# Commentary on Article 45 Charter of Fundamental Rights

Chapter published in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights. A Commentary* (Oxford, Hart Publishing, 2014) 1161-1176

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**Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

**Explanation on Article 45 [from OJ 2007 C 303]**

The right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the European Union (cf. also the legal base in Article 21; and the judgment of the Court of Justice of 17 September 2002, Case C-413/99 *Baumbast* [2002] ECR I-7091). In accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties.

Paragraph 2 refers to the power granted to the Union by Articles 77, 78 and 79 of the Treaty on the Functioning of the European Union. Consequently, the granting of this right depends on the institutions exercising that power.

**Selected Bibliography**

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## A. Field of Application of Article 45

Title V of the Charter, by and large, reproduces provisions of the TEU/TFEU. For this reason, it has been criticised in that its provisions appear, at least at first sight, to be redundant. This is especially the case in relation to Article 45 Charter which, as other provisions in the same title, is addressed only to citizens (para 1), or provides no substantive right (para 2). Its first paragraph reproduces Article 20(2)(a)TFEU,

providing a right to move and reside for Union citizens; pursuant to Article 52(2) Charter any TFEU/TEU Treaty derived right must be exercised 'under the conditions and within the limits' defined by the relevant Treaty itself, hence excluding, bar some very creative interpretation, any autonomous life for Treaty derived Charter rights.

Article 45(2), on the other hand, seems tautological: given that the Charter does not modify, or affect, the repartition of competences between Member States and Union,[1] the fact that the Charter provides that a competence conferred by the Treaties on the Union 'may be' exercised appears to add very little to the status quo.

Be as it may, this is not to deny the absolute centrality of the free movement rights for the European integration project, both the most tangible and the most successful rights conferred by the Treaty (and now also by the Charter) on individuals. Furthermore, it is the exercise of these rights that might act as a trigger for the enjoyment of Union fundamental rights,[2] whether as general principles or as Charter rights. And the very inclusion of EU Citizens' rights in the Charter confirms the gradual shift, first rendered explicit in the Maastricht Treaty with the creation of Union citizenship, from the internal market to a more citizen-focused European Union.[3]

### B. Interrelationship of Article 45 with other provisions of the Charter

The impact of Article 45 Charter appears to be very limited: first of all, only Article 45 (1) is justiciable; secondly, given that it reproduces a Treaty right, it just reinforces existing obligations already binding both on the European Union institutions; and on the Member States. Indeed, the Treaty right is more wide-ranging than the Charter equivalent since it is a free standing right, i.e. it can be exercised autonomously without the need to establish any other link with EU law (as it is the case for Charter rights). In fact, it is through the exercise of the Treaty free movement provisions that citizens might establish a link with EU law that allows them to claim a Charter right.[4]

The Charter provisions most relevant to Article 45 are Articles 15 and 21. In particular, Article 15(2) Charter provides for the right of Union citizens to seek employment or/and work as employed or self-employed in any of the Member States. Article 21(2) Charter, on the other hand, reproduces the prohibition of discrimination on grounds of nationality within the scope of application of the Treaties. As we shall see in more detail below, the rights granted by Article 45 Charter encompass also the right to move in order to seek or take up employment/self-employed activity; and, one

[1] See Art 6 TEU and Article 51(2) Charter.

[2] EU Fundamental rights, and now the Charter, apply to national rules only insofar as the Member State is implementing EU law, or acting within its scope. The latter situation arises when an act of the State is derogating or limiting one of the rights of free movement (see e.g. Case C-260/89 *ERT* ECR I-2925; Case C-36/02 *Omega* [2004] ECR I-9709). Hence, the free movement rights have also been used with the sole aim of enforcing fundamental rights claim against the Member States, see e.g. Case C-60/00 *Carpenter* [2002] ECR I-6279.

[3] See also G De Bùrca "Human Rights: the Charter and Beyond" Jean Monnet Working Papers, 2001, http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/013601.html.

[4] Following the proclamation of the Charter there were some doubts whether its provisions applied to Member States only when they *implemented* EU law (as the text of Art 51 seems to suggest) or also when they *act within the scope* of EU law, as the Court's case law and logic would demand. The explanations to Article 51 also indicated the latter as the correct interpretation; this has now been confirmed by the Court, see e.g. Case C-256/11 *Dereci*, judgment of 15 November 2011, nyr.

of the most tangible benefits arising from the right to move is the ability to claim, (though not necessarily to obtain), equal treatment in relation to almost all matters, including social security and welfare provision.

On the other hand, Article 52 (2) Charter limits the possibility for an autonomous 'life' of Article 45; the former provision states that Treaty derived rights 'shall be exercised under the conditions and within the limits defined by those Treaties'. As we shall see in more detail below, those limits include both the limitations contained in the Treaty itself; and the limitations contained in secondary legislation, and especially in Directive 2004/38.[5] Article 52(1) Charter, the general derogation clause, provides that all limitations to Charter rights must meet the necessity and proportionality requirements. In relation to the free movement provisions, the same requirements have long been established through the case law of the Court of Justice.[6]

### C. Sources of Article 45 Rights

As mentioned above, and as clarified in the explanations, Article 45(1) Charter reproduces verbatim Article 20(2)(a) TFEU. The right to move and reside within the territory of the Member States was first introduced by the Maastricht Treaty, before then movement being a prerogative of those economically active.[7] As we shall see in more detail below, the right to move and reside in Member States is qualified in Article 21 TFEU, which refers to 'limitations and conditions laid down in the Treaty and by the measures adopted to give them effect'. The most relevant 'limitations and conditions' are those contained in Directive 2004/38, which are the focus of detailed examination further below. Movement rights can also be limited for reasons of public health, public security and public policy.[8]

Article 45 (2) refers to the power granted to the Union by Title V (Part III) of the TFEU in relation to migration and movement of third country nationals. It should be recalled that the United Kingdom and Ireland – unless they make an ad hoc decision to the contrary – and Denmark do not take part in those measures.[9] Consequently, even should Article 45(2) Charter be found to be more than merely declaratory, its application would be confined to the EU institutions and to those Member States participating to the adoption of the above mentioned measures.

### D. Analysis

[5] 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 [2004] OJ L 229/35, (hereinafter Directive 2004/38).
[6] See in relation to citizenship residency rights, e.g. Case C-413/99 *Baumbast and R* [2002] ECR I-7091.
[7] It should be noted that 'passive economic actors', i.e. those whose economic link consists in parting with money, and in particular tourists, were afforded some protection by Article 56 TFEU which extended to service recipients following the ruling in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377; for tourists see e.g. Case 186/87 *Cowan* [1989] ECR 195; Case C-45/93 *Commission v Spain* [1994] ECR I-911. Even following the introduction of Union Citizenship, the Court relied on Article 56 TFEU in order to establish a link with the Treaty and afford equal treatment in relation to court proceedings in Case C-274/96 *H O Bickel and V Franz* [1998] ECR I-1121.
[8] See Directive 2004/38 as well as Articles 45(3) and 52(1) TFEU.
[9] See Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom security and justice; and Protocol 22 on the position of Denmark .

## I. *General Remarks*

The significance of Article 45 seems to be rather limited since the Charter applies only to the EU Institutions and to the Member States when they are implementing Union law. As a result, Article 45 could be relevant in the review of acts of the EU institutions, but since the latter are in any event bound by the Treaty, and since Treaty provisions are lex specialis, it is very unlikely that challenges to the legality of EU acts would be based on the Charter rather than the TFEU. The same can be said in relation to Member States implementing Union law. For the rest, the Charter does not grant free standing rights; rather the enjoyment of those rights is conditional upon the individual having established a link with Union law, link which is most commonly created through the exercise of one of the free movement or citizenship rights contained in the TFEU. It is hence very difficult to foresee circumstances where Article 45 Charter could be usefully relied upon by individuals.

## II. *Scope of Application – Article 45 (1)*

The free movement rights contained in Article 45 Charter are dependent upon possession of Union citizenship; this in turn is, for the time being, conditional upon possession of the nationality of one of the Member States. Consistently, the Court has clarified that it is for national law alone to determine who is a citizen;[10] more controversially, the Court has also held that the withdrawal of national citizenship might fall within the scope of Union law, and hence be subjected to scrutiny in relation to proportionality and fundamental rights, if it entails the loss of Union citizenship status, i.e. when the individual does not possess citizenship of another EU Member State.[11]

The right to move and reside within the EU is subject to the requirements contained in the Treaty and in secondary legislation, especially the conditions now detailed in Directive 2004/38. When approaching the analysis of the free movement rights a caveat is necessary: those rights are conferred to Union citizens directly by the Treaty (and now by the Charter); this means that any limitation or condition imposed on the exercise or enjoyment of those rights by either the Member States or the Union legislature must be necessary and proportionate;[12] and must not deprive the movement/residence rights of their substance.[13]

## III. *Right to move, right to enter and right to exit*

[10] And it is for national law alone to determine who is a citizen, Case C-369/90 *Micheletti* [1992] ECR I-4239; Case C-192/99 *R v SofS for the Home Department Ex p. Kaur* [2001] ECR I-1237; C-200/02 *Chen v SofS for the Home Department* [2004] ECR I-9925.

[11] Case C-135/08 *Rottmann* [2010] ECR I-1449; on the broader constitutional significance of the *Rottmann* decision see 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; and T Konstadines "La Fraternité Européenne? The extent of national competence to condition the acquisition and loss of nationality from the perspective of EU citizenship" (2010) 35 ELRev 401.

[12] E.g. Case C-413/99 *Baumbast and R* [2002] ECR I-7091; see also below section IV (b).

[13] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

All Union citizens have a right to move freely across the territory of the Union, upon production of a valid document.[14] No exit/entry visas or similar can be imposed on Union citizens; visas might be imposed on third country national family members, although those are obtained as a matter of right and not as a matter of discretion.[15] The only reasons why Member States might limit the right of Union citizens and their family members to exit/enter their territory are those listed in the Treaty and detailed in Directive 2004/38: public policy, public security and public health. The latter can be used to justify a limit to movement only in the first three months of residence and solely for infectious diseases listed by the World Health Organisation.[16] As we shall see in more detail below, public policy and public security are also narrowly construed.[17] Furthermore, limits to the right to move must always satisfy the proportionality test so that the longer the stay of the Union citizen in the host country the more difficult it is for the Member State to deport them.[18]

It should be noted that Directive 2004/38 applies only to Union citizens who "move to or reside in a Member State other than that of which they are national',[19] so that actions against the citizen's own Member State continue to be covered exclusively by the TFEU.[20] The issue of whether the Treaty provisions, and the Charter by implication, might be invoked lacking the cross-border element, i.e. in purely internal situations, is an open one.[21]

## IV. *Right to reside*

The Union citizen's right to reside 'freely' within the territory of the Member States is heavily qualified: following the introduction of Directive 2004/38 there are three

[14] See generally Chapter II Directive 2004/38. Failure to produce a document is not in itself a sufficient reason for the Member State to deny admission; rather the national authorities have to give the Union citizen (and her family member) reasonable time to prove identity (or family ties); see Article 5(4) Directive 2004/38 and Case C-459/99 *MRAX* [2002] ECR I-6591.

[15] It should be noted that Directive 2004/38 grants rights to residence and equal treatment also to third country national family members, as listed in article in Article 2(2) Directive 2004/38; however, the scope of application of Article 45 (1) Charter is more limited as it applies only to Union citizens.

[16] See Article 29 Directive 2004/38.

[17] See Arts 27 and ff Directive 2004/38; but recently CJ EU has been more lenient in accepting deportation for public policy/security reasons; see below footnote 62.

[18] See Art 28 Directive 2004/38 which also provides a different regime for permanent residents, who can be expelled only on 'serious' grounds of public policy and security; and for Union citizens who have stayed in the host country longer than 10 years, who can only be expelled on 'imperative' grounds of public policy and security. Surprisingly, the Court has interpreted those conditions less strictly than previous case law might have suggested, see e.g. Case C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid*, judgment of 22 May 2012, nyr.

[19] Article 3(1) Directive 2004/38.

[20] Cf also Case 175/78 *R v Saunders* [1979] ECR 1129;

[21] See e.g. E Spaventa "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects" (2008) CMLRev 13; C Dautricourt and S Thomas "Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?" (2009) 34 ELRev 433; A Lansbergen and N Miller "European citizenship rights in internal situations: an ambiguous revolution? Decision of 8 March 2011, Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)" (2011) 7 ECL Rev 287; P. Van Elsuwege "European Union Citizenship and the Purely Internal Rule Revisited: Decision of 5 May 2011, Case C-434/09 Shirley McCarthy v. Secretary of State for the Home Department" (2011) 7 ECL Rev 308.

different types of residence rights, which very much depend on duration of stay.[22] The only truly 'free' right to reside is that of short term visitors,[23] i.e. Union citizens that travel to another Member State for a period of less than three months (which accounts for the great majority of movement within the Union).[24] In this case, no condition can be imposed on visitors and they enjoy a qualified right to equal treatment, which excludes them from entitlement to social assistance.[25] Furthermore, the right to stay of short term visitors can be terminated if they become an unreasonable burden on the social assistance system of the host Member State.[26]

Union citizens wishing to move and reside in another Member State for more than 3 months have to satisfy given requirements: either (a) they must be economically active; or (b) they must be economically independent, i.e. possess sufficient resources and comprehensive health insurance so as not to become an unreasonable burden on the host welfare system. After 5 years of lawful residence,[27] Union citizens gain a right to permanent residence which is unconditional (i.e. no requirement to be satisfied) and entitles them to a full right to equal treatment.[28]

### a) Economically active migrants

Union Citizens who move in order to seek or exercise an economic activity as employed or self-employed enjoy an unconditional right to move and reside in any of the Member States,[29] coupled with a full right to equal treatment.[30] The rights for economically active migrants were included in the Treaty from its inception, being at the core of the European integration project, and were supplemented by generous

[22] This has been very appropriately termed 'incremental approach' to citizenship rights by C Barnard, "EU Citizenship and the Principle of Solidarity", in M Dougan and E Spaventa (eds) *Social Welfare and EU Law* (Hart Publishing, 2005), p 157, at 166.
[23] Article 6 Directive 2004/38.
[24] For statistical data see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Tourism_trends, for tourism; and compare with data on internal migration available on http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics; last accessed 15th February 2013.
[25] See Article 24(2) Directive 2004/38; social assistance has been interpreted very narrowly in the context of work seekers, see Joined Cases C-22 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, although it is doubtful whether that interpretation would extent to visitors who have no link with the employment market.
[26] Article 14(1) Directive 2004/38; however pursuant to paragraph 3 of the same article, expulsion can never be the automatic consequence of recourse to social assistance.
[27] The Court has clarified that lawful residence before accession of the Union Citizen's home State to the EU might be taken into account towards the 5 years provided the conditions contained in the Directive were satisfied during the (prior) stay; see e.g. Case C-424 and 425/10 *Ziolkowski et al*, judgment of 21 December 2011, nyr; Joined Cases C-147 and 148/11 *Czop and Punakova*, judgment of 6 September 2012, nyr. The same reasoning applies to periods of residence accrued before the deadline for transposition of Directive 2004/38 expired (30 April 2006), see case C-162/09 *Lassal* [2010] ECR 9217.
[28] See Art 24 Directive 2004/38.
[29] They are also protected upon returning to their home country, e.g. Case C-370/90 *Singh* [1992] ECR I-4265, and see below section V.
[30] In relation to work seekers those rights are somehow more limited; if the work seeker has not secured a job within 3months of arrival they might be asked to prove that they are still looking for, and have a genuine chance of finding, employment (Article 14(4)b). As mentioned above work seekers do not enjoy a full right of equal treatment, see Article 24(2) Directive 2004/38.

provisions contained in secondary legislation.[31] The free movement rights were innovative and ambitious for their time, granting an unqualified right to work in any of the Member States without being discriminated on grounds of nationality and without having to satisfy any immigration requirement (including work permits of any sort);[32] the right to access social assistance and welfare provision in the host-State on equal basis to own nationals;[33] and granting extensive rights to migrants' family members, including educational rights for their children.[34] Furthermore, and in keeping with its teleological interpretation of the Treaty, the Court of Justice, from the very beginning, gave a broad interpretation to the personal and material scope of those rights. For instance, in order to be protected by the free movement of workers, freedom of establishment or free movement of services provisions, the Union citizens must perform (or receive) services for remuneration, since an 'economic' element is a precondition for the enjoyment of those rights. However, the Court was satisfied that whilst an element of remuneration is always necessary in order to be qualified as worker or self-employed, this might take the form of remuneration in kind (e.g. board and lodging) rather than be limited to monetary compensation.[35] Similarly, whilst in order to be covered by the Treaty a service needs to be an 'economic service', i.e. a service provided for remuneration, it is immaterial whether the remuneration is paid by the recipient or by a third party. What matters is that someone at some stage has paid for it.[36] The *quantum* of remuneration is also irrelevant, provided that the economic activity is genuine and not marginal or ancillary. For this reason, part-time workers, even when working only a few hours a week, are included in the notion of 'worker',[37] and as such have access to all welfare benefits on equal grounds to own-citizens. This means, of course, that the host welfare system can be relied upon by

[31] E.g. Directive 64/221on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health[1964] OJ Sp ed 117; Regulation 1612/68 on the freedom of movement of workers within the Community [1968(1)] OJ Sp ed 475; Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968(I)] OJ Sp Ed 485; Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14. All of the above legislation but for Regulation 1612/68 has been repealed by Directive 2004/38.

[32] Originally Arts 48, 52 and 59 EEC, Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [1968(I)] OJ Sp Ed 485; Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14.

[33] Art 7 (2) Reg 1612/68.

[34] See art 12 Reg 1612/68; this has been generously interpreted so that a parent no longer working can gain a right to reside as a result of their children's right to continue education in the host Member State, eg Case C-310/08 *Ibrahim* [2010] ECR I-1065; Case C-480/08 *Texeira* [2010] ECR I-1107; Joined Cases C-147 and 148/11 *Czop* and *Punakova*, judgment of 6 September 2012, nyr, which also clarified that the same reasoning does not apply if the parent is/was self-employed.

[35] Case 196/87 *Steymann* [1988] ECR 6159;

[36] Case 352/85 *Bond van Adverteerders* [1988] ECR 2085;on the other hand if the economic element is lacking, the Treaty free movement of service provisions do not apply; see Case C-159/90 *Grogan* [1991] ECR I-4685. This is also true in relation to the resources necessary to gain a right to reside in relation to economically inactive people: there the Court has held that such resources can be provided by a third party dismissing the Member State's objection that that would leave the Union citizen (and hence the host-State) more vulnerable to a change in circumstance; see Case C-408/03 *Commission v Belgium* (citizenship) [2006] ECR I-2647; and also Case C-200/02 *Chen and others* [2004] ECR I-9925.

[37] E.g. Case 53/81 *Levin* [1982] ECR 1035; Case 139/85, *Kempf* [1986] ECR 1741.

those workers who earn less than the minimum wage/threshold and who would then qualify for means tested benefits.

As mentioned above, an economic migrant benefits from a full right to equal treatment in relation to all matters covered by the Treaty; this right not to be discriminated on grounds of nationality has been interpreted broadly, to encompass both discrimination in law (direct discrimination) and in fact (indirect discrimination). In particular, the latter concept has been pivotal to eradicate barriers resulting from long standing regulatory habits, and the Court has made clear that neither intention, nor statistical information are relevant for a finding of indirect discrimination. Rather, it held that "conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (…) or the great majority of those affected are migrant workers (…), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (…) or where there is a risk that they may operate to the particular detriment of migrant workers".[38] The right not to be discriminated against encompasses also the right to equal treatment in relation to welfare benefits and social assistance, so that any benefit payable by virtue of an individual's status as a worker or residence on national territory, where the extension of the benefit to nationals of other Member States might facilitate free movement of workers protection, is also available to economic migrants. [39] Furthermore, the Court also included, at least to a certain extent, work-seekers in the notion of 'worker', to ensure that work-seekers would benefit from the right to move to another Member State in order to seek employment.[40] This case law has now been codified in Directive 2004/38 so that those looking for a job can move without having to satisfy any additional requirement; and can stay beyond the initial three months provided they continue to seek employment and have a genuine chance of being engaged.[41] Pursuant to Article 24(2) Directive 2004/38, Member States are not obliged to confer entitlement to social assistance to work seekers; however, the Court has interpreted this exception narrowly and held that a benefit aimed at facilitating access to the employment market is not caught by the exclusion contained in Article 24(2) Directive 2004/38.[42]

If economically active migrants have always enjoyed protection in EU law, the situation is different for non-economically active citizens; as mentioned above, their Treaty status is of more recent derivation, and their rights are the result of an extensive hermeneutic effort by the Court. Whilst, at first, Member States appeared rather suspicious of this expansive jurisprudential interpretation, some even questioning whether the citizenship provisions introduced by the Maastricht Treaty

[38] See for a comprehensive definition of the right not to be discriminated on grounds of nationality Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617, para 18.
[39] The Court held that Article 7(2) Reg 1612/68; Case 207/78 *Even* [1979] ECR 2019. In Case 59/85 *Reed* [1986] ECR 1283, the Court interpreted the concept of equal treatment in social advantages encompasses equal treatment in relation to residency rights of one's partner/spouse.
[40] See Case 316/85 *Lebon* [1987] ECR 2811, which held that work seekers did not enjoy a right to equal treatment in relation to social advantages; the case law then developed in light of the introduction of Union citizenship in Case C-138/02 *Collins* [2004] ECR I-2703, see generally M Dougan 'Free Movement: the Workseeker as a Citizen' (2001) 4 CYELS 94.
[41] Cf Article 14(4)b Directive 2004/38.
[42] C-22/08 *Vatsouras* [2009] ECR I-4585.

bestowed any new rights at all,[43] slowly the case law came to be accepted and was eventually codified in its entirety in Directive 2004/38. We will limit our analysis to the residence rights of non-economically active citizens; when considering the limitations and conditions imposed on movement for this class of citizens, it should be remembered that the legislature and the Court are attempting to strike a difficult balance: on the one hand, the introduction of Union citizenship was the result of a new stage in integration where the European project emancipated itself, at least partially, from its predominant (if not exclusive) economic roots. On the other hand, the ambitions of citizenship have to be reconciled with the reality of the nation state, and especially of welfare provision still divided across national lines.[44] The result is a compromise between rhetoric and reality, so that whilst important progress has been made (not least the Charter), rights in European law are still conditional upon the satisfaction of a multiplicity of requirements which, inevitably, privilege certain categories of people (able and/or wealthy migrants) over others (static citizens; disabled, elderly and less economically solvent individuals).[45]

### b) Economically inactive citizens: Union citizenship in the case law of the Court

In order to understand the rights of non-economically active citizens, it is necessary to briefly recall the development of such rights in the case law of the Court since, as mentioned above, it is this case law that provided the basis for codification in Directive 2004/38; and it is this case law which still informs the latter's interpretation.[46]

At the time when the Maastricht Treaty was adopted, non-economically active Union citizens derived their rights of residence from three residency directives which subjected the right to reside upon the possession of sufficient resources and comprehensive health insurance, so that the migrant Union citizen would not become an 'unreasonable burden' on the public finances of the host Member State.[47] Since Article 21 TFEU (and Article 8a Maastricht Treaty before then) explicitly subjects the

[43] See e.g. the submissions of the French and British Governments in Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, as summarised by AG La Pergola esp at paras 15 and ff.

[44] On Union citizenship and welfare provision see e.g. M Dougan and E Spaventa (eds) *Social Welfare and EU Law* (Hart Publishing Oxford 2005) and G de Búrca (ed) *EU Law and the Welfare State. In Search of Solidarity* (OUP Oxford 2005); U Neergaard, R Nielsen and L M Roseberry (eds) *The Role of Courts in Developing a European Social Model: Theoretical and Methodological Perspectives* (2010 Copenhagen DOJ publishing); M Ross and Y Borgmann-Prebil (eds) *Promoting Solidarity in the European Union* (OUP 2010); R C A White "Social Solidarity and Social Security" in A Arnull, C Barnard, M Dougan and E Spaventa (eds) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), 301.

[45] On these issues see also M Ross "The Struggle for EU Citizenship: Why Solidarity Matters" in A Arnull, C Barnard, M Dougan and E Spaventa (eds) *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011), 283; and more generally N Nic Shuibhne "The Resiliance of EU Market Citizenship" (2010) 47 CMLRev 1597.

[46] On the complex interaction between Treaty free movement provisions and secondary legislation see e.g. K Engsig Sorensen "Reconciling secondary legislation with the Treaty rights of free movement" (2011) 36 ELRev 339.

[47] Directive 90/364 on a general right to residence [1990] O.J. L180/26 (hereinafter Directive 90/364); Directive 90/365 on retired persons [1990] O.J. L180/28 (hereinafter Directive 90/365); Directive 93/96 on students [1993] O.J. L317/59 (hereinafter Directive 93/96); as said above tourists were (and are) also protected under the provisions relating to the free movement of services; see above footnote 7.

right of residence and movement to the limitations and conditions contained therein and in secondary legislation, most Member States believed that the citizenship movement and residence rights introduced in the Treaty were not innovative,[48] rather codifying at Treaty level free movement rights already contained in secondary legislation.[49]

The Court, however, followed a different path, and in a series of judgments found that the right to move enshrined in Article 21 TFEU was capable of triggering the right to equal treatment (also in relation to welfare benefits).[50] Finally, in the case of *Baumbast*,[51] the Court also recognised that the citizenship provisions bestowed upon Union citizens a directly effective right of residence in other Member States. This right could legitimately be subjected to limitations and conditions contained in secondary legislation, amongst which the requirements of economic self-sufficiency and comprehensive health insurance. However, given 'the fundamental status' of Union citizenship, the Member States had to apply those conditions having due regard to the principle of proportionality and fundamental rights. In this way, the Court sought to balance the ambitions of supranational citizenship with the budgetary reality of welfare states funded by national communities. As a result, several elements must be taken into account to determine the actual 'quantum' of rights of the individual migrant: the link with the host community;[52] the nature (economic or not) of the request;[53] and ultimately whether the migrant is a 'deserving' one, whether her requests are reasonable and in good faith, or rather an attempt to engage in welfare tourism.[54]

It is open to debate whether this rather Victorian approach to citizenship entitlement, which juxtaposes the 'deserving' to the 'undeserving' citizen, often merely on grounds of wealth, is to be welcomed; or whether it further promotes integration as an essentially elitist project. Be as it may, the compromise made by the Court is fully incorporated in the provisions of Directive 2004/38, which repealed most of the relevant pre-existing secondary legislation.

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[48] See submissions of the French and British Governments in Case C-85/96 *Martínez Sala* [1998] ECR I-2691, as summarised by AG La Pergola esp at paras 15 and ff.

[49] On the other hand, the scholarship had already identified in the free movement of workers provisions (pre Maastricht) the nucleus of an incipient European citizenship, see e.g. E. Meehan *Citizenship and the European Community* (Sage Publications, 1993); D O'Keeffe "Union Citizenship" in D O'Keeffe and PM Twomey (eds) *Legal Issues of the Maastricht Treaty* (Chancery Law London 1994), ch 6.

[50] Case C-85/96 *Martínez Sala* [1998] ECR I-2691, and see S O'Leary "Putting flesh on the bones of European Union citizenhip" (1999) 24 ELRev 68; Case C-184/99 *R Grzelczyk* [2001] ECR I-6193 ; Case C-224/98 *D'Hoop* [2002] ECR I-6191.

[51] Case C-413/99 *Baumbast and R* [2002] ECR I-7091, and see M Dougan and E Spaventa "Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article18 EC" (2003) 28 ELRev 699.

[52] E.g. C-138/02 *Collins* [2004] ECR I-2703; Case C-209/03 *Bidar* [2005] ECR I-2119; on the notion of real link see C O'Brien "Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity" (2008) 33 ELRev 643.

[53] E.g. Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

[54] This said, the Court has taken a slightly stricter, and perhaps surprising, approach in Case C-158/07 *Förster* [2008] ECR I-8507, noted O Golynker (2009) 46 CMLRev 2021; S O'Leary 'Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance' (2009) 34 ELRev 612.

*i) The right to reside and the right to equal treatment of economically inactive citizens*

As said above, pursuant to the provisions of Directive 2004/38 economically inactive citizens have a qualified right to reside in a Member State other than that of their nationality. [55] If a citizen meets the requirements of sufficient resources and comprehensive health insurance, the right to reside is automatic, and can only be refused on public health, public policy or public security grounds. However, if the citizen does not satisfy *all* of the requirements provided for by the Directive, they might be able to claim a right to reside in another Member State pursuant to the Treaty provisions (Articles 20 and 21 TFEU, reproduced in the Charter); whether, in practice, they will be successful in their claim will depend on the actual circumstances of the case, and in particular on the application of the principle of proportionality and of fundamental rights. Thus, it might be disproportionate to deny the right to reside to a Union citizen who has already established a link with the host territory by virtue of having lived there for a certain period of time; who has family ties in the host-territory; who has never relied on the host State welfare provision; and who fails to satisfy the requirements contained in the Directive only by a small margin (see by analogy the ruling in *Baumbast*).[56] On the other hand, claiming a Treaty right to reside might be considerably more difficult for a person who has no resources at all; a more tenuous link with the host-State; and who finds herself in rather more difficult circumstances (see by analogy ruling in *Trojani*).[57]

Once a Union citizen is lawfully resident in another Member State, they have a right not to be discriminated against on grounds of nationality, pursuant to Article 18 TFEU[58] and Article 24(1) Directive 2004/38. However, whilst economically active Union citizens, together with those who have acquired the right to permanent residency,[59] enjoy a full right to equal treatment, economically inactive Union citizens have more limited rights, so as to shelter national welfare budgets from welfare tourism. For this reason Member States might legitimately deny entitlement to social assistance and maintenance aid for students to economically inactive Union citizens.[60] And yet, this does not mean that a lawfully resident citizen can *never* get relief from the host-State; Article 14 of Directive 2004/38 codifies the principle of proportionality as developed in the case law so as to clarify that recourse to social assistance cannot automatically lead to expulsion.

A Union citizen (whether or not economically active) who is lawfully resident in the host State can be deported only for reasons of public policy and public security;[61]

[55] Following the ruling in Case C-148/02 *Garcia Avello* [2003] ECR I-11635, it was thought that dual nationality might also allow claimants to rely on Union citizenship against one of their Member State of nationality; however in Case C434/09 *McCarthy* [2011] ECR I-0000, the Court seems to at least considerably limit (if not altogether exclude) the relevance of dual nationality for claiming rights against one of the Member States of nationality in case of dual nationality.
[56] Case C-413/99 *Baumbast and R* [2002] ECR I-7091.
[57] Case C-456/02 *Trojani* [2004] ECR I-7574.
[58] Reproduced in Article 21(2) Charter.
[59] This is acquired after 5 years of lawful residency; see generally Chapter IV Directive 2004/38.
[60] Article 24(2) Directive 2004/38.
[61] As mentioned above, Member States can also rely on the public health derogation in relation to restriction to entrance and in the first three months of stay of the Union citizen; however, after that

those being derogations from a fundamental Treaty right are interpreted narrowly and are subject to the principle of proportionality.[62] Furthermore, public policy and security can only be invoked in relation to the personal conduct of the individual, so that reasons of general prevention[63] cannot be used to justify an expulsion measure.[64] And, the offending personal conduct must represent 'a genuine, present and sufficient threat affecting one of the *fundamental* interests of society'.[65] This means that not only it is difficult for Member States to rely on the derogations unless the conduct in question is also sanctioned when performed by nationals,[66] but also that not all criminally sanctioned behaviour can give rise to a deportation order. Hence, expulsion can never be the automatic consequence of a custodial sentence[67] and can never be permanent.[68]
When considering an expulsion measure, Member States are under a Union law obligation to respect the citizen's fundamental rights and to comply with minimum procedural safeguards.[69]

## V. *The right to move and claims against the Member State of origin*

As mentioned above, the rights detailed in Directive 2004/38 apply only against a Member State different from that of nationality. However, the Treaty free movement rights, and by implication Article 45(1) Charter, can also be relied upon in order to challenge barriers to movement imposed by the Member State of origin. This had already been established, to a certain extent, in pre-citizenship case law: thus, Member States have never been allowed to impose restrictions on the economic migrant's right to leave their own territory.[70] Furthermore, the Court also held that Member States could not penalise own migrant citizens upon return to their home country;[71] and that, in certain circumstances, own citizens should be equated to Union migrants so as to enjoy Union derived rights.[72] The same principles apply also post-citizenship, so that a Member State cannot penalise its own citizens for having moved abroad.[73] However, the broadening of the scope of the Treaty as a result of the weakening of the economic link required in order to benefit from rights in Union law, also determined a much wider range of situations in which Union citizens might face (and challenge) a barrier to movement imposed by their own Member State.

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initial period Member States can no longer rely on reasons of public health to exclude an individual from their territory since either the illness would have been contracted in the host territory; or it would have had already the time to spread. Member States can also rely on the derogations to justify imposing a prohibition on leaving the national territory, although that is a more rare occurrence; see recently Case C-249/11 *Byankov*, judgment of 4 October 2012, nyr; Case C-434/10 *Aladzhov*, judgment of 17 November 2011, nyr; Case C-430/10 *Gaydarov*, judgment of 17 Novembner 2011, nyr.

[62] See Arts 27 and 28 Directive 2004/38 codifying pre-existing case law. Rather surprisingly, in recent years the Court seems to have taken a broader view of the reasons which might justify expulsion; see e.g. Case C-348/09 *P.I.*, judgment of 22 May 2012, nyr.

[63] In French *ordre public* which is a narrower concept than public policy.

[64] See Art 27(2) Dir 2004/38, and Case 67/74 *Bonsignore* [1975] ECR 297.

[65] Art 27(2) and before Case 30/77 *R v Bouchereau* [1978] ECR 1999.

[66] joined Cases 115 & 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665.

[67] Art 33 Dir 2004/38 and Case 30/77 *R v Bouchereau* [1978] ECR 1999.

[68] Art 32 Dir 2004/38 and Case C-348/96 *Calfa* [1999] ECR I-11.

[69] See Art 30 and ff Directive 2004/38.

[70] Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377;

[71] Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-517.

[72] Case C-370/90 *Singh* [1992] ECR I-4265.

[73] Case C-224/98 *D'Hoop* [2002] ECR I-6191.

For instance, following the introduction of Union citizenship, any residence requirement imposed on benefit claimants now needs to be justified since, by definition, a residence requirement is a barrier to movement.[74] Thus, in *Pusa* a regime which took into account tax paid on a pension in the country of origin but not tax paid in the (new) country of residence was found by the Court to be incompatible with Article 21 TFEU.[75] In *Nerkowska* the payment of a pension granted to civilian war victims was made conditional upon residence in the national territory; the Court found that there was no justification for such a requirement which hence was incompatible with Article 21 TFEU.[76] On the other hand, in *De Cuyper* the Court accepted that a residence condition imposed on recipients of unemployment benefits was justified by the need to monitor compliance with the statutory requirements upon which the benefit was dependent.[77] As a result of Union citizenship, then, any residence requirement imposed by the Member State of origin must undergo the necessity and proportionality test;[78] this is not to say, however, that the Court is blind to the needs of Member States: hence if the benefit is conditional upon continued assessment of entitlement then it is fairly easy for the residence requirement to be justified.

The potential to challenge rules of the Member State of origin does not exhaust itself to residence requirements since the Court has construed the scope of the Treaty citizenship provisions in a very broad way. In the case of *Garcia Avello*,[79] the claimants complained about Belgian rules on surnames which prevented children having dual Belgian and Spanish nationality to be registered in Belgium according to the Spanish custom of including both the father's and the mother's surname. The Belgian Government argued that the situation lacked an intra-Union link, since the case involved Belgian nationals complaining about Belgian rules, and that therefore the Treaty did not apply (the children not having yet moved). The Court found that dual nationality alone was sufficient to bring the case within the scope of the Treaty and that Belgian rules breached the principle of non-discrimination by treating citizens with dual nationality in the same way as Belgian only nationals. And that the rules could result in a barrier to movement since the children in question *might* at a certain stage want to go to Spain where they *might* want to use their Spanish surname, in which case having certificates and documents under the different Belgian surname would have been inconvenient.[80]

The case law on barriers imposed by one's own Member State is possibly that which most radically broadens the scope of the Treaty, not least since it contributes to further blurring the distinction between areas of national competence and Union law. As a result there is no possibility for Member States to erect a fence to protect their own national sovereignty and any rule, whatever the subject matter, might fall within

[74] Consistent case law in relation to the Treaty free movement provisions has found that a residence requirement is automatically indirectly discriminatory since more likely to be satisfied by own nationals than by non nationals; see e.g. Case 33/74 *Van Binsbergen* [1974] ECR 1299.
[75] Case C-224/02 *Pusa* [2004] ECR I-5774.
[76] Case C-499/06 *Nerkowska* [2008] ECR I-4004.
[77] Case C-406/04 *De Cuyper* [2006] ECR I-6971.
[78] On these issues see G Davies "'Any place I hung my hat?' or: Residence is the new Nationality" (2005) 43 ELJ 11.
[79] Case C-148/02 *Garcia Avello* [2003] ECR I-11635, see also Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.
[80] In Case C-434/09 *McCarthy* [2011] ECR I-0000, the Court seems to limit considerably the scope of *Garcia Avello*.

the scope of the Treaty if it affects in any way the rights of Union citizens to move and/or exercise their citizenship rights.[81]

The expansion of the scope of the Treaty as a result of the introduction of the citizenship provisions, and the consequent blurring of a neat distinction between spheres of influence / competence (if ever there was one), led to questions as to whether there was still scope for the purely internal situation rule, according to which the Treaty free movement provisions, including citizenship, can only apply when there is a intra-European link.[82] This question is of paramount constitutional importance for pragmatic and constitutional reasons alike: factually, it affects the extent to which individuals might by-pass their own constitutional processes in order to seek judicial review of legislation in relation to proportionality (and fundamental rights); constitutionally, it might highlight a further evolution in the European integration process towards a more mature, and more intrusive, constitutional system where citizens are right holders regardless of their status as migrants. Furthermore, and particularly relevant in this context, once a situation falls within the scope of the Treaty, the Charter applies, at least to a certain extent. Hence, the broader the scope of EU law, the more union citizens will be able to claim Charter rights.

## VI. *Nature of Charter rights – and purely internal situations*

The analysis carried out above focussed on the Court's interpretation, and the legislative elaboration, of the Treaty rights which are reproduced in the Charter. However, and as mentioned earlier, it should be remembered that differently from Treaty rights, Charter rights are not free standing. In other words, in order to rely on a Charter right a claimant must have already brought themselves within the scope of the Treaty or of Union law. In the former case, the claimant would rely directly on the Treaty, since the Charter free movement right does not add (or subtract) anything from the Treaty provision it reproduces. However, it might be wondered whether there is space for an autonomous role of Article 45 (1) Charter in those cases in which the Member State is implementing Union law; or when the action is directed against a Union institution. It should be made clear from the inception that both situations are also covered by the Treaty: when a Member State is implementing Union law it has to exercise its discretion compatibly with the Treaty; and the same can be said about Union institutions. Rather, the issue is whether it could be argued that, differently from the Treaties, the Charter might also be relevant in purely internal situations since the cross-border rationale appears to be immaterial to Charter rights. So, take by means of example, the situation in which a Member State in implementing EU law imposes a residence requirement in a given municipal location in order to be eligible for a given benefit. It would be, at least theoretically, possible for an individual to claim that such a restriction is a breach of Article 45(1) without having to also establish an intra-Union link, i.e. the potential intention to move in another Member State. Since the Charter's aims are not the same as the Treaties' aims, restricting its field of application to cross-border situations might be considered inconsistent with

[81] Not relevant in this context since it relates to Article 20 TFEU as foundational of Union citizenship, is the case law which further blurs the distinction between purely internal situation and situation of Union relevance by limiting the ability of Member States to act in a way which might deprive Union citizens of the enjoyment of the substance of the rights attaching to Union citizenship, see Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177; and Case C-135/08 *Rottmann* [2010] ECR I-1449.

[82] Literature on purely internal

the idea of meaningful protection of citizens' (and not just migrants') rights. On the other hand, it could also be argued, and as mentioned at the beginning of this contribution, that Article 52(2) Charter constitutes an absolute bar to an autonomous life of Treaty derived rights. In any event, the circumstances in which such an autonomous interpretation would be of use are rather marginal.

### E. Article 45(2)

So far we have focussed on the right to move and reside enshrined in the first paragraph of article 45 Charter. This, as explained above, is confined to Union citizens. The second paragraph of the same article, on the other hand, is addressed to non-Union citizens and states that movement and residence rights *may* be granted in accordance to the Treaties to legally resident third country nationals. The reference to 'legal residence' as a pre-condition for enjoyment of rights makes this provision particularly relevant to those TCNs who have no family ties with migrant Union citizens. In the case of the latter, rights are derived from the Union citizen – in a way they are instrumental to maximising the citizen's enjoyment of their own right to move - and for this reason there is no lawful residence requirement.[83] On the other hand, Article 45(2) simply recalls the fact that, since the Treaty of Amsterdam, the Union might grant rights to move and reside to third country nationals.[84] Measures adopted in this context include for instance those giving effect to the Schengen area;[85] common immigration policy and the like. As mentioned in the introduction, this provision seems merely declaratory and not capable of independent application.

### F. Remedies

As discussed above, it is very unlikely that Article 45 would be of direct relevance to Union citizens since Article 45(2) seems not justiciable, whilst Article 45(1) merely reproduces existing Treaty provisions. Hence, the remedies available to individuals whose right to free movement has been breached would be those available in the case of breaches of Treaty provisions. As a result, should an institution have breached the free movement right, it would be liable for damages insofar as the provisions relating to the non contractual liability of the Union would be applicable.[86] In the case of a

[83] See Case C-127/08 *Metock* [2008] ECR I-6241.

[84] E.g. Directive 2003/109 concerning the status of third country nationals who are long term residents [2003] OJ L 16/44, amended by Directive 2011/51 [2011] L 132/1, consolidated version http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0109:20110520:EN:PDF; on barriers to movement in this context see Case C-508/10 *Commission v Netherlands*, judgment of 26 April 2012, nyr; Directive 2009/50 on the conditions of entry and residence for the purposes of highly qualified employment (Blue Card Directive) [2009] L 155/17; Directive 2004/114 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L 375/12; Directive 2005/71 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L 289/15. For a critique of the Union policy on free movement of TCNs see A Wiesbrock "Free movement of third-country nationals in the European Union: the illusion of inclusion" (2010) 35 ELRev 455.

[85] See e.g. Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (2006) OJ L 105/1.

[86] See generally A A Dashwood, M Dougan, B Roger, E Spaventa and D Wyatt *Wyatt and Dashwood's European Union Law* (6th edition, 2011, Hart Publishing), Chapter 6 section V.

breach caused by the Member State, *Francovich* damages would be available provided the criteria for Member State liability are satisfied.[87]

## G. **Evaluation**

Article 45 Charter is not set to be one of the 'revolutionary' provisions of the Charter and one might wonder whether it will ever be subjected to interpretation by the Court of Justice. The reasons for this are clear: the first paragraph of the Article reproduces verbatim one of the central provisions of the Treaty on the Functioning of the European Union. Given the subserviency of Charter rights to their original sources, and given that the Treaty rights, unlike the Charter equivalent, are free standing, it is difficult to imagine situations in which an individual might benefit from reliance on Article 45(1) Charter rather than on Articles 20/21 TFEU. The same can be said in relation to the obligation to respect the Charter imposed on Union institutions and Member States when implementing Union law, since institutions and Member States are equally bound by the Treaties. It would be surprising, then, if the Court were to rely on the Charter right with preference to the Treaties in those situations. Article 45(2) seems also of little practical relevance since, as mentioned above, it is declaratory in character and it is difficult to foresee a situation in which it could be justiciable.

This of course, begs the question as to why those rights, which at best merely duplicate existing provisions, were introduced at all. The answer is not difficult to gauge: the Charter was drafted without knowledge of its future position amongst the sources of Union law; the drafting Convention did not know what its legal status would be; and whether it would be incorporated in the Treaties; whether it would be an Annex therein; or whether it would exist in a parallel dimension. Furthermore, in drafting the Charter the aim was to make rights more visible, and the Cologne mandate explicitly provided that the Charter should contain the rights pertaining to Union citizens.[88] And it is not surprising that, if the intention was to create a comprehensive catalogue of rights recognised by the European Union, those rights which are directly granted by the Union and that are central to its project and functioning, could not be omitted. Thus, the fact that those rights are of little practical relevance should not detract from the symbolic importance of their inclusion in the Union fundamental rights instrument. It might not matter much that those rights are included, but it would have mattered a great deal if they had been excluded.

[87] See generally A A Dashwood, M Dougan, B Roger, E Spaventa and D Wyatt *Wyatt and Dashwood's European Union Law* (6th edition, 2011, Hart Publishing), Chapter 9 section VC.
[88] Presidency Conclusions, Cologne 3 and 4 June 1999, 150/99 REV 1, Annex IV.