish Migration Board. In administrative practice, applications for permission to retain citizenship are rarely refused. In 2008 216 were applications approved. Only one case was refused. Normally, applications from the first generation born abroad are granted, while applications from subsequent generations are granted only as long as the ties with Sweden have not been completely severed.

As a person who loses his or her Swedish citizenship also loses his or her Union citizenship, the Commission of inquiry of 2013 concluded that the principle of proportionality must be taken into consideration when applying Sect. 14 of the Citizenship Act, especially if the person in question lives in another Member State. Sect 14, as such, was not considered unproportional because of the fact that EU law respects the international rule that every state may decide on its own acquisition and loss of nationality, and the fact that international law accepts national conditions related to a genuine link between the country and the person in question. It was also pointed out that the citizenship may be retained on application.

22. SOU [Swedish Government Official reports] 2013:29 *Det svenska medborgarskapet* [The Swedish Citizenship]. Betänkande av medborgarskapsutredningen, p. 137.

The generous Swedish rules on acquisition and loss were also discussed by the Commission of Inquiry of 2013 from a EU loyalty point of view. It was concluded that as long as Swedish citizenship law rests upon the idea of a genuine link between the state and the individual, the principle of loyalty must be considered to be fulfilled. No case law from the ECJ suggests otherwise.

As to acquisition of Swedish Citizenship, there are four categories that can use a facilitated procedure of notification: children who have not acquired Swedish citizenship automatically, and whose father was Swedish upon the birth of the child, children who have grown up in Sweden and fulfil the residence requirement, persons who reacquire Swedish citizenship, and Nordic citizens (Citizenship Act (*medborgarskapslagen* 2001:82), Sect. 5-10).

Aliens who cannot use the procedure of notification can apply for naturalisation (Sect. 11). Sweden has, for a very long time, had a rather high proportion of acquisition of citizenship among long-term resident immigrants. The barriers for naturalisation are not very high in Sweden compared to many other countries. Instead, the possibilities of applying for naturalisation are rather generous. There are, however, several criteria that the applicant must fulfil. First, the person has to provide proof of his or her identity. This requirement has been tightened due to the increasing number of aliens arriving in Sweden without identity documents. Second, the applicant must have reached the age of eighteen. The applicant must also have a permanent residence permit, and have been residing uninterruptedly in Sweden for the past five years (two years if the person is a Nordic citizen, and four years if the person is stateless or a recognised refugee).

The applicant also has to fulfil a good conduct requirement. The good conduct requirement has been tightened up over the years. A person who has committed a crime in Sweden can still become a Swedish citizen, but waiting periods have been introduced in administrative practice. The waiting periods serve as guiding principles, but individual control and examination is always carried out. For example, if the applicant has been sentenced to imprisonment for one month, he or she can normally become Swedish citizen no sooner than four years after the crime. If the applicant has been sentenced to imprisonment for one year he or she can become a Swedish citizen no sooner than seven years after the crime. Marks on a person's record, such as unpaid taxes, fines or child support, can also cause an application to be rejected.

Political rights of EU citizens

Question 9

In 1997, through amendments in the former Election Act (*vallagen* 1997:157) and in the Swedish Local Government Act (*kommunallagen* 1991:900), the Directive 93/109/EC was introduced. Today, Union Citizens' right to vote in European Parliament elections is governed by the new Elections Act (2005:837) (Chapter 1, Sect. 4-6), and the Swedish Local Government Act (Chapter 4, Sect. 2-3). The Elections Act states that a foreign Union Citizen, who has regional and local electoral rights and who has not voted in another EU country, has electoral rights in European parliament elections in Sweden. Regional and local electoral rights for Union citizens are governed by the Swedish Local Government Act, which states that any person registered as a resident of the county/municipality, and who has reached the age of 18 no later than on the Election Day, is entitled to vote.

A condition for electoral rights is that the Union citizen has registered himself or herself in the electoral roll. The Union citizen must, no later than 30 days before the election, notify the County Administrative Board (*länsstyrelsen*) that he or she wishes to be included in the electoral roll. The person must also provide information on his or her nationality and address in Sweden, as well as information on where, in the country of origin, he or she was last registered in an electoral roll. The person must also assure that he or she will not vote in another EU Member State (Elections Act, Chapter 5, Sect. 3). There is no relevant case law in national courts. A change in the Electoral Act might be needed because of Art 1 in the Directive 2013/1/EU amending Directive 93/109/EC (that the host state shall check if the Union citizen has lost his or her right to stand as a candidate in the home state through a judicial or administrative decision).

Question 10

Directive 94/80/EC was implemented in Swedish law in 1997.[23] The right for European citizens to vote in local elections (in Sweden defined as regional (*landsting*) and local (*kommun*) elections) was introduced by an amendment in the former Elections Act (1997:157) and an amendment in the Swedish

23. Government proposition 1996/97:70.

Local Government Act (1991:900). There are no additional conditions imposed on EU citizens compared to national citizens. There is no relevant case law.

Question 11

In regional and local elections (county and municipality) and in regional and local referenda any person who is a citizen of an EU country (or a citizen of Iceland or Norway), has electoral rights if he or she has reached the age of 18 on the Election Day and is registered as resident in Sweden (Swedish Local Government Act (1991:900), Chapter 4, Sect. 2-5 and Act on Regional and Local Referenda (*lagen (1994:692)om kommunala folkomröstningar*) Sect. 5). The person must be registered in the electoral roll. The special rules for Icelandic and Norwegian citizens are based on the close ties between the Nordic countries and on Nordic cooperation. Similar rules apply in all Nordic countries. Other foreigners (those who are not EU citizens or citizens of Iceland and Norway) also have the right to vote if he or she has been registered as resident in Sweden for a continuous period of three years before Election Day (Swedish Local Government Act (1991:900), Chapter 4, Sect. 2-5 and Act on Regional and Local Referenda, (1994:692) Sect. 5).

Question 12

There is no tension between EU law and national provisions limiting the scope of the franchise:

Mentally disabled persons are not disenfranchised. The possibility to be incapacitated was abolished in 1991. A person who, because of illness or physical disability, cannot personally go to a polling station or advance voting place may vote by messenger (relatives, carers, or rural postmen). In addition, the Election Committee (*valnämnden*, i.e. the local election authority) may appoint special persons to act as messengers for those who have no one to help them. Special material is required for voting by messenger and can be ordered from the Election Authority (*Valmyndigheten*) or from a municipality.

Persons convicted for criminal offences are not disenfranchised. The right to vote was introduced for convicted criminals in 1937. Persons detained on remand or in correctional institutions may vote by messenger. It is also possible to vote at an advance voting place. The prisons usually provide this possibility, and the votes are sent in a special window envelope by the election officials to the Election Committee. Advance voting begins 18 days before

Election Day. A person voting in advance at a special voting place must present his or her voting card as well as an identification document.

Culture(s) of citizenship

Question 13

The overall culture of Union Citizenship in Sweden can be said being one of individual rights.

What complicates the legal status of the Union citizens is that a residence right is, in line with the Directive 2004/38 and relevant ECJ case-law, one of an on-the-spot account, i.e. each Swedish authority has to make an independent assessment whether a Union citizen has a right of residence at a given time. The national authorities are independent from each other and the assessment might therefore differ between the authorities, given their discretion.[24]

The Swedish administration has overall good comprehensive information on the rights that a Union citizen has. The administration has a general understanding of the Union citizenship as a right for an individual and not an authority based permission. For instance, CSN, the National Board for Financial Aid for Studies has detailed information on their website on what rights a Union citizen has.[25] The Migration board has detailed information on right of residence and even an easy accessible online registration for residence permits.[26] However there are examples of less accessible information for the Union citizens as the Social Security Agency's (*Försäkringskassan*) website[27] as well as information on social aid for union citizens as the social aid is administered by the 290 local counties with no overarching co-ordination.[28] On the other hand the local counties are guided by thorough guidelines issued

24. The Swedish Authorities are independent from each other as well as from the Government ever since the creation of a modern administration in the early 17th century.
25. http://www.csn.se/en/2.1034/2.1036/2.1037/2.1040/1.9366.
26. http://www.migrationsverket.se/info/eumedborgare_en.html.
27. http://www.forsakringskassan.se.
28. See the Stockholm county report on homeless union citizens where the city of Stockholm, based on legal arguments on the union citizenship, decides to support NGOs providing food and lodging;
http://insynsverige.se/documentHandler.ashx?did=1715019.

by The National Board of Health and Welfare (*Socialstyrelsen*) on the Union Citizenship.[29] Other authorities are also guided by comprehensive in-house guide-lines that emphasize Union Citizenship as a right.[30]

Question 14

The binding effect of the Charter of Fundamental Rights of the European Union has played a minor role in how the rights of EU citizens are being interpreted by the national courts in Sweden. The national rapporteurs have, in our research covering some 80 cases, not come across the use of the Charter in a court's reasoning.

In MIG 2009:21, delivered 3 June 2009, the issue was whether a Croatian husband of a Union citizen resident in Sweden could be evicted on the ground of public security. In its reasoning the Migration Court of Appeal notices that an eviction must take into account a person's social inclusion in the society, for how long the person has been resident in Sweden, as well as other family relations. In doing so the Court refers to Article 8(1) in Convention on Humans Rights. Yet, there is no referral to the Charter.

Question 15

The EU citizenship was a salient issue in media during spring 2013. The major Swedish newspaper *Dagens Nyheter* covered the issuefrom a Roma-perspective where the reporters covered not only the situation in Stockholm with beggars from Romania and other Eastern European countries, but also explained the underlying ides of EU citizenship as well as travelling down to Romania to give the readers a broad understanding of the complexity of the EU-solidarity, free movement for persons, and the economical incentives travelling to Sweden.[31] In parallel, the Swedish National radio ran an in-depth

29. EG-rätten & Socialtjänsten, published in 2008: http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/8774/2008-126-3_20081263.pdf.
30. Some of those guides are made public, others the national rapporteurs have come across in our research. See especially the Social Security Agency's guideline: Vägledning 2004:11 Version 4, Tillämplig lagstiftning, EU, Socialförsäkringskonventioner, m.m., p. 148 that stresses the difference between a national authorization and a right to residence under EU-law. http://www.forsakringskassan.se/wps/wcm/connect/0f73beea-0f68-4d03-83ab-3c7cd0d53d61/vagledning_2004_11.pdf?MOD=AJPERES.
31. http://www.dn.se/sthlm/jag-ska-inte-behova-leva-sa-har/.

coverage on the situation for a Romanian family in Gothenburg where the mother was finally allowed to register as a job-seeker.[32]

Overall, the national rapporteurs have a feeling that Swedish media has a pretty accurate reporting explaining the underlying EU principles and objectively showing the tension that the Union citizenship might cause vis-à-vis the national welfare state. There are no major or local newspapers painting a picture of Union citizens coming to Sweden to take jobs, steal, and beg. There has not, to the knowledge of the national rapporteurs, been any headlines like the ones in the UK with headlines, stating that as 'soon we will be another 29 million in the UK' on the opening of the borders vis-à-vis Bulgaria and Romania as of 1st of January 2014.

32. http://sverigesradio.se/sida/avsnitt/176326?programid=1316.

SWITZERLAND

Markus Kern[1]

Vorbemerkungen

Als Nichtmitglied der EU und des EWR ist die Schweiz im Rahmen des sogenannten Freizügigkeitsabkommens (FZA)[2] teilweise an den *acquis* der EU im Bereich der Personenfreizügigkeit gebunden. Das Abkommen hat zum Ziel, auf der Grundlage der in der EU geltenden Bestimmungen die Freizügigkeit der Staatsangehörigen der Vertragsparteien zu verwirklichen (Präambel FZA). Zu diesem Zweck verpflichten sich die Vertragsparteien, den Staatsangehörigen anderer Vertragsstaaten unter anderem ein Recht auf Einreise, Aufenthalt und Zugang zu unselbstständiger Erwerbstätigkeit oder Niederlassung als Selbstständiger einzuräumen und Personen ohne Erwerbstätigkeit ein Recht auf Einreise und Aufenthalt zu gewähren, jeweils unter Sicherstellung gleicher Lebens-, Beschäftigungs- und Arbeitsbedingungen wie für inländische Personen (Art. 1 FZA).

Die Personenfreizügigkeit zwischen der Schweiz und der EU wurde durch eine schrittweise Öffnung erreicht, wobei bei Überschreitung bestimmter Immigrationszahlen während eines Übergangszeitraumes zusätzlich eine vorübergehende Rückkehr zu einer Kontingentierung vorgesehen ist (sogenannte Ventilklausel; Art. 10 Abs. 4 FZA). Von dieser Möglichkeit hat die Schweiz 2012 in Bezug auf Staatsangehörige der mittel- und osteuropäischen EU-Staaten (EU-8) Gebrauch gemacht und eine Beschränkung der fünfjährigen Aufenthaltsbewilligungen vorgenommen. 2013 wurde die teilweise Kon-

1. Dr. iur. LL.M. (Harvard), Oberassistent am Institut für Europarecht an der Universität Freiburg i.Ü.
2. Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit, abgeschlossen am 21. Juni 1999, in Kraft getreten am 1. Juni 2002 (FZA; SR 0.142.112.681; Abl. L 114 vom 30.6.2002). Vertragspartei ist heute die Europäische Union als Rechtsnachfolgerin der Europäischen Gemeinschaft (Art. 1 Abs. 3 Uabs. 3 EUV).

tingentierung auch auf die Staatsangehörigen der alten EU-Staaten sowie Malta und Zypern (EU-17) ausgeweitet.[3]

Die Bestimmungen des Freizügigkeitsabkommens entsprechen weitgehend der Rechtslage der Personenfreizügigkeit in der EU zum Zeitpunkt des Abschluss des Abkommens (21. Juni 1999). Bei der Auslegung der Vorschriften des Abkommens ist die Rechtsprechung des EuGH vor dem Unterzeichnungszeitpunkt verbindlich, während die Gerichte an spätere Urteile des EuGH im Grundsatz nicht gebunden sind (Art. 16 Abs. 2 FZA *e contrario*). In der Praxis zeigt sich das schweizerische Bundesgericht jedoch bestrebt, eine zur Rechtslage innerhalb der EU möglichst parallele Rechtslage zu schaffen und weicht deshalb von der Auslegung abkommensrelevanter Vorschriften durch den EuGH nur bei Vorliegen triftiger Gründe ab.[4] Nicht Teil des Abkommens bilden die nach dem Unterzeichnungszeitpunkt vorgenommenen Änderungen des *aquis* der EU und somit namentlich auch die durch die RL 2004/38/EG erfolgten Anpassungen. Die entsprechenden Vorgaben der Unionsbürgerrichtlinie haben folglich für Schweiz grundsätzlich keine Geltung.[5] Im Rahmen des FZA relevant ist die Richtlinie jedoch jedenfalls insoweit, als sie bereits früher bestehende Rechtsakte aufgreift oder die Rechtsprechung des EuGH kodifiziert.

Die EU hat der Schweiz angetragen, das FZA an die Weiterentwicklung des *acquis* anzupassen und somit insbesondere auch die Vorgaben der Unionsbürgerrichtlinie ins nationale Recht zu übernehmen. Diesem Vorbringen ist die Schweiz unter Verweis auf die gesunkene Akzeptanz des Abkommens in der Bevölkerung sowie auf zwei hängige Volksinitiativen, die auf eine Beschränkung der Migrationsströme gerichtet sind, nicht gefolgt und hat sich entschieden, auf die Aufnahme von Verhandlungen zur Übernahme der Richtlinie zu verzichten.[6] Zusammenfassend lässt sich somit sagen, dass die für die Schweiz bindenden Rechtsvorschriften mehrheitlich auf dem Stand

3. Nicht von der Kontingentierung umfasst sind hingegen die Kurzaufenthaltsbewilligungen, so dass die vorgenommenen Einschränkungen relativ einfach umgangen werden können. Ab 1. Juni 2014 gilt für die EU-25 gemäss Abkommen die volle Personenfreizügigkeit, Einschränkungsmöglichkeiten bestehen somit lediglich noch gegenüber Staatsangehörigen aus Rumänien und Bulgarien (Ventilklausel bis 31. Mai 2019) sowie dannzumal wohl aus Kroatien.
4. Vgl. BGE 136 II 5, E. 3.4 sowie etwa BGE 139 II 393, E. 4.1.1.
5. Zum Grundsatz der Nichtbeachtlichkeit vgl. etwa BGE 130 II 113, E. 6.3 sowie BGE 136 II 65, E. 4.2 bezüglich Daueraufenthaltsrecht (Art. 16 RL 2004/38) und voraussetzungslosem Aufenthalt bis drei Monate (Art. 6 RL 2004/38).
6. Vgl. hierzu Medienmitteilung des Bundesamtes für Migration vom 14.6.2011 zum elften Treffen des Gemischten Ausschusses zum Freizügigkeitsabkommen.

des Unionsrechts vor Inkrafttreten der Unionsbürgerrichtlinie basieren und somit stärker auf den Nexus zwischen Erwerbstätigkeit und Freizügigkeitsrechten abstellen, als dies nach geltendem Unionsrecht der Fall ist.[7]

Die Annahme der »Volksinitiative zur Masseneinwanderung« im Februar 2014 und die daraus resultierende Verankerung einer Verfassungsbestimmung, welche die Einführung eines Systems mit jährlichen Zuwanderungskontingenten vorsieht, hat die Grundlagen und Rahmenbedingungen des Freizügigkeitsrechts in der Schweiz massgeblich verändert. Zur Umsetzung der Initiative soll innerhalb der nächsten drei Jahre einerseits eine – seitens der EU kaum konsensfähige – Neuverhandlung des Freizügigkeitsabkommens angestrebt und andererseits ausführende Gesetzgebung verabschiedet werden, die wiederum einem Referendum untersteht. Ob und inwieweit eine Umsetzung der Initiative gefunden werden kann, die mit den Vorgaben des Freizügigkeitsabkommens vereinbar ist, wird sich zeigen müssen. Dementsprechend stehen die nachfolgenden Ausführungen unter dem Vorbehalt weitergehender Anpassungen dieses Rechtsrahmens im Zuge der Umsetzung der Volksinitiative.

Unionsbürgerschaft *im Rahmen* der Richtlinie 2004/38/EG – Beständigkeit des Aufenthalts von Unionsbürgern und ihren Familienangehörigen

Frage 1

Die Rechtslage in der Schweiz in Bezug auf die Personenfreizügigkeit basiert im Grunde auf dem Stand des *acquis* zum Zeitpunkt des Abschlusses des Freizügigkeitsabkommens und lehnt sich somit eng an die Vorschriften der Verordnungen Nr. 68/360 und Nr. 1612/68 an, die durch die Unionsbürgerrichtlinie aufgehoben worden sind. Eine weitergehende Umsetzung der Vorgaben aus der Unionsbürgerrichtlinie ins schweizerische Recht hingegen ist unterblieben.

Nach geltendem Recht erstreckt sich der Kreis der Familienangehörigen gemäss Art. 3 Abs. 2 Anhang 1 FZA auf den Ehegatten, Verwandte absteigender Linie, die unter 21 Jahre alt sind oder denen Unterhalt gewährt wird, Verwandte aufsteigender Linie, denen Unterhalt gewährt wird, sowie die

7. Vgl. beispielsweise BGE 130 II 113, E. 6.1-6.3.

Ehegatten und die unterhaltsberechtigten Kinder im Falle von Studierenden. Somit zeigen sich in verschiedener Hinsicht Einschränkungen im Vergleich zu Art. 2 RL 2004/38/EG: Lebenspartner, mit denen eine eingetragene Partnerschaft eingegangen wurde, und Stiefkinder des Ehegatten oder Lebenspartners des EU-Staatsangehörigen sind nach dem Wortlaut der Bestimmung nicht dem Kreise der Familienangehörigen zuzurechnen und schliesslich besteht eine Einschränkung in im Hinblick auf die Familienangehörigen von Studierenden. Die enge Definition der Familienangehörigkeit in Bezug auf eingetragene Partnerschaften wird insofern relativiert, als Art. 52 Ausländergesetz (AuG),[8] eine Bestimmung, die in diesem Fall auch auf Staatsangehörige der EU zur Anwendung gelangt,[9] vorsieht, dass die Bestimmungen über den Familiennachzug sinngemäss auch für die Partnerschaft gleichgeschlechtlicher Paare gilt. Sollte die Behandlung eingetragener Partnerschaften im Einzelfall dennoch weniger günstig ausfallen, könnte sich auch aus Art. 8 EMRK oder dem Gleichheitssatz von Art. 8 Bundesverfassung ein Anspruch auf Gleichbehandlung ergeben. In Bezug auf die von Art. 3 Abs. 2 Anhang 1 FZA nicht ausdrücklich erfassten Stiefkinder hat das schweizerische Bundesgericht die Rechtsprechung des EuGH in Sachen *Baumbast*[10] und damit im Resultat die Neuformulierung der Bestimmung gemäss Art. 2 Abs. 2 Bst. 6 RL 2004/38/EG nachvollzogen und entschieden, dass sich der Anspruch auf Familiennachzug im Grundsatz auch auf die Stiefkinder eines EU-Staatsangehörigen erstreckt.[11] Dazu ist gemäss bundesgerichtlicher Rechtsprechung jedoch erforderlich, dass tatsächlich ein soziales Familienleben im Sinne einer Beziehung von minimaler Intensität besteht. Zudem muss der nachziehende Ehegatte entweder über das Sorgerecht oder bei geteiltem Sorgerecht über das Einverständnis des anderen Elternteils verfügen und schliesslich darf der Nachzugsentscheid der Eltern nicht in offenkundigem Widerspruch zum

8. Bundesgesetz über die Ausländerinnen und Ausländer (AuG; SR 142.20).
9. Art. 2 Abs. 2 AuG sieht deklaratorisch den grundsätzlichen Vorrang des FZA vor den Bestimmungen des AuG vor, sofern nicht das AuG günstigere Bestimmungen einhalt.
10. EuGH, Rs. C-413/99, Slg. 2002, I-7091 (Baumbast).
11. BGE 136 II 65; BGE 136 II 177; vgl. auch Urteil des Bundesgerichts 2C_195/2011 vom 17.10.2011; für eine eingehendere Diskussion der Urteile mit weiteren Nachweisen vgl. etwa Astrid Epiney/Beate Metz, Zur schweizerischen Rechtsprechung zum Personenfreizügigkeitsabkommen, in: Alberto Achermann et al. (Hrsg.), Jahrbuch für Migrationsrecht 2011/2012, Bern 2012, S. 243 f.

Kindeswohl stehen, wie es sich aus der Kinderrechtskonvention ergibt.[12] Damit hat das Bundesgericht ein nach Abschluss des FZA ergangenes und somit eigentlich nicht verbindliches Urteil des EuGH übernommen, wobei dies einerseits mit der inhaltlichen Bezugnahme der europäischen Rechtsprechung auf die auch dem FZA zugrundeliegende Verordnung Nr. 1612/68 und andererseits dem Bestreben zur Schaffung eines einheitlichen Freizügigkeitsrechts begründet wurde.[13] Diese Einheitlichkeit fehlt hingegen auch weiterhin in Bezug auf den Kreis der Familienangehörigen von Studierenden, der nach Art. 3 Abs. 2 Anhang 1 FZA enger definiert wird als in der Unionsbürgerrichtlinie. Nimmt man das gesamte Normengefüge in diesem Bereich in den Blick, so zeigt sich im schweizerischen Recht eine grundsätzlich zur Entwicklung des Unionsrechts parallele Tendenz der schrittweisen Ausweitung des Kreises der Familienangehörigen, ohne dass jedoch bislang eine vollständige und formelle Angleichung an die weitgefassten Begrifflichkeiten des Unionsrechts erfolgt wäre.

Frage 2

Spezifisches, nach Begründungsmotiven differenziertes statistisches Datenmaterial zu ausländerrechtlichen Entscheidungen ist soweit ersichtlich weder für die gesamte Schweiz noch für die einzelnen Kantone verfügbar. Der Nachweis, dass Ausweisungen gestützt auf ausschliesslich finanzielle Gründe tatsächlich vorkommen, findet sich jedoch in einzelnen Gerichtsurteilen:

So bestätigte beispielsweise das Verwaltungsgericht St. Gallen die Zulässigkeit der Ausweisung einer rumänischen Staatsangehörigen,[14] wobei insbesondere in Betracht gezogen wurde, dass die betroffene Person zum entsprechenden Zeitpunkt in der Schweiz nicht arbeitsberechtigt war und ihr somit

12. BGE 136 II 65, E. 5.2; BGE 136 II 177, E. 3.2.2; vgl. zum Ganzen auch etwa Christine Kaddous/Diane Grisel, Libre circulation des personnes et des services, Basel 2012, S. 889.
13. Ebenfalls eine Rolle spielte das Argument der Schaffung einer parallelen Rechtslage in ähnlichem Zusammenhang im Hinblick auf das Aufenthaltsrecht für Bezugspersonen minderjähriger Unionsbürger, wo das Gericht an die Rechtsprechung des EuGH anknüpfte (EuGH Rs. C-200/02, Slg. 2004, I-9925 (Zhu und Chen)), indem es ein abgeleitetes Aufenthaltsrecht des sorgeberechtigten Elternteils im Grundsatz soweit ersichtlich bejahte, im zu beurteilenden Einzelfall aufgrund mangelnder finanzieller Mittel jedoch letztlich verneinte (Urteil des Bundesgerichts 2C_574/2010 vom 15.11.2010).
14. Verwaltungsgericht des Kantons St. Gallen, B 2011/114, Urteil vom 7. Dezember 2011.

lediglich die Zulassung ohne Erwerbstätigkeit offenstand (Art. 24 Anhang 1 FZA). Die vorliegenden Zusagen für eine Übernahme ihrer Lebenskosten durch ihren Lebenspartner waren offenbar nicht umgesetzt worden und konnten zudem aufgrund der Tatsache, dass dieser selber in einer anderen Ehe verheiratet war, auch nicht gerichtlich durchgesetzt werden. Berücksichtigung fand zudem die finanzielle Situation (Gegenüberstellung von Verpflichtungen und möglichen Einkünften; Verschuldung; Betreibungen). Vor dem Hintergrund dieser Erwägungen nahm das Gericht eine Interessenabwägung zwischen dem öffentlichen Interesse einer Ausweisung und dem privaten Interesse des Verbleibs in der Schweiz mit ihren Kindern und beim Lebenspartner vor, die zugunsten ersterer ausfiel.

In einem anderen kantonalen Urteil bestätigte das Verwaltungsgericht Graubünden[15] die Verweigerung einer Aufenthaltsbewilligung für einen französischen Staatsbürger, der nach eigenen Angaben seit mehr als zehn Jahren keiner Erwerbstätigkeit mehr nachging, weder über Einkommen noch über Vermögen verfügte und keinen Mietvertrag oder Krankenversicherungsschutz geltend machen konnte. Dabei stützte sich das Gericht insbesondere auf die Tatsache, dass auch für die Zukunft nicht damit zu rechnen sei, dass der Betroffene einer Erwerbstätigkeit nachgehen würde.

Gestützt auf diese punktuellen Einblicke in die Gerichtspraxis lässt sich somit zusammenfassen, dass in der Schweiz durchaus Ausweisungen von Unionsbürgern aus finanziellen Gründen vorgenommen werden. Dazu ist grundsätzlich erforderlich, dass die Voraussetzungen für einen Aufenthalt von Personen ohne Erwerbstätigkeit (ausreichende finanzielle Mittel sowie Krankenversicherungsschutz) nicht mehr vorliegen und somit kein Aufenthaltsrecht mehr besteht (Art. 24 Abs. 1 i.V.m. Art. 24 Abs. 8 Anhang 1 FZA). Ein allfälliger Widerruf des Aufenthaltstitels dürfte mangels spezifischer Vorschriften im FZA gemäss Bundesrecht erfolgen, wobei einerseits die Vorgaben des Verhältnismässigkeitsgrundsatzes zu beachten sind und andererseits die öffentlichen Interessen an einer Verweigerung des Aufenthaltsrechts aufgrund der Fürsorgebedürftigkeitsgefahr gegen die privaten Interessen abzuwägen sind, wobei für Letztere auch die persönlichen Umstände und der Integrationsgrad Berücksichtigung finden müssen (Art. 96 Abs. 1 AuG).

15. Urteil des Verwaltungsgerichts Graubünden, U 11 36, vom 31. Mai 2011; vgl. auch Urteil des Verwaltungsgerichts Graubünden, U 11 4, vom 15. Februar 2011.

Frage 3

Art. 12 bis 15 Unionsbürgerrichtlinie wurden nicht formell ins schweizerische Recht übernommen, welches sich in Art. 4 Anhang 1 FZA vielmehr auf die Vorgängerbestimmungen der Verordnung Nr. 1251/70/EWG sowie der RL 75/34/EWG bezieht. Nach diesen Bestimmungen kommt Familienangehörigen von EU-Staatsangehörigen nach Beendigung derer Erwerbstätigkeit ein Verbleiberecht zu, falls der Arbeitnehmer oder Selbstständige selbst ein Verbleiberecht erworben hat (Art. 4 Anhang 1 FZA i.V.m. Art. 3 Verordnung Nr. 1251/70 sowie Art. 3 RL 75/34/EWG). Stirbt der aufenthaltsberechtigte EU-Bürger, haben die Familienangehörigen ein Verbleiberecht, falls er (1) sich zum Zeitpunkt des Todes seit mindestens zwei Jahren ständig im Hoheitsgebiet aufgehalten hat, (2) infolge Arbeitsunfall oder Berufskrankheit verstorben ist oder (3) der überlebende Ehegatte die Staatsangehörigkeit des Mitgliedstaates besitzt oder sie durch Heirat verloren hatte. Das Urteil *Givane* des EuGH[16] zum früheren Recht, wonach der zweijährige ständige Aufenthalt in der Zeit unmittelbar vor dem Tod vorliegen muss, wurde vom Bundesgericht aufgenommen, obschon es nach Unterzeichnung des Abkommens ergangen war.[17] Darüber hinaus erachtet es das Bundesgericht als erforderlich, dass die Familienangehörigen bis zum Zeitpunkt des Todes einen gemeinsamen Haushalt geführt haben.[18] Im Falle einer Scheidung oder der Auflösung der registrierten Partnerschaft mit dem aufenthaltsberechtigten EU-Bürger (bzw. eines Drittstaatangehörigen – in dieser Hinsicht besteht keine unterschiedliche Behandlung zu EU-Staatsangehörigen) besteht die Aufenthaltsberechtigung fort, wenn die Ehe mindestens drei Jahre bestanden hat und eine erfolgreiche Integration gegeben ist oder wenn wichtige persönliche Gründe vorliegen (Art. 50 Abs. 1 AuG). Die erfolgreiche Integration ist namentlich gegeben, wenn die betroffene Person die rechtsstaatliche Ordnung und die Werte der Verfassung akzeptiert und Wille zur Teilnahme am Wirtschaftsleben und zur Erlernung der am Wohnort gesprochenen Landessprache zeigt (Art. 77 Abs. 4 VZAE[19]). Als wichtige persönliche Gründe gelten etwa eheliche Gewalt, Zwangsheirat oder eine starke Gefährdung der Wiedereingliederung im Herkunftsland (Art. 50 Abs. 2 AuG). Entgegen der in der öffentli-

16. EuGH, Rs. C-257/00, Slg. 2003, I-345, (Givane), Rz. 50.
17. Urteil des Bundesgerichts 2C_926/2010 vom 21.11.2011 sowie BGE 137 II 1.
18. Urteil des Bundesgerichts 2C_926/2010 vom 21.11.2011, E. 3.2 sowie BGE 137 II 1, E. 3.2.
19. Verordnung über Zulassung, Aufenthalt und Erwerbstätigkeit (VZAE; SR 142.201).

chen Meinung teilweise bestehenden Ansicht sind die Abweichungen vom geltenden *acquis* der Union in Bezug auf die Aufrechterhaltung des Aufenthaltsrechts beim Bezug von Sozialhilfeleistungen von eher begrenzter Tragweite.[20] Der Unionsbürgerrichtlinie ist hierzu bekanntlich die Vorgabe zu entnehmen, dass die »Sozialhilfeleistungen des Aufnahmemitgliedstaats nicht unangemessen in Anspruch« genommen werden dürfen, wobei die Inanspruchnahme nicht automatisch zu einer Ausweisung führen darf (Art. 14 Abs. 1 u. 3 RL 2004/38/EG). Im Rahmen des FZA haben Arbeitnehmer und Selbstständige grundsätzlich ein Recht auf die gleichen sozialen Vergünstigungen wie inländische Arbeitnehmer und somit auf gleiche Sozialhilfeleistungen (Art. 9 Abs. 2 bzw. Art. 15 Abs. 2 Anhang 1 FZA).[21] Ausgeschlossen werden kann der Bezug von Sozialhilfe jedoch im Rahmen des Aufenthaltsrechts zum Zweck der Arbeitssuche und für Arbeitssuchende nach Ablauf eines Arbeitsverhältnisses von unter einem Jahr (Art. 2 Abs. 1 Anhang 1 FZA) sowie für Studierende (Art. 24 Abs. 4 Anhang 1 FZA). Nicht ausdrücklich im FZA geregelt ist die Rechtslage für anderweitige Personen ohne Erwerbstätigkeit (nicht mehr erwerbstätige Selbstständige, Rentner etc.), die zur Erlangung der Aufenthaltserlaubnis grundsätzlich ausreichende finanzielle Mittel und Krankenversicherungsschutz nachweisen müssen (Art. 24 Abs. 1 Anhang 1 FZA). Erfüllen sie diese Bedingungen nicht (mehr), so verlieren sie ihr Aufenthaltsrecht (Art. 24 Abs. 8 Anhang 1 FZA), womit die Aufenthaltserlaubnis nach Art. 63 AuG entzogen werden kann. Dabei sind das Verhältnismässigkeitsprinzip sowie der Schutz des Familienlebens gemäss Art. 8 EMRK zu beachten.[22] Zur Umsetzung dieser Vorgaben ist vorgesehen, dass die Sozialhilfebehörden den Leistungsbezug durch ausländische Staatsangehörige unaufgefordert an die Ausländerbehörden weitermelden (Art. 97 Abs. 3 lit. d AuG i.V.m. Art. 82 Abs. 5 VZAE). In diesem Zusammenhang nicht geklärt ist die Frage, ob nach geltendem Recht bis zum Widerruf des Aufent-

20. Wie umstritten die Thematik der Sozialhilfebezüge im Kontext des FZA ist, zeigen die zahlreichen parlamentarischen Anfragen in jüngster Zeit: Vgl. etwa Postulat Nr. 13.3597 sowie Interpellationen Nr. 13.3597, 13.3880 oder 13.3775.
21. Zudem wird teilweise die Ansicht vertreten, der Verweis in Art. 5 Abs. 2 Anhang 1 FZA auf RL 64/221/EWG, die eine Ausweisung aus wirtschaftlichen Gründen untersagt, würde einem Widerruf einer Bewilligung wegen Sozialhilfebezug entgegenstehen: Andreas Zünd/Ladina Arquint Hill, in: Uebersax/Rudin/HugiYar/Geiser (Hrsg.), Ausländerrecht, 2. Aufl., Basel 2009, Rz. 8.41.
22. Zudem geht die Rechtsprechung von einem engen Verständnis der Sozialhilfe aus, unter Ausschluss etwa von Verbilligungen von Krankenkassenprämien oder Ergänzungsleistungen der Sozialversicherungen: Urteil des Bundesgerichts 2C_448/2007 vom 20.2.2008, E. 3.4.

haltstitels grundsätzlich ein Anspruch auf Sozialhilfe besteht oder ob dieser aufgrund der ausländerrechtlichen Bestimmungen gar nicht erst entstehen kann. Die Antwort auf diese Frage dürfte insbesondere vom entsprechenden (auf Ebene der Kantone geregelten) sozialrechtlichen Rahmen abhängen, wobei das Bundesrecht implizit jedenfalls von der Möglichkeit auszugehen scheint, dass auch in diesen Situationen Sozialhilfe geleistet werden kann (Art. 82 Abs. 5 VZAE).

Frage 4

Die Bestimmungen der Unionsbürgerrichtlinie zum Recht auf Daueraufenthalt wurden nicht formell in die schweizerische Rechtsordnung übernommen. Gemäss dem geltenden Recht in der Schweiz steht EU-Bürgern im Grundsatz die Möglichkeit offen, eine Niederlassungsbewilligung, die ausländischen Staatsangehörigen einen gefestigten und unbefristeten Anwesenheitsstatus einräumt, zu beantragen.[23] Erforderlich ist hierzu ein Aufenthalt von mindestens 5 (erfolgreiche Integration) bzw. 10 Jahren gestützt auf Kurzaufenthalts- oder Aufenthaltsbewilligungen sowie eine ununterbrochene Aufenthaltsbewilligung während der vergangenen fünf Jahre und zudem dürfen keine Widerrufsgründe vorliegen (Art. 34 Abs. 2 u. 4 AuG; Art. 60 VZAE), wobei grundsätzlich kein gesetzlicher Anspruch auf Erteilung einer solchen Bewilligung besteht. Das FZA räumt einen Anspruch auf automatische Verlängerung der ursprünglichen Aufenthaltserlaubnis von fünf Jahren für eine Dauer von mindestens fünf Jahren ein, wobei diese Dauer bei unfreiwilliger Arbeitslosigkeit zum Verlängerungszeitpunkt beschränkt werden kann (Art. 6 Abs. 1 Anhang 1 FZA). Darüber hinaus hat die Schweiz mit zehn EU-Staaten Niederlassungsvereinbarungen abgeschlossen, aus denen sich zumeist ein Anspruch auf Erteilung einer unbedingten und unbefristeten Niederlassungsbewilligung nach einem Aufenthalt von fünf Jahren ergibt.[24] Selbiges Regime wird aus Gegenrechtserwägungen auch sieben weiteren EU-Staaten ge-

23. Zur Niederlassungsbewilligung vgl. etwa Peter Uebersax, in: Uebersax/Rudin/Hugi Yar/Geiser (Hrsg.), Ausländerrecht, 2. Aufl., Basel 2009, Rz. 7.244.
24. Belgien, Dänemark, Deutschland, Frankreich, Griechenland, Italien (nach Abkommenstext ist ein Aufenthalt von 10 Jahren erforderlich, gemäss der vom Bundesrat festgelegten Praxis erfolgt die Bewilligung bereits nach fünf Jahren), Niederlande, Österrreich, Portugal und Spanien.

währt.[25] Keine solchen Vereinbarungen bestehen hingegen mit den neuen Mitgliedstaaten der EU sowie Zypern und Malta, deren Staatsangehörigen eine Niederlassungsbewilligung im Grundsatz nach einem regulären und ununterbrochenen Aufenthalt von 5 bzw. 10 Jahren erteilt werden kann. Somit profitieren die Staatsangehörigen der alten EU-Mitgliedstaaten gestützt auf bilaterale Übereinkünfte grundsätzlich von einem privilegierten, mit der Unionsbürgerrichtlinie teilweise vergleichbaren Status, wogegen die Gewährleistung des unbefristeten und unbedingten Anwesenheitsrechts für Staatsangehörige der neuen Mitgliedstaaten zeitlich länger hinausgeschoben wird. Diese unterschiedliche Behandlung ist in den Niederlassungsverträgen angelegt, die teilweise bis in die 1930er Jahre zurückreichen, und ist somit insbesondere als Spiegel der diplomatischen Beziehungen mit den entsprechenden Staaten zu sehen. Gleichzeitig fällt auf, dass es sich bei den Vertragsstaaten überwiegend um Staaten mit hoher Wirtschaftsleistung handelt (bislang keine Verträge mit ost- und mitteleuropäischen Staaten, Abschluss der Abkommen mit Spanien, Portugal und Griechenland erst Ende der 1980er Jahre) sie können somit auch als Ausdruck einer vorsichtigeren Vorteilseinräumung gegenüber Ländern mit geringerer Wirtschaftskraft betrachtet werden.

Gegenwärtig (Ende 2012) sind in der Schweiz auf die Gesamtbevölkerung von 8.039 Mio. Personen 1'194'640 Personen aus den 28 EU-Staaten ansässig. Davon verfügen 782'470, also 65.5 % über eine Niederlassungsbewilligung.[26]

Frage 5

Auch Art. 24 Abs. 2 RL 2004/38/EG wurde nicht formell ins schweizerische Recht übernommen. Nach dem Freizügigkeitsabkommen sind vom Grundsatz der Gleichbehandlung sowohl für Arbeitnehmer als auch für Selbstständige insbesondere Rahmenbedingungen und Leistungen in engem Zusammenhang zur Berufstätigkeit erfasst (Art. 2 FZA sowie Art. 9 und Art. 15 Anhang 1 FZA), der Schutz erstreckt sich darüber hinaus jedoch auch auf »soziale Vergünstigungen« (Art. 9 Abs. 2 sowie Art. 15 Abs. 2 i.V.m. Art. 9 Abs. 2 Anhang 1 FZA). In der Konturierung dieses Begriffes bezieht sich das

25. Finnland, Grossbritannien und Nordirland, Irland, Island, Luxemburg, Norwegen und Schweden. Für einen Überblick siehe Peter Uebersax, in: Uebersax/Rudin/Hugi Yar/Geiser (Hrsg.), Ausländerrecht, 2. Aufl,. Basel 2009, Rz. 7.140 u. 7.249.
26. Vgl. zu den statistischen Angaben das Zahlenmaterial des Bundesamtes für Statistik im Bereich Migration: <http://www.bfs.admin.ch/bfs/portal/de/index/themen/01/07/blank/data/01.html> (zuletzt besucht am 15.11.2013).

Bundesgericht[27] ausdrücklich auf das extensive Verständnis des EuGH zu Art. 7 Abs. 2 Verordnung Nr. 492/2011[28] und vertritt ebenfalls eine eher weite Auslegung des Begriffs.[29]

Bezüglich Studienbeihilfen schafft das FZA für Arbeitnehmende, Selbstständige und deren Familienangehörige einen grundsätzlichen Anspruch auf Gleichbehandlung mit Inländern,[30] wobei jedoch Personen ohne Erwerbstätigkeit ausdrücklich ausgenommen sind (Art. 24 Abs. 4 *in fine* Anhang 1 FZA). Letzteren wird auch ein Anspruch auf Gleichbehandlung beim Zugang zum Studium ausdrücklich verwehrt, worauf sich die teilweise bestehenden weitergehenden Studienbeschränkungen für ausländische Studierende an den Universitäten sowie unterschiedliche Regime im Bereich der Studiengebühren abstützen lassen. In Bezug auf Studienbeihilfen ist dem schweizerischen Recht ein Anspruch auf Gleichbehandlung für sämtliche Personenkategorien zu entnehmen, sobald sie eine Niederlassungsbewilligung erlangt haben,[31] womit in der Praxis letztlich jedenfalls für die Staatsangehörigen der alten EU-Mitgliedstaaten eine mit Art. 24 Abs. 2 RL 2004/38/EG vergleichbare Lösung resultieren dürfte.

Frage 6

Die Freizügigkeitsrechte des FZA dürfen aus Gründen der öffentlichen Ordnung, Sicherheit und Gesundheit eingeschränkt werden, wobei das Abkommen auf die RL 64/221/EWG, 72/194/EWG und 75/35/EWG Bezug nimmt, die für die EU mit Inkrafttreten der RL 2004/38/EG aufgehoben wurden, aber im Verhältnis zur Schweiz weiterhin gelten (Art. 5 FZA). In der Auslegung

27. BGE 138 V 186. E. 3.4.1 sowie bereits das Urteil des Bundesgerichts 2P.142/2003 vom 7. November 2003, E. 3.4.
28. Früher Art. 7 Verordnung Nr. 1612/68.
29. Als soziale Vergünstigung hat das Gericht Beiträge für Opfer von Straftaten qualifiziert (BGE 137 II 242, insb. E. 3.2.2). Dagegen wurde diese Qualifikation etwa verneint für die Erteilung eines Jagdpatents (Urteil des Bundesgerichts 2P.142/2003 vom 7.11.2013) oder für Leistungen der staatlichen Rentenversicherung (BGE 138 V 186) und in Bezug auf Sonderschulungsleistungen offengelassen (BGE 132 V 184, E. 6).
30. Vgl. hierzu auch die Vorschrift von Art. 5 lit. b Ausbildungsbeitragsgesetz (SR 416); vgl. aus dem Schrifttum etwa Astrid Epiney/Robert Mosters/Sarah Theuerkauf, Die Rechtsprechung des EuGH zur Personenfreizügigkeit, in: Epiney/Theuerkauf/Rivière (Hrsg.), Schweizerisches Jahrbuch für Europarecht 2003, Zürich 2004, S. 100 f.
31. Art. 5 lit. d Ausbildungsbeitragsgesetz.

der Einschränkungsgründe orientiert sich das Bundesgericht eng an der Interpretation des EuGH und folgt ausdrücklich dessen restriktivem Verständnis.[32] Erforderlich ist demnach eine »*tatsächliche* und *hinreichend schwere* Gefährdung, die ein Grundinteresse der Gesellschaft berührt«.[33] Bei der Beurteilung ist nicht in jeder Verletzung des nationalen Strafrechts eine schwere Gefährdung eines Grundinteresses zu erblicken und es ist auf das persönliche Verhalten des des Betroffenen abzustellen,[34] weshalb Massnahmen mit einer generalpräventiven Stossrichtung unzulässig sind.[35] Sodann ist gemäss der Rechtsprechung des Bundesgerichts eine hinreichende Wahrscheinlichkeit erforderlich, dass der Betroffene künftig die öffentliche Ordnung und Sicherheit stören wird, wobei die Anforderungen an die Wahrscheinlichkeit aufgrund der Bedeutung der Freizügigkeit nicht zu gering ausfallen dürfen und eine Festlegung der Wahrscheinlichkeitsschwelle anhand der Schwere der zu erwartenden Rechtsgüterverletzung vorgenommen wird.[36] Als besonders schwergewichtig stuft die höchstrichterliche Rechtsprechung dabei Verletzungen der Vorschriften des Betäubungsmittelrechts ein.[37] Generell hat diese Abwägung im Rahmen der Vorgaben der EMRK und unter Beachtung des Verhältnismässigkeitsprinzips zu erfolgen.[38]

32. Vgl. etwa BGE 130 II 493, E. 3.2; BGE 139 II 121, E. 5.3.
33. BGE 130 II 176, E. 3.4.1 (Hervorhebungen im Original) unter Bezugnahme auf EuGH, Rs. 30/77, Slg. 1977, 1999 (Bouchereau), Rn. 33 ff. sowie EuGH, Rs. C-348/96, Slg. 1999, I-11 (Calfa), Rn. 20.
34. BGE 130 II 176, E. 3.4.1 mit Verweis auf Art. 3 Abs. 1 RL 64/221/EWG.
35. BGE 129 II 215, E. 7.1 mit Verweis auf EuGH, Rs. 67/74, Slg. 1975, 297 (Bonsignore), Rn. 6 f.
36. BGE 130 II 176, E. 4.3.1. Anhaltspunkte für die Interessenabwägung bietet auch Art. 96 AuG, der aufgrund des Diskriminierungsverbotes gegenüber Staatsangehörigen der EU als Minimalstandard gilt. Demgemäss sind bei der Ermessensausübung die öffentlichen Interessen, die persönlichen Verhältnisse sowie der Integrationsgrad des Betroffenen zu berücksichtigen. Ist die Ergreifung einer bestimmten Massnahme den Umständen nicht angemessen, so kann auch eine Androhung vorgenommen werden. Damit werden die Vorgaben des bereits aufgrund des Verfassungsrechts zu berücksichtigenden Verhältnismässigkeitsprinzips konkretisiert.
37. 139 II 121, E. 5.3 unter Bezugnahme auch auf die Rechtsprechung zu Art. 28 RL 2004/38/EG (EuGH, Rs. C-145/06, Slg. 2010, I-11979 (Tsakouridis), Rn. 46 f. und 54 ff. – ohne dass das Gericht allerdings auf die die darin angesprochenen Stufung der Anforderungen eingegangen wäre).
38. Weiterführend zum erhöhten Ausweisungsschutz bei Daueraufenthalt und der Übertragbarkeit dieser unionsrechtlichen Vorgaben auf das FZA siehe Astrid Epiney/Robert Mosters, Schweizerisches Jahrbuch für Europarecht 2012/2013, Zürich 2013, S. 59 ff.

Noch nicht vollständig geklärt ist die Frage der Umsetzung einer im Zuge einer Volksinitiative in die Bundesverfassung eingebrachten Bestimmung (Art. 121 Abs. 3-6 BV), wonach Ausländer ihr Aufenthaltsrecht unabhängig vom ausländerrechtlichen Status verlieren, wenn sie wegen der Begehung bestimmter Delikte (vorsätzliche Tötung, Vergewaltigung, andere schwere Sexualdelikte, Menschenhandel etc.) rechtskräftig verurteilt worden sind oder missbräuchlich Sozialleistungen bezogen haben. Die betroffenen Personen sind demnach mit einem Einreiseverbot von 5 bis 15 Jahren, im Wiederholungsfall von 20 Jahren zu belegen. Jedenfalls wenn man diese Bestimmung als Automatismus versteht, stünde eine Anwendung der Vorschrift einerseits mit der EMRK (mögliche Verletzung von Art. 8 sowie des Verhältnismässigkeitsprinzips) und andererseits mit den Verpflichtungen der Schweiz aus dem Freizügigkeitsabkommen in einem beträchtlichen Spannungsverhältnis. Das Bundesgericht hat die Verfassungsbestimmung als nicht hinreichend bestimmt und somit nicht unmittelbar anwendbar qualifiziert und in einem – an den Gesetzgeber adressierten – *obiter dictum* die Erwägung angestellt, dass die neue Verfassungsbestimmung in der Umsetzung der Volksinitiative mit anderen in der Verfassung verbrieften Interessen (Verhältnismässigkeitsprinzip, Bindung an die völkerrechtlichen Verpflichtungen, Grundrechtsinteressen der Betroffenen) in einen Ausgleich zu bringen sei.[39] Tatsächlich sieht sich der Gesetzgeber in der Umsetzung mit der Herausforderung konfrontiert, eine Abwägung zwischen dem im Wortlaut der Bestimmung wohl angelegten Ausweisungsautomatismus und insbesondere den völkerrechtlichen Verpflichtungen aus FZA und ERMK zu finden. Da die Schweiz ein Anwendungsgebot auch für verfassungswidrige Bundesgesetzbestimmungen kennt (Art. 190 BV), den menschenrechtlichen Verpflichtungen des Völkerrechts hingegen jedenfalls im Grundsatz Vorrang gegenüber widersprechenden Verfassungsvorschriften zukommt, scheint es nicht ausgeschlossen, dass sich die gesetzgeberische Umsetzung letztlich enger an den völkerrechtlichen Vorgaben als am Verfassungstext orientieren wird.[40]

39. BGE 139 I 16, E. 4.2 und E. 4.3.

40. Angesichts der sich abzeichnenden Verzögerungen bei der Umsetzung der Volksinitiative ist bereits eine weitere Volksinitiative zustandegekommen (»Durchsetzungsinitiative«), wonach für dieselben inhaltlichen Forderungen einerseits eine Konkretisierung des Textes auf Verfassungsebene vorgesehen ist, womit auf eine Umsetzung durch den Gesetzgeber verzichtet werden kann, und andererseits festgelegt wird, dass der entsprechende Verfassungspassus dem nicht zwingenden Völkerrecht vorgeht. Vgl. BBl 2013 1146.

Unionsbürgerschaft *außerhalb* der Richtlinie 2004/38/EG – Untersuchung der nationalen Anwendung von primärem EU-Recht

Frage 7

Wie bei der Anwendung des Unionsrechts ist auch der Anwendungsbereich des Personenfreizügigkeitsabkommens von rein internen Situationen abzugrenzen. Die höchstrichterliche Rechtsprechung in der Schweiz folgt auch in dieser Frage der Linie des EuGH, womit das Vorliegen eines »Auslandbezuges« bzw. eines »grenzüberschreitenden Sachverhaltes« für eine Anrufung der Rechte aus dem Abkommen vorausgesetzt wird. Dagegen wird die Anwendung der Freizügigkeitsvorschriften ausgeschlossen für »Sachverhalte, die einen Mitgliedstaat rein intern« betreffen.[41] Der aus dieser Differenzierung entstehende Raum für Inländerdiskriminierungen hat sich in der Schweiz insbesondere in Bezug auf die Bestimmungen zum Familiennachzug realisiert: Nachdem den Staatsangehörigen von EU-Staaten im Geltungsbereich des Freizügigkeitsabkommens ein Recht auf Familiennachzug eingeräumt wurde, das über jenes für Schweizer hinausging, hatte der Gesetzgeber die Inländerbenachteiligung mit der Schaffung eines entsprechenden Anspruches für Schweizer beseitigt.[42] Mit der Übernahme der *Metock*- und *Baumbast*-Rechtsprechung des EuGH durch das Bundesgericht[43] wurde die Rechtslage für EU-Bürger allerdings erneut verbessert, ohne dass der Gesetzgeber bislang durch eine Anpassung der einschlägigen Gesetzesbestimmungen nachgezogen oder die Gerichte, welche aufgrund des Anwendungsgebots für Bundesgesetze (Art. 190 Bundesverfassung) auch verfassungswidrige Vorschriften zur Anwendung bringen müssen, den Schweizer Staatsbürgern gestützt auf den grundrechtlichen Gleichheitssatz analoge Rechte eingeräumt hätten.[44]

41. BGE 129 II 249, E. 4.2 unter Bezugnahme u.a. auf EuGH, Rs. 35/82 und 36/82, Slg. 1982, 3723 (Morson und Jhanjan), Rn. 11 ff.
42. Art. 42 AuG, allerdings noch unter Abstützung auf die *Akrich*-Rechtsprechung des EuGH: EuGH, Rs. C-109/01, Slg. 2003, I-9607 (Akrich).
43. BGE 136 II , E. 3 in Bezug auf EuGH, Rs. C-127/08, Slg. 2008, I-6241 (Metock); BGE 136 II 64, E. 3 und 4 in Bezug auf EuGH, Rs. C-413/1999, Slg. 2002, I-7091 (Baumbast), Rn. 57.
44. Immerhin hat das Bundesgericht angemahnt, die Ungleichbehandlung von Inländern und Drittstaatsangehörigen durch Gesetzesänderung zu beheben, da die Gerichte andernfalls über eine teleologische Auslegung der Bestimmung zu einem analogen Resultat gelangen, wie dies das FZA vorsieht, oder eine Verletzung der

Die Diskussion um die Übernahme der EuGH-Urteile *Chen*, *Ruiz Zambrano*, *Dereci* und *McCarthy* kann als Illustration für den Umgang der schweizerischen Gerichte mit den Weiterentwicklungen des Unionsrecht herangezogen werden: Grundsätzlich strebt das Bundesgericht die Schaffung einer zur Rechtslage in der EU möglichst parallelen Rechtslage an und weicht nicht ohne Not von der Auslegung abkommensrelevanter Vorschriften durch den EuGH ab.[45] Gleichzeitig stellt sich das Gericht auf den Standpunkt, dass die Regeln zur Unionsbürgerschaft und die diesbezügliche Rechtsprechung des EuGH für die Schweiz nur bedingt massgeblich sind und setzt für eine Übernahme voraus, dass es sich um Vorschriften handelt, die Sinn und Geist des FZA entsprechen und diesem zugrunde liegen.[46] Nur bedingt relevant sind demzufolge Entwicklungen im Kernbereich der Unionsbürgerschaft,[47] wozu wohl auch die Hauptaussagen der Urteile *Ruiz Zambrano*, *Dereci* und *McCarthy* zu zählen sind.[48] Liegt hingegen ein inhaltlicher Bezug zu sekundärrechtlichen Bestimmungen vor, die bereits vor dem Abschluss des FZA in Kraft waren, erachtet das Bundesgericht es für angezeigt, der entsprechenden Rechtsprechung im Grundsatz zu folgen (so für *Chen und Zhu, Baumbast* und *Metock*). Problematisch ist hierbei, dass das Vorliegen eines solchen Nexus *ex ante* teilweise schwierig antizipiert werden kann, da auch nicht im Einzelnen geklärt ist, welcher Natur und Intensität er zu sein hat (Formulierung, Inhalt, Sinn und Zweck der entsprechenden Bestimmung). Damit wird den Gerichten ein weiter Auslegungsspielraum belassen, der bisher im Zweifelsfall eher zugunsten einer unionsrechtsnahen Auslegung genutzt wurde.

Frage 8

Da das FZA die Schweiz nicht in die bürgerrechtliche Dimension der Unionsbürgerschaft einbindet, ist wohl davon auszugehen, dass die Vorschriften über den Erwerb oder Verlust der schweizerischen Staatsbürgerschaft keinerlei Bindung an Vorgaben des Unionsrechts unterliegen.

EMRK feststellen könnten: BGE 136 II 120, insb. E. 3.5.3; vgl. dazu etwa Christine Kaddous/Diane Grisel, Libre circulation des personnes et des services, Basel 2012, S. 874 f.

45. BGE 139 II 393, E. 4.1.1; vgl. dazu bereits oben »Vorbemerkungen«.
46. BGE 136 II 65, E. 4.2.
47. BGE 139 II 393, E. 4.1.2.
48. Zu den Auswirkungen auf die Schweiz und (ebenfalls zurückhaltend) zur Übertragbarkeit auf das FZA vgl. Robert Mosters, Anmerkung zum Urteil Zambrano, Asyl 3/2011, S. 31 f. und ders. Anmerkung zum Urteil McCarthy, Asyl 3/2011, S. 33 f.

Politische Rechte von Unionsbürgern

Frage 9

Im Hinblick auf die RL 93/109/EG besteht soweit ersichtlich keine rechtliche Bindung der Schweiz und demzufolge wurde die Richtlinie auch nicht in nationales Recht umgesetzt.

Frage 10

Im Hinblick auf die RL 94/80/EG besteht soweit ersichtlich keine rechtliche Bindung der Schweiz und demzufolge wurde die Richtlinie auch nicht in nationales Recht umgesetzt.

Frage 11

Die Bundesverfassung überlässt es den Kantonen, die politischen Rechte auf ihrem Gebiet zu regeln (Art. 39 Abs. 1 BV), weshalb die Kantone ausländischen Staatsangehörigen Stimm- oder/und Wahlrechte auf kantonaler oder kommunaler Ebene einräumen können.

Auf kantonaler Ebene kennen lediglich die Kantone Neuenburg und Jura ein Stimm- sowie ein (aktives) Wahlrecht für ausländische Staatsangehörige. Voraussetzung ist hierzu, dass die betreffende Person seit zehn Jahren in der Schweiz und davon mindestens ein Jahr im Kanton lebt (Jura), bzw. dass eine Niederlassungsbewilligung vorliegt und ein Aufenthalt im Kanton seit mindestens fünf Jahren gegeben ist (Neuenburg). Im Kanton Jura sind Entscheidungen zur Änderung der Kantonsverfassung vom Stimmrecht ausländischer Staatsangehöriger ausgenommen.[49]

Auf kommunaler Ebene erhalten ausländische Staatsangehörige in vier Kantonen das volle Stimm- sowie das aktive und passive Wahlrecht,[50] in einem Kanton wird ihnen lediglich das Stimm- und das aktive Wahlrecht eingeräumt[51] und in weiteren drei Kantonen wird es den Gemeinden freigestellt,

49. Art. 3 Abs. 2 Loi sur les droits politiques vom 26. Oktober 1978 i.V.m. Art. 77 Bst. a, b und f Verfassung des Kantons Jura.
50. Kantone Neuenburg, Jura (mit der Einschränkung, dass das passive Wahlrecht sich lediglich auf die Wahl in Gemeindeparlamente erstreckt), Waadt und Freiburg.
51. Kanton Genf.

das Stimm- und Wahlrecht für ausländische Staatsangehörige einzuführen.[52] Zur Erlangung des Stimm- oder Wahlrechts wird jeweils eine bestimmte Mindestaufenthaltsdauer oder das Vorliegen einer Niederlassungsbewilligung vorausgesetzt.

Vergleicht man diese nationalen materiellrechtlichen Vorschriften mit den Anforderungen des Unionsrechts (RL 94/80/EG), so zeigt sich – abgesehen vom Umstand, dass die Gewährung von Ausländerstimm- und -wahlrechten in den Gebietskörperschaften der Schweiz noch immer die Ausnahme darstellt – insbesondere bei den Anforderungen an Aufenthaltsstatus und -dauer eine wesentlich striktere Ausgestaltung als jene, die gemäss Art. 3 RL 94/80/EG innerhalb der EU vorausgesetzt werden könnte. Umgekehrt ist aber zu konstatieren, dass das Recht einiger Kantone über den Mindeststandard des Unionsrechts hinausgeht, indem politische Rechte (1) sämtlichen ausländischen Staatsangehörigen eingeräumt werden, (2) neben Wahlrechten auch das Recht zur Teilnahme an Abstimmungen umfassen, (3) sich teilweise nicht lediglich auf die kommunale, sondern auch auf die kantonale Ebene erstrecken und schliesslich (4) zum Teil auch das passive Wahlrecht für Mitglieder von Exekutivorganen umfassen.

Überblickt man die Regelungen des Wahl- und Stimmrechts für ausländische Staatsangehörige in der Schweiz, so lässt sich ein Muster weitergehender Liberalität in der französischen Schweiz und ein eher restriktiver Ansatz in der Deutschschweiz und dem Tessin beobachten. Zudem zeigt der Umstand, dass die Stimmbürger in den letzten zwölf Jahren über mehr als ein Dutzend kantonale Abstimmungsvorlagen zum Ausländerstimmrecht zu befinden hatten, dass es sich bei der Partizipation ausländischer Staatsangehöriger an der politischen Entscheidungsfindung in der Schweiz um ein äusserst umstrittenes Thema handelt, wobei insbesondere im vergangenen Jahrzehnt gleichzeitig eine Tendenz der Ausweitung der Wahl- und Stimmrechte zu beobachten war. Dass es in diesem Bereich zu einer weitergehenden Annäherung oder sogar einer Bindung an die Vorgaben der EU kommen könnte, scheint hingegen aufgrund des engen Souveräntitätsbezugs der Wahl- und Stimmrechte und – damit zusammenhängend – der hohen politischen Brisanz der Thematik eher unwahrscheinlich.

52. Kanton Appenzell Ausserrhoden (umgesetzt in drei Gemeinden); Kanton Graubünden (umgesetzt in 18 Gemeinden); Kanton Basel-Stadt (mit Ausnahme der Gemeinde Basel-Stadt; bislang in keiner Gemeinde umgesetzt).

Frage 12

Mangels Bindung der Schweiz an die Vorgaben des Unionsrechts in Bezug auf das Stimm- und Wahlrecht sind in diesem Bereich keine Konflikte zwischen EU-Recht und nationalen Vorschriften ersichtlich.

Kultur(en) der Staatsbürgerschaft

Frage 13

Die Personenfreizügigkeit mit der EU hatte in der Schweiz politisch von Beginn einen eher schwierigen Stand und wird wohl von einem beträchtlichen Teil der Bevölkerung nicht so sehr als Errungenschaft, denn als Preis für den Einbezug der Schweiz in den Binnenmarkt betrachtet. Diese skeptische Haltung dürfte bereits im Hinblick auf die ökonomische Dimension der Personenfreizügigkeit bestehen, die der Volkswirtschaft offenkundige Vorteile (insbesondere Zugang zu hochqualifizierten Arbeitskräften, Verbesserung der Finanzierbarkeit der Sozialwerke, solides Wirtschaftswachstum im vergangenen Jahrzehnt) und relativ geringe Nachteile (Lohndruck lediglich in gewissen Branchen, weiterhin tiefe Arbeitslosigkeit, Bevölkerungswachstum) gebracht hat.[53]

Trotz dieser überwiegend positiven Bilanz aus volkswirtschaftlicher Perspektive steht die Personenfreizügigkeit in der öffentlichen Diskussion unter Druck. Dies zeigt sich zum einen an der Annahme der »Volksinitiative zur Masseneinwanderung« und weiteren hängigen Volksbegehren, und zum anderen am zurückhaltenden Umgang mit den Freizügigkeitsrechten durch die politischen Institutionen, beispielsweise in der Anrufung der Ventilklausel zur Kontingentierung der Einwanderung aus dem EU-Raum durch den Bundesrat, der beständigen Betonung der sogenannten flankierenden Massnahmen (Sicherstellung der Einhaltung der minimalen Lohn- und Arbeitsbedingungen bei grenzüberschreitender Dienstleistungserbringung) oder dem Verzicht auf eine Übernahme der Unionsbürgerrichtlinie. Ein über dieses ökonomische Paradigma hinausgehendes bürgerrechtlich oder konstitutionell be-

53. Vgl. hierzu etwa den 9. Bericht des Observatoriums zum Freizügigkeitsabkommen Schweiz-EU zu Auswirkungen der Personenfreizügigkeit auf den Schweizer Arbeitsmarkt vom 11.6.2013 verfügbar unter <https://www.bfm.admin.ch//bfm/de/home/themen/fza_schweiz-eu-efta.html> (zuletzt besucht am 15.11.2013).

gründetes Verständnis der Migrationsrechte lässt sich in der vorherrschenden Debatte in der Schweiz kaum beobachten. Breite Kreise der Bevölkerung dürften das Konzept einer Konstitutionalisierung der Migrationsrechte geradezu als rotes Tuch und als Widerspruch zum gepflegten Unabhängigkeits- und Souveränitätstopos wahrnehmen, so dass auch migrationsfreundliche Akteure in der öffentlichen Debatte auf die Heranziehung und Geltendmachung dieses Verständnisses verzichten. Diese festzustellende Migrationsskepsis kontrastiert in eigentümlicher Weise mit dem Umstand, dass die Migration, insbesondere auch aus und in den EU-Raum, in der Schweiz eine unverkennbare Realität darstellt (2012: Ausländeranteil von 23.3 %, Anteil EU-Bürger von 14.8 %; Einwanderung von 125‘045 Personen; 420‘981 Schweizer Staatsbürger in der EU), welcher unbestrittenermassen ein wichtiger Anteil am Funktionieren von Gesellschaft, Volkswirtschaft und Staat zukommt. Wenn heute also für die öffentliche Meinung – etwas überspitzt ausgedrückt – eher von einer *Freizügigkeitskultur der Duldung* als der Konstitutionalisierung gesprochen werden kann, erscheint es naheliegender, dass die Fortentwicklung dieses Verständnisses letztlich über die Anerkennung der bestehenden engen faktischen Einbindung der Schweiz in den Migrationsraum der EU erfolgt, als dass es rechtliche oder ideelle Faktoren sind – denen gemeinhin eher mit Skepsis begegnet wird –, die den Anstoss für eine Umdeutung der vorherrschenden Migrationskultur geben werden.

Frage 14

Die Wirkung der EU-Charta der Grundrechte auf die Freizügigkeitsrechte dürfte im Falle der Schweiz als beschränkt einzustufen sein. Gemäss Bundesgericht ist die Rechtsprechung des EuGH im Bereich der Grundrechte für die Schweiz im Prinzip nicht von Relevanz, da sich die Schweiz, abgesehen von einzelnen Garantien wie dem Diskriminierungsverbot gemäss Art. 2 FZA, nicht zur Einhaltung dieser Rechte verpflichtet hat.[54] Eine Ausnahme vom Grundsatz der Nichtbeachtlichkeit bildet der Fall, dass der EuGH zur Auslegung von Begriffen des Unionsrechts, die zur Anwendung des Freizügigkeitsabkommens herangezogen werden (Art. 16 Abs. 2 FZA), auf grundrechtliche Bestimmungen zurückgreift.[55] In allen anderen Fällen ist der schweizerische Richter nicht an die Auslegung der Grundrechte durch den EuGH gebunden und beurteilt die entsprechenden Normen somit vor dem Hintergrund

54. BGE 130 II 113, E. 6.4.
55. BGE 130 II 113, E. 6.5.

der eigenen Rechtsordnung, d.h. insbesondere unter Einbezug der Vorgaben der EMRK. Nun mag hierbei die als Ausnahme qualifizierte Beachtlichkeit der Rechtsprechung im Grundrechtsbereich tatsächlich den häufigsten Fall und damit eigentlich die Regel darstellen,[56] für die Tatsache, dass die Verbindlichkeit der Grundrechte-Charta durch den Filter der Übernahme bereits signifikante Auswirkungen auf die Auslegung der Freizügigkeitsrechte durch die Schweiz gehabt hätte, sind jedoch momentan (noch) keine Nachweise ersichtlich.

Frage 15

In der öffentlichen Diskussion über die Beziehungen zwischen der Schweiz und der EU stellt die Personenfreizügigkeit eines der umstrittensten und meistdiskutierten Themen dar. Zur Debatte stehen dabei sowohl Fragen zur exakten Ausgestaltung und zum Anwendungsbereich der Freizügigkeitsvorschriften als auch die Grundsatzfrage der Einbindung der Schweiz in den Migrationsraum Europa. Anlass für diese Diskussionen waren und sind insbesondere Volksabstimmungen über migrationspolitische Fragestellungen im Allgemeinen sowie über die Einrichtung und Weiterentwicklung der Personenfreizügigkeit mit der EU im Besonderen.[57] Die Unionsbürgerschaft als solche kam in diesen Debatten bislang nur am Rande zur Sprache, einzelne Themen in ihrem Kontext jedoch durchaus. So stellen beispielsweise die Entwicklung der Lohn- und Arbeitsbedingungen, der verbleibende Spielraum bei der Ausschaffung von straffälligen ausländischen Staatsangehörigen sowie insbesondere die Frage der Sozialhilfeansprüche für zugewanderte Personen wichtige Diskussionspunkte dar. Dabei ist die Faktendarstellung in den

56. So Astrid Epiney, Die schweizerische Rechtsprechung zum Personenfreizügigkeitsabkommen – ein Überblick, in: Achermann/Epiney/Kälin/Nguyen (Hrsg.), Jahrbuch für Migrationsrecht 2004/2005, Bern 2005, S. 144.

57. Nach der Abstimmung über die eigentlichen sektoriellen Abkommen mit der EU im Jahre 2000 waren dies insbesondere Volksabstimmungen über die Ausweitung der Personenfreizügigkeit auf neue Mitgliedstaaten (2005; 2009 und voraussichtlich 2014 für die Ausweitung auf Kroatien), die Schengen- und Dublin-Assoziierung (2005), die Weiterentwicklung des Schengen Besitzstandes (2009) sowie über die Volksinitiative über die »Ausschaffung krimineller Ausländer« (2008). Mit der Abstimmung zu einer Volksinitiative, die eine Beschränkung der jährlichen Zuwanderung auf 0.2 % der Bevölkerung verlangt (»ECOPOP-Initiative«) und der Abstimmung über die Ausweitung der Personenfreizügigkeit auf Kroatien steht auch für die kommende Zeit eine Reihe von freizügigkeitsrelevanten Themen auf der politischen Agenda.

Medien wohl mehrheitlich als korrekt anzusehen und auch eine übermässige inhaltliche Einflussnahme lässt sich jedenfalls für die verbreitetsten Medien kaum konstatieren. Eine wohl gewichtigere Einflussfunktion kommt den Medien als Plattform und Sprachrohr für politische Akteure zu, wobei in Migrationsfragen zu beobachten ist, dass gerade auch radikaleren politischen Exponenten ein beträchtlicher Platz eingeräumt wird, was durchaus einer der Faktoren für den Umstand sein könnte, dass Migrationsfragen in der Schweiz derzeit ziemlich erbittert diskutiert werden. Trotz einer gewissen Radikalisierung der Debatte blieben die politischen Resultate – jedenfalls bis zur Annahme der »Volksinitiative zur Masseneinwanderung« – weitgehend einem gewissen Pragmatismus verpflichtet, wie er sich für einen mit dem Ausland in wirtschaftlicher und gesellschaftlicher Hinsicht eng verbunden Kleinstaat als politischer Weg auch durchaus anbietet.

THE UNITED KINGDOM

Thomas Horsley and Stephanie Reynolds[1]

Citizenship *within* Directive 2004/38 EC – Stability of Residence for Union Citizens and their Family Members

Question 1

1. Arts 2 and 3 of Directive 2004/38 EC (hereinafter: CRD) define the categories of individuals who enjoy derived rights under EU law as 'family members,'[2] 'other family members',[3] or non-married partners of Union citizens.[4] The three distinct categories apply without reference to the nationality of the individuals concerned and confer distinct levels of protection. Most significantly, Art 5 CRD affords Union citizens and their 'family members' a right to enter the territory of the host Member State on the production of certain valid documents. Arts 2, 3, and 5 of the CRD were transposed into UK law through Regs 7, 8, and 11 of the *Immigration (European Economic Area) Regulations* 2006 (hereinafter: EEA Regulations).[5] The European Casework

1. Dr Thomas Horsley and Miss Stephanie Reynolds, School of Law and Social Justice, University of Liverpool. Report complied, November 2013.
2. The Union citizen's spouse or registered partner (where the host State treats registered partnerships as equivalent to marriage) and the direct descendants (under the age of 21 or dependent) and direct dependent relatives in the ascending line of the Union citizen and/or his or her spouse/civil partner (Art 2 CRD).
3. Persons who, in the country from which they have come, are dependants or members of the household of the Union citizen and persons requiring the personal care of the Union citizens on serious medical grounds (Art 3 CRD).
4. 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 [2004] OJ L 158/1.
5. Immigration (European Economic Area) Regulations, SI 2006/1003. For detailed review of the EEA Regulations, see e.g. H. Toner, 'New Regulations implementing Directive 2004/38,' (2006) 25(4) *Journal of Immigration, Asylum and Nationality Law* 331. For discussion of the interface between the CRD/EU citizenship rights and UK immigration law, see J. Shaw, N. Miller, M. Fletcher, 'Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free

Instructions, issued by the UK Border Agency (UKBA), supplement the EEA Regulations by providing UK immigration caseworkers with guidance on CRD rights.[6] The UK has adopted special transitional provisions to govern the entry and residence rights of Bulgarian and Romanian nationals and their family members.[7] These arrangements apply until 1st January 2014.

2. The EEA Regulations categorise 'other family members' and non-married partners as 'extended family members.' Unless otherwise stated, we shall adopt this label throughout this report to refer collectively to these two specific categories of derived rights holders. The EEA Regulations apply to 'EEA nationals,' defined as nationals of an EEA State who are not also British citizens. Unless otherwise stated, reference to EEA nationals in this Report should be taken to include the situation of Member State nationals as Union citizens.

3. Our findings indicate that UK courts and tribunals understand the key distinction established by the CRD between the rights of family members and extended family members of Union citizens.[8] National courts and tribunals recognise that persons qualifying as family members (Art 2 CRD/Reg 7 EEA Regulations) enjoy automatically, by virtue of their status as a family member of a Union citizen and irrespective of their nationality, a right of entry into and residence within the UK as host Member State. UK courts understand that, by contrast, extended family members (Art 3 CRD/Reg 8 EEA Regulations) benefit only from a more limited procedural right; specifically: a right to have the UK authorities consider fully their personal circumstances with a view to 'facilitating' their entry and residence.

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movement law,' (2013) *Edinburgh Law School Citizenship Studies* and J. Shaw and N. Miller, 'When legal worlds collide: an exploration of what happens when EU free movement meets UK immigration law,' (2013) 38(2) *EL Rev*. 137.

6. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ (all electronic links last accessed on 14/11/13).
7. Accession (Immigration and Worker Authorisation) Regulations SI 2006/3317 (as amended).
8. E.g. *AP (India) v Secretary of State for the Home Department* [2007] UKAIT 48 and *Aladeselu v Secretary of State for the Home Department* [2013] EWCA Civ 144 at paras 8-16, 52 and 54. See here also the recent decision of the CJEU in Case C-83/11 *Secretary of State v Rahman*, Judgment of the Court (Grand Chamber) of 5 September 2012 (nyr) at para. 21 – on preliminary reference from the Court of Appeal.

4. The distinction between family members and extended family members proved decisive before the UK courts in *B v Home Office*.[9] In that decision, the High Court concluded that the EU law doctrine of Member State liability for breaches of Union law (*Francovich*)[10] only protected the substantive rights of entry and residence afforded to family members under Art 2 CRD and not the procedural rights conferred on extended family members by Art 3 CRD.[11]

Family members

5. With particular respect to family members, the case law of UK courts and tribunals to date has been concerned primarily with the interpretation of the two dependent variables in Art 2 CRD/Reg 7 of the EEA Regulations: (1) the existence of legal marriages between Union citizens and (usually) Third Country Nationals (hereinafter: TCN) spouses; and (2) the criterion of dependency.[12] The first criterion has given rise to most of the case law on family members. Legal disputes interpreting that first criterion tend to involve judicial review of determinations of 'sham marriages' made by UKBA officials.[13] In particular, UK courts have criticised the UKBA's failure, in specific instances, to recognise fully the automatic rights of entry and residence enjoyed by TCN spouses of EU citizens under Union law.[14]

6. The UK was one of several Member States that opted to impose an additional requirement of prior lawful residence (within the territory of the Union) for TCN family members when transposing the CRD into national law. The UK Government introduced this extra requirement in Reg 12(1)(b) of the EEA Regulations. In *Metock*, the Court of Justice held that EU law did not permit the application of such a test to determine the rights of entry and resi-

9. *B v Home Office* [2012] EWHC 226 (QB).
10. Joined Cases C-6/90 and C-9/90 *Francovich and others v Italian Republic* [1991] ECR I-5357.
11. *B v Home Office*, cited *supra* note 8 at paras 105-119.
12. On this point, see also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at p. 21.
13. E.g. *ZH (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1060 and *Adetola v First-Tier Tribunal (Immigration and Asylum Chamber)* [2010] EWHC 3197 (Admin).
14. *ZH (Afghanistan)*, cited *supra* note 21 and *Papajorgji* [2012] UKUT 38 (IAC).

dence of TCN family members of Union citizens.[15] The UK Government was extremely slow to respond to the *Metock* ruling. Reg 12(1)(b) of the EEA Regulations was not amended to reflect the substance of that decision until 2011.[16] On the other hand, UK courts reacted more swiftly and favorably to the *Metock* ruling. That decision was followed by the English Court of Appeal in *ZH (Afghanistan)*, prior to the amendment of the EEA Regulations.[17] During the same period, the Court of Appeal also expressed its clear frustration with the UK Government's initial delayed response to *Metock*. In *Owusu* that Court strongly criticised the Secretary of State's attempt to rely, post-*Metock,* on Reg 12(1)(b) of the EEA Regulations in the knowledge that that provision was now 'flagrantly unlawful.'[18]

Extended family members

7. UK courts and tribunals have addressed three specific points of interpretation as regards the rights of extended family members. First, national courts and tribunals have been requested to examine the requirement that extended family members previously resided with the Union citizens in an EEA State before entering the UK.[19] That requirement for prior EEA residence is not provided for in the CRD, but was (again) imposed by the UK Government through transposition, in parallel with its approach to family members – discussed above.[20] Secondly, national courts and tribunals have reviewed the requirement, included in both the CRD and EEA Regulations, that extended family members 'accompany or join' the Union citizen in the host Member State.[21] Finally, UK courts have again been required to interpret the dependency criterion, which also applies to govern the derived rights of certain extended family members under both the CRD and EEA Regulations.[22]

15. Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.
16. Immigration (European Economic Area) (Amendment) Regulations, SI 2011/1247.
17. *ZH (Afghanistan) v Secretary of State*, cited *supra* note 12.
18. *R.(on the application of Owusu) v Secretary of State* [2009] EWHC 593 (Admin).
19. E.g. *KG (Sri Lanka) v Secretary of State* [2008] EWCA Civ 13 and *SM (Sri Lanka) v Secretary of State* [2008] UKAIT 75 (AIT).
20. See Reg 8(2)(a) EEA Regulations.
21. E.g. *Aladeselu v Secretary of State* [2011] UKUT 253 (IAT) and *Aladeselu v Secretary of State*, cited *supra* note 7.
22. *Ibid*.

8. After some initial difficulty in places,[23] UK courts and tribunals now appear to be making good progress on all three of the aforementioned key issues. First, following the approach for family members discussed above, national courts have struck down as unlawful the prior EEA residence requirement for extended family members introduced by Reg 8 of the EEA Regulations.[24] Secondly, with respect to the requirement – permitted by the CRD – that extended family members 'accompany or join' the Union citizen in the United Kingdom, national courts have kept pace with developments in the case law of the CJEU. Recently, for instance, the Court of Appeal ruled that this specific requirement must be read in light of *Metock*.[25] In other words, it took the view that the requirement in both the CRD and EEA Regulations that extended family members accompany or join Union citizens in the host State must be taken to include the situation of relations who entered the host State – whether legally or illegally – *prior* to the Union citizen. Finally, on dependency, UK courts are working towards a generous construction of that criterion. In *Adaleslu* the Court of Appeal recently ruled that, for extended family members, that requirement must be assessed at the time of application.[26] Further, it also concluded that the situation of dependency need not have arisen in the recipient's country of origin.[27] The Court of Appeal's position would appear to extend beyond the requirements outlined by the CJEU in *Rahman*. The Court of Justice had strongly suggested that the situation of dependency on the Union citizen in Art 3(2)(a) CRD must have arisen in the extended family member's country of origin.[28]

9. The primary procedural safeguard as regards the right of entry into the host State is contained in Art 5(4) CRD. That provision obliges Member States to afford Union citizens and their family members 'every reasonable opportunity' to obtain – or have brought to them within a reasonable period – the necessary documentation required to support their right of entry into the host

23. See esp. *KG (Sri Lanka) v Secretary of State,* cited *supra* note 17 and *SM (Sri Lanka) v Secretary of State* [2008] UKAIT 75 (AIT). In both cases UK courts struggled to assess correctly the derived rights of TCNs as extended family members.
24. *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79. In that case, the Secretary of State conceded that Art 3(2) CRD had been incorrectly transposed. The EEA Regulations were subsequently amended in 2011 by the Immigration (European Economic Area) (Amendment) Regulations, SI 2011/1247.
25. *Aladeselu v Secretary of State,* cited *supra* note 7 at paras 39 and 44.
26. *Ibid.,* at para. 48.
27. *Ibid*.
28. Case C-83/11 *Rahman*, cited *supra* note 7 at para. 33.

State. Alternatively, Member States must permit persons to corroborate or prove by other means that they are covered by the right of free movement and residence under Union law. The host Member State is expressly prohibited from refusing persons entry to the national territory before the aforementioned obligations have been discharged. The substance of Art 5(4) is transposed into UK law in Reg 11(4) of the EEA Regulations.

10. Reg 11(4) has been invoked to establish, for TCN family members of Union citizens, a right of entry into the UK. For instance, in *CO (Nigeria) v Entry Clearance Officer*, the Asylum and Immigration Tribunal held that the son of a Polish national resident in the UK could rely on Reg 11(4) in order to secure entry into the United Kingdom.[29] Equally, in *Owusu* the Court held that a Ghanaian minor was entitled to join his Dutch mother resident in the UK on the basis of that same provision.[30] The application of Reg 11(4) to establish rights of entry and residence for TCN family members is, however, severely limited in practice by the UK's rules on entry clearance.[31] The UK has introduced financial penalties for carriers bringing TCN family members to the United Kingdom who have not first obtained an 'EEA family permit' in accordance with Reg 12 of the EEA Regulations.[32] Thus, in effect, TCN family members without an EEA permit will in all likelihood be denied boarding by carriers even though they would be able to secure entry upon arrival pursuant to Reg 11(4).

11. The requirement under the EEA Regulations that TCN family members obtain a UK-issued 'EEA family permit' prior to entering the UK conflicts with Art 5(2) CRD. That provision clearly directs Member States to exempt non-EEA family members from visa requirements otherwise applicable under national law where such persons hold a valid EU residence card issued by the authorities of another Member State in accordance with Art 10 CRD. The UK Government's refusal to transpose this obligation is based on concerns about the abuse of rights, fraud and, moreover, the current absence of uniform, minimum standards governing the issue of CRD residence cards throughout the

29. *CO (Nigeria) v Entry Clearance Officer* [2007] UKAIT 74.
30. *R. (on the application of Owusu)*, cited *supra* note 17.
31. See here also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 7 at p. 10.
32. Art 1(2) of the Immigration and Asylum Act 1999 (Section 40) indicates that liability may be waivered if the person concerned is able to satisfy the conditions in Reg 11(4) EEA Regulations upon arrival.

Union.[33] In 2011 the European Commission concluded that the UK had failed to transpose Art 5(2) CRD correctly.[34] In November 2012, the High Court ruled that the UK's refusal to recognise non-UK issued residence cards in accordance with Art 5(2) CRD was justified and proportionate.[35] Nevertheless, in the final analysis, the Court opted to refer the matter to the Court of Justice on a preliminary reference.[36] The CJEU is yet to adjudicate on the validity of the UK's legal position.[37]

Question 2

12. There is clear evidence of targeted administrative efforts to deport EU citizens from the UK on grounds that are inherently linked to economic considerations. By way of illustration, in April 2010 the UKBA introduced a pilot scheme aimed at removing homeless EEA nationals from the United Kingdom.[38] The scheme ran in parts of London as well as in several other cities in the South of England. The Homelessness Pilot project involved UKBA officials issuing written notices to EU citizens requiring them to attend a local police station for interview. The purpose of this hearing was to determine whether the EU citizen concerned had a right of residence in the UK under the CRD (e.g. by virtue of Arts 7 or 16 CRD). *The Guardian* reported in July 2010 that, one month into the Homelessness Pilot project, more than 200 people had been targeted under the pilot, with around 100 EU citizens served removal notices and 13 deported.[39]

13. A recent report in *Inside Housing* indicates that the UKBA has revived its removal scheme.[40] As of July 2013, it is reported that Metropolitan Police and UK Immigration officers have again targeted homeless EU citizens in London. *Inside Housing* reports that 63 Romanian nationals were questioned near Marble Arch, around 20 of who were subsequently deported by plane to

33. See here esp. *R (on the application of McCarthy) v SSHD* [2012] EWHC 3368 (Admin) at paras 41-57.
34. http://europa.eu/rapid/press-release_IP-12-417_en.htm.
35. *R (on the application of McCarthy) v SSHD*, cited *supra* note 32 at para. 108.
36. *Ibid*., at para. 112.
37. As Case C-202/13.
38. For discussion, see Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at pp. 31-32.
39. http://www.theguardian.com/society/2010/jul/20/eastern-european-rough-sleepers-deported.
40. http://www.insidehousing.co.uk//6527844.article.

Romania. An official statement by the Head of the Home Office Immigration Enforcement Team, confirmed that a number of 'immigration offenders from Eastern Europe' were targeted in the July action on the grounds that they did not enjoy a right of residence in the UK under Union law.[41]

14. UK courts and tribunals are only very exceptionally confronted with the issue of removing EU citizens from the UK on grounds that are purely economic.[42] Most of the national case law on deportation addresses the existence of CRD residence rights or the interpretation of the concepts of public policy, public security, and public health protecting EU citizens from expulsion from the host State.[43] On the issue of residence rights (point one), national courts frequently conclude that EU citizens and/or their family members do not enjoy a right of residence under EU law for want of sufficient resources (Art 7 CRD).[44] However, that determination does not, of itself, lead in law or practice to the deportation of Member State nationals. The solution adopted by the UK courts is to treat EU citizens who do not enjoy a right of residence by virtue of e.g. Art 7 CRD as simply 'present' in the United Kingdom.[45] That status does not confer any right of residence in the UK under either EU or national law. Such persons are deemed subject to UK immigration control and, therefore, liable to removal by the Secretary of State.[46] The preceding discussion of the UKBA's schemes to remove EU citizen confirms that such follow-on administrative action is now being taken – at least with respect to specific categories of non-economically active EU citizens.

Question 3

15. Arts 12 and 13 CRD provide for the retention of residence rights, under certain conditions, by family members of a Union citizen following the death or departure from the host Member State of that citizen, or after the termina-

41. *Ibid*.
42. See here *Chief Adjudication Officer v Wolke* (HL) [1997] 1 WLR 1640.
43. See further Q6 below.
44. E.g. *Lekpo-Bozua v Hackney LBC* [2010] EWCA Civ 909 and *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952. The sufficient resources test is transposed in Reg 4(4) EEA Regulations.
45. *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310. See here also *Abdirahman v Secretary of State* [2007] EWCA Civ 657.
46. As per Maurice Kay LJ, *Kaczmarek v Secretary of State*, cited *supra* note 44 at para. 5. See here also Lord Hoffmann in *Chief Adjudication Officer v Wolke,* cited *supra* note 41 at p. 1656.

tion of a marriage or registered partnership. These provisions have been transposed into UK law by Reg 10(2), (3), and (5) of the EEA Regulations. Art 14 CRD places conditions on both the individual and the host State in relation to the retention of residence under Articles 6, 7, 12 and 13 CRD. These broadly relate to conditions of work or self-sufficiency.[47] Art 14 is transposed to a greater extent by Regs 14, 13(3), 19(4), and (6)(2)(b)(iii) of the EEA Regulations. Art 15 CRD affords Union citizens and their family members a range of procedural safeguards; e.g. protection from expulsion upon the expiry of identity documents and a right of appeal against expulsion decisions. These provisions are partly transposed by Regs 26, 27, 29, and 29A of the EEA Regulations. The Commission has identified specific problems with the UK's transposition of the rights of appeal related to Art 15 CRD – discussed below.[48]

16. Much of the national case law in relation to Arts 12 and 13 CRD has concerned the economic status required of both the Union citizen and his/her (former) family members for residence rights to be retained, following death, departure or termination of marriage/registered partnership. In short, UK courts have largely held that, for family members to retain residence rights, the Union citizen, from whom rights are derived, must have been working, self-sufficient or self-employed up until the point of death, departure or divorce.[49] This requirement has been held to apply even in relation to Art 13(2)(c) CRD under which spouses can retain a right of residence, without meeting requirements as to length of residence attached to other parts of the provision, in particularly difficult circumstances such as domestic violence.

17. The economic status of the Union citizen, from whom rights were originally derived, is considered irrelevant *after* the date of death, departure, or divorce.[50] At this point, the focus shifts to the economic status of the (former) family member. UK courts have held that, from the date of death, departure,

47. The initial right of residence, residence for more than three months, and the retention of residence respectively.
48. COM (2008) 840 at p. 9. These issues are yet to be addressed by the UK.
49. *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552 and *Ahmed v Secretary of State for the Home Department* [2013] UKUT 89 (IAC). C.f. *Samsam v The Secretary of State for the Home Department* [2011] UKUT 165 (IAC).
50. *Amos*, cited *supra* note 48. Reasoned by reference to the fact that such a requirement would be impossible under Art 12 CRD, which can relate to the death of the Union citizen, and the similarity of the wording of Art 13 CRD.

or divorce, family members must themselves become employed, self-employed or self-sufficient in order to retain derived residence rights under Union law. This requirement is applied to both Union citizen family members[51] and TCN family members[52] who retain rights under Arts 12 and 13 CRD. However, in one Upper Tribunal decision, it was held that a TCN who had obtained a retained right of residence following divorce did not lose that right if he subsequently ceased to be employed or self-employed.[53] Finally, national courts have held that a condition of employment, self-employment, or self-sufficiency on the part of the family member does not attach to Art 12(3) CRD, which concerns the retention of residence due to a child's enrolment at an educational establishment in the host State.[54]

18. In other developments, UK courts have confirmed that the rights conferred on TCNs under Art 13 CRD apply only to the dissolution of marriages/civil partnerships and not with respect to durable relationships.[55] On the termination of marriages/civil partnerships, national courts have followed established principles of EU law by confirming that legal, rather than factual termination is required for this provision to give rise to retained residence rights.[56]

19. With respect to Art 15 CRD, we identified a problem with access to appeal rights for family members in specific instances. The UK presently imposes a requirement that family members produce evidence that they are, inter alia, indeed family members of an EEA national *before* they are granted a right to appeal.[57] Ordinarily, this precondition is unproblematic, e.g. in cases where a family member is facing deportation on grounds of public policy, public security, and public health. However, in certain instances, an individual may be subject to a deportation order following an administrative decision

51. *Okafor v Secretary of State for the Home Department* [2011] EWCA Civ 499 at para. 8.
52. *Amos*, cited *supra* note 48, through a combined reading of both paragraphs of Art 13(2) CRD.
53. *Samsam*, cited *supra* note 48.
54. *Okafor*, cited *supra* note 50 at para.8.
55. *CS (Brazil) v Secretary of State for the Home Department* [2009] EWCA Civ 480.
56. *Ahmed*. *Supra* note 48, based on a combined reading of both paragraphs of Art 13(2) CRD.
57. Reg 26(3) EEA Regulations.

finding that they are not family members for the purposes of the CRD.[58] In such circumstances, the requirement to adduce proof of the appellant's status as a family member is the very basis of the substantive appeal. The European Commission has highlighted this approach to appeal rights under the EEA Regulations as a matter of concern.[59]

Question 4

20. Arts 16-18 CRD outline the conditions for the acquisition of the right of permanent residence by Union citizens and their family members. The basic right is set out in Art 16 CRD and confers a right of permanent residence to Union citizens and their family members who have resided legally in the host State for a continuous period of five years. Arts 17 and 18 CRD address the acquisition of the right of permanent residence by Union citizens and/or their family members in specific circumstances, e.g. following the Union citizen's retirement, or on the basis of residence rights retained under Arts 12 and 13 CRD. The substance of Arts 16-18 CRD is transposed principally by Reg 15 of the EEA Regulations. Arts 19-21 CRD require Member States to issue Union citizens and their family members entitled to permanent residence with certifying documents and impose conditions on the issue and renewal of such documents. Arts 19-21 CRD are transposed into UK law by Reg 18 of the EEA Regulations.

21. The UK Home Office has published data on the issue and refusal of residence documentation to EU citizens (as 'EEA nationals') and their family members.[60] See below table:

58. See e.g. *The Queen on the Application of AH (Iraq) v Secretary of State for the Home Department, Asylum and Immigration Tribunal* [2009] EWHC 1771 (Admin).
59. COM(2008) 840 at p. 9. These issues are yet to be addressed by the UK.
60. The Home Office considers the quality of these statistics to be 'high'. For information on how those statistics are compiled and their quality controlled, see: https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2013/immigration-statistics-january-to-march-2013#european-economic-area-eea, in particular, at para.14.7 and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200531/user-guide-immig-statistics.pdf.

Year	Recognition of permanent residence – issued	Recognition of permanent residence – refused	Recognition of permanent residence – invalid application
2006	8777	1775	16
2007	7623	1455	4
2008	4020	1038	8
2009	11379	1726	7
2010	20157	3748	0
2011	21159	1999	5222
2012	15197	2332	9568

22. According to the Home Office, the generally rising number of applications made between 2007 and 2011 might reflect an increase in the number of eligible EU citizens who had been living in the UK in accordance with the CRD for the 5-year period required under Art 16 CRD.[61] The statistics record a fall in decisions recognising permanent residence in 2012 – across most nationalities. Yet, there was a notable rise in relation to Bulgarian and Romanian nationals in 2012, although the Home Office indicates that the 'numbers remain low'.[62] In the same year, there was also an increase in the numbers refused recognition of permanent residence (2,332, up 17 %). Perhaps most notably, since 2011 there has been a large increase in the number of 'invalid' applications. This likely follows from a change in Government policy in 2011. Applications are now deemed invalid during a 'pre-application' sifting process in instances where key information and/or supporting documentation is missing/incomplete. Immediate re-application may follow rejected or invalid applications. Re-applications are included in the above statistics.

23. Following the most recent amendment to the EEA Regulations in 2013,[63] there is now a processing and consideration fee of £55 per person to apply for a document certifying permanent residence/a permanent residence card, payable regardless of the outcome.

24. The two principal issues in the national case law on Arts 16-21 CRD have addressed: 1) the definition of 'legal' residence for the purposes of acquiring

61. *Ibid*.
62. Issues to Bulgarians: 13 in 2011, 1067 in 2012; Romanians: 24 in 2011; 1110 in 2012.
63. The Immigration (European Economic Area) Regulations, SI 2013/1391, s. 2.

a permanent right of residence; and 2) the impact of imprisonment on the accrual of the years of residence necessary to attain a permanent right of residence.

The definition of 'legal' residence

25. UK courts consistently interpret the requirement for 'legal' residence in Art 16 CRD to mean residence in accordance with the CRD.[64] Under the terms of the EEA Regulations, Union citizens must therefore be resident in the UK as 'qualified persons' i.e. as a worker, or self-employed/self-sufficient person in order for residence to be legal. TCN family members also have to reside in the UK with 'qualified persons'. Residence that does not accord with the terms of the CRD, but which is lawful by virtue of UK nationality,[65] or because no steps have been taken by national authorities to remove an individual,[66] will not constitute 'legal' residence for the purposes of Art 16 CRD. Moreover, residence that is lawful under other provisions of Union law, rather than the CRD, whether secondary[67] or primary law,[68] will not meet the requirements of Art 16. The approach of national courts on this point is in line with the UK's approach to the implementation of EU citizens' rights beyond the scope of the CRD (see Part 2 of this Report). The EEA Regulations clearly stipulate that the rights of residence arising from the Court of Justice's decisions in *Chen, Teixeira* and *Ibrahim*, and *Ruiz Zambrano*[69] do not qualify as 'legal' for the purposes of acquiring a right to permanent residence under Art 16 CRD.

64. Reasoned by reading Art 16 CRD in combination with Recital 17, this interpretation reduces the potential for conflict between the CRD and Reg 15, which requires residence 'in accordance with these regulations'.
65. *McCarthy* [2008] EWCA Civ 641.
66. *Lepko-Bozua*, cited *supra* note 43; *Okafor*, cited *supra* note 50. The UK courts consider Union residents residing in the UK, but not meeting the requirements of the CRD to be 'lawfully present' yet without a 'right to reside.' See Q2, para. 14 above.
67. E.g. Art 12 of Regulation 1612/68 EEC. See *Okafor*, cited *supra* note 50; *Dias v Secretary of State for the Home Department* [2009] EWCA Civ 807; and *MDB* [2010] UKUT 161 (IAC). The national courts often refer to the Court of Justice's decision in Case C-325/09 *Dias* [2011] ECR I-6387 in connection with this approach.
68. On Arts 20/21 TFEU: *Lepko-Bozua*, cited *supra* note 43 and *Abdirahman,* cited *supra* note 44. Incidentally, Art 12(3) CRD also does not confer a right to permanent residence.
69. See Q7. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925; Case C-480/08 *Teixeira v London Borough of Lambeth*

26. At times, national courts have taken a strict approach to whether residence purported to be in accordance with the CRD in fact meets its requirements. For instance, a permanent residence claim based on five years' self-sufficient residence in the UK was rejected on the basis that the applicant's sickness insurance *complemented* rather than *replaced* all services provided by the UK's publicly-funded National Health Service. The applicant had not been truly self-sufficient and so her residence had not been 'legal' under the CRD for the purposes of enjoying a permanent right of residence.[70] On the other hand, the national courts have recognised a number of situations as falling within Art 16 'legal' residence, in accordance with decisions of the Court of Justice. Thus, residence occurring before the coming into effect of the CRD,[71] but which *would have been* in accordance with its terms constitutes 'legal' residence for the purposes of Art 16.[72] It is also recognised that spouses who derive residence rights from a working or self-sufficient Union citizen do not have to live in the matrimonial home with that Union citizen in order for the residence to be 'legal' under Art 16.[73]

Imprisonment and periods of 'lawful' residence under the CRD

27. Until recently, national courts had consistently held that time spent in prison does not constitute 'legal' residence for the purposes of attaining a right to permanent residence under Art 16 CRD. To support this conclusion, UK courts had referred to: 1) the integrative objectives of the CRD and the

and Secretary of State for the Home Department [2010] ECR I-1107; Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department* [2010] ECR I-1065; and Case C-34/09 *Ruiz Zambrano v ONEM* [2011] ECR I-1177. Reg 15A, EEA Regulations.

70. *FK (Kenya) v Secretary of State for the Home Department* [2010] EWCA Civ 1302. See, in particular, Sullivan LJ at para. 15. The UK's refusal to view NHS provision as 'sufficient medical insurance' in relation to Union citizens is currently the subject of infringement proceedings brought by the European Commission: http://europa.eu/rapid/press-release_IP-12-417_en.htm.
71. In other words, before 30th April 2006.
72. E.g. *LG and CC (Italy)* [2009] UKAIT 24. This approach also applies to Art 17 CRD, see *RM (Zimbabwe) v Secretary of State for the Home Department* [2013] EWCA Civ 775, particularly the judgment of Lady Justice Gloster at para. 38, also following C-162/09 *Secretary of State for Work and Pensions v Lassal* [2010] ECR I-9217.
73. *PM (Turkey) v Secretary of State for the Home Department* [2011] UKUT 89 (IAC).

belief that these cannot be met whilst in prison;[74] 2) the fact that 'legal' residence requires an individual to be a worker, self-sufficient, or self-employed[75] and that Art 7 CRD does not include imprisonment when listing situations in which a person retains worker status;[76] and 3) a Commission Communication which stated that, as a rule, Member States are not obliged to take time spent in prison into account when calculating periods of legal residence in a host State.[77] Nevertheless, the Upper Tribunal in *Onuekwere*[78] recently referred the question of whether, and in what circumstances, a period of imprisonment may constitute legal residence, for the purposes of the acquisition of an Art 16 CRD right to permanent residence, to the Court of Justice.[79] This preliminary reference is currently pending.

28. National courts have also had to consider whether periods of imprisonment break the *continuity* of legal residence required in order to enjoy a permanent right of residence under Art 16 CRD. In other words, does an individual have to begin accruing years of legal residence afresh, from zero, upon his/her release from prison? The national courts had previously answered this question in the affirmative: an individual cannot aggregate periods of legal residence before and after imprisonment to accumulate 5 years' legal residence under Art 16 CRD.[80] However, following the Court of Justice's *Tsakouridis*[81] judgment, the Upper Tribunal recently considered it necessary to refer the matter to the Court of Justice for a preliminary ruling.[82] What is already clear to national courts is that, once acquired, a right of permanent resi-

74. *HB* [2008] EWCA Civ 806. See the judgment of Buxton LJ at para. 9.
75. *Jarusevicius v Secretary of State for the Home Department* [2012] UKUT 120 (IAC).
76. *C v Secretary of State for the Home Department* [2010] EWCA Civ 1406, per Maurice Kay LJ at para. 29.
77. *Ibid.*, at para. 25. COM (2009) 313 final, 2 July 2009.
78. *Onuekwere* [2012] UKUT 269 (IAC).
79. As Case C-378/12.
80. *LG and CC (Italy),* cited *supra* note 71 and *C v Secretary of State,* cited *supra* note 75 at para. 36.
81. Case C-145/09 *Tsakouridis* [2010] ECR I-11979.
82. *Onuekwere,* cited *supra* note 77. See also *Jarusevicius,* cited *supra* note 74, although a preliminary reference was considered unnecessary in that case, on the facts.

dence under the CRD cannot be lost even by significant periods of imprisonment.[83]

Question 5

29. Art 24(2) CRD makes provision for Member States to restrict the entitlement of EU citizens to social assistance benefits. Under that provision, Member States are not obliged to provide social assistance to EU citizens residing in accordance with the right of residence for up to three months (Art 6 CRD). Member States are also not obliged to grant social assistance to EU citizens enjoying a right of residence in the host State as 'workseekers' for the longer period of residence pursuant to Art 14(4)(b) CRD. With respect to maintenance aid for studies, including vocational training, consisting in student grants or student loans, Art 24(2) CRD permits Member States to exclude the payment of such benefits to economically inactive EU citizens *prior* to their acquisition of the right of permanent residence.

30. Art 24(2) CRD – together with the positive statement on equal treatment contained in Art 24(1) CRD – is not transposed by the EEA Regulations. The substance of that provision is instead given effect in UK law through a series of statutory amendments to existing UK legislation on social security/student maintenance. The legal framework governing social security, in particular, has been accurately described as 'labyrinthine' and subject to repeated amendment.[84] The following paragraphs offer a summary of key UK provisions and judicial decisions of relevance to this question.

Social Assistance

31. In the social assistance context, the Social Security (Persons from Abroad) Amendment Regulations 2006 (hereinafter: Social Security Regulations) is the most comprehensive attempt to transpose the substance of Art 24(2) CRD.[85] That Regulation entered into force on the same date as the CRD (30th April 2006). As the Explanatory Note indicates, its amending pro-

83. *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199. The Court of Appeal held that loss of a permanent right of residence for this reason would be inconsistent with *Tsakouridis,* cited *supra* note 80. Case C-348/09 *PI,* Judgment of the Court (Grand Chamber) of 22 May 2012 (nyr) and Art 16(4) CRD.
84. Maurice Kay LJ, *Kaczmarek v Secretary of State*, cited *supra* note 44 at para. 5.
85. SI 2006/1026.

visions were made 'in consequence of' the enactment of the Citizens' Directive with the purpose of modifying the criterion for entitlement to specific social benefits 'to take account of Article 24(2) CRD'.[86]

32. Briefly summarised, the Social Security Regulations introduce a new eligibility test for EEA nationals seeking to claim Income Support; Jobseeker's Allowance; Housing Benefit; Council Tax Benefit; and State Pension Credit. That same test also now governs entitlement to other benefits, such as Employment and Support Allowance – regulated separately.[87] In short, EEA nationals are now required to establish a 'right to reside' under EU law in order to secure access to the aforementioned range of UK social assistance benefits. EU citizens must demonstrate that they enjoy a right of residence under Union law as a worker (or person retaining this status pursuant to Art 7(3) CRD); self-employed migrant; or EU citizen with permanent residence (Art 16 CRD). The introduction of the right to reside test introduces an important difference in treatment between EEA nationals and UK (and Irish) citizens with respect to social assistance entitlement. For the latter category of persons, eligibility continues to be determined exclusively by the 'habitual residence' test.[88] That test was introduced into the UK legal framework on social security benefits in 1994. Prior to the adoption of the EEA Regulations, the habitual residence test governed entitlement for *both* EEA nationals and UK citizens.

33. The UK's right to reside test has given rise to a considerable body of case law before national courts and tribunals. In summary, legal disputes address three distinct issues. First, EU citizens have sought to contest administrative decisions finding that they do not qualify as 'EU workers' or 'persons retaining EU worker status' pursuant to Art 7(3) CRD[89] and are, therefore, not entitled to social assistance. Secondly, national courts and tribunals have been requested to adjudicate on whether EU citizens failing the 'right to reside' test enjoy a right of residence in the UK under *primary* EU law (Art 21 TFEU).

86. *Ibid*., at p. 15.
87. The Employment and Support Allowance Regulations, SI 2008/794, Reg 70.
88. For an overview of the habitual residence test, see e.g. 'The Habitual Residence Test – Commons Library Standard Note,' 2011 SN/SP/416 available at: http://www.parliament.uk/briefing-papers/SN00416.
89. E.g. *Secretary of State for Work and Pensions v Elmi* [2008] EWCA Civ 1403; *R. (on the application of Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397; and *Jessy ST Prix v Secretary of State for Work and Pensions* [2011] EWCA Civ 806.

The existence of such a right is highly significant in the social assistance context. It would make it possible for EU citizens who are unable to satisfy the right to reside test to assert a right to equal treatment with respect to social assistance benefits on the basis of Art 18 TFEU.[90] Thirdly, direct challenges have been made to the legality of the right to reside test itself. In several recent cases, EU claimants have argued unsuccessfully that the right to reside test is discriminatory, contrary to both EU and UK law.[91] As noted above, that test is applied only to EEA nationals whereas UK nationals are simply required to demonstrate that they are habitually resident in the United Kingdom.

34. In 2013 the European Commission commenced infringement proceedings against the United Kingdom with respect to its introduction of the right to reside test to govern entitlement to social benefits falling within the scope of Regulation 883/2004.[92] According to the Commission, the right to reside test is indirectly discriminatory and, further, cannot be justified under EU law. It maintains that entitlement to the applicable social security benefits should be determined, for both UK nationals and EU citizens, under the same habitual residence test (as was the case before 30th April 2006). The UK Government has made its position clear that it does not intend to alter the current legal framework, which it also considers lawful.[93]

Student Maintenance

35. Separate instruments regulate entitlement to student maintenance within the United Kingdom.[94] This reflects that fact that competence to regulate stu-

90. See e.g. *Abdirahman v Secretary of State*, cited *supra* note 44.
91. E.g. *Kaczmarek* cited *supra* note 44 and *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11.
92. See http://europa.eu/rapid/press-release_IP-13-475_en.htm. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
93. See e.g. http://www.theguardian.com/uk/2013/may/30/uk-government-eu-migrant-benefits.
94. For England, see: The Education (Student Support) Regulations, SI 2011/1986; for Scotland, see: The Education (Student Loans) (Scotland) Regulations, SI 2007/154; for Northern Ireland, see: The Education (Student Support) (No.2) Regulations (Northern Ireland), SI 2009/373; and for Wales, see: The Education (Student Support) (Wales) Regulations, SI 2012/3097. For a summary of the categories and conditions of entitlement, see: http://www.ukcisa.org.uk/International-Students/Fees--

dent support is devolved to the Northern Irish, Scottish, and Welsh administrations.

36. The provisions on student maintenance applicable within England, Scotland, Northern Ireland, and Wales adopt a broadly common approach with respect to EU citizens. In line with Art 24(2) CRD, all four sets of rules restrict entitlement to student maintenance for EU citizens who do not qualify as workers, self-employed persons, or the family members of such persons. Non-economically active EU citizens must satisfy a minimum period of three years residence in order to access student maintenance and other grants.[95] An additional criterion also applies where the period of qualifying residence was completed primarily for the purposes of receiving full-time education. In such instances, the applicant must demonstrate that he/she was ordinarily resident within the EEA immediately prior to the period of residence in the UK completed for the purposes of receiving full-time education.

37. All four sets of rules on student maintenance expressly exclude British nationals who have not exercised their rights of intra-EU movement under the Treaty from relying on their status as Union citizens in order to establish entitlement to equal treatment.[96] This exclusion is particularly significant in light of the considerable differences in entitlements available across England, Scotland, and Wales.

38. UK law recognises the specific position of EU citizens as job-seekers as regards entitlement to social benefits. On the one hand, job-seekers are expressly *excluded* from the categories of EEA nationals capable of establishing

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finance/Student-support/Applying-in-England/Who-is-eligible/#Category-2:-European-Union-nationals-and-family-living-in-the-European-Economic-Area-and-Switzerland.

95. The Education (Student Support) Regulations, cited *supra* note 93, Schedule 1, Part 2, S.10; the Education (Student Loans) (Scotland) Regulations, cited *supra* note 93, Schedule 1, S.8; The Education (Student Support) (No. 2) Regulations (Northern Ireland), cited *supra* note 93, Schedule 1, Part 2, S.10; and the Education (Student Support) (Wales) Regulations, cited *supra* note 93, Schedule 1, Part 2, S.10.

96. The Education (Student Support) Regulations, cited *supra* note 93, Schedule 1, Part 2, S. 10(1)(a); The Education (Student Loans) (Scotland) Regulations, cited *supra* note 93, Schedule 1 S.8(a); The Education (Student Support) (No. 2) Regulations (Northern Ireland), cited *supra* note 93, Schedule 1, Part 2, S.10(1)(a); and The Education (Student Support) (Wales) Regulations, cited *supra* note 93, Schedule 1, Part 2, S.10(1)(a).

a right to reside under the Social Security Regulations. This exclusion applies to the following key social benefits: Council Tax Benefit; Housing Benefit; Income Support; and Pension Credit. On the other hand, job-seekers are entitled to claim Jobseeker's Allowance – provided that they are able to satisfy the 'habitual residence' test in Art 85A of the Jobseeker's Allowance Regulations 1996. The habitual residence test applies to both EEA nationals and UK citizens.

39. The inclusion of job-seekers as persons entitled to claim Jobseeker's Allowance (subject to the habitual residence test) follows the Court of Justice's decision in *Collins*.[97] In that case – on reference from the Court of Appeal – the CJEU concluded that Member State nationals are entitled, as workseekers, to equal treatment with UK nationals as regards financial benefits intended to facilitate access to employment in that State. However, the Court also accepted that it was legitimate for Member States to restrict the payment of such benefits to EU national job-seekers who are able to demonstrate a 'genuine link' to the employment market of that State.[98] In that connection, the CJEU concluded that a residence requirement, such as the UK's habitual residence test, could function as an appropriate tool to ensure that such a connection is established.[99] On the strength of the CJEU's decision, the Court of Appeal subsequently upheld the validity of the UK's habitual residence test as justified in EU law.[100]

40. EU citizens who are able to satisfy the habitual residence test and, therefore, secure UK Jobseeker's Allowance may be passported subsequently to two additional categories of social assistance. Under the Social Security Regulations, recipients of Jobseeker's Allowance qualify as persons with a 'right to reside' for the purposes of entitlement to Housing and Council Tax Benefit.[101]

97. Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703. See thereafter e.g. Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.
98. Case C-138/02 *Collins*, cited *supra* note 96 at para. 67.
99. *Ibid*., at paras 69-72.
100. *Collins v Secretary of State for Work and Pensions* [2006] EWCA Civ 376.
101. See Reg 10(3)(b)(k) of The Housing Benefit Regulations, SI 2006/213 and Reg 7(4A)(k) of The Council Tax Benefit Regulations, SI 2006/215.

41. Art 24(2) CRD has not displaced the Court of Justice's 'real link' test before UK courts and tribunals in the social assistance context.[102] National courts continue to fall back on the 'real link' criterion as the primary legal basis to support the exclusion of certain EU citizens from the categories of persons entitled to claim UK social assistance benefits. The recent Supreme Court decision in *Patmalniece* upholding the validity of the UK's right to reside test illustrates this point clearly.[103] In *Patmalniece*, the Supreme Court also made an important connection between the real link test and Member State concerns about the phenomenon of 'social tourism'.[104] The purpose of the real link test, it was argued, was to protect the UK's resources against social tourism on the basis of the principle that entitlement is based directly on the claimant's degree of economic and social integration in the UK.[105] We suggest that the fact Art 24(2) CRD is yet to take hold as a legislative alternative to the real link test may be linked to the UK Government's decision not to transpose that provision directly in the EEA Regulations.

Question 6

42. Arts 27 and 28 CRD permit the Member States to restrict the freedom of movement and residence of Union citizens and their family members, regardless of their nationality, subject to various conditions. Relevant individuals can only be refused admittance, or deported, on grounds of public policy, public health, and public security. 'Serious grounds of public policy or public security' are required for those enjoying a permanent right of residence, while those who have resided in the host State for ten years can only be expelled on 'imperative grounds of public security'. The national courts have consistently applied this increasingly stringent hierarchy of protection based on duration of residence[106] and refer to the different levels of protection described above using the shorthand of 'level one', 'level two', and 'level three' protection re-

102. On the real link test, see e.g. Case C-224/98 *D'Hoop* [2002] ECR I-6191 at para. 38 and Case C-138/02 *Collins*, cited *supra* note 93 at para. 67.
103. *Patmalniece (FC) v Secretary of State*, cited *supra* note 90. See also earlier e.g. *Kaczmarek v Secretary of State*, cited *supra* note 44.
104. To support their conclusions, UK courts attach particular authority to the decision in Case C-456/02 *Trojani* [2004] ECR I-7573.
105. As per Lord Hope, *Patmalniece (FC)*, cited *supra* note 90 at para. 52.
106. See e.g., *NYK* [2013] CSOH 84; *A, B, C v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin); and *VP v Secretary of State for the Home Department* [2010] EWCA Civ 806.

spectively.[107] This Report will adopt the shorthand distinction of level one to three protection developed by UK courts.

43. Whatever the level of protection, restrictions on free movement are subject to the condition that the individual represents a genuine, present and sufficiently serious threat to a fundamental interest of society, the principle of proportionality, and to factors such as, *inter alia*, the individual's age, family and economic situation, social and cultural integration in the host State, and the extent of his/her links with the Member State of origin. Transposition into UK law is by way of Regs 19, 20(6) 21(2)-21(6) of the EEA Regulations.

44. National case law relating to which level of protection applies has principally concerned how to calculate duration of residence. In differentiating between the levels of protection the national courts have frequently been tasked with determining the type of conduct that falls within each level.

Application: calculating the duration of residence

45. Deportation decisions usually follow a period of imprisonment. Appellants against such decisions often argue that they enjoy a permanent right of residence and therefore level two protection. However, this will often depend on whether time spent in prison constitutes the 'legal' residence required for the attainment of a permanent right of residence and/or whether any legal residence accrued before a custodial sentence is lost upon entering prison. Discussed in Q4 above, this issue is currently the subject of a reference to the Court of Justice for a preliminary ruling[108] and will not be discussed further here. The national courts have held that residence must also be 'legal' for level three protection to apply although there is no reference to this in Art 28(3) CRD/Reg 21(4) EEA Regulations.[109]

46. Reg 21(4)(a) of the EEA Regulations bestows level three protection upon those who have resided in the UK for ten years *prior* to the deportation order.

107. *LG (Italy) v The Secretary of State for the Home Department* [2008] EWCA Civ 190.

108. *Onuekwere,* cited *supra* note 77.

109. *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371, applied in *LG and CC,* cited *supra* note 71. See also *Chindamo* Appeal No. 1A/13107/2006. C.f. *MG and VC (EEA Regulations 2006 'conducive' deportation) Ireland* [2006] UKAIT 53.

The national courts have interpreted this as requiring them to count *backwards* from the date of deportation order, as opposed to *forwards* from the commencement of legal residence as one would with level two protection.[110] This is significant because, if level three protection requires 'legal' residence, and periods of imprisonment do not constitute such residence, a person who has lived in the UK for decades will never enjoy level three protection if a deportation order is made after a custodial sentence.[111] However, in *MG,*[112] the Upper Tribunal considered that both the methodology of counting *backwards* from the deportation order and the rule that Art 28(3) CRD required ten years *legal* residence to be open to question in light of the purposes of the Directive and the recent decisions of the Court of Justice in *Tsakouridis* and *PI.*[113] Consequently, a reference was made to the Court of Justice for a preliminary ruling for clarification.[114] Shortly after *MG,* however, the Court of Appeal decided *FV*,[115] in which it held that, following *Tsakouridis* and *PI,* the test in relation to the acquisition of level three protection should involve a qualitative assessment of the level of integration of the individual, under which time spent in prison was only a factor.[116] The key question, it concluded, was whether 'integrating links' forged with the UK had been broken. The Court of Appeal also considered that the loss of protection acquired after ten years' legal residence caused by counting backwards from a deportation order would be inconsistent with the Court of justice's approach to the facts of *PI.*[117]

47. At the administrative level, a lack of consistency as to whether a person will be considered to have resided in the UK for past ten years, despite a pe-

110. *LG and CC,* cited *supra* note 71.
111. Although Art 28(3) CRD implies a similar approach by referring to the 'previous' ten years, the issue is all the more acute under the EEA Regulations, which requires ten years' *continuous* residence prior to the deportation order.
112. *Secretary of State for the Home Department v MG (Portugal)* [2012] UKUT 268 (IAC).
113. Cited *supra* note 82. Also by reference to Recitals 23 and 24 of the CRD and the Common Position (EC) No 6/2004, adopted by Council on 5 December 2003. See also *LG and CC*, cited, *supra* note 71.
114. As Case C-400/12. See also *Jarusevicius,* cited *supra* note 74, *Onuekwere,* cited *supra* note 72 and Q4 concerning the impact on this in relation to level two protection.
115. *FV (Italy),* cited *supra* note 82, decided 14th September 2012.
116. *Ibid*., at paras 82 and 85.
117. *Ibid*., at paras 81 and 84. In *PI,* cited *supra* note 82, there had been two years' custody immediately before the deportation decision 'and nothing was made of that.'

riod of imprisonment prior to the deportation order, has led to a 'luck of the draw' application of level three protection.[118]

Application: the principle of proportionality; the consideration of factors such as how long the individual concerned has resided in the territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin.

48. In practice, the principle of proportionality contained in Art 27(2) CRD/Reg 21(5)(a) of the EEA Regulations overlaps with the condition that an individual represents a genuine, present, and sufficiently serious threat to a fundamental interest of society[119] and the requirement to consider factors such as, *inter alia,* the individual's age, family and economic situation, or links with his/her Member State of origin.[120] In numerous cases, national courts have emphasised the need for a *present* threat to a fundamental interest of society and warned against using previous convictions or offender assessment reports made at the time of the offence to inform a deportation decision.[121] However, in several cases, previous convictions have been combined with evidence of an individual's continued unwillingness to reform or to abide by the criminal law; a willingness to mislead judges;[122] escalating levels of violence;[123] and even financial circumstances, to determine a present threat on the facts.[124]

49. The risk of re-offending is often central to the question of whether the appellant poses a *present* threat and to whether deportation is proportionate. Following *Tsakouridis,* this risk is increasingly assessed by reference to the potential impact of deportation on the rehabilitation and social integration of the EU citizen/family member concerned. The 'European dimension' to this

118. *Bulale* [2008] EWCA Civ 806 and *VP,* cited *supra* note 105.
119. Reg 21(5)(c) EEA Regulations/Art 27(2) CRD.
120. Reg 21(6) EEA Regulations/Art 28(1) CRD. See, for instance, *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923.
121. *A, B, C,* cited *supra* note 105 and *BF (Portugal)*, cited *supra* note 119. Up-to-date offender assessment reports have conversely been used to find that a decision of the Secretary of State to deport has been disproportionate. See *Flaneur's Application for Judicial Review, Re* [2011] NICA 72.
122. *Jarusevicius,* cited *supra* note 74.
123. *Batista v Secretary of State for the Home Department* [2010] EWCA Civ 896.
124. *Flaneur's,* cited *supra* note 120.

question is acknowledged. Thus, the Court of Appeal has stated that 'common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life'.[125] This encompasses comparing the prospects for rehabilitation in the UK against those in the Member State of origin.[126] Such comparisons necessitate the consideration of the factors contained in Art 28 CRD. Accordingly, national courts consistently take into account factors such as the applicant's social, familial, and cultural links in the UK and compare them with, for instance, the individual's knowledge of the language of his/her Member State of origin, and the availability (or not) of familial and financial support in that State, when deciding whether deportation is permissible.[127] However, there are some examples of a potentially tokenistic consideration of these questions resulting from a possible tendency by the national courts to overlook personal circumstances or use a one size fits all approach in relation to personal wealth.[128]

Differentiation: Determining the type of conduct which falls within each level

50. UK courts have recognised that, as derogations to the rights of free movement, grounds of public policy, public security, and public health must be interpreted strictly.[129] While national courts have seen merit in using administrative guidance to categorise the type of conduct that would justify deportation under levels one, two and three,[130] they have explicitly stated that administrative operational manuals do not provide formal, legal categories.[131] They have also openly questioned whether administrative guidance adequately distinguishes between different levels of protection, especially in light of

125. *Ibid.,* per Carnwath LJ. See also *NYK,* cited *supra* note 105.
126. Accordingly, a proportionality assessment under the CRD should not be conflated with a proportionality assessment under Art 8 ECHR, which only concerns private and family life and is therefore narrower than under the CRD. See *R. (on the application of Essa) v Upper Tribunal (Immigration and Asylum Chamber)* [2012] EWCA Civ 1718.
127. See for instance *A, B, C*, *NYK,* cited *supra* note 105 and *Essa,* cited *supra* note 125.
128. *Essa* [2012] EWHC 1533 (Admin). In that case, the High Court considered the availability of 'quick and cheap travel to The Netherlands.' See also *NYK*, cited *supra* note 105.
129. See *Essa*, cited *supra* note 127.
130. *LG (Italy),* cited *supra* note 71. The AIT also considered a questionnaire, sent by the Secretary of State to other Member States, which asked how 'imperative grounds' were defined in those states.
131. *LG (Italy)*, cited *supra* note 106.

the case law of the Court of Justice. As a result, differentiation based on 'severity' of the conduct or custodial sentence length alone has been rejected.[132]

51. The courts have held that conduct falling within level one presupposes and encompasses the existence of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[133] Examples of crimes justifying deportation at level one include culpable homicide,[134] the use of forged or stolen passports,[135] and conspiracy to handle stolen goods.[136] Although activity does not have to be criminal, it will rarely be permissible to refuse to admit, or deport, an individual in relation to activity that is not even unlawful under UK law.[137]

52. Concrete examples of offences that have been held to constitute 'serious' grounds of public policy and public security (level 2 protection) include serious domestic burglaries,[138] conspiracy to handle stolen goods,[139] and violent crime not only against society, but also against the person. In the absence of Union-level guidance, the Court of Appeal considers that the Member States have a certain amount of discretion in deciding what level of violence its law-abiding citizens must put up with under level two, with due regard to the seriousness of the conduct under domestic law.[140] In *Batista*,[141] a 'medium risk

132. *FV*, cited *supra* note 82, per Lord Carnwath in consideration of *Tsakouridis* and *PI,* cited *supra* note 82. See also *LG (Italy),* cited *supra* note 106.
133. *LG (Italy)*, cited *supra* note 71 and *LG (Italy)*, cited *supra* note 106.
134. *NYK,* cited *supra* note 105.
135. *R v Clarke (Thomas)* [2008] EWCA Crim 3023.
136. *Jarusevicius*, cited *supra* note 74.
137. *GW (Netherlands)* [2009] UKAIT 50, concerning the expression of views that Islam should not be tolerated or followed.
138. R. v Laurusevicius (Vytautas) [2008] EWCA Crim 3020.
139. While not giving rise to 'imperative grounds of public security', conspiracy to handle stolen goods must constitute 'serious grounds' if committed on a particularly large scale. *Jarusevicius,* cited *supra* note 74.
140. *B (Netherlands) v Secretary of State for the Home Department* [2008] EWCA Civ 806, reasoned with reference to an examination of the *travaux préparatoires* to the CRD and applying Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. See also *Batista,* cited *supra* note 122.
141. Cited *supra* note 122.

of serious harm to the public', amongst other things, was sufficient to establish level two grounds.[142]

53. Administrative guidance provides the following examples of conduct falling within 'imperative grounds' (level 3 protection): murder, terrorism, drug trafficking, serious immigration offences, or serious sexual or violent offences carrying a maximum penalty of ten years or more imprisonment.[143] The national courts have generally adopted a restrictive approach to the definition of imperative grounds, holding that, even if the threshold includes crimes other than terrorism, the threat must be 'so compelling that it justifies the exceptional course of removing someone who ... has become 'integrated' by 'many years residence in the host State'.'[144] The risk of the future commission of even serious offences will not be enough.[145] Accordingly, the difference between levels two and three cannot be merely a matter of degree, but must entail a qualitative difference.[146] The Court of Appeal, in *FV*,[147] has recently interpreted the Court of Justice's decisions in *Tsakouridis* and *PI* as meaning that any deportation decision must consider, *inter alia*, the exceptional seriousness of the threat; the serious negative consequences deportation might have on the rehabilitation of genuinely integrated Union citizens and therefore whether the measure is strictly necessary or the objective can be met through less strict means. 'Imperative grounds' presuppose not just a threat to public security, but also one of a particular high degree of seriousness to the calm and physical security of the population.[148] Accordingly, the appellant's conviction for manslaughter did not constitute 'imperative grounds of public security'. A distinction was drawn here between the risk of homicide to the public at random and potential for violence towards a specific person.

142. The conflated consideration of 'serious grounds' and a 'sufficiently serious threat to a fundamental interest of society' in this case risks blurring level one and two in light of the decision in *LG* that level one 'presupposes a sufficiently serious risk to a fundamental interest of society'.
143. http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/criminality-and-detention/34-eea-offender-cases?view=Binary.
144. *LG (Italy),* cited *supra* note 106, quoting the Preamble to the CRD. See also, *VP,* cited *supra* note 105.
145. *MG and VC* [2006] UKAIT 53.
146. *LG (Italy),* cited *supra* note 106.
147. *FV (Italy)*, cited *supra* note 71.
148. *Ibid.,* at para. 132.

Question 7

54. The Court of Justice's case law grounded directly on the Treaty provisions on Union citizenship has bolstered further the rights of EU citizens, particularly as regards the right of residence for their dependent TCN family members. In *Chen*, on reference from the UK, the CJEU established a right of residence for primary carers of minor EU citizens resident in a Member State of which they are not a national – subject to self-sufficiency and a requirement for medical insurance.[149] In *Ruiz Zambrano* the Court of Justice developed its case law on Union citizenship rights further by concluding that Art 20 TFEU precluded national measures that had the effect of depriving Union citizens of the 'genuine enjoyment' of the rights conferred on them by the Treaty as citizens of the Union. On the facts of that case, this conferred a right to reside and work on the TCN parents of dependent minor EU citizens, residing in their home Member State, who would have to leave the territory of the Union if such rights were not bestowed upon their parents.[150]

55. The UK Government has implemented CJEU's jurisprudence on primary law citizenship rights though a series of statutory amendments. The Immigration (EEA) (Amendment) Regulations 2012 amends the EEA Regulations to give effect to the Court of Justice's decision in *Chen*.[151] That instrument amends Regs 11 and 15A of the EEA Regulations accordingly by providing rights of entry and residence for 'the primary carer of an EEA, who is (a) under the age of 18 and (b) residing in the United Kingdom as a self-sufficient person, where the denial of such a right would prevent the EEA national child from exercising his or her own right of residence'.[152] A second instrument,

149. Case C-200/02 *Chen*, cited *supra* note 68.
150. Case C-34/09 *Ruiz Zambrano,* cited *supra* note 68.
151. SI 2012/1547.
152. *Ibid*., explanatory notes. The UKBA Immigration Rules have also recently been amended in light of the *Chen* ruling. In July 2013, Paragraph 257 C, regulating 'requirements for leave to enter or remain as the primary carer or relative of an EEA national self-sufficient child', was deleted. See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2013/hc1039.pdf?view=Binary at paras 86-88.

the Immigration (EEA) (Amendment) (No 2) Regulations 2012 gives effect to the *Ruiz Zambrano* judgment.[153] It amends the EEA Regulations by conferring rights of entry and residence on the 'primary carer of a British citizen who is residing in the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State'.[154] Significantly, where a Union citizen minor has two primary carers, the amended EEA Regulations state that *both* primary carers must be required to leave the UK before a derivative right can be enjoyed by P.[155] As the wording of the amended EEA Regulations makes clear, the UK has opted for a narrow transposition of the *Ruiz Zambrano* decision, closely orientated around the particular facts at issue in that decision.[156] Broadly, this is in line with the terms of the CJEU's subsequent clarifications in e.g. *McCarthy*, *Dereci* and *Iida*.[157]

56. Significant consequential changes have also been made to UK legislation on social security entitlement in light of CJEU's case law on primary law citizenship rights. Perhaps most notably, the UK legal framework has been amended to *exclude* entitlement to a range of UK social assistance benefits for persons resident in the UK under the terms of the *Ruiz Zambrano* ruling.[158] Additionally, the amended EEA Regulations make it clear that indi-

153. SI 2012/2560.
154. *Ibid*., explanatory notes.
155. Reg 15A(7A) EEA Regulations. The amended Regulations apply only to children. This makes explicit what is implicit in the judgments of the Court of Justice, that Union citizen *adults*, not usually requiring care, will not be considered *compelled* to leave the Union territory if their spouse is deported to a third country and so will not trigger *Ruiz Zambrano* protection. See also *F & ANR* [2013] EWCA Civ 76 for national judicial consideration of this point.
156. In stark contrast, commentators continue to reflect, more dynamically, on what other factual situations might deprive a Union citizen of the genuine enjoyment of the rights associated with his/her Union citizenship. See e.g. D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2012) 37 *EL Rev*. 369; N. Nic Shuibhne '(Some of) the Kids Are All Right: Comment on *McCarthy* and *Dereci*' (2012) 49 *CML Rev*. 349, 364-366; S. Reynolds, 'Exploring the 'Intrinsic Connection' between Free Movement and the genuine Enjoyment Test: Reflections on EU Citizenship after *Iida*' (2013) 38 *EL Rev,* p. 376.
157. Case C-434/09 *McCarthy* [2011] ECR I-3375; Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315; and Case C-40/11 *Iida v Stadt Ulm*, Judgment of the Court (Third Chamber) of 8 November 2012 (nyr).
158. Social Security (Habitual Residence) (Amendment) Regulations, SI 2012/2587, amending, *inter alia*, Income Support (General) Regulations 1987; Jobseeker's Al-

viduals residing in the UK on the basis of derived residence rights conferred by primary EU law cannot acquire permanent residence under Art 16 CRD. This introduces an important additional restriction on EU citizenship rights in the UK context. Such individuals can also be deported more easily.[159]

57. There is a growing body of case law addressing EU citizenship rights beyond the CRD framework. A review of the jurisprudence indicates that, overall, UK courts and tribunals are responding appropriately to the evolving case law of the Court of Justice in this area. For instance, the reasoning of national courts and tribunals indicates that they are capable of distinguishing clearly between the rights acquired under the CRD and those under Arts 20 and/or 21 TFEU. UK courts have demonstrated that they are able to progress logically through the co-authored framework of citizenship rights guaranteed in Union law – assessing, in sequence, the rights contained with the CRD; the subsequent case law of the ECJ extending the scope of EU legislative provisions;[160] and the jurisprudence on Union citizenship rights under primary EU law.[161]

58. First, with respect to the *Chen* ruling, UK courts and tribunals were quick to recognise that that decision establishes, in primary EU law, a derived right of residence for TCN family members in their capacity as primary carers of dependent minor EU citizens.[162] Much of the subsequent UK case law on *Chen* addresses the interpretation of the conditions attached to the existence of the derived residence right under primary EU law established in that decision: self-sufficiency and the requirement for comprehensive medical insurance. On this matter, UK courts have upheld the requirement to satisfy both

lowance Regulations 1996; State Pension Credit Regulations 2002; and The Employment and Support Allowance Regulations 2008. See here also *R. (on the application of Sanneh) v Secretary of State for Work and Pension*s [2013] EWHC 793 (Admin).

159. Reg 21A, EEA Regulations.

160. Case C-480/08 *Teixera,* cited *supra* note 68 and Case C-310/08 *Ibrahim*, cited *supra* note 68.

161. *Okafor,* cited *supra* note 50.

162. E.g. M-T v T [2005] EWHC 79 (Fam); *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494; and *Bassey v Secretary of State for the Home Department* [2011] NICA 67.

conditions in order to establish the derived right of residence under *Chen*.[163] Additionally, in *W (China)*, the Court also concluded that Art 20 TFEU did not establish a right to work in the host Member State for TCN family members; in other words, that provision did not enable such persons to *create* sufficient resources for the family unit as required in *Chen*.[164] The House of Lords rejected a request for permission to appeal this assessment, noting that there was 'no scope of reasonable doubt' on this issue.[165]

59. In relation to *Ruiz Zambrano*, it is worth noting in the first instance, that cases involving very similar facts have been resolved with no reference to *Ruiz Zambrano* or the genuine enjoyment test. For example, in *ZH*[166] Lady Hale found that the validity of a decision to deport the TCN parent of a British child, who may take that child with him/her, was to be determined by reference to the best interests of the child and in accordance with the UK's obligations under the United Nation's Convention on the rights of the child.

60. Nevertheless, UK courts have engaged with *Ruiz Zambrano* in several key cases.[167] In summary, national courts have adopted a restrictive approach to that judgment, relying frequently on the Court of Justice's subsequent decision in *Dereci*.[168] The *Ruiz Zambrano* ruling is now understood as being 'exceptional' in character, and is not considered to cover anything short of the situation in which an EU citizen is forced to leave the territory of the Union.[169] The courts have made clear that, while strong emotional and psychological ties within the family would be significantly likely to rupture in instances of separation, diminishing the enjoyment of life in the UK, this would not, on its own, trigger the *Ruiz Zambrano* principle. Only when quality of life is so diminished that an individual is effectively compelled to leave Union territory would *Ruiz Zambrano* apply. Consequently, the High Court has explicitly stated that 'where a non-EU ascendant relative is compelled to leave EU territory, the Art 20 [TFEU] rights of an EU child will not be in-

163. *W (China) v Secretary of State* cited *supra* note 161; *Liu v Secretary of State for the Home Department* [2007] EWCA Civ 1275, and *Z v Secretary of State for the Home Department* [2013] CSIH 16.
164. *W (China),* cited *supra* note 161. See also *Bassey,* cited *supra* note 161.
165. *Ibid*.
166. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.
167. *Harrison v Secretary of State for the Home Department* [2012] EWCA Civ 1736*; Ahmed,* cited *supra* note 48; and *Sanneh,* cited *supra* note 157.
168. Case C-256/11 *Dereci*, cited *supra* note 156.
169. Elias LJ in *Harrison,* cited *supra* note 166. See also *Sanneh,* cited *supra* note 157.

fringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child.'[170] The courts have, however, taken a fact-sensitive approach to the application of this rule, noting, for instance, in *MDB* that Union citizen children could not be cared for by their abusive Italian national father if their Argentine mother were deported.[171]

61. New factual constellations that push the boundaries of *Ruiz Zambrano* have chiefly concerned what other rights – aside from the right of residence and the right to work – must be respected in order to ensure that a Union citizen is not compelled to leave the Union territory. In this connection, the intervention of the Home Secretary in *Pryce v Southwark LBC*[172] suggests that the question of a *Ruiz Zambrano*-based right to social welfare has arisen frequently at the administrative level. In that case, it was held that an individual would have a right to certain social benefits *once* a residence right has been established pursuant to *Ruiz Zambrano*. Yet, due to a significant concession made by the defendant local council in that case, *Pryce* does not establish whether recourse to and denial of social assistance will *itself* give rise to a *Ruiz Zambrano* right of residence. The Court of Appeal considered this to be fact-sensitive.

62. The argument that denial of social welfare to a TCN parent effectively compels Union citizen children to leave the Union territory is currently before the national courts in *Sanneh*.[173] Now on appeal to the Court of Appeal, the Upper Tribunal rejected Sanneh's case because she had been 'surviving' in the UK since 2006 and was continuing to do so in 2011. As a result, she was not compelled to leave the Union territory. Similarly, Sanneh's application to the High Court for the interim payment of social welfare while her substan-

170. *Sanneh* [2013] ECHW 793 at para. 20. See also *Harrison,* cited *supra* note 166. There is a contrary approach by the national courts to the same issue in relation to *Chen*-based residence rights. See *Bassey*, cited *supra* note 161. The national courts have voiced some concern that the focus on the provision of primary care can result in the removal of children from homes, where they are happy and settled, in order to live with a TCN parent who seeks to establish a *Ruiz Zambrano* right to residence. See here *R (on the application of Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin).

171. *MDB (Italy) v Secretary of State for the Home Department* [2012] EWCA Civ 1015. See also *Ahmed*, cited *supra* note 48.

172. *Pryce v Southwark LBC* [2012] EWCA Civ 1572.

173. *Sanne,h* cited *supra* note 157.

tive case proceeded through the court system was rejected on the basis that Sanneh had 'survived' in the UK to date and that Sanneh herself had accepted that she would never, in practice, leave the UK due to economic pressure as she was 'absolutely determined' to stay in the UK as her case progressed. The High Court in *Sanneh* rejected the argument that paragraph 44 of *Ruiz Zambrano*[174] means that it must be assumed, irrebuttably and as a matter of law, that a person such as Sanneh must be accorded both the right to residence and to access a particular level of funds by way of earnings or benefits.[175]

63. National courts have also been charged with determining whether *Ruiz Zambrano* applies to *non-British* Union citizens living in the UK. While this is clearly not anticipated in the 2012 amendments to the EEA Regulations, the Upper Tribunal held in *Ahmed* that 'nothing said by the Court of Justice in any of the Art 20 TFEU cases excludes the potential application of *Ruiz Zambrano* principles to third country national parents if the practical effect of a refusal decision is that the children are obligated to leave the territory of the Union as a whole, notwithstanding that the children are not, as in *Ruiz Zambrano*, citizens of the host Member State'.[176] The application of *Ruiz Zambrano* to non-British Union citizen children arguably undercuts the conditions attached to the derived rights of residence for TCN primary carers established in *Chen*, rendering it unnecessary to meet the requirements for sufficient resources and conferring a right to work on relevant individuals. However, the emerging UK case law on this potential extension to the scope of the *Ruiz Zambrano* ruling is far from clear. For instance, in *JYZ*, the Court of Session held that Irish citizen children would not be compelled to leave the territory of the Union if their TCN parents were not afforded the right to work in the UK as the family could move to Ireland where *Ruiz Zambrano* would apply.[177]

64. Decisions of the UK courts and tribunals make occasional reference to the existence of a 'purely internal situation' or, to the same effect, the absence on

174. '... if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would result in the children, citizens of the Union, having to leave the territory of the Union'.
175. At para. 100.
176. *Ahmed,* cited *supra* note 48 at para.68. See also *MDB (Italy),* cited *supra* note 170.
177. *JZY (China) v Secretary of State for the Home Department* [2013] CSIH 16. See also *Pryce v Southwark LBC,* cited *supra* note 171. On this point at Union level, see Case C-86/12 *Alopka*, Judgment of the Court (Second Chamber) of 10 October 2013 (nyr).

the facts of a relevant 'connecting factor' to EU law.[178] UK courts and tribunals apply these linguistic markers simply to acknowledge that the legal dispute in issue does not fall within the scope of the Court's existing case law on Union citizenship rights beyond the CRD. For example, in *Bent*, the Court concluded that there was 'no EU law connection' on the basis of the finding that the claimant could not be reasonably regarded as the primary carer of a minor EU citizen.[179]

65. There is particularly interesting discussion of the internal rule in *Harrison*. In that decision Elias LJ accepted that free movement can generally be breached by activity that impedes, rather than totally deprives an individual of that right. Elias LJ took the view that a stricter test was necessary in relation to the genuine enjoyment test in *Ruiz Zambrano* 'precisely because it does not require the exercise of free movement'.[180] Thus, whilst the Court of Justice still insists that there is an 'intrinsic connection' between free movement and the genuine enjoyment test,[181] the UK Court of Appeal, in this case at least, seems to have accepted that, in some instances, the purely internal rule, as a synonym for a cross-border requirement, no longer applies. Indeed, the Court of Appeal considered that *Ruiz Zambrano* had removed the condition of 'even an exiguous cross-border link', previously required by *Chen*.

Question 8

66. The British Nationality Act 1981 (as amended) sets out the principal rules on the acquisition and loss of British citizenship.[182] That instrument defines various categories of British nationality in an effort to rationalise and narrow entitlement to key citizenship rights (chiefly: the right of abode in the UK).[183] At the same time, the 1981 Act also seeks to recognise both the historic and

178. E.g. R. *(on the application of H) v Secretary of State for the Home Department* [2008] EWCA Civ 245; R. *(on the application of Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin); and *McCarthy*, cited *supra* note 64 at para. 21
179. *R. (on the application of Bent)*, cited *supra* note 177. See also R *(on the application of H)* cited *supra* note 177.
180. *Harrison*, cited s*upra* note 166 at para. 65.
181. See Case C-40/11 *Iida,* cited s*upra* note 156.
182. British Nationality Act 1981.
183. For analysis, see the EUDO Citizenship Country Report on the United Kingdom: http://eudocitizenship.eu/admin/?p=file&appl=countryProfiles&f=United%20Kingdom.pdf.

continuing links that many overseas nationals have with the United Kingdom. The declaration of the UK Government on the definition of 'nationals', annexed to the EU Treaties, defines the categories of person considered to be nationals of the United Kingdom for the purposes of EU law.[184] The EUDO Citizenship Observatory provides a detailed overview of the rules governing the acquisition and loss of British citizenship.[185]

67. The 1981 Act makes no special provision for EEA nationals. It has also not been amended in light of Court of Justice's decision in *Rottmann*.[186] However, the UK legal framework on nationality acquisition/loss is arguably relatively open to the unique features of Union citizens. First and foremost, UK law does not preclude British citizens from holding dual or multiple nationalities – in contrast to certain other Member States. EEA nationals who acquire British citizenship are, therefore, not, as matter of UK law, required to surrender the nationality of their home Member State, as was the case under both German and Austrian law in *Rottmann*. The decision to renounce British citizenship is, from a UK legal perspective, entirely at the discretion of the citizen concerned. S.12 of the 1981 Act provides that a British citizen may renounce their citizenship by declaration on the condition that they will become a citizen of another country within 6 months.[187] Further, it is also open to British citizens to reinstate British citizenship by registration if that status was renounced in order to acquire the citizenship of another (Member) State.[188] Yet, resumption under s.13 of the 1981 Act is permitted only once.[189] This limitation might potentially, over the course of a lifetime, impact on the migration choices of EU citizens (including British citizens) who hold, have held, or wish to acquire British citizenship.

184. [1983] OJ C 23/1, as revised at Lisbon by Declaration No.63. On this point, see also Case C-192/99 *Queen v Secretary of State for the Home Department, ex parte: Kaur* [2001] ECR I-1237.
185. See, respectively: http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=country&country=United+Kingdom and http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=country&country=United+Kingdom.
186. Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449.
187. To protect against statelessness, that provision states that British citizenship will be reinstated automatically should the applicant fail to acquire citizenship of another country within the prescribed time period.
188. S.13.
189. S.13(2).

68. Non-British EU citizens over the age of 18 and of full capacity may acquire the status of 'British citizen' through naturalization.[190] The general rules in the 1981 Act apply: requiring persons to satisfy a minimum residence period of 5 years (with requirements related to absences etc); to demonstrate good character; sufficient knowledge of English, Welsh, or Scots Gaelic as well as of life in the United Kingdom.[191] Applicants must also declare an intention to reside in the UK as their principal home.

69. S.40 of the British Nationality Act 1981 permits the Secretary of State to deprive persons of their status as British citizens. First, the Secretary of State may issue an order to this effect where he/she are satisfied that to do so is 'conducive to the public good.' An order may not be issued in circumstance where the individual would be left stateless.[192] Secondly, s.40(4) of the 1981 Act permits the Secretary of State to deprive a person of British citizenship by order where that status was acquired – through registration or naturalization – by fraud; false representation; or concealment of material facts. In all cases under s.40, the Secretary of State is required to give reasons for the deprivation order. The individual concerned is also afforded certain rights of appeal. The *Rottmann* judgment suggests that, subject to the demands of the proportionality principle, s.40 of the 1981 Act may be compatible with the requirement of EU law. In that decision, the Grand Chamber noted expressly that EU law did not, in principle, preclude a Member State from depriving its nationals of its citizenship where this had been obtained by fraud or deception.[193] With respect to s. 40(2) – deprivation 'conducive to the public good' – the UK rules on the loss of citizenship may also be defensible. In *Rottmann*, the CJEU pointed clearly to the possibility of justifying revocation decisions for reasons 'relating to the public interest,' within which it is arguably possible to subsume the substance of s.40(2) of the UK Act.[194]

70. The *Rottmann* decision remains particularly relevant in the UK context in connection with decisions to revoke British citizenship from persons who hold the nationality of a non-Member State. In such instances, the revocation of British citizenship under the 1981 Act necessarily deprives such individuals of the status of Union citizenship. Thus far, the UK courts appear reluctant

190. S.6 of the 1981 Act.
191. See Schedule 1.
192. S.40(4).
193. Case C-135/08 *Rottmann*, cited *supra* note 185 at para. 59.
194. *Ibid*., at para. 51.

to engage with *Rottmann* in that context. In *G1 v Secretary of State*, the appellant had argued that, following *Rottmann*, the decision to revoke his British citizenship under s. 40(2) of the 1981 Act triggered the application of EU law.[195] Interpreting the Grand Chamber's decision in *Rottmann*, it was argued that loss of British citizenship necessarily entailed the loss of the appellant's status as a Union citizen.[196] For that reason, the decision to deprive him of his British citizenship fell within the scope of EU law, meaning that national law must 'have due regard to EU law.' The Court of Appeal rejected this argument outright. It took the view that there was 'no cross-border element whatsoever' to the case.[197] On the facts, the appellant was a British citizen who had not exercised his Treaty free movement rights. On one view, this was a key distinction with *Rottmann*. However, by adopting this position, the Court arguably failed to engage with another, broader reading of that decision; namely, that Member State authorities are obliged post-*Rottmann* to have regard to EU law in connection with the deprivation of national citizenship *per se* because this would also lead to the loss of *Union* citizenship. On that possible interpretation, the Court of Appeal was clear. If the CJEU had intended in *Rottmann* to establish such an approach, then this raised serious concerns about the jurisdiction of the Court of Justice in the area of Member State nationality law.[198]

Political Rights of EU Citizens

Question 9

71. Directive 93/109 EC grants Union citizens the right to vote and stand as a candidate in elections to the European Parliament as residents of a Member State of which they are not nationals. The UK implemented that instrument in 1994 within 15 days of the transposition deadline through the European Parliamentary Elections (Changes to the Franchise and Qualification of Representatives) Regulations.[199] The 1994 Regulations amended para.5 of Sched-

195. *G1 v Secretary of State* [2012] EWCA Civ 867.
196. *Ibid*., at para. 30.
197. As per Laws LJ, *G1 v Secretary of State*, cited *supra* note 194 at para. 41.
198. *Ibid*., at para. 43.
199. SI 1994/342. For an overview of the political rights of EU citizens within the UK, see the EUDO Citizenship Report on Access to Electoral Rights available at: http://eudo-

ule 1 of the European Parliament Elections Act 1978 to provide Union citizens who are not British citizens, but resident in the UK with the right to stand as a candidate in elections to the European Parliament.[200] Reg 7 of the 1994 Regulations extended the franchise to vote in European Parliamentary elections to the same category of persons. The Commission's 1998 Report on the application of Directive 93/109 EC identified no specific concerns with the UK's implementation of that instrument.[201]

72. The legal framework governing EU citizens' right to vote and stand for election in European Parliamentary elections has been subject to several amendments. The 1978 Act has been replaced by the European Parliamentary Elections Act 2002 (hereinafter: the 2002 Act). Section 8(5) of the 2002 Act currently regulates the electoral franchise. The relevant rules to which that section refers are set out in revised Regulations.[202] The 2002 Act also repealed the provisions of the 1994 Regulations governing the right of resident non-national EU citizens to stand as candidates in European Parliamentary elections. The current rules are set out in the European Parliamentary Regulations 2004.[203] The UK legislative provisions fully implement Directive 93/109 EC.

73. With respect to the right to vote, the UK has not opted to implement Art 9(3)(a)-(c) of Directive 93/109 EC. Under that provision Member States may require EU citizens to declare that they have not been deprived of the right to vote in their home Member State; to produce a valid ID document; and/or to indicate the date from which they have been resident in the host Member

citizenship.eu/admin/?p=file&appl=countryProfiles&f=1310-UK-FRACIT.pdf. See also e.g. J. Shaw, 'Citizenship and Electoral Rights in the Multi-Level 'Euro Polity' – The Case of the United Kingdom,' in H. Lindahl (Ed.), *A Right to Inclusion and Exclusion: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Oxford: Hart, 2009).

200. The special position of Irish nationals is discussed further below (para. 73).
201. Report from the Commission to the European Parliament and the Council on the application of Directive 93/109/EC – Voting rights of EU citizens living in a Member State of which they are not nationals in European Parliament elections [1998] COM (97) 731 Final.
202. The European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations, SI 2001/1184, as amended by The European Parliamentary Elections (Franchise of Relevant Citizens of the Union) (Amendment) Regulations, SI 2009/726.
203. SI 2004/293.

State. However, the UK has invoked the derogation in Art 14(2) of Directive 93/109 EC to exempt Irish nationals from the registration regime established in that instrument. Under Reg. 1(2) of the 2011 Regulations, Irish nationals, as well as Commonwealth citizens (here: citizens of the UK, Malta, or Cyprus) are excluded from the definition of 'relevant citizen of the Union' to which the Regulations apply. This special provision for Irish and certain Commonwealth citizens reflects the particular constitutional relationship between the UK and citizens of these Member States.[204] Finally, as for voter registration, the UK has not opted to require Union citizens to provide a valid ID document to support their application to stand as candidates in elections to the European Parliament. Art 10(3) of the Directive permits this restriction.

74. The UK Government has already prepared a draft statutory instrument to implement the changes required by Directive 2013/1 EU.[205] The draft European Parliamentary Elections (Amendment) Regulations 2013 abolishes the requirement for Union citizens wishing to stand as election candidate to obtain an attestation from their home Member State certifying that they have not been deprived of their right to stand as a candidate in that Member State or that no disqualification is known to them. The 2013 draft Regulations replaces the attestation requirement, which was identified as a barrier to the exercise of Union citizens' rights,[206] with an obligation on candidates to declare that they have not been deprived of their right to stand in their home Member State. The host Member State is then required to check the validity of this declaration in cooperation with the designated authority in candidate's home Member State.

75. The issue of prisoners' voting rights takes centre stage in the UK case law on European Parliamentary elections.[207] This important line of case law is considered in Q12 below. Aside from the issue of prisoners' voting rights, there is relatively little judicial activity on the topic of EU citizens' right of participation in elections to the European Parliament. The case law on European Parliamentary elections in the national context has focussed on extensions to the franchise. In *Matthews*, the European Court of Human Rights held that the UK had violated Article 3 of the Protocol 1 of the ECHR by ex-

204. See here e.g. Shaw, cited *supra* note 198 at pp. 246-247.
205. The European Parliamentary Elections (Amendment) Regulations, SI 2013/2876.
206. Directive 2013/1 EU, preamble 4.
207. See *McGeoch v Lord President of the Council* [2011] CSIH 67 and, recently, *McGeoch v Lord President of the Council* [2013] UKSC 63.

cluding Gibraltarians from voting in European Parliamentary elections.[208] The UK Government amended its election rules to give effect to the Court's judgment. The European Court of Justice subsequently confirmed the validity under EU law of the amended UK provisions in the context of an Art 258 TFEU infringement procedure initiated by the Spanish Government.[209]

Question 10

76. The UK was one of the first four Member States to transpose fully Directive 94/80 EC, which lays down arrangements for the exercise of the right to vote and stand as a candidate in municipal elections for citizens of the Union residing in a Member State of which they are not a national. Transposition was in the form of a statutory instrument, namely the Local Government Elections (Changes to the Franchise and Qualification of Members) Regulations 1995.[210] This amended, *inter alia,* the Representation of the People Act 1983, allowing a person to vote at local government elections if he is, on the day of the poll, a relevant citizen of the Union. S.1(c) of the Elected Authorities (Northern Ireland) Act 1989 introduces the changes for local elections in Northern Ireland. 'Citizen of the Union' is defined by reference to Art 20 TFEU, whilst 'relevant Union citizen' refers to Union citizens who are not citizens of the Commonwealth or the Republic of Ireland.[211] Various pieces of primary legislation divided according to region allow 'relevant Union citizens' to stand as candidates in local government elections: the Local Government Act 1972, s.79; The Local Government (Scotland) Act 1973 s.29; The Local Government Act (Northern Ireland) 1972 s.3; and the Greater London Authority Act 1999 s.20. The terms 'citizen of the Union' and 'relevant Union citizen' are defined as they are above.[212]

208. *Matthews v United Kingdom*, No 24833/94 (1999).
209. Case C-14/05 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-7917.
210. SI 1995/1948.
211. S.202(1) Representation of the People Act 1983; s.10(1) Elected Authorities (Northern Ireland) Act 1989; and s.4(1) City of London (Various Powers) Act 1957. Commonwealth citizens and citizens of the Republic of Ireland have more extensive voting rights including the right to vote in national parliamentary elections. This is relevant for Maltese and Cypriot nationals.
212. E.g. s.79(2)A Local Government Act 1972; s.29(2) Local Government (Scotland) Act 1973; and s.3(2) Local Government Act (Northern Ireland) 1972. Commonwealth and Republic of Ireland citizens may also stand under these provisions.

77. Directive 94/80 EC permits derogations from the general rule that Union citizens should be able to vote in local elections in the host Member State where the proportion of non-national Union citizens of voting age in that Member State exceeds 20 % of the total number of Union citizens residing there.[213] This does not apply to the UK and has not been used by the UK.[214] Under Art 12(3), a Member State may also derogate from Arts 6-11 of the Directive, which relate to the exercise of the right to vote and stand as a candidate in municipal elections, in respect of non-national Union citizens who have a right to vote in national parliamentary elections and are thus entered on the national roll under exactly the same conditions as national voters. Although Irish, Maltese and Cypriot citizens can vote in UK parliamentary elections, the UK has not availed itself of this derogation. The UK has a separate register of 'local government electors'.

78. In order to be able to vote in elections in the UK, individuals must register to vote, whether they are British nationals or not. There are number of conditions for eligibility that apply equally to British citizens and eligible voters of other nationalities. Similarly, the UK imposes no additional requirements on EU citizens when compared with UK nationals in relation to standing as a candidate in local government elections. The Directive permits Member States to restrict some posts related to the executive of local government to its own nationals. Yet, the UK has not opted to impose any such restrictions. Accordingly, in the UK, a non-national EU citizen can be the head, deputy or member of the executive of basic government units.[215]

79. The only UK case law relevant to the discussion of the voting rights under Directive 94/80 EC is discussed in Q12 below. This concerns attempts to invoke EU law in order to contest the UK's prohibition on prisoner voting.

80. According to the European Commission's 2012 report on the application of Directive 94/80/EC, awareness of the right to vote for EU citizens living in the UK had risen from 32 % in November 2007 to 72 % in March 2010. Further, the UK has adopted target measures to inform EU citizens of their electoral rights in municipal elections by activating a dedicated helpline. Overall turnout in local elections is nevertheless low. In London's most recent municipal elections, at the time of the report, turnout was just 45.30 % while in Sal-

213. Art 12(1) Directive 94/80 EC.
214. For more detail on this derogation see COM (2012) 99 final at p. 12.
215. *Ibid*., at p. 11.

ford, it was 29.35 %.[216] Turnout, nationally, in the May 2013 local elections was 31 %. National research has found that registration rates are lower amongst eligible non-UK nationals: while 84 % of UK nationals are registered to vote, only 56 % of Union citizens resident in the UK have registered.[217] For the May 2013 elections, the Electoral Commission developed new media advertisements using the online platform www.itsyourvote.org to encourage interaction and as an opportunity to target under-registered groups.[218] Used as a 'test run', the Electoral Commission is looking to use this campaign in relation to the European Parliamentary elections in 2014.

Question 11

81. The right to vote has been extended to (certain) Union citizens beyond the franchise for Union citizens in local and European Parliament elections required by Directives 94/109 EC and 94/80 EC in the following areas:

– National parliamentary elections
– Elections in relation to devolved bodies
– Police commissioner elections

National parliamentary elections

82. Under S.1 of the Representation of the People Act 1983, citizens of the Commonwealth and of the Republic of Ireland can vote in national parliamentary elections. As a result citizens of Cyprus, Malta, and the Republic of Ireland are eligible to vote in all elections within the UK. This is because Commonwealth citizens and citizens of Ireland are not viewed as 'foreign' in UK law.[219]

216. COM (2012) 99 final.
217. The Electoral Commission: Great Britain's electoral registers 2011 (December 2011). Available at http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/145366/Great-Britains-electoral-registers-2011.pdf.
218. http://www.lgcplus.com/Journals/2013/07/15/f/b/l/Local-Elections-May-2013-report.pdf.
219. E.g. s.2 Ireland Act 1949 states that the Republic of Ireland is not a 'foreign country.'

Elections to devolved administrations

83. Under s. 11(1)(b) of the Scotland Act 1998, those who are registered to vote in the register of local government electors are entitled to vote in Scottish Parliamentary elections. As Union citizens are permitted to vote in local government elections, they appear on this register. Union citizens are therefore also able to vote in Scottish parliamentary elections. Under Article 16(2) of the same Act, a citizen of the European Union resident in the United Kingdom is not disqualified from being a member of the Scottish Parliament because he was born outside the United Kingdom. The same rules apply in relation to The Welsh Assembly, by virtue of s. 12(1)(b) and 17(2) of the Government of Wales Act 2006.

84. The right of Union citizens to vote in elections to the Scottish and Welsh administrations is, therefore, based on their inclusion on local government registers, rather than as a result of an explicit provision that makes specific reference to a right of the European citizen to vote in elections to devolved bodies. Nevertheless, this 'loophole' is openly acknowledged. The general information website for voting in the UK 'www.aboutmyvote.co.uk' states that Union citizens can vote in such elections.[220] Furthermore, Union citizens were able to vote in the referendums concerning the establishment of the Scottish Parliament and Welsh Assembly in the first place. In relation to the forthcoming referendum on Scottish Independence, s. 2 of the Scottish Independence Referendum (Franchise) Act 2013 states that, 'a person is entitled to vote in an independence referendum if, on the date on which the poll at the referendum is held, the person is ... a relevant citizen of the European Union.'

85. Union citizens in Northern Ireland were permitted to vote in the last election to the Northern Irish Assembly but were not permitted to vote in the referendum on the voting system.[221] S. 36(7) of the Northern Ireland Act 1998 clearly states that: A person is not disqualified for membership of the Assembly ... by reason only ... that he is born out[side] of the Kingdom if he is a citizen of the European Union.

86. Although electors for elections for devolved bodies are drawn from local government elections, national courts do not appear to consider the devolved

220. http://www.aboutmyvote.co.uk/who_can_register_to_vote.aspx.

221. Electoral Commission information: http://www.aboutmyvote.co.uk/PDF/NI-accessible.pdf.

administrations in Scotland, Wales, and Northern Ireland as 'basic local government units' under Directive 94/80 EC. As a result, the right to vote in such elections is interpreted as extending the franchise for Union citizens beyond the requirements of the Directive rather than as implementing it. This is clear from the approach of the Supreme Court in *McGeoch*.[222] In that case, the Court noted expressly that elections to the Scottish Parliament did not constitute 'municipal elections' within the meaning of Directive 94/80 EC. In its view, municipal elections referred specifically to 'local government elections at a lower level of government, closer to people and with a more direct responsibility for service delivery'.[223]

87. In relation to the London Assembly, s.17 of the Greater London Authority Act 1999 makes reference to Schedule 3 of the same Act which amends the Representation of the People Act 1983, treating elections to the London Assembly as local government elections. Under s.20 of the 1999 Act, in order to be Mayor or a member of the London Assembly, one must be, *inter alia*, a 'relevant citizen of the Union'.

Police commissioners

88. In November 2012, local police authorities were replaced with democratically elected 'Police and Crime Commissioners' in an attempt to make the police more accountable. It is unclear whether this role falls under the description of a 'basic local government unit' defined in Art 2 of Directive/94/80 EC.[224] If it did, a Police and Crime Commissioner could reasonably be interpreted as the elected head of the basic local government unit. Member States are permitted to restrict such posts to their own nationals. Nevertheless, under s.52(1)(a) of the Police Reform and Social Responsibility Act 2011, a person is entitled to vote in the elections for the Police and Crime Commissioner for their area if they are registered to vote as an elector at a local or government election. Accordingly, this includes Union citizens. The right of Union citizens to stand for election results from a combined reading of s. 66(1) and s. 68 of the 2011 Act.

222. *McGeoch*, cited *supra* note 206.
223. *Ibid.,* at para. 45.
224. Bodies elected and empowered to administer 'certain local affairs on their own responsibility.' The Annex to the Directive describes such units in the UK as covering counties, districts, regions, parishes and wards, which arguably covers Police and Crime Commissioners.

Question 12

89. Two specific areas of tension have recently come to light in the UK case law concerning the relationship between EU law and national provisions limiting the scope of the franchise. First, the Court of Appeal was requested to rule on whether the UK provision on 'overseas electors' constitutes an obstacle to intra-EU movement. Secondly, as referenced in Q9 and Q10, there is a recent line of national case law considering the compatibility with EU law of the current UK prohibition on prisoners' voting.

The UK's '15-year rule' on overseas voting as an obstacle to intra-EU movement

90. The validity of the UK rules on overseas voting arose in *Preston*.[225] In that case the applicant, a British citizen resident and engaged in economic activity in Spain since 1992, sought judicial review of the UK's so-called '15-year rule' on overseas voting. Under s.1 of the Representation of the People Act 1983, non-resident British citizens retain the right to vote in national elections as overseas electors for a period of 15 years.[226] The applicant maintained that this limitation constituted an obstacle to intra-EU movement in that it was liable to deter economic actors and EU citizens from exercising their free movement rights guaranteed in Union law.

91. The Court of Appeal accepted that, in principle, the loss of the right to vote under the 15-year rule could be qualified as a 'disadvantage.'[227] However, it held that not every disadvantage constitutes an obstacle to the exercise of the rights of intra-EU movement.[228] On its view, it was necessary to adopt a 'long term view' when determining the potential deterrent effect of national measures on EU free movement rights.[229] Further, the Court asserted that electoral rights were 'qualitatively and quantitatively different' from social benefits.[230] National measures limiting the latter category of entitlements

225. R. *(on the application of Preston) v Wandsworth LBC* [2012] EWCA Civ 1378.
226. The 15-year period is calculated from the date of an individual's last entry on the electoral role of their previous UK constituency.
227. As per Mummery LJ in *Preston*, cited *supra* note 224 at para. 79.
228. *Ibid*. See here also earlier, Elias LJ in *R. (on the application of Preston) v Wandsworth* LBC [2011] EWHC 3174 (Admin) at para. 38.
229. As per Mummery LJ in *Preston*, cited *supra* note 224 at para. 79.
230. *Ibid*., at para. 81.

were considered capable of constituting direct and immediate barriers to the exercise of free movement rights. By contrast, and with respect to the relationship between the 15-year rule and the exercise of the Treaty free movement rights, the Court concluded that:

'No legal test, whether formulated in terms of 'probability', or 'likelihood', or 'capability', or 'liability', or 'real possibility', addresses the basic difficulty that what is asserted in the claimant's case is too speculative, remote and indefinite to establish a case.'[231]

92. The Court of Appeal also held that, even if evidence could be adduced to indicate a deterrent effect, the 15-year rule could be justified in EU law. According to the Court, that rule served a legitimate and proportionate objective of testing the strength of British citizens' link with the United Kingdom to ensure that only those maintaining close links remain eligible to vote.[232] In the Court of Appeal's view, the justification ground alone was sufficient to reject the appellant's request for a preliminary reference to the Court of Justice.

Prisoners' voting rights and EU law

93. EU law has been recently invoked to challenge the legality of the UK's blanket ban on prisoners' voting rights.[233] Successful attempts have already been made to challenge the legality of that prohibition under Art 3 of the 1st Protocol of the ECHR.[234] The UK Government is yet to implement the Strasbourg jurisprudence on prisoners' voting rights.[235]

94. With respect to Union law, the Supreme Court ruled in October 2013 in *McGeoch* that British citizens detained in custody in the United Kingdom do not enjoy the right to vote in municipal elections as a consequence of their status as Union citizens.[236] The argument advanced in support of extending

231. *Ibid*., at para. 80.
232. *Ibid*., at paras 88-95. The Court of Appeal made particular reference to the jurisprudence of the Strasbourg Court on the compatibility with the ECHR of the UK's 15-year rule. See e.g. *Doyle v UK* (2007).
233. See s. 5(2) of the Representation of the People Act 1983.
234. *Hirst v United Kingdom (No. 2)*, No. 74025/01 (2006).
235. The UK Ministry of Justice has produced a draft bill on this issue. See http://www.justice.gov.uk/downloads/legislation/bills-acts/voting-eligibility-prisoners/voting-eligibility-prisoners-command-paper.pdf.
236. *McGeoch* [2013], cited *supra* note 206.

the franchise relied principally on the specific wording of Art 20(2)(b) TFEU. That provision, inserted by the Treaty of Lisbon, grants Union citizens 'the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.' In *McGeoch*, it was argued that the omission of the phrase 'in a Member State of which he is *not* a national' as a qualifier in Art 20(2)(b) TFEU was decisive.[237] The absence in that provision of any reference to the right to vote in host Member States, it was submitted, granted Union citizens electoral rights in the Member State of which they are nationals under the terms required by EU law. That core argument was bolstered further with reference to the Court of Justice's evolving case law on the rights of static Union citizens – both in terms of political and non-political rights[238] – as well as to Arts 39 and 40 of the Charter on Fundamental Rights.

95. The UK Supreme Court unanimously rejected the argument advanced for the appellant to the effect that the insertion of Art 20(2)(b) TFEU had established a self-standing right for EU citizens to vote in municipal elections in the Member State of which they are nationals. The Supreme Court concluded that it would be 'positively misleading' to adopt such an interpretation of that provision in light of the Treaty's structure.[239] The right to vote in municipal elections under EU law was considered limited to resident EU citizens who are not nationals of the host Member State.[240] Lord Mance noted further, that this interpretation of the franchise under EU law was also supported by the wording of Arts 39 and 40 of the EU Charter on Fundamental Rights.[241] The Supreme Court also rejected the appellant's request for a preliminary reference to the Court of Justice.[242]

237. As per Lord Mance in *McGeoch* [2013], cited *supra* note 206 at para. 17.
238. See esp. Case C-300/04 *Eman and Sevinger v Netherlands* [2006] ECR I-8055, Case C-135/08 *Rottmann*, cited *supra* note 185 and Case C-34/09 *Ruiz Zambrano*, cited *supra* note 68 respectively.
239. As per Lord Mance in *McGeoch* [2013], cited *supra* note 206 at para. 59.
240. *Ibid*.
241. *Ibid*.
242. *Ibid*., at para. 84.

Culture(s) of citizenship

Question 13

96. Our findings lead us to conclude that, for the most part, Union citizenship is generally still understood in the UK context as an adjunct to national immigration law.[243] With respect to the legislative transposition, administrative application and judicial interpretation of the rights of EU citizenship, there is – to differing degrees – evidence of a permissions-based approach to the implementation of the rights conferred by EU law.[244] In certain instances, this permissions-based approach is inherent in the implementation process itself, e.g. through the transposition of EU Directives. In other instances, it follows as a result of administrative and judicial 'seepage' – a phenomenon whereby the approach of the UKBA and national courts and tribunals to EU citizenship rights is shaped by the administrative and legal framework governing non-EU immigration.[245] The impact of seepage on the culture of EU citizenship within the UK is particularly significant in light of the UK's strong permissions-based system governing non-EU migration.[246]

97. The transposition of the CRD through the EEA Regulations provides the clearest example of the predominantly permissions-based approach to EU citizenship rights within the UK. In line with its full title, that instrument effectively casts the free movement rights of EU citizens as an adjunct to UK immigration law.[247] That instrument integrates (many of) the rights contained

243. For recent analysis on the interface between EU citizenship rights and UK immigration law, see Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 and Shaw and Miller, cited *supra* note 4.

244. Shaw and Miller characterise the interface between EU citizenship and UK immigration law as 'legal worlds in collision.' See Shaw and Miller, cited *supra* note 4 at p. 140.

245. This phrase is borrowed from Shaw et al, cited *supra* note 4 at p. 43. See also Shaw and Miller, cited *supra* note 4 at p. 156.

246. See here esp. the conclusions of Lord Hoffmann in *Chief Adjudication Officer v Wolke,* cited *supra* note 41: '[UK immigration law] contemplates that persons who are not British citizens will be entitled to be present here only if they have been given leave to enter and that their right to reside in the United Kingdom will be a consequence of the terms of that leave. The whole scheme relies upon the exercise of control at the frontier.'

247. On the embedded nature of EU citizenship within UK immigration law and policy, see Shaw and Miller, cited *supra* note 4 at pp. 142-143.

within the CRD into a national immigration system that is based squarely on frontier controls and residence rights that are directly linked to a non-national's 'leave to enter' the United Kingdom.[248] Specific provisions of the EEA Regulations also permit the immigration detention of EU citizens even *prior* to the adoption of a decision by the Secretary of State to remove that person on grounds of public policy, public security and public health grounds.[249]

98. Structured as an adjunct to UK immigration law, the EEA Regulations deal only with the CRD rights of entry, residence and expulsion for EU citizens and their family members. Other core rights of EU citizenship contained within the CRD are not transposed. Most notably, the EEA Regulations do not transpose Art 24(1) of the CRD – the right to equal treatment.[250] That provision is not directly transposed in UK law. The UK Government has again taken a permission-based approach to the transposition of the rights of equal treatment in Art 21 CRD. As discussed in Q5, EU citizens must establish a 'right to reside' in the UK under the CRD in order to secure access to a range of social assistance benefits. That test applies only to non-British citizens. Moreover, it positions EU citizens and their family members directly alongside non-EU migrants, who are also required to establish a right to reside to secure entitlement to the principal UK social assistance benefits. As such, its application further embeds the rights of EU citizenship within the general framework of UK immigration law.

99. Our review of the administrative practices of the UKBA provides additional evidence to support the view that EU citizenship rights within the UK are predominantly construed as permission- rather than rights-based. We have identified numerous instances of 'seepage' in the approach of UKBA officials towards EU nationals and their family members – exposed through litigation. The decision of the Court of Appeal in *Bassey* provides a particularly striking instance of seepage in the administrative context.[251] In that case, UKBA officials failed outright to identify and uphold the appellant's derived rights of entry and residence under EU law. UKBA officials simply applied ordinary UK immigration rules and, ultimately, detained the appellant pending depor-

248. *Ibid*.
249. Reg 24(1) EEA Regulations. See also *R. (on the application of Nouazli) v Secretary of State* 2013 EWHC 567 (Admin).
250. See here also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at p. 39.
251. *Bassey*, cited *supra* note 161. See also *McCarthy*, cited *supra* note 32.

tation. Whilst accepting that the appellant had falsely declared his intentions, the Court of Appeal strongly criticised the approach of the UKBA. In its view, the UKBA had wrongly treated the appellant's situation as a 'straightforward case of illegal entry by deception by an individual with no arguable right to the in the country'.[252] The case law on 'sham marriages' exposes further examples of seepage in the administrative practices of the UKBA. In several cases, the UKBA has been criticised by the UK courts for failing to recognise that the TCN spouse of a EU citizen enjoyed an automatic derived right to enter and reside in the United Kingdom under EU law.[253]

100. National courts also fall victim to the phenomenon of seepage. By way of illustration, we detected some discussion of the 'credibility' of individual litigants – a benchmark of UK immigration law – in individual EU citizenship cases.[254] This is clearly at odds with the approach to citizenship rights and their abuse in EU law. Additionally, our findings also identified isolated problems with judicial implementation of EU citizenship rights. In *McCarthy* (Q5), for example, the High Court upheld the validity of the UK's refusal to recognise, pursuant to Art 5(2) CRD, residence cards issued to TCN nationals by other Member States in accordance with the CRD.[255] In *B v Home Office* (Q1) that same court adopted a particularly restrictive reading of the doctrine of State liability under EU law, in respect of a serious administrative delay in issuing a residence permit to an extended family member of a Union citizen.[256] In places, we also detected some resistance on the part of national courts to engage fully with particular landmark rulings of the CJEU on EU citizenship rights. The Court of Appeal decision in *G1 v Secretary of State* (Q8) on the scope of application of the *Rottmann* judgment illustrates this point most forcefully.[257]

101. On the other hand, our review of the UK legal framework also revealed a degree of understanding of EU citizenship as a more vibrant, rights-centered legal status, distinct from ordinary UK immigration law. National courts and tribunals drive this more positive vision of EU citizenship – sub-

252. *Bassey*, cited *supra* note 161 at para. 38.
253. See esp. *ZH (Afghanistan)*, cited *supra* note 12.
254. E.g. *Adetola*, cited *supra* note 12 and *Essa*, cited *supra* note 127. On this point, see also Shaw and Miller, cited *supra* note 4 at p. 156.
255. *McCarthy*, cited *supra* note 32.
256. *B v Home Office*, cited *supra* note 8.
257. *G1 v Secretary of State*, cited *supra* note 194.

ject to the preceding remarks. Additionally, there is also evidence of a stronger constitutional culture in connection with the transposition of the political rights of EU citizenship. In this area, EU citizens are closely assimilated with British nationals as rights holders – at least insofar as the former enjoy limited electoral participation rights under Union law. The political rights of EU citizens have also been extended beyond the requirements of Union law.

102. UK courts and tribunals play an absolutely critical role in entrenching the constitutional rights-orientated character of EU citizenship within the UK legal order. This is clear already from the preceding decisions scrutinising UKBA practices (e.g. *Bassey*). National courts also have corrected errors in the UK Government's transposition of the CRD. As discussed in Q1, the Court of Appeal struck down as 'flagrantly unlawful' Reg 12(1)(b) of the 2006 Regulations – introducing an additional requirement of prior lawful residence within the EEA for TCN family members of EU citizens.[258] However, it is through their approach to judicial interpretation that UK courts and tribunals have arguably impacted most significantly on the culture of EU citizenship within the UK. Our review of the case law demonstrates, to a greater extent, that the national courts and tribunals broadly understand and, further, are able properly to apply the rights of EU citizenship within the national judicial context. This is apparent, in particular, from the consistent application of the CRD hierarchy of protection from deportation on public policy, public security, and public health afforded to Union citizens and their family members.[259] Moreover, in numerous cases, UK courts have demonstrated their ability to step outside of the UK legal framework and resolve EU citizenship cases in accordance with interpretative principles developed and applied by the Court of Justice.[260] Finally, there has been express judicial recognition of the 'fundamental' character of EU citizens' rights of movement and residence.[261]

103. To a greater extent, UK courts have also responded well to the challenges presented by the evolutionary nature of EU citizenship. As demonstrated in Q7 above, national courts have managed to implement specific CJEU deci-

258. *R. (on the application of Owusu*), cited *supra* note 17.
259. See here e.g. *BF (Portugal)*, cited *supra* note 119; *LG and CC (Italy),* cited *supra* note 71 and *B (Netherlands)*, cited *supra* note 139.
260. See e.g. *Aladeselu,* cited *supra* note 20 at para. 19 and *PM (Turkey),* cited *supra* note 72 at para. 32.
261. E.g. *Essa*, cited *supra* note 127. See also Moses LJ in *ZZ v Secretary of state for the Home Department* [2011] EWCA Civ 440 at para. 54.

sions enhancing the rights of EU citizens and their family members beyond the terms of the CRD – ahead of the legislative transposition of these judgments.[262] We also identified evidence of the ability of UK courts to transpose the substance of particular CJEU decisions to parallel factual constellations. The Court of Appeal's decision in *Adaleslu* (Q1), in which that Court applied *Metock* by extension to the situation of extended family members, offers a clear illustration of this openness to crosspollination.[263] Equally, when faced with specific questions of interpretation, the Court of Appeal and Supreme Court have made appropriate preliminary references to the Court of Justice.[264] Moreover, we would highlight that UK courts have also made references to the CJEU in instances where the scope of EU citizenship rights was arguably rather clear, but where there was a sense, on the part of the referring national court, that greater rights protection is desirable. For example, in *Jessy ST Prix* the Supreme Court requested the CJEU to determine whether 'retained worker' status in Art 7(3) CRD extends to cover the situation of an EU citizen who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy/child birth.[265] As the Supreme Court noted, the CRD is actually rather clear on this point: it does not.[266] The Supreme Court is inviting the Court of Justice to develop further the rights of EU citizens beyond the terms of the CRD on fundamental rights grounds.[267]

104. Finally, there is also a somewhat stronger constitutional character to the political rights of EU citizenship in the UK. Overall, our findings indicate that EU citizens are more closely integrated with British citizens as rights holders in the political context. The legislative framework governing the electoral rights of EU citizens does not employ the permission-based entitlement tests such as the right to reside introduced to govern the exercise of the substantive rights of intra-EU movement. Equally, as discussed in Qs 9, 10 and 11 above, the UK Government has not opted to introduce special restrictions on the voting rights of EU citizens, even where permitted under EU law – contrary to the position of certain other Member States. It has also already drafted legislation to implement the changes required by Directive 2013/1

262. E.g. *M-T v T*, cited *supra* note 161 and *W (China) v Secretary of State*, cited *supra* note 161.
263. *Aladeselu v Secretary of State*, cited *supra* note 7.
264. E.g. *McCarthy,* cited *supra* note 32 and *MG (Portugal*), cited *supra* note 111.
265. *Jessy Saint Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.
266. *Ibid*., As per Lady Hale at para. 21.
267. *Ibid*.

EU. The more favorable treatment of EU citizens as compared with the position on entry, residence, and entitlement to social advantages may simply be linked to the low cost implications associated with the right to vote in municipal and European Parliamentary elections. In any case, the strength of rights in this context is an important component of the qualified constitutional character of EU citizenship within the UK legal order. A review of the legislative framework on municipal elections (Q11), also demonstrates that the electoral rights of EU citizens has been extended beyond the terms of Directives 94/109 EC and 94/80 EC.

Question 14

105. Legal practitioners increasingly make reference to the Charter to support arguments concerning the interpretation of the rights of Union citizens before national courts. In *ZZ*, Maurice Kay LJ neatly summarised the impact of the Charter in its national context:

'... the Charter is not a free-standing rights-creating legislative instrument. It is akin to a restatement of rights, freedoms and principles already established in law as a result of, inter alia, the judgments of the Luxembourg Court...what the Charter does not and cannot do is to give birth to rights, freedoms and principles in areas in which the Treaties claim no rule-making competence but acknowledge the exclusive competence of Member States. This is spelt out by Article 51.2 of the Charter.'[268]

106. Based on our findings in this report, we highlight three specific examples of the Charter's emerging impact on the interpretation of the rights of EU citizens within the UK:

1) The application of the UK's contested 'right to reside' test
2) The application of the 'genuine enjoyment test' following *Ruiz Zambrano*
3) The use of the Charter to create new substantive rights for Union citizens

The application of the UK's contested 'right to reside' test

107. Attempts have been made in some cases to address the perceived harshness of the UK's current 'right to reside' test by using rights that EU citizens derive from the Charter. In *Mirga*,[269] a Polish national was found not have

268. At paras 16 and 17.
269. *Mirga* [2012] EWCA Civ 1952.

satisfied the 'right to reside' test, as she was not a 'qualified person', i.e. working, self-employed, or self-sufficient, and so did not qualify for income support. M argued that denial of a right to reside would violate her right to family life under Article 7 of the Charter, as she had given birth to a child in the UK. In considering this argument, the Court of Appeal acknowledged, first, that while legal effect was only given to the Charter by the Lisbon Treaty, which post-dated the appellant's application, the fundamental right to family life was a fundamental principle of Union law.[270] Nevertheless, the Court of Appeal held that 'the protection of her fundamental rights did not require that she be accorded such a 'right of residence'.'[271] The Court of Appeal cited a previous judgment in which it was stated that to allow a right of residence where a category of person had clearly been excluded from Directive 2004/38 would be an attack on the Directive itself and in which the Court did not accept fundamental rights arguments.[272]

The application of the 'genuine enjoyment test' following Ruiz Zambrano

108. The Charter of Fundamental Rights has been raised in the arguments of appellants in a number of cases relating to whether or not an individual has been deprived of the genuine enjoyment of the rights arising from their Union citizenship. Applying *Dereci*, the national courts have repeatedly stated that the Charter only applies if the 'genuine enjoyment' test is satisfied; in other words, that the Charter only applies if the matter falls within the scope of EU law.[273] Moreover, relevant national case law consistently features the statement in *Dereci* that a desire to keep one's family together will not be sufficient, alone, to trigger protection under the genuine enjoyment test.[274] However, the national courts have also remarked that *Dereci* is not entirely clear on whether the separation family members can ever trigger the test. In *Harrison,* Elias LJ suggested that the Court of Justice 'might have been envisaging that Article 7 [EU Charter] could be relevant to the question whether the EU citizen was in fact compelled to follow the non-EU citizen out of the territory of the EU' but that the case law had not developed to that stage yet.[275] In-

270. *Ibid.,* at para. 20.
271. *Ibid.,* at para. 26.
272. *Ibid.,* at para. 29, citing Lord Justice Maurice Kay in *Kaczmarek*, *supra* note 44 at para. 15.
273. *Sanneh,* cited *supra* note 157 at para. 19. See also *Harrison,* cited *supra* note 166.
274. See Q7.
275. *Harrison,* cited *supra* note 166 at para. 69.

deed, in *Harrison* itself, the Court of Appeal focussed on the factual possibility for the British citizen children concerned to remain in the Union despite the deportation of their fathers in order to hold that the genuine enjoyment test had not been triggered.[276]

The use of the Charter to create new substantive rights for Union citizens

109. Finally, we highlight that the entry into force of the Charter is also opening up new lines of argument for litigants. The example of prisoners' voting rights was discussed above in Q12. Here EU law – and the Charter – is being invoked in order to inject a new supranational EU dimension into existing domestic legal challenges. In other instances, the Charter is invoked to establish rights in new legal contexts. For example, in *Sandiford* the Charter was invoked in an effort to establish an obligation on the United Kingdom Government to provide legal aid to one of its own nationals who had been convicted and sentenced to death in a Third Country for drug trafficking offences.[277] That argument was unsuccessful.

Question 15

110. EU citizenship and related issues feature frequently in the mainstream UK media. National media coverage is often rather negative in character, reflecting perhaps the influence of a powerful centre-right British press. In the first instance, we identified only very infrequent discussion of substantive citizenship 'rights' – even in strands of the media that are not openly critical of the UK's continued membership of the EU (e.g. *BBC*; *Guardian*; *Independent*). Mirroring the legislative framework implementing EU citizenship rights (Q13 above), the UK media tends to identify EU nationals as 'migrants' or 'foreign nationals' rather than EU citizens. Notably, there is also only infrequent reporting on the rights enjoyed by *British nationals* as EU citizens in host Member States. The focus is squarely centered on incoming 'migrants', which again reinforces the view that EU citizenship is simply an adjunct to UK immigration law and not part of a framework of reciprocal rights. We would also observe that, where they exist, reports on the exercise of Treaty rights by British nationals are often framed negatively. This includes, for example, emphasizing the costs to the UK taxpayer of the exercise of their

276. See Q7.

277. *The Queen on the application of Lindsay Sandiford v The Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581.

rights of intra-EU movement as EU citizens (e.g. 'European Court Ruling will increase the number of Brits abroad who can claim winter fuel allowance,' *Daily Mail* Jan 2013).[278]

111. The dominant and recurring themes in the UK media related to EU citizenship include entitlement to social welfare benefits; access to public services (particularly the NHS and State education sector); the rights of entry and residence enjoyed by EU citizens and their family members (particularly TCN family members); and the EU rules governing the expulsion of Union citizens. These key themes feature particularly predominantly in the centre-right UK press (chiefly: *Telegraph*; *Daily Mail*; *Daily Express*). Reporting on these key issues by this strand of the UK press is highly critical of EU citizenship, typically presenting headline-grabbing projections of both the number of incoming 'EU migrants' and their direct costs to the UK taxpayer.[279] As Shaw et al observe, there is a certain preoccupation within large sections of the UK media that EU migrants opt to exercise their Treaty rights in order chiefly to exploit the United Kingdom's welfare system.[280] Yet, we did detect evidence of clear efforts to counter the validity of such perceptions within strands of the UK media.[281] Notably, the situation of EU citizens resident in the UK as economically active/self-sufficient Member State nationals does not feature prominently in national media, except to the extent that such persons and their family members contribute to an overall increase in demand for the UK public services (e.g. 'Urgent need for 250,000 school places, spending watchdog warns,' *BBC News Online*, 15th March 2013 and 'EU influx leaves 3,000 children without primary places for the new term,' *Daily Mail*, 1st Sept 2013).[282]

278. http://www.dailymail.co.uk/news/article-2259585/Sunshine-test-stop-expats-claiming-16million-year-taxpayers-money-help-winter-fuel-bills.html#ixzz2h8qjrzOM.
279. See e.g. http://www.telegraph.co.uk/news/worldnews/europe/10375358/True-scale-of-European-immigration.html and http://www.dailymail.co.uk/news/article-2460704/One-10-dole-claimants-outside-UK-Cameron-moves-limit-access-benefits-foreigners.html.
280. Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at p. 27.
281. See e.g. http://www.theguardian.com/commentisfree/2013/mar/06/uk-benefits-eu-migrants-what-crisis (countering claims regarding the costs of EU migration to UK taxpayers) and http://news.bbc.co.uk/1/hi/7525472.stm (emphasising the rights-enhancing character of the CJEU's decision in *Metock*).
282. http://www.bbc.co.uk/news/education-21785796 and http://www.dailymail.co.uk/news/article-2408231/EU-influx-leaves-3-000-children-primary-places-new-term.html.

112. The centre-right UK press also tends periodically to isolate individual categories of EU citizens as 'bad' or 'undesirable' migrants.[283] These labels were often applied with reference *en masse* to nationals of the 10 Central and Eastern European States that acceded to the European Union in 2004. Interestingly, the situation of EU citizens from Western EU Member States is rarely discussed. This is despite the fact that nationals from these Member States (and their family members) have triggered the most significant extensions in the scope of rights/entitlement to social welfare benefits for EU citizens within the United Kingdom (e.g. *Baumbast*; *Chen*; *Bidar*; *Teixera*).[284] Most recently, Romanian nationals – and more specifically: members of the Roma community – have been singled out as 'bad migrants' by strands of the centre-right press as a target for particularly unfavorable treatment. The *Daily Express*, *Daily Mail*, and *Daily Telegraph* have all run a series of articles on the prospect of an 'invasion' by Romanian nationals following the lifting of the UK's transitional arrangements for Romanian (and Bulgarian) nationals in January 2014.[285] Reports in all three papers frequently present a distorted image of Romanian nationals. (e.g. 'The Roma invasion of Paris ... next stop Britain,' *The Daily Telegraph*, 6th Oct. 2013).

113. As the preceding comments indicate, the quality of reporting on EU citizenship issues in the UK is generally rather selective and non rights-centered. In addition, we suggest that, in places, UK reporting is often misleading.[286] For instance, there is still a tendency to conflate EU citizenship rights with the legal framework of rights protection under the ECHR/Human Rights Act.[287] The UK Office of the European Commission publishes official clari-

283. On this point, see also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at p. 29.

284. Case C-413/99 *Baumbast and R v Secretary of State* [2002] ECR I-7091, Case C-202/02 *Chen*, cited *supra* note 68, Case C-209/03 *Bidar* [2005] ECR I-219 and Case C-480/08 *Teixeira,* cited *supra* note 68.

285. E.g. http://www.express.co.uk/news/uk/440206/Join-our-Crusade-today-stop-new-EU-migrants-flooding-in-to-Britain, http://www.dailymail.co.uk/news/article-226 3661/Up-70-000-Romanian-Bulgarian-migrants-year-come-Britain-controls-EU-migrants-ex pire.html and http://www.telegraph.co.uk/news/uknews/immigration/10013810/Diplomats-admit-35000-Romanian-and-Bulgarian-migrants-may-come-to-Britain.html respectively. Cf. http://www.theguardian.com/world/2013/feb/02/ romania-uk-immigrants-diplomatic-row.

286. See here also Shaw et al, 'Getting to grips with EU citizenship,' cited *supra* note 4 at pp. 53-54.

287. *Ibid*., at pp. 29-30.

fying responses to such instances of misreporting on EU issues on a near daily basis.[288] Its efforts appear to have little impact on the quality press reporting by the centre-right British press.

114. It is difficult in a study of this scope and nature to draw robust conclusions on the impact of the reporting on EU citizenship issues by the UK media on national public discourse. However, on the strength of our limited and illustrative sample, we would argue that the mainstream UK media contributes little to the sense of EU citizenship as rights-based legal status that is destined to become the fundamental status of all Member State nationals. As is perhaps inevitable in the national context, issues affecting or related to EU citizens are subsumed within broader political debates on e.g. immigration; public service reform; and criminal justice. In each context, EU citizens remain easily cast as 'others' – as EU migrants; welfare tourists; foreign criminals – at least within an influential strand of the UK media. There is, of course, a wealth of alternative media sources, including internet blogs that offer a more balanced and overtly rights-centered analysis of EU citizenship.[289] However, these attract the attention of more limited, specialist audiences.

288. http://ec.europa.eu/unitedkingdom/blog/.
289. E.g. http://eutopialaw.com/.

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ABBREVIATED QUESTIONNAIRE GENERAL TOPIC 2

Citizenship *within* Directive 2004/38/EC – Stability of Residence for Union Citizens and their Family Members

Question 1

With respect to a Union citizen's family members, how have Articles 2, 3, and 5 of the Directive been transposed into national law? How have national courts and/or tribunals dealt with the different types of family relationships outlined in Articles 2 and 3? Are the procedural safeguards contained in Article 5 providing *effective* protection?

Question 2

Is there any evidence of the expulsion of EU citizens (and/or their family members) on purely economic grounds (i.e. failure to satisfy the conditions set out in Article 7 of the Directive) e.g. in the decisions of national courts and/or tribunals?

Question 3

How have Articles 12-15 of the Directive been transposed into national law? Have any disputes on the interpretation or application of these provisions been addressed within national courts or tribunals?

Question 4

How have Articles 16-21 of the Directive been transposed into national law? Has data on the volume of applications to date for the status of permanent residence been published for your Member State? Have any disputes on the

interpretation or application of these provisions been addressed within national courts or tribunals?

Question 5

How has Article 24(2) of the Directive been transposed into national law? Does national law distinguish between the categories specified in Article 24(2) and job-seekers in terms of entitlement to social benefits? Has Article 24(2) displaced the Court of Justice's 'real link' case law before national courts or tribunals?

Question 6

Please describe how the national courts and tribunals have understood, applied, and differentiated between the concepts of 'public policy, public security, or public health' (Article 27), 'serious grounds of public policy or public security' and 'imperative grounds of public security' (Article 28). How has the principle of proportionality been understood and applied in these contexts? How have the national courts and tribunals taken account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin?

EU Citizenship *beyond* Directive 2004/38/EC – Exploring National Application of Primary EU Law

Question 7

To what extent do national courts and tribunals tend to reject arguments based on EU citizenship rights on the grounds that the dispute involves a 'purely internal situation'? To what extent has the Court of Justice's case law grounded directly on the TFEU's citizenship provisions (e.g. *Chen*, *Ruiz Zambrano*, and subsequent decisions) been effectively implemented and applied at the national level? Does national case law distinguish clearly between rights acquired under Directive 2004/38 and under Articles 20 and/or 21 TFEU when EU citizens are seeking family reunification rights from their home Member States? Have legislative or specific administrative changes

been put in place? How are these matters being dealt with by the national courts?

Question 8

In the context of the judgment in *Rottmann*, to what extent do rules on the acquisition and/or loss of national citizenship reflect the implications of the particular requirements of EU citizenship? Please consider the EUDO Citizenship Observatory data on acquisition and loss of citizenship in answering this question.

Political Rights of EU Citizens

Question 9

Since when has Directive 93/109/EC on European Parliament elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts? What additional changes will be required by the December 2012 amendments to Directive 93/109/EC.

Question 10

Since when has Directive 94/80/EC on local elections been fully implemented? Have there been any derogations? Are there any additional conditions imposed on EU citizens compared to national citizens (special registration or residence requirements)? Has there been relevant case law in domestic courts?

Question 11

Briefly report on regional and other elections in which EU citizens residing in the country are granted electoral rights under national law. Is there a franchise for EU citizens that goes beyond the local and EP electoral rights required under EU law? What have been the reasons for extending such rights specifically to EU citizens?

Question 12

Are there any specific areas where tensions exist between EU law and national provisions limiting the scope of the franchise (e.g. in relation to the voting rights of persons convicted of criminal offences or persons with mental impairments)? In answering this question, rapporteurs may be interested to know about an emerging line of case law in the UK on the application of EU law, specifically Article 39 CFR, to restrictions on prisoners' voting, which will reach the UK Supreme Court in June 2013.

Culture(s) of Citizenship

Question 13

On the basis of your findings from the above questions, do you consider that the implementation of EU citizenship in your Member State is understood at the national level as part of a rights-based EU 'free movement' and 'constitutional' culture, or as an adjunct to national immigration systems based on 'permissions' to non-nationals to be present in the territory?

Question 14

Has the binding effect of the Charter of Fundamental Rights of the European Union, following the entry into force of the Lisbon Treaty in 2009, played any role in how the rights of EU citizens are being interpreted by the national courts and/or tribunals?

Question 15

Please describe the extent to which issues connected to EU citizenship have been a salient issue in the national media and how this issue has been dealt with in the national media. Are there any particularly dominant themes within media reporting (e.g. expulsion; access to state benefits; derived rights for third country nationals)? How *accurate* is national reporting of EU citizenship issues? Can you detect evidence of the influence of the media on national public discourse?

The proceedings of XXVI FIDE Congress in Copenhagen in 2014 are published in three volumes, where this book concerns: Union Citizenship: Development, Impact and Challenges.

The three editors, Professor and President of FIDE, Ulla Neergaard, Associate Professor and Secretary General of FIDE, Catherine Jacqueson, and Commissioner in EU Law and Human Rights, Nina Holst Christensen, are all distinguished experts within EU law. The Joint General Rapporteurs, Professors Jo Shaw and Niamh Nic Shuibhne, are among the absolute leading scholars within the particular field of Union citizenship in Europe. The Institutional Rapporteur is Michal Meduna from DG Justice of the Commission of the European Union, who has long and acknowledged experience in the area.

Their impressive analyses are contained in this book together with important and valuable studies on the implementation of the relevant EU law in the Member States all over Europe. Thereby, this book hopefully constitutes a goldmine for comparative and EU lawyers in the field of Union citizenship.

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