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Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework?

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Abstract

This Article will deal with the rights of European Union ("EU") citizens and third country nationals. It first gives a brief overview of the classical doctrine of harmonization of legislation. This is followed by an analysis of the harmonization issues for rights of EU citizens (Part II) and third country nationals (Part III). Subsequently, harmonization methods are discussed (Part IV). Finally, it will attempt to sketch a framework for analysis (Part V).

HARMONIZATION OF LEGISLATION ON MIGRATING EU CITIZENS AND THIRD COUNTRY NATIONALS: TOWARDS A UNIFORM EVALUATION FRAMEWORK?

*Piet Jan Slot & Mielle Bulterman**

INTRODUCTION

It is with great pleasure that we dedicate this contribution to Francis Jacobs. As Advocate General, Francis Jacobs has made numerous important contributions to the development of European Community ("EC" or "Community") law. These will undoubtedly be highlighted in the other contributions written in his honor. This Article will deal with the rights of European Union ("EU") citizens and third country nationals. In his opinion in *Konstantinidis*[1] Francis Jacobs reminded us of the universal rights of Roman citizens and suggested that a similar status should be attributed to EU citizens. It seems that we in the EU have come a long way towards such a status. Recently, the Council of Ministers of the EU adopted three important harmonization measures on the free movement of persons. The first was 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.[2] This Directive replaced the existing patchwork of rules on the rights of migrating EU citizens and codified case law of the European Court of Justice (the "Court" or "ECJ").[3] The second was Directive 2003/109 concerning the sta-

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1. Konstantinidis v. Stadt Altensteig-Standesamt and Landratsamt Calw-Ordnungsamt, Case C-168/91, [1993] E.C.R. I-1191.

2. *See generally* Council Directive No. 2004/38, O.J. L 158/77 (2004). Apparently, it was quite difficult to have the correct version of this directive published in the Official Journal. It was first published in O.J. L 158/77 (2004) as Directive 2004/58. In O.J. L 229/35 (2004) a first corrigendum was published, but the mistake in the numbering of the directive was not corrected. This only happened in the corrigendum to the corrigendum published in O.J. L 197/34 (2005).

3. *See id.* art. 5, ¶ 4 (implementing the judgment in *Mouvement contre le racisme,*

tus of third country nationals who are long-term residents,[4] and the third was Directive 2003/86 on the right to family reunification.[5]

As in other areas of Community law, there is tension between the need for harmonized rules and the pursuit of objectives of the individual Member States. A uniform framework of rules is not always possible or desirable, as Member States must have some latitude to chart their own course. Therefore, an ever-recurring question in case of harmonization of legislation is to what extent national Member States could maintain or introduce national measures if harmonization measures have been adopted. Could the Netherlands allow family reunification rights to homosexual partners of third country nationals who are residing in the Netherlands? And if so, the question arises whether such rights should be recognized by the other Member States.

For the internal market a clear doctrine on the harmonization of legislation has been developed largely due to the relevant case law of the ECJ. This doctrine indicates when national measures may go beyond the standard contained in the relevant directive.[6] In the case of the harmonization of the rights of EU citizens and third country nationals, however, the applicable rules are less clearly defined and still under development.

This Article will make an attempt to outline some principles for a framework of harmonization of the rights of migrating EU citizens and third country nationals. We will ask whether the general rules on the harmonization of legislation as developed by the ECJ over the years apply to the area of the harmonization of "migration rights" and if so, to what extent. The harmonization of the rights of migrating EU citizens will be analyzed from the perspective of Article 18 of the Treaty Establishing the European Community ("EC Treaty") as developed in the Court's re-

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l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgium, Case C-459/99, [2002] E.C.R. I-6591, [2002] 3 C.M.L.R. 25); *see also id.* at pmbl. ¶ 27 (briefly referencing *Calfa*, Case C-348/96, [1999] E.C.R. I-11, [1999] 2 C.M.L.R. 1138).

4. *See generally* Council Directive No. 2003/109, O.J. L 16/44 (2004). This Directive was adopted pursuant to Title IV of the Treaty Establishing the European Community ("EC Treaty").

5. *See generally* Council Directive No. 2003/86, O.J. L 251/12 (2003).

6. *See generally* Piet Jan Slot, *Harmonisation*, 21 EUR. L. REV. 378 (1996).

cent case law.[7] For third country nationals for whom the rules applicable to EU citizens do not apply because they have no relationship with an EU citizen,[8] the rules for harmonization have yet to be developed.

This Article first gives a brief overview of the classical doctrine of harmonization of legislation. This is followed by an analysis of the harmonization issues for rights of EU citizens (Part II) and third country nationals (Part III). Subsequently, harmonization methods are discussed (Part IV). Finally we will attempt to sketch a framework for analysis (Part V).

For the sake of completeness it should be noted that Article 65,[9] in conjunction with Article 61(c)[10] of Title IV of the EC Treaty also requires harmonization measures in other areas. These areas are often closely connected with the internal market. In such cases, the framework of the free movement rules could serve to delimit the powers of the Member States and the Community.[11] Not everyone, however, is convinced of the need for such harmonization.[12] In the case of harmonization of family law, national measures would have to be judged by the provisions of the European Convention on Human Rights, and possibly Article 18 of the EC Treaty as well.

I. *HARMONIZATION OF LEGISLATION*

For a long time harmonization has been used in the European Community primarily as a tool to realize the internal mar-

7. *See* Consolidated Treaty Establishing the European Community art. 18, O.J. C 325/33, at 45 (2002) [hereinafter EC Treaty].

8. *See generally* Sec'y of State for the Home Dep't v. Akrich, Case C-109/01, [2003] E.C.R. I-9607, [2003] 3 C.M.L.R. 26. As *Akrich* demonstrates, it is not always easy to determine whether the rules of EC law protecting relatives of EU citizens can be relied upon when the third country national concerned is residing unlawfully in a Member State. *See generally* Eleanor Spaventa, *Case C-109/01, Secretary of State for the Home Department v. H. Akrich, judgment of the Full Court of 23 September 2003, [2003] ECR I-9607*, 42 COMMON MKT. L. REV. 225 (2005).

9. EC Treaty, *supra* note 7, art. 65, O.J. C 325/33, at 59-60 (2002).

10. EC Treaty, *supra* note 7, art. 61, O.J. C 325/33, at 57-58 (2002).

11. *See* Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, Case C-212/97, [1999] E.C.R. I-1459, 1472, ¶ 16, [1999] 2 C.M.L.R. 551, 583. *See generally* Uberseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), Case C-208/00, [2002] E.C.R. I-9919, [2005] 1 C.M.L.R. 1; Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., Case C-167/01, [2003] E.C.R. I-10155, [2005] 3 C.M.L.R. 34.

12. *See generally* ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION: CONVERGENCE AND DIVERGENCE BETWEEN BRUSSELS I AND ROME I (Johan Meeusen et al. eds., 2004).

ket's objectives, especially the free movement of goods. In that context also, extensive case law has evolved to clearly define the powers of the Member States and the Community. Moreover, the various amendments to the EC Treaty have created new provisions that further clarified these relations. This applies in particular to EC Treaty Article 95, paragraphs 4 to 10.[13] It could be argued that the interaction between the judiciary and the legislature in the highest instance has resulted in a well-defined doctrine.

In the *Tedeschi* judgment, the ECJ held that if a certain subject matter is covered exhaustively by a directive, the compatibility with EC law of measures of Member States have to be assessed on the basis of the directive and the general provisions on free movement in the EC Treaty can no longer be invoked.[14] In that case, national laws that derogate from the standards laid down in the directive in question are allowed, if:[15]

a) The relevant directive provides for minimum harmonization;[16]
b) The directive contains a safeguard clause that permits derogation from the directive's regime. The safeguard clause sets the conditions for the adoption of safeguard measures by the Member States;
c) The national measure complies with the terms and conditions of Article 95(4) or (5) of the EC Treaty.

It is important to note that national measures taken under a) or b) should be in conformity with the rules of the Treaty. That means that if such measures restrict the free movement of

13. *See* EC Treaty, *supra* note 7, art. 95, O.J. C 325/33, at 69-70 (2002).

14. *See* Tedeschi v. Denkavit Commerciale s.r.l., Case 5/77, [1977] E.C.R. at 1577.

15. National rules beyond the scope of the directive should conform to the rules of Articles 28 through 30 of the EC Treaty if they concern the free movement of goods. In other words, the (lower) limit of the rules set by the Treaty and case law revives in such a case. In the measures under b) (the directive contains a safeguard clause), the evaluation is performed by the Commission. In cases arising under a) (the relevant directive provides for minimum harmonization), it is further relevant whether the directive has a free movement clause. In such a case, the evaluation framework of Articles 28 through 30 EC is of secondary importance.

16. Besides minimum harmonization, the literature distinguishes the following forms of harmonization: total harmonization (a uniform standard is laid down); optional harmonization (market parties have a choice); partial harmonization (a uniform standard applies to intra-Community movement, but Member States may deviate from that standard for internal situations); and alternative harmonization (in which Member States have a choice with regard to the standard to be implemented). In practice, minimum harmonization and total harmonization are the most common methods.

goods, they are permitted only if justified on the basis of Article 30 of the EC Treaty or the rule of reason as pointed out by the ECJ in *DocMorris*[17] and *Commission v. Germany*.[18]

In the event of minimum harmonization the directive could provide for a so-called free movement clause. This clause implies that possibly stricter requirements of one of the Member States may not be applied to products from other Member States that satisfy the directive's minimum standard.

The above framework also applies to products from third countries. Article 23 EC stipulates that the treaty provisions on the free movement of goods also extend to "products coming from third countries which are in free circulation in Member States."[19] Article 95 EC applies to EU products as well as to products from third countries that are in free circulation. The Court's case law further shows that harmonization measures based on Article 95 EC can relate to products to be exported to third countries.[20]

The doctrine and case law have not explicitly considered the extent to which derogations contained in paragraphs 4[21] and

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17. Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval, Case C-322/01, [2003] E.C.R. I-14887. This case concerned a situation like the one under section b. In paragraphs 64 and 65 of the judgment, the European Court of Justice ("ECJ") held:

> A national measure in a sphere which has been the subject of exhaustive harmonisation at Community level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty . . . . However, the power conferred on Member States by Article 14(1) of Directive 97/7 must be exercised with due regard for the Treaty, as is expressly stated in that provision.
>
> Such a provision does not, therefore, obviate the need to ascertain whether the national prohibition at issue in the main proceedings is compatible with Articles 28 EC to 30 EC.

See id. ¶ 64-65. Even if the relevant Directive does not say so, the Member States should exercise their powers under the Directive in conformity with the Treaty provisions. *See, e.g.*, Bosal Holding BV v. Staatssecretaris van Financiën, Case C-168/01, [2003] E.C.R. I-9409.

18. Commission v. Germany, Case C-463/01, [2004] ECR I-11705 (regarding deposits on bottled mineral water). This was a situation in which the issue was not regulated exhaustively. In this judgment the ECJ ruled in paragraph 44 that the Directive did not embody exhaustive regulation of rules about reusage. The ECJ, incidentally, used the term "complete harmonization."

19. EC Treaty, *supra* note 7, art. 23, O.J. C 325/33, at 46 (2002).

20. *See, e.g.*, British American Tobacco Manufacturing BV v. Hauptzollamt Krefeld, Case C-222/01, [2004] E.C.R. I-4683.

21. Article 95, paragraph 4 reads:

> If, after the adoption by the Council or by the Commission of a harmonisation

5[22] of Article 95 EC could be invoked in the event of harmonization measures that are *not* based on Article 95 EC. The wording of Article 95 EC does not seem to exclude such interpretation; paragraphs 4 and 5 after all refer to "a harmonisation measure" in general. On the other hand, paragraph 1 of Article 95 EC stipulates that the provisions contained in Article 95 apply "save where otherwise provided in this Treaty."[23] That may seem to imply that paragraphs 4 and 5 do not apply to harmonization measures that are not based on Article 95.

II. *RULES CONCERNING EU CITIZENS*

A. *Introduction*

Important to EU citizens first and foremost, are naturally the economic freedoms of the EC Treaty (Articles 39, 43, and 49).[24] Over the years the significance of these provisions has become clear from the ECJ's case law. Furthermore, directives have been adopted to implement the Treaty freedoms. First, there are the rules implementing the rights of travel and residence guaranteed to EU citizens by the EC Treaty. Second, harmonization has taken place concerning national rules that do not relate directly to the rights of travel and residence, but may restrict the free movement of person (for instance, diploma requirements and driver's license requirements). Examples of the first category are Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families[25] and Directive 64/

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measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

EC Treaty, *supra* note 7, art. 95(4), O.J. C 325/33, at 69 (2002).

22. Article 95, paragraph 5 reads:

Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

Id. art. 95(5), O.J. C 325/33, at 69 (2002).

23. *See id.* art. 95, O.J. C 325/33, at 69, ¶ 1 (2002).

24. *See id.* arts. 39, 43, 49, O.J. C 325/33, at 51, 52, 54, (2002).

25. *See* Council Directive No. 68/360, O.J. L 257/13 (1968).

221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.[26] The new Directive 2004/38 also comes in this category.[27] This Directive puts an end to the existing patchwork of rules of the right to move and reside freely for each category of economically active EU citizens (employees, the self-employed, and students). Directive 2004/38 relates to the conditions for exercising the right of EU citizens and their family members to move and reside freely, and restrictions on said rights for reasons of public policy, public security, or public health.[28]

Originally, economically inactive EU citizens could not rely upon the EC Treaty to invoke their right to move freely. This changed with the adoption of Article 18 of the EC Treaty introducing a general right of travel and residence for EU citizens. It took some time before the scope of Article 18(1) EC was defined by the ECJ. The question was what the surplus value of this provision was, compared to the other free movement provisions and the relevant secondary legislation.[29] ECJ case law now allows some conclusions about the relationship between Article 18 of the EC Treaty and secondary legislation on the travel and residence rights of EU subjects.

B. *Granting of Nationality*

A first conclusion is that Article 18 does not require the harmonization of national laws on the granting of nationality. EU citizenship follows from the nationality of a Member State and the Member States remain exclusively competent to confer nationality. This was confirmed in *Chen*.[30] A girl born to Chinese parents was granted Irish nationality on account of her being born in North Ireland. The girl's birth in North Ireland had been, as the mother admitted, carefully planned to take advan-

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26. *See* Council Directive No. 64/221, O.J. L 56/850 (1964).

27. *See* Council Directive No. 2004/38, O.J. L 158/77, at 84 (2004).

28. For a general discussion of the contents of Directive 2004/38, see Kay Hailbronner, *Union Citizenship and Access to Social Benefits*, 42 COMMON MKT. L. REV. 1245 (2005).

29. For a discussion on this issue in the early days of EU citizenship, see SIOFRA O'LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP (1996).

30. Chen v. Sec'y of State for the Home Dep't, Case C-200/02, [2004] E.C.R. I-9925, [2004] 3 C.M.L.R. 48. *See also Kaur*, Case C-192/99, [2001] E.C.R. I-1237.

tage of EU citizenship. When mother and daughter, relying on Article 18 of the EC Treaty, claimed the right to reside in the United Kingdom, the U.K. Government argued that Chen's daughter should not be regarded as an EU citizen. The ECJ set this argument aside and concluded that, by virtue of Irish law, Chen had Irish nationality and other Member States could not challenge that.

C. *Article 18(1) and the Right of Residence*

The ECJ's case law has a major impact on the right of residence of economically inactive EU citizens. Economically *active* EU citizens derive their right of residence directly from the Treaty provisions. Economically *inactive* EU citizens must rely on Directives 90/364,[31] 90/365[32] and 93/96[33] (collectively, the "residence Directives"). The case law of the ECJ shows that the specific criteria for granting residence rights laid down in these Directives should be applied with due regard to the European citizenship requirements.

Grzelczyk[34] concerned the question whether the French student Grzelczyk was entitled to claim Minimex (a social benefit) in Belgium. Although his residence status was not the subject of the dispute, the ECJ's answer to the question about Mr. Grzelczyk's right to Minimex did affect his resident status in Belgium directly. In its decision, the ECJ ruled that the residence criteria laid down in Directive 93/96 (the "Students' Directive") had to be interpreted restrictively. Thus, the requirement that students should have adequate means of subsistence applied at the moment the student commenced his studies. The ECJ also ruled that the exclusion of grants in Article 3 of Directive 93/96 did not mean that the Directive entails that students may not have access to social benefits. This approach appears to be based on the provisions of the Students' Directive itself, and a comparison with the other two residence Directives. In *Grzelczyk*,

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31. Council Directive No. 90/364, O.J. L 180/26 (1990) (on the right of residence).

32. Council Directive No. 90/365, O.J. L 180/28 (1990) (on the right of residence for employees and self-employed persons who have ceased their occupational activity).

33. Council Directive No. 93/96, O.J. L 317/59 (1993) (on the right of residence for students).

34. Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, Case C-184/99, [2001] E.C.R. I-6193, [2002].

the ECJ refers to two important basic principles that underlie these Directives: beneficiaries may not become "an unreasonable burden" on the host State's public finances.[35] There is, however, a "certain degree of financial solidarity" between the subjects of the host State and those of other Member States.[36] All the more so when the problems of the beneficiary of a right of residence are merely temporary, as with Mr. Grzelczyk, who called on public finances in the last year of his study only when he could no longer combine his academic commitments with a job.

Baumbast,[37] even more so than *Grzelczyk*, demonstrates the relevance of Article 18 EC to the limitations and conditions set out in the residence Directives. Under Article 18, these limitations and conditions are subject to judicial review by the ECJ. Therefore, they must be applied in accordance with the limits imposed by Community law, including the general principles of that law, in particular the principle of proportionality. In *Baumbast* the ECJ again noted that the residence Directives embody the principle that beneficiaries may not become an unreasonable burden on the host Member State's public finances.[38] Specifically, the Court ruled that it is not proportionate for a Member State to refuse an EU subject the right of residence simply because he is not insured for urgent medical assistance, provided he does satisfy the other criteria of Directive 90/364.[39]

The decision in *Trojani* showed that the right of residence under Article 18 EC does have its limits.[40] An EU citizen who does not have adequate resources as referred to in Directive 90/364 cannot rely on Article 18 to reside in the territory of a Member State of which he is not a subject. In such a case, the refusal of a right of residence is not disproportionate to attain the Directive's objective. The ECJ's case law does not—at least not to date—result in total equal treatment of economically active and eco-

35. *Id.* ¶ 44; *see also* Michael Dougan, *Fees, Grants, Loans and Dole Cheques: Who Covers the Cost of Migrant Education Within the EU*, 42 COMMON MKT. L. REV. 943 (2005).

36. *Grzelczyk*, [2001] E.C.R. at I-6245, ¶ 44.

37. Baumbast v. Sec'y of State for the Home Dep't, Case C-413/99, [2002] E.C.R. I-7091, [2002] 3 C.M.L.R. 23.

38. *See id.* at I-7167, ¶ 90.

39. *See id.* at I-7168, ¶ 93.

40. *See* Trojani v. Centre public d'aide sociale de Bruxelles (CPAS), Case C-456/02, [2004] E.C.R. I-7573, [2004] 3 C.M.L.R. 38.

nomically inactive EU citizens. As Advocate General Leger observed in his opinion in *Oulane*:

> The development of Community law undeniably leans towards uniformization, yes unity even, of the applicable regulations on the free movement of subjects of Member States. In anticipation of such uniformization, and for the issues that are still governed by sectoral Community regulations, I believe that the classification of beneficiaries of free movement still has a legal purpose.[41]

As we will see in Part III of this Article, the rights of travel and residence have been specifically addressed in Directive 2004/38.

D. *Article 18(1) and Equal Treatment*

Equal treatment is a fundamental right for EU citizens. This right is enshrined in the Treaty provisions on the internal market. In addition, there is the general prohibition of discrimination on grounds of nationality of Article 12 EC. The general rule of Article 12 applies if the specific prohibitions of the free movement provisions are not applicable. The prohibition of Article 12 applies only to situations that come within the scope of Community law. This implies a double check: EC law should apply *ratione personae* and *ratione materiae*.[42] Article 24 of Directive 2004/38 contains a very general equal treatment clause:

> 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.[43]

Meanwhile, the ECJ ruled in *Bidar* that this specific provision in the Directive cannot affect the right to equal treatment derived

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41. Opinion of Advocate General Leger, Oulane v. Minister voor Vreemdelingenzaken en integratie, Case C-215/03, [2005] E.C.R. I-1215, ¶ 49.

42. *Ratione personae* means "by reason of the person concerned," and *ratione materiae* means "by reason of the matter involved." *See* BLACK'S LAW DICTIONARY 1269 (7th ed. 1999).

43. Council Directive No. 2004/38, art. 24, O.J. L 158/77, at 112 (2004).

by EU citizens from the EC Treaty.[44] Thus, individuals can rely on Article 12 EC in cases outside the scope of Article 24 of the Directive, primarily those cases in which an EU citizen derives a right of residence from national law. The non-discrimination provision contained in Directive 2004/38 is discussed in further detail below.

1. The Scope *Ratione Personae* of EC Law for Economically Inactive Citizens

Until the introduction of EU citizenship, economically inactive citizens derived their residence rights solely from those Directives that defined the scope *ratione personae* of Community law. The introduction of Article 18 EC has changed this. It follows from the ECJ's case law that EU subjects who lawfully reside in another Member State fall within the scope *ratione personae* of Article 18 and for this reason can rely on Article 12 EC. The application of Article 12 does not require the EU citizen in question to have a right of residence based on EC law. In *Trojani*, the ECJ considered that a lawful residence based on national legislation suffices to bring a community national within the scope *ratione personae* of Community law and to trigger Article 12.[45] The ECJ based this conclusion on three arguments: the social security payment (Minimex) comes within the scope of the Treaty; Mr. Trojani lawfully resides in the host Member State for a specific period; and Mr. Trojani meets the requirements applicable to the host Member State's own subjects for the social security payment. Other EU citizens satisfying the same conditions are likely to benefit from this ruling. Fulfilling these conditions may be helped by the fact that it is often difficult for the authorities of the Member States to establish whether residence is illegal. Because of the absence of border checks, every EU citizen can enter freely. Consequently, after residing a specific period in a Member State, their EU citizenship almost automatically creates a right to equal treatment.

The ruling in *Pusa v. Osuuspankkien Keskinäinen Vakuutusyh-*

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44. *See generally* Bidar v. London Borough of Ealing, Case C-209/03, [2005] E.C.R. I-2119, [2005] 2 C.M.L.R. 3.

45. *See Trojani*, [2004] E.C.R. at 844, ¶ 40. This was already pleaded by Advocate General Geelhoed in *Ninni-Orasche*, but in that judgment, the ECJ only considered Article 39 of the EC Treaty. *See* Ninni-Orasche v. Bundesminister Für Wissenschaft, Verkehr und Kunst, Case C-413/01, [2003] E.C.R. I-13187.

tiö demonstrates that the right to equal treatment can also be invoked in the event of unequal treatment in the country of origin.[46] Pusa left Finland and took up residence in Spain. According to the ECJ, Article 18(1) and Article 12 of the EC Treaty protected him against the discriminatory taxes imposed by the Finnish tax authorities.[47]

The scope *ratione personae* of Article 18 EC does have its limits. Purely internal situations do not come within the scope of EC law. In *Uecker & Jacquet*, the ECJ made clear that the provisions on citizenship do not alter this situation: citizenship of the Union as provided for by Article 17 EC does not extend the scope *ratione materiae* of the Treaty to include purely internal situations.[48] By contrast, *García Avello* came within the scope of Community law because the children involved had the nationality of two Member States and had resided in one of those Member States since birth.[49] And in *Schempp*, the ECJ held that Article 18 and Article 12 EC could be relied upon by a German national paying alimony to a former wife who resided in Austria.[50]

Another interesting case on the scope of Article 18 EC is *Baldinger*.[51] The facts of the case are as follows: Under the Austrian *Kriegsgefangenenentschädigungsgesetz* (Act on the compensation of war prisoners, or "KGEG"), Austrian citizens who were held prisoners of war during the First or Second World War qualify for compensation from the Austrian State. According to the Austrian national court, applicants were required to have Austrian nationality at the time of application. As a result, Mr. Baldinger did not qualify for compensation. An Austrian by

46. Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, Case C-224/02, [2004] E.C.R. I-5763, [2004] 2 C.M.L.R. 23.

47. *See id.* at 525-26, ¶¶ 16-17, 20. In *Werner v. Finanzamt Aachen-Innenstadt*, however, the Court of Justice held that a dentist who had never trained or worked outside his Member State of origin could not rely on Article 43 EC (freedom of establishment) because of the mere fact that he was residing in a Member State other than his Member State of origin. *See generally* Werner v. Finanzamt Aachen-Innenstadt, Case C-112/91, [1993] E.C.R. I-429.

48. *See* Land Nordrhein-Westfalen v. Uecker, Joined Cases C-64/96 & C-65/96, [1997] E.C.R. I-3171, I-3190, ¶ 23, [1997] 3 C.M.L.R. 963, 976.

49. *See* Garcia Avello v. Etat Belge, Case C-148/02, [2003] E.C.R. I-11613, [2004] 1 C.M.L.R. 1.

50. *See* Schempp v. Finanzamt München V, Case C-403/03, [2005] E.C.R. I-6421, [2005] 3 C.M.L.R. 37.

51. Baldinger v. Pensionsversicherungsanstalt der Arbeiter, Case C-386/02, [2004] E.C.R. I-8411, [2005] 1 C.M.L.R. 20.

birth, Mr. Baldinger had been a prisoner of war in Russia from May 1945 to December 1947. After the war, he resided in Austria for some time and then emigrated to Sweden. In 1967, he exchanged his Austrian nationality for Swedish nationality. It was beyond dispute that Mr. Baldinger satisfied the material condition for compensation under the KGEG. The only obstacle was that he no longer held Austrian nationality at the time of his application.

The questions submitted by the national court—and the answer provided by the ECJ—all relate to the question of whether the Austrian rule is incompatible with Article 39 EC. The Court did not think so, and pointed out that arrangements on compensations to victims of acts of war or their consequences do not come within the scope of Regulations 1408/71 and 1612/68, or Article 39(2) EC.[52] The question of whether the Austrian arrangement was compatible with Article 18 EC was not considered by the ECJ. Advocate General Ruiz-Jarabo Colomer took the view that the Austrian nationality requirement should also be considered from the perspective of Article 18. According to him, the crucial question would be whether Mr. Baldinger could invoke Article 18. Obviously, the fact that Mr. Baldinger had Swedish nationality was insufficient to invoke Article 18. Because of the fact that Mr. Baldinger was already living in Sweden as a Swede at the time of Sweden's and Austria's accession to the Union, he could hardly be regarded as a migrating EU citizen. But the Advocate General argued that this fact was not decisive:

> [W]here the cross-border element consists of the fact that a person who used to hold the nationality of one Member State now resides in another Member State . . . his situation cannot be equated with that of nationals of his host Member State who have always retained the same nationality. In fact, as these proceedings demonstrate, despite the passage of time, his former bond of nationality may still determine his entitlement to certain rights. Clearly, it is not a purely internal matter.[53]

52. *See id.* at 512-13, ¶¶ 11, 16, 19, 20-21.

53. Opinion of Advocate General Ruiz-Jarabo Colomer, Baldinger v. Pensionsversicherungsanstalt der Arbeiter, Case C-386/02, [2004] E.C.R. I-8411, ¶ 38.

2. The Scope *Ratione Materiae* of EC Law

Even if every EU citizen lawfully residing in another EU Member State now comes within the scope of the EC Treaty, for a claim to be brought successfully it should also be assessed whether the act comes within the scope *ratione materiae* of Article 12 EC. In the past, for example, the ECJ made clear that study grants do not come within the scope of EC law.

It appears that the introduction of Article 18 EC has also resulted in an extension of the scope *ratione materiae* of EC law.[54] In *Grzelczyk*, the ECJ held that a student may invoke Article 12 EC to gain access to a social benefit in a non-contributory system.[55] In *Collins*, the Court ruled 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 48(2) of the Treaty—which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty—a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.[56]

Formerly it had been established case-law that persons in search of employment enjoyed some degree of protection under Article 39 EC, but were entitled only to equal treatment with regard to the access to employment and not with regard to the social and fiscal advantages referred to in Article 7, paragraph 2 of Regulation 1612/68.[57] In *Commission v. Belgium*, the ECJ held that a national employment program for young persons seeking first employment does not fall within the scope of EC law.[58]

The case law (*Lair*[59] and *Brown*[60]) holding that student

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54. *See* Opinion of Advocate General Geelhoed, Bidar v. London Borough of Ealing, Case C-209/03, [2005] E.C.R. I-2119, [2005] 2 C.M.L.R. 3. In the opinion, Advocate General Geelhoed reached the same conclusion.

55. *See Grzelczyk*, [2001] E.C.R. I-6193, 6249, [2002] 1 C.M.L.R. 543, 586.

56. Collins v. Sec'y of State for Work and Pensions, Case C-138/02, [2004] E.C.R. I-2703, ¶ 63, [2004] 2 C.M.L.R. 8, 183.

57. *See generally* Centre Public d'Aide Sociale, Courcelles v. Lebon, Case 316/85, [1987] E.C.R. 2811, [1989] 1 C.M.L.R. 337; Commission v. Belgium, Case C-278/94, [1996] E.C.R. I-4307, [1997] 1 C.M.L.R. 1040.

58. *See Commission v. Belgium*, Case C-278/94, [1996] E.C.R. I-4307, [1997] 1 C.M.L.R. 1040.

59. Lair v. Universität Hannover, Case C-39/86, [1988] E.C.R. 3161, [1989] 3 C.M.L.R. 545.

grants are beyond the scope of EC law was reviewed in *Bidar*.[61] Advocate General Geelhoed argued that developments in Community law no longer justify the exclusion of the costs of living. He pointed to the introduction of EU citizenship and the powers of the European Union in education. The ECJ concurred with its Advocate General. The ruling in *Bidar* raises interesting points about the relationship between the general prohibition of discrimination under Article 12 EC and secondary legislation. For instance, the ECJ's view that study grants and loans come within the scope *ratione materiae* of EC law is based in part on the wording of Article 24(2) of Directive 2004/38.[62] This paragraph allows Member States to deny economically inactive EU citizens access to study grants and loans. The Court held that this implies that such allowances do come within the scope of Community law.[63] The ECJ further observed that even though Article 3 of the Students' Directive explicitly excludes study grants and loans, this provision does not prevent EU citizens lawfully residing in another Member State pursuant to Article 18 EC and Directive 90/364 from invoking Article 12 EC.[64]

Like the ECJ's ruling in *Bidar*, the interpretation of Article 18 EC suggested by Advocate General Ruiz-Jarabo Colomer in *Baldinger* extends the scope *ratione materiae* of EC law. The allowance at issue was excluded explicitly from the scope of Regulation 1408/71 as well as from the scope of Article 39 EC. This did not stop him from concluding that Articles 18 and 12 of the EC Treaty would entitle Mr. Baldinger to this allowance.

3. Significance of the Right to Equal Treatment

Once it has been established that EU citizens can rely on Article 12 EC, the question is: What does the right to non-discrimination under Article 12 imply?

First, it prohibits discrimination on grounds of nationality,

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60. Brown v. Sec'y of State for Scotland, Case 197/86, [1988] E.C.R. 3205, [1988] 3 C.M.L.R. 403.

61. *See generally* Opinion of Advocate General Geelhoed, *Bidar*, Case C-209/03, [2005] E.C.R. I-2119, [2005] 2 C.M.L.R. 3.

62. *See Bidar*, [2005] E.C.R. I-2119, ¶¶ 42-43, [2005] 2 C.M.L.R. at 90.

63. *See id.* ¶ 43.

64. *See id.* ¶ 46. In this context, the difference in wording between Article 3 of Directive 93/96 and Article 24, paragraph 2, of Directive 2004/38 is interesting. In the former, study grants are explicitly excluded from the Directive's effect, and in the latter, Member States are given the *possibility* of excluding these from equal treatment.

i.e., direct discrimination. Thus the specific Belgian criteria for subjects from other Member States to qualify for Minimex were set aside in *Grzelczyk* and *Trojani*. Contrary to the prohibition provisions of the economic freedoms, Article 12 EC does not contain any exceptions. Nevertheless, the prohibition contained in Article 12 is not absolute. According to the ECJ, Article 12 entitles EU citizens to equal legal treatment "irrespective of their nationality, subject to such exceptions as are expressly provided for."[65] This means that the exceptions contained in the Treaty that apply to the free movement of persons, such as the public policy exception, may also be relevant for the application of Article 12 (see paragraph 5).

Article 12 goes beyond prohibiting a formal distinction between a Member State's own subjects and those from other Member States. The Article also prohibits provisions that discriminate indirectly, i.e. national legislation that does not discriminate explicitly on grounds of nationality but contains criteria that are easier to fulfill by national subjects. An example of an indirectly discriminatory provision is the British law that was at issue in *Collins*.[66] Under this law, persons seeking employment who had their habitual place of residence in the UK qualified for an allowance for job seekers. The ECJ reasoned:

> The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State's own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 O'Flynn [1996] ECR I2617, paragraph 18, and Case C-388/01 Commission v Italy [2003] ECR I-721, paragraphs 13 and 14).
>
> A residence requirement of that kind can 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 (Case C-274/96 Bickel and Franz [1998] ECR I-7637, para-

65. *See, e.g.*, Carlos García Avello v. Belgian State, Case C-148/02, [2003] E.C.R. I-11613, ¶¶ 22-23, [2004] 1 C.M.L.R. 1, 23.

66. *See generally* Brian Francis Collins v. Sec'y of State for Work and Pensions, Case C-138/02, [2004] E.C.R. I-2703, [2004] 2 C.M.L.R. 8.

graph 27).[67]

The rule formulated by the Court is established case law: a measure that discriminates indirectly is prohibited unless there is an objective justification. In *Collins* the ECJ held that a Member State may require a genuine link between the applicant for an allowance and the national employment market. The Court continued:

> However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its 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 themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.[68]

Earlier, in *D'Hoop*, the ECJ had already accepted the criterion of a genuine "link between the applicant for [an] allowance and the geographical employment market" as a justification for awarding a tideover allowance to school drop-outs, but the Court found that the Belgian authorities could not link the grant of tideover allowances to the condition of having obtained the required diploma in Belgium.[69]

In *Bidar*, the Court ruled on the criteria that Member States may impose in awarding study grants or loans. According to the ECJ, Member States may award such assistance only "to students who have demonstrated a certain degree of integration into the society of that state."[70] Residence and settlement criteria are in principle appropriate to ensure that the applicant for assistance meets the integration condition.

E. *Conclusion*

The case law on Article 18 EC has led to an extension of the

67. *Id.* at 183, ¶¶ 65-66.

68. *Id.* at 184, ¶ 72.

69. *See* D'Hoop v. Office national de l'emploi, Case C-224/98, [2002] E.C.R. I-6191, 6225, ¶ 38, [2002] 3 C.M.L.R. 12, 334.

70. Bidar, Case C-209/03, [2005] E.C.R. I-2119, ¶ 57, [2005] 2 C.M.L.R. 3, 92.

personal and material scope of EC law for every EU citizen who resides lawfully in another Member State. This creates a new framework for review that has a normative effect on the provisions of the Treaty as well as secondary law and on situations in which no Community rules apply (e.g., *Trojani*). This framework for review implies a reversal of the onus of proof, in the sense that, once Union citizenship has been established, national restrictive measures are only allowed if there is a justification subject to the usual proportionality test. In essence, this framework does not differ much from a similar framework in the context of the economic freedoms. As a result of the introduction of Article 18 and its interpretation by the ECJ, it is rather easy for citizens of the European Union to come within the Treaty's scope as referred to in Article 12 EC.

The extension of the protection offered by the combined effect of Article 18(1) and Article 12 clearly increases the importance of establishing that a situation comes within the scope of the Treaty. The introduction of Article 18 seems to have expanded the scope *ratione materiae* of the EC Treaty. As Advocate General Geelhoed commented in his Opinion on *Bidar* with regard to study grants and loans:

> Where it is acknowledged that such a benefit comes within the scope ratione materiae of the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty.[71]

The application of Article 12 EC prohibits, of course, requiring nationality as a criterion for access to certain financial facilities of a Member State. At the same time it is clear that EU citizens cannot simply immigrate to another Member State to claim certain allowances in that State: "no [student grant] tourism."[72] Therefore, the question arises as to which criteria Member States may impose instead of the prohibited nationality requirements.

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71. Opinion of Advocate General Geelhoed, *Bidar*, Case C-209/03, [2005] E.C.R. I-2119, ¶ 51, [2005] 2 C.M.L.R. at 77.

72. *Id.*

For allowances awarded to job seekers, the Court accepts the criterion of a link with the geographical employment market. In implementing these conditions the Member States must ensure that the applicable criteria are stringent enough to demonstrate the link with the employment market, yet not so stringent as to exclude certain persons from the allowance on unjustified grounds. In the case of student grants, a "certain degree of integration into the society of [the host Member] State" is an admissible alternative to nationality requirements.[73] It will not be easy to find suitable criteria to exclude access to social benefits that are not related to economic activities or a study. In *Trojani*, the nationality requirement from the Belgian Minimex was rejected. Which criteria could the Belgian authorities apply instead without violating EC law and without opening their general social benefits to all EU citizens? The criterion applied by the Court in *Bidar*, i.e. "a certain degree of integration into the society of [the host Member] State" again seems a suitable criterion, but questions about the details will remain.[74]

Not surprisingly, the ECJ's approach has been criticized.[75] It is remarkable, however, that the Court of Justice's active role has not been challenged in the process of the drafting of the Constitution. The wording of Article I-10 of the Constitution detracts nothing from Article 18 of the EC Treaty in content-specific terms and thus leaves the case law of the Court of Justice untouched. In the event of dissatisfaction with this case law the Convention could of course have formulated restrictions. This is demonstrated by the precedents set by the Barber Protocol[76] and the Irish abortion Protocol.[77] Reference could also be made to the conclusions of the European Council of December 2004 that explicitly underline the importance of European citizenship.[78]

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73. *Bidar*, Case C-209/03, [2005] E.C.R. I-2119, ¶ 57, [2005] 2 C.M.L.R. at 92.

74. *Id.*

75. *See generally* Dougan, *supra* note 35.

76. *See* Protocol concerning Article 119 of the Treaty establishing the European Community, O.J. C 191/68 (1992).

77. *See* Protocol Annexed to the Treaty on European Union and to the Treaties establishing the European Communities, O.J. C 191/94 (1992).

78. *See* European Council, Conclusions of the Chair, December 16 and 17, 2004, ¶¶ 67-68, *available at* http://ue.eu.int (European Council, Presidency Conclusions). However, in an interview at the occasion of assuming the Presidency, the Austrian Chancellor was very critical of the ECJ's role in education cases. The Chancellor's remarks were clearly incited by the ECJ's July 7, 2005 ruling in Commission v. Austria,

It should be noted, however, that in Directive 2004/38, the Member States appear to slightly reverse ECJ case law.[79] Article 24 paragraph 2 contains several exceptions to the right to equal treatment.[80] The Member States, for instance, are not required to award social assistance to EU citizens and migrants seeking employment during the first three months of their residence. The same applies to the award of study grants to EU citizens who do not have permanent residence permits. The exclusion of persons seeking employment is clearly an attempt to reverse the consequences of the *Collins* judgment. Whether this attempt will succeed is not automatically clear. The adoption of the power of Member States to exclude the right to equal treatment with regard to study grants and loans for economically inactive migrants in Article 24(2) of the Directive did not stop the Court of Justice in *Bidar* from declaring Article 12 of the EC Treaty applicable to such facilities.

Advocate General Geelhoed, too, held that Article 24(2) of the Directive does not bar the application of Article 18 and Article 12 EC.[81] In his opinion, these Treaty provisions should guide the interpretation of Article 24(2):

> [I]n applying this condition, the fundamental rights conferred directly by the EC Treaty on EU citizens must be fully respected. . . . I do not consider that this amounts to an undermining of the requirement adopted by the Community legislature. Rather it is necessary to ensure that this requirement is applied in conformity with the fundamental provisions of the EC Treaty.[82]

We concur with the opinion of the Advocate General. The powers of the Member States to exclude grants provided for by Article 24(2) of Directive 2004/38 have to be exercised in accordance with Community law and may therefore be reviewed by the ECJ.

Case C-147/03, [2005] E.C.R. I-5969, [2005] 3 C.M.L.R. 23, that national legislation on admission to Austrian universities was contrary to Community law.

79. *See* Council Directive No. 2004/38, O.J. L 158/77 (2004).

80. *See id.* art. 24.

81. *See* Opinion of Advocate General Geelhoed, *Bidar*, Case C-209/03, [2005] E.C.R. I-2119, ¶ 37, [2005] 2 C.M.L.R. 3, 72-73.

82. *Id.* ¶ 64.

III. *RULES CONCERNING THIRD COUNTRY NATIONALS*

A. *Introduction*

There is no general Treaty framework for rights of travel and residence of third country nationals as there is for migrating EU citizens. Third country nationals cannot (directly) invoke the treaty provisions on the free movement of persons and the related rights such as the right to equal treatment. Third country nationals can, however, invoke the harmonization legislation promoting the free movement of persons (the second category mentioned in Part II.A. above). This was demonstrated by the *Awoyemi* judgment.[83] Mr. Awoyemi, a Nigerian national, drove in Belgium with a driver's license issued by the United Kingdom. When prosecuted by the Belgian authorities, he invoked his rights under the Directive on the introduction of a European driver's license. Mr. Awoyemi had not converted his British driver's license within the then-applicable term of one year. Under Belgian law this omission was equivalent to driving without a license and Mr. Awoyemi was fined. The Court held that Mr. Awoyemi fell within the scope *ratione personae* of the Directive. Mr. Awoyemi could not, however, invoke the protection, developed by the ECJ in its case law for EU citizens, against the sanction instituted by the Belgian authorities for his failure to convert his British driver's license into a Belgian one. This protection was connected to the protection of the free movement of persons guaranteed by the Treaty, which could not be invoked by Mr. Awoyemi, a third country national.

An important question is whether the Court will continue to follow this case law of *Awoyemi* in the future or whether the recent Community rules concerning third country nationals will inspire it to rule that third country nationals also fall within the scope of the Treaty and can thus invoke the general principles of Community law.

To answer this question we must analyze the rules that are relevant to third country nationals. There are three situations in which third country nationals may derive rights from EC law. The special legislation on stateless persons, asylum seekers and refugees—however important—will not be considered here.

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83. *See generally* Criminal Proceedings against Ibiyinka Awoyemi, Case C-230/97, [1998] E.C.R. I-6781, [2001] 1 C.M.L.R. 15.

First, EC law offers protection to third country nationals who qualify as family members of EU citizens. This follows from the ECJ's case law and secondary legislation. Directive 2004/38 confers on these persons equal rights of travel and residence, although these rights partially depend on their status as family members of an EU citizen.[84] Article 3(2) of the Directive further awards a soft right to other family members and partners of the EU citizen with whom he or she has an adequately proven lasting relationship.

Second, third country nationals can derive rights from the agreements their home States have concluded with the EC. This follows from the case law of the ECJ in judgments like *Jany* as well as various judgments concerning the association agreements with Turkey and Morocco.[85]

Finally, third country nationals may derive rights of travel and residence from Directive 2003/86 on the right to family reunification and Directive 2003/109 concerning the status of third country nationals who are long-term residents.[86]

Hereafter the legal protection offered by EC law to each category is discussed. Occasionally these categories overlap: the Turkish partner of a German residing long-term in the Netherlands falls in all three categories.

B. *Rights Based on Family Ties with EU Citizens*

Carefree enjoyment of the rights of free movement by EU subjects requires that their family members, too, enjoy some degree of protection under EC law. This was already recognized in Regulation 1612/68, which granted certain rights to family members of workers.[87] Family members can travel with the EU citizen and have the right to seek work in the other Member State. Directive 2004/38 also grants such rights to family members of migrating EU citizens, regardless of their nationality. The equal treatment provision (Article 24) explicitly stipulates that the third country national with family ties to an EU citizen has the same right to equal treatment as EU subjects. EC law

84. *See* Council Directive No. 2004/38, O.J. L 158/77, arts. 12-13 (2004).

85. *See generally* Jany et al. v. Staatssecretaris van Justitie, C-268/99, [2001] E.C.R. I-8615, [2003] 2 C.M.L.R. 1.

86. *See* Council Directive No. 2003/86, O.J. L 252/12 (2003); *see also* Council Directive No. 2003/109, O.J. L 16/44 (2004).

87. *See generally* Commission Regulation No. 1612/68, O.J. L 257/2 (1968).

also grants admission and residence to family members of EU subjects who, after having exercised economic activities in another Member States, return to the Member State of origin.[88] This is subject to the condition that the third country national resided lawfully with the EU subject in the other Member State.[89]

It is not always necessary for family members of EU citizens to rely upon secondary legislation in order to enjoy the protection of Community law: this protection follows directly from the treaty provisions. A far-reaching application of this principle is found in *Carpenter*.[90] In this judgment the Court held that the deportation of Ms. Carpenter, a Philippine woman, was incompatible with the rules on free movement of services because she would no longer be able to take care of the children of Mr. Carpenter, a British citizen who was the service provider. Even though restrictions to the free movement could in principle be justified, deportation of Ms. Carpenter was contrary to the standards contained in the European Human Rights Convention and therefore unacceptable from a Community law perspective.

Compared to the ruling in *Carpenter*, *Chen* goes a step further. In *Chen*, the Court ruled that it follows from Article 18 EC that a Chinese mother has the right to reside in the United Kingdom with her Irish baby: for the baby to enjoy the right of residence in the United Kingdom, it was necessary for her mother to stay with her.[91]

Although a little exotic, *Carpenter* and *Chen* show how far EU law protects family members of EU citizens regardless of their nationality. Since these rights are based on family ties with an EU citizen, two important restrictions apply. First, in order to rely on EC law the family member must be able to invoke one of the basic freedoms of the Treaty.[92] This does not suffice: *Akrich* shows that reliance on the freedoms is not allowed if the third country national resided unlawfully in one of the Member

88. *See* Queen v. Immigration Tribunal et Singh, *ex parte* Sec'y of State for Home Dep't, Case C-370/90, [1992] E.C.R. I-4265, 4293-94, ¶¶ 17, 21.

89. *See* Sec'y of State for the Home Dep't v. Akrich, Case C-109/01, [2003] E.C.R. I-9607, ¶ 45.

90. *See* Carpenter v. Sec'y of State for the Home Dep't, Case C-60/00, [2002] E.C.R. I-6279, I-6319-20, ¶ 36-38, [2002] 2 C.M.L.R. 64, 1541, 1571.

91. *See Chen*, Case C-200/02, [2004] E.C.R. I-9925, ¶ 47, [2004] 3 C.M.L.R. 48, 1090.

92. *See Carpenter*, [2002] E.C.R. at I-6320, ¶ 38, [2002] 2 C.M.L.R. 64, 1571.

States.[93] Second, the third country national forfeits the protection conferred by EC law if the family ties with the EU citizen cease to exist, for instance due to divorce or the death of the EU citizen. For these reasons, the protection of the EC rights discussed in the paragraphs below remains relevant for third country nationals with family ties to EU citizens.

C. *Rights Under Agreements Concluded Between the EC and Third Countries*

The EC has concluded agreements with several countries that contain provisions on the free movement of workers, services and the freedom of establishment. These agreements do not contain identical rules on free movement. The agreement with Morocco, for instance, contains a non-discrimination provision, but not a provision on the free movement of employees.[94]

According to established case law such provisions should not automatically be interpreted like the freedoms contained in the EC Treaty. If, however, the agreement has the objective to gradually establish free movement between the Union and the third country in question, this would be a reason to apply the principles contained in the EC Treaty as much as possible to subjects of the third country in question. Thus, when interpreting the terms and rights under the association agreement with Turkey, the ECJ regularly refers to its case law on the freedoms contained in the EC Treaty.

For the purpose of this Article, however, it is not necessary to extensively study the nature and contents of the free movement provisions in all agreements concluded by the EC with third countries. It is, however, important to note that those agreements remain relevant when they provide protection beyond the Directives discussed below.

D. *Rights Under Directives 2003/86 and 2003/109*

In Directive 2003/109 concerning the status of third country nationals who are long-term residents, the conditions for and consequences of granting long-term resident status to third

93. *See Akrich*, [2003] E.C.R. I-9607, ¶ 54.

94. *See* El-Yassini v. Sec'y of State for Home Dep't, Case C-416/96, [1999] E.C.R. I-1209, I-1245, ¶ 56, [1999] 2 C.M.L.R. 32, 46.

country nationals have been laid down.[95] The residence permit provided for by the Directive closely resembles what is known as a "green card" in the United States. After five years of permanent and uninterrupted residence in an EU Member State, third country nationals may submit a request to obtain long-term resident status, provided that they have a fixed and regular income and health insurance. The Member States may set integration requirements as well. The requirement of a five-year legal and uninterrupted stay means that a third country national who leaves for another EU Member State for the purpose of continuing his activities there will lose the rights accrued in the first Member State and the required five-year term will start to run again. Clearly, the free movement right of third country nationals is only complete once long-term residence status has been acquired. Whereas an EU citizen has full free movement rights as a result of migration, the third country national loses the protection of EC law as a result of migration.

The Directive introduces a new type of residence permit: The EC residence permit for long-term residents. The Directive includes the rights that long-term residents enjoy in the Member State of residence (equal treatment, protection against removal), as well as the right to stay in other EU Member States. Chapter III provides for the right of long-term residents to stay in other EU Member States for a period in excess of three months.[96] For this purpose, the third country national must apply for a residence permit with the competent authorities of the second Member State. An important question is, of course, whether a residence permit has a constitutive or a declaratory nature. As the right of residence in a second Member State applies under Article 14 "provided that the conditions set forth in this Chapter are met," a residence permit appears to be a condition required for obtaining a third country national's right of residence. In this respect, an important difference in comparison with relatives of EU citizens remains, as the right of residence of family

95. *See* Council Directive No. 2003/109, O.J. L 16/44 (2004).

96. *See id.* art. 14, O.J. L 16/44, at 50 (2004). Legislation with regard to residence periods of shorter than three months is being prepared. *See* Proposal for a Council Directive, O.J. C 270E/244 (2001) (relating to conditions in which third country nationals shall have freedom to travel in territory of Member States for periods not exceeding three months, and introducing specific travel authorization and conditions of entry or movement for periods not exceeding six months).

members of migrating EU citizens follows directly from the EC Treaty.

Under Directive 2003/109, third country nationals have a right of residence and the rights connected therewith that closely resemble the rights of migrating EU citizens under the EC law.[97] Nevertheless, the differences remain substantial. Under Article 11 of the Directive, long-term residents shall enjoy equal treatment with nationals. Even though the equal treatment provided for in Article 11(1) of the Directive covers the economically important areas, this is not a general equal treatment right. Moreover, Article 11(2) and (3) offer the Member States a possibility of further restricting the right to equal treatment in these fields. For example, the Member States are allowed to put restrictions on the access to work as an employee or a self-employed person if, under existing national or Community legislation, these activities are reserved for their own nationals, EU citizens or EEA citizens. The Member States may also set language requirements with respect to access to education or training.

Directive 2003/86 lays down the conditions under which third country nationals lawfully staying in the Union qualify for reunion with their family members staying outside the Union.[98] The Directive has a long and laborious drafting history. It is still controversial: the European Parliament ("EP") has lodged an appeal against it.[99] According to the EP, the Directive violates, among other things, Article 8 of the European Convention on Human Rights ("ECHR").

The Directive applies to nationals from third countries who lawfully stay in a Member State and have a prospect of a permanent right to stay there. Article 4 provides for a list of family members that qualify for family reunification (for more details on this subject see Part IV.B. below). Chapter IV sets forth further requirements for exercising the right of family reunifica-

97. *See* Council Directive No. 2003/109, O.J. L 16/44 (2004).

98. *See* Council Directive No. 2003/86, O.J. L 251/12, at 15 (2003).

99. *See* Action brought on 22 December 2003 by the European Parliament against the Council of the European Union, Case C-540/03, O.J. C 47/35 (2004). On September 8, 2005, Advocate General Kokott delivered her Opinion in this case. She partly agrees with the views of the European Parliament ("EP"), but nevertheless suggests that declaring the appeal inadmissible as a partial annulment of the Directive—as the EP seeks to do—is not possible.

tion. For example, the Member States may reject an application for family reunification on grounds of public policy, public security or public health (Article 6). Article 7 offers the Member States the possibility of demanding that the person applying for family reunification must have adequate housing, health insurance and income. The Member States may also set integration requirements.

E. *Conclusion*

First, third country nationals enjoy the rights awarded to them by Directive 2003/109.[100] This Directive has a surplus value also for the family members of EU subjects: the Directive confers on them an independent right of travel and residence and they are no longer dependent on their European partner. The family ties with a migrating EU citizen still remain important, however, because those ties give rise to more favorable rights than those granted to third country nationals by Directive 2003/109. For instance, Directive 2003/109 does not give a third country national not having the status of long-term resident in a Member State the right to travel to another Member State in search of employment. If his partner is a migrating EU citizen, primary EC law gives her or him that right. Furthermore, the third country national with family ties with a EU citizen has the same equal treatment right as EU subjects. This right has been incorporated explicitly into Article 24(1) of Directive 2004/38.[101] This does not apply automatically to all third country nationals.

A similar conclusion applies to third country nationals who derive rights from an agreement concluded by their country of origin with the EC. The rights that Directive 2003/109 grants are not derived from these agreements (such as the long-term residence status); on the other hand, the agreement may give more extensive protection than Directive 2003/109.

On a final note, a question that is extremely relevant to this Article's topic is whether third country nationals only have the rights specifically mentioned in the Directive, or whether the coming into force of those Directives changes the status of third country nationals to such an extent that they can henceforth rely

100. *See generally* Council Directive No. 2003/109, O.J. L 16/44 (2004).

101. *See* Council Directive No. 2004/38, art. 24(1), O.J. L 158/77, at 112 (2004).

on important general equal treatment principles accompanying the free movement of persons rules that have been developed by the ECJ, as discussed above. Third country nationals with family ties to migrating EU citizens have such rights; to them, the equal treatment principle as laid down in Article 12 EC applies in full. But what about other third country nationals who fall within the scope of the Directives? Do they thus fall within the scope the EC Treaty, so that they can rely on Article 12 EC? A first consideration of the objectives of the Directives points in that direction. Reference can be made in particular to paragraph 2 of the preamble to Directive 2003/109, which states that the Directive purports to lay down "a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union."[102] However, as noted above, Article 11 of Directive 2003/109 lays down a specific equal treatment rule. Although Article 11 awards several important rights, there may be situations that are not covered by this Article: the judgments given in *Cowan*[103] and *Pusa*[104] are good examples. *Cowan* concerned entitlement to the French fund for victims of crimes, and *Pusa* related to the discriminatory application of Finnish tax laws. We would welcome protection under Article 12 EC for similarly-situated third country nationals who are long-term residents.

And what about the possibility for a third country national to rely on the protection against restrictions that EU citizens enjoy under the free movement of persons rules? Could, for example, a third country national with a long-term residence status in Belgium rely on Community law to oblige the Belgian authorities to recognize his German architect's degree, if this degree is not listed in the architects' Directive? In other words, does the bifurcation of rights under *Awoyemi*, as discussed above, still apply?

It could be argued that, in view of the special nature of the free movement provisions under the Treaty, the provisions protecting third country nationals provide for a less extensive form of integration and hence a more restrictive interpretation would be justified. In our view, however, this is contradicted by the

102. Council Directive No. 2003/109, O.J. L 16/44, pmbl. ¶ 2 (2004). Consideration 3 in the preamble to Directive 2003/86 uses similar terms.

103. Cowan v. Tresnor Public, Case C-186/87, [1989] E.C.R. 195.

104. Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, Case C-224/02, [2004] E.C.R. I-5763.

objectives of the Directives referred to earlier, which explicitly declare that these rights should be "as near as possible to those enjoyed by citizens of the European Union."[105] We therefore hold the opinion that Article 12 EC can be invoked also by third country nationals with a long-term residence status save for justified restrictions. Articles 2, 3, and 11 of Directive 2003/109 list a number of such justification grounds.

IV. *THE HARMONIZATION METHODS CONTAINED IN THE DIRECTIVES*

The preceding text focused on the rights derived from EC law by EU citizens and third country nationals. This Part discusses the harmonization rules on migrating EU citizens and third country nationals from the perspective of the harmonization methods used. Our main focus is on the question of to what extent the Directives allow the Member States to adopt rules different from those set by the Directives.

A. *Migrating EU Citizens*

Article 37 of Directive 2004/38 allows Member States to adopt or maintain more favorable national provisions.[106] In other words, the Directive provides for minimum harmonization. The qualification of persons as family members within the meaning of the Directive is primarily determined by national law. Article 2, point 2 of the Directive defines a family member as follows:

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

105. Council Directive No. 2003/109, O.J. L 16/44, pmbl. ¶ 2 (2004).
106. Council Directive No. 2004/38, art. 37, O.J. L 158/77, at 121 (2004).

those of the spouse or partner as defined in point (b).[107]

Important of course is the reference under (b) to the legislation of the host Member State in determining whether the partner of the EU citizen should be regarded as a family member as defined in the Directive. The Directive does not contain a so-called free movement clause. Registered partnership therefore only offers rights of travel and residence in the Member State of long-term residence and the other Member States where such partnership is recognized. In that respect, Article 2 paragraph 2 codifies ECJ case law regarding the right of residence of the partner of a migrating EU citizen.[108]

The Directive does not contain a reference to the national laws of the Member States for the definition of the spouse. Therefore, the question arises as to how to interpret the term "spouse." Dutch law allows same-gender marriages, which makes the two partners spouses. The crucial question of course is whether this should be recognized by EU Member States who do not allow same gender marriages. For now, there is no clear answer to this question. In *D. v. Council*, both the Court of First Instance and the ECJ held that the concept of marriage should be determined at the Community level.[109] However, this case concerned the right to a family allowance for an official of the Council with a registered partnership based on the Staff Regulations. The Staff Regulations entitled married officials to a family allowance. The question was whether the Court would adopt the same approach with regard to the recognition by the host Member State of a same-gender marriage consummated in another Member State. On one hand, reference could be made to the Court's case law on the term "worker," where the Court ruled that this is a concept of Community law and thus prevents a strict interpretation under national law frustrating the free movement of employees. On the other hand, it is clear that when interpreting the term "spouse" as referred to in Article 2(2)(a) of the Directive, the Court should consider national traditions that are difficult to reconcile. Because very divergent national traditions exist, the Commission refrained from extending the term spouse

107. *Id.* art. 2(2), at 88.

108. *See, e.g.*, Netherlands v. Reed, Case 59/85, [1986] E.C.R. 1283, [1987] 2 C.M.L.R. 448.

109. *See* D. v. Council, Joined Cases C-122/99 & C-125/99 [2001] E.C.R. I-4319, [2003] 3 C.M.L.R. 9; *see also* Case T-264/97, [1999] E.C.R. II-1.

and partner as suggested by the European Parliament. In the proposal the Commission argued:

> On this point the Commission feels that harmonization of the conditions of residence for Union citizens in Member States of which they are not nationals must not result in the imposition on certain Member States of amendments to family law legislation, an area which does not fall within the Community's legislative jurisdiction. The Commission feels that the amended proposal represents an equitable solution to these issues: firstly, it complies with the principle of non-discrimination in as much as it requires Member States to treat couples from other Member States in the same way as its own nationals; and, secondly, it allows for a possible change in interpretation in the light of developments in family law in the Member States.[110]

This, however, does not answer the question of how to interpret the term "spouse" as referred to in Article 2(2)(a) of the Directive. As the majority of EU Member States do not recognize a same-gender marriage, the Court is likely to interpret the term "spouse" strictly, i.e., traditionally. This would mean that gay and lesbian spouses would not derive any protection from the Directive. Such an interpretation would probably not be contrary to the interpretation given to Article 8 of the European Court of Human Rights Convention (family life). In *Kerkhoven*, the Commission ruled that "despite the modern evolution towards homosexuality, a stable homosexual relationship between two women does not fall within the scope of the right to respect for family life ensured by Article 8."[111]

A second option is to define the term "spouse" based on either the law of the Member State where the marriage was concluded or of the host Member State. It is clear that only in the former case would the Directive result in the mutual recognition of marriages. The discussion about the interpretation of the term "spouse"—at any rate where the right of residence in another EU Member State is concerned—is of particular relevance

110. 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, at 4, ¶ 3(1), COM (2003) 199 final (Apr. 15, 2003).

111. Kerkhoven, Hinke & Hinke v. The Netherlands, App. No. 15666/89, Eur. Comm'n H.R. (1992) (unreported).

for spouses who do not have the nationality of an EU Member State and for that reason cannot invoke the free movement principles. But partners who both have the nationality of an EU Member State may want to rely on the Directive, for instance, for their pension rights.

Article 3(2), clearly shows that the Directive also offers some degree of protection to family members and partners who do not fall within the scope of Article 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.[112]

The obligation, in the last section of Article 3(2), to examine the personal situation of the persons concerned, creates in our view a presumption that the host Member State admits such partners. Refusal has to be justified. In addition to the statements made earlier about the rights of same gender spouses, it follows at any rate from the Directive that same gender spouses may not be categorically denied admission or residence.

Finally, the question arises as to the meaning of the phrase "in accordance with its national legislation" in the heading of this provision.[113] The phrase seems to refer to the national administrative provisions implementing the Directive and should not be interpreted as a possibility to affect the basic rights of the Directive under national law.

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112. Council Directive No. 2004/38, art. 3(2), O.J. L 158/77, at 89 (2004).

113. *See id.*

B. *Migrating Third Country Nationals*

The Family Reunification Directive expressly provides for the possibility for Member States to adopt or maintain more favorable provisions.[114] According to Article 4(1) the following persons qualify for family reunification: the sponsor's spouse, the minor children of the sponsor and/or his spouse, the minor children of the sponsor, and the minor children of the sponsor's spouse.[115] Member States may extend the right to family reunification to include: financially dependent relatives by blood in the ascending line and adult children,[116] and the unmarried partner or a partner who is bound to the sponsor by a registered partnership. It follows from the preamble that Member States who do not recognize those family ties need not treat those persons as family members "with regard to the right to reside in another Member State, as defined by the relevant EC legislation."[117] "Relevant EC legislation" in the first instance includes Directive 2003/109, which regulates the right of residence in one of the other Member States in Articles 14 *et seq.*[118]

As was discussed in Part IV.A. above, Article 37 of Directive 2003/109 provides that Member States may issue permits with a permanent or unlimited validity under more favorable conditions. In that case the permit does not entitle the bearer to a right of residence in other Member States. The long-term resident may rely on full application of rights derived from the Directive by long-term residents against the Member State where he resides.

It follows from Article 3 that the Directive shall apply without prejudice to existing international obligations on the treatment of third country nationals.[119]

Directive 2003/109 also contains provisions enabling the Member States to set further conditions and limitations for ac-

114. Council Directive No. 2003/86, art. 3(2) O.J. L 251/12, at 14 (2003).

115. *See id.* art. 4(1), at 14.

116. *See id.* art. 4(3), at 14.

117. *Id.* at 12.

118. *See* Council Directive No. 2003/109, O.J. L 16/44, at 50-53 (2004).

119. Reference is made to bilateral and multilateral agreements concluded by the Community or the Community and its Member States, bilateral agreements concluded between a Member State and a third country before the date of entry into force of the Directive, the European Convention on Establishment, the European Social Charter, and the European Convention on the Legal Status of Migrant Workers.

quiring long-term resident status.[120] Directive 2003/86 allows Member States similar freedom for the award of the right to family reunification.[121] Directive 2003/109 explicitly allows Member States to impose integration conditions for the award of long-term residence status. Examples of such conditions under the Family Reunification Directive are the requirements set out in consideration 7 regarding housing, sickness insurance and income.[122]

For the sake of completeness, it should be noted that Directive 2004/83 also includes provisions on minimum harmonization.[123] Article 3 confers on Member States the right to introduce or retain more favorable standards for determining who qualifies as a refugee. This Directive only regulates the recognition of the status of refugees and the rights that the refugee has within the Member State concerned. The Directive does not award any rights of travel or residence that have been laid down in the Directives discussed earlier.

V. *TOWARDS A FRAMEWORK FOR REVIEW*

A. *Minimum Harmonization and Mutual Recognition*

The Directives considered in this Article are all examples of minimum harmonization. Harmonization of rules for the internal market embodying minimum harmonization is often combined with a free movement clause. Such a clause obliges Member States who have set higher national requirements to admit products from other Member States that comply with the minimum standard of the Directive. If the Netherlands, for instance, decides to introduce stringent requirements for the nicotine content of cigarettes, it may not impose those strict requirements on cigarettes produced in other EU Member States that comply with the standard contained in the relevant directive.

In the harmonization rules for migrating EU citizens and third country nationals, free movement clauses are absent. This

120. *See* Council Directive No. 2003/109, O.J. L 16/44, at 47 (2004).

121. *See generally* Council Directive No. 2003/86, O.J. L 251/12 (2003).

122. *See* Council Directive No. 2003/109, O.J. L 16/44, at 16-17 (2004).

123. *See* Council Directive No. 2004/83, O.J. L 304/12, at 12 (2004) (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted).

absence can partly be explained by the difference between the harmonization of laws for products and for persons. When product laws are harmonized, the requirements for the products will be harmonized. Any stricter requirements that a Member State wishes to impose will restrict trade and there will be reason to safeguard the free movement of the products that comply with the requirements set by the Directive. When laws for persons are harmonized, the Directive does not lay down specific requirements for persons but confers certain rights on those persons. When a Member State provides for more extensive protection, this will not restrain free movement, so there will be no need for a free movement clause.

This is different for the provisions that define the scope *ratione personae* of the Directives. The Directives give the core family the benefit of free movement; the Member States may decide to grant a more extensive protection but the other Member States are under no obligation to accept such an extension. If, for example, the Netherlands would allow family reunification for unmarried partners, the Directive concerned would not require another Member State to recognize this if the third country national wished to settle there with his or her partner. As we noted in IV.A., the Commission argued that the Community lacks the necessary powers for harmonization in the field of family law. As a result, the Member States cannot be forced to accept a more liberal granting of rights in other Member States. We think that this argument is not very convincing. While it is true that the Community does not have the competence to take harmonization measures in the area of public health (Article 152, paragraph 4 of the EC Treaty), that does not mean that the Community cannot adopt harmonization measures for the internal market that have an effect on public health.[124] Of course, the real reason is that the opinions of the Member States on marriage and registered partnership differ considerably and that mutual recognition is still a bridge too far.

B. *Framework of Review for More Extensive National Measures*

In the case of minimum harmonization rules for the inter-

124. *See generally* Sec'y of State for Health v. British American Tobacco (Inv.) Ltd. and Imperial Tobacco Ltd., Case C-491/01, [2002] E.C.R. I-11453, [2003] 1 C.M.L.R. 14.

nal market, more stringent national measures should be compatible with the relevant Treaty provisions. For the Directives described in this Article, a similar test is not available. After all, if the Member States grant a more extensive protection, it is in the interest of the EU citizen or third country national. Other Member States are only affected if the persons benefiting from such extensive rights travel to those Member States. This is different for internal market rules where economic operators may face trade barriers as a result of more extensive national measures (such as stricter environmental requirements).

C. *Framework for Review for Less Extensive Protection by Member States*

The Directives, discussed in this Article, do offer the Member States the possibility to set stricter requirements on certain topics or to offer less extensive protection. We have mentioned several examples above, to which Article 9(2) of Directive 2003/86 could be added.[125] This provision allows Member States to confine the right to family reunification of refugees to those refugees whose family ties existed before entry (Article 9(2) of Directive 2003/86). This situation may be compared to stricter national standards in the case of minimum harmonization for the internal market, so that a similar question about the framework for review arises.

D. *Relation Between Harmonization Legislation and the Framework of the Treaty Law*

When considering the harmonization rules on the free movement of EU citizens, a comparison with the "internal market" framework referred to in the introduction is obvious. For example, in *Dreessen II*, the ECJ held that the obligation under Article 43 EC to take all diplomas, certificates and other formal qualifications as well as the relevant experience of the person concerned (as earlier was determined in *Vlassopoulou*) into account, also applies if a Directive on the mutual recognition of diplomas has been adopted for the profession in question.[126] The Court analyzed whether the Directive covered the issue ex-

125. *See* Council Directive No. 2003/86, art. 9, O.J. L 251/12, at 16, (2003).

126. *See generally* Conseil national de l'ordre des architectes v. Dreessen, Case C-31/00, [2002] E.C.R. I-633, ¶¶ 25-26.

haustively, taking an approach similar to its analysis in *Doc-Morris* (which was related to the internal market).[127]

Stricter national measures than provided for by Directive 2004/38 should also be evaluated against the EC Treaty. The ECJ's interpretation of Article 18 EC has—as discussed in Part II.E.—resulted in a more extensive protection of economically inactive EU citizens and thus in the equalization of the protection that different categories of EU citizens have under EC law. This seems to result in a general rule that national legislation that differs from the standard set by the Directive should be tested under Article 12 EC.

The secondary legislation for third country nationals as discussed in this Article reduces the existing discrepancy between the protection for EU citizens and third country nationals. As a result of this legislation, third country nationals now fall within the scope of Community law and may therefore invoke Article 12 EC, on the conditions set out in Part III.E. A condition for the successful reliance on Article 12, however, is that the subject matter of the national measure falls within the scope *ratione materiae* of EC law. For EU citizens this question has—as demonstrated in Part II—become largely irrelevant. For third country nationals, this remains an important question because not every adverse treatment of third country nationals comes within the scope of EC law.

The provisions in the Directives, and in particular the safeguard clauses, should be interpreted in line with the general principles of Community law. This follows from *Baumbast*. Although this judgment dealt with the free movement of EU citizens in the context of Article 18 EC, these principles apply to all cases that fall within the scope of the Treaty.

E. *European Convention on Human Rights ("ECHR") as a Minimum Standard*

The ECHR[128] ultimately determines the minimum level of protection within EC law both for EU citizens and third country nationals. According to established ECJ case law, national or community measures have to be compatible with the ECHR.

127. *See supra* note 17.

128. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

This requirement is confirmed in Article 6(2) of the EU Treaty,[129] and has already been confirmed in cases like *Carpenter*. National measures restricting free movement cannot be justified if they violate the standards of the ECHR. The fact that the EU requires the respect of the ECHR does not in itself yield additional protection against measures by Member States: after all, all Member States as such are bound by the ECHR.

All European legislation should also be compatible with the European Human Rights Convention. Thus the European Parliament in its appeal against Directive 2003/86 alleges a breach of the ECHR. According to the Parliament, Article 4(1), last paragraph, Article 4(6), and Article 8 of the Directive violate Article 8 of the ECHR. For the purpose of this Article, it is important to note that any stricter requirements imposed by the Member States should also be compatible with the ECHR. When Member States make use of the possibility offered by the Directive to introduce stricter requirements, their action comes within the scope of Community law. The ECJ may therefore review whether the national measure is in conformity with the ECHR.

F. *Public Policy, Public Security and Public Health Exception*

The freedoms for EU subjects and third country nationals are not unlimited. They may be restricted by Member States on grounds of public policy, public security and public health. Exceptions to the Treaty freedoms can be found in Article 39 paragraphs 3 and 4 (workers), and Articles 45 and 46 of the EC Treaty (services and establishment). Case law[130] and secondary legislation have further developed those exceptions.

The Court's interpretation of the Treaty exceptions is also relevant to the exceptions to the free movement provisions contained in the agreements concluded between the EC and third countries. In *Nazli* the ECJ decided that the possibility offered to the Member States to make exceptions to the rights of Turkish subjects on grounds of public policy should be interpreted in a way similar to the public policy exception contained in the EC

129. *See* Consolidated Version of the Treaty on European Union, art. 6(2), O.J. C 325/5, at 11-12 (2002).

130. *See, e.g.*, Van Duyn v. Home Office, Case 41/74, [1974] E.C.R. 1337, [1974] 1 C.M.L.R. 1.

Treaty.[131] In *Jany* the Court reached a similar conclusion with regard to the public policy exception in the agreements with the Czech Republic and Poland.[132] Of course, an important question is whether the convergence in the case law on the different free movement exceptions in the Treaty and those in the agreements with third countries is continued in the harmonization Directives.

The ECJ's interpretation of the exceptions to the free movement of EU citizens has been codified and supplemented in Articles 27, 28, and 29 of Directive 2004/38.[133] According to Article 27, 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. The conditions applying the public policy or public security exceptions in Directive 64/221 and developed in the case law of the Court are found in Article 27(2). Article 28 contains specific protection against expulsion and lists the factors to be considered by Member States before taking an expulsion decision on grounds of public policy or public security. Those factors are the duration of the residence on its territory of the individual concerned, 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. Citizens and their family members who have the right of permanent residence may only be expelled on *serious* grounds of public policy or public security. Union citizens who have resided in the particular Member State for ten years or more and minors are protected by an even higher standard: there should be imperative grounds of public security as defined by the Member States.

Article 6 of Directive 2003/109 offers Member States the possibility to refuse the long-term resident status on grounds of public policy or public security.[134] The original Commission proposal contained similar conditions as those applicable to the free movement of EU citizens.[135] The wording of the Directive

131. *See generally* Nazli v. Stadt Nürnberg, Case C-340/97, [2000] E.C.R. I-957.

132. *See generally Jany*, C-268/99, [2001] E.C.R. I-8615, [2003] 2 C.M.L.R. 1.

133. *See* Council Directive No. 2004/38, O.J. L 158/77, at 113-16 (2004).

134. Council Directive No. 2003/109, art. 6, O.J. L 16/44, at 47-48 (2004).

135. Article 7, paragraph 1, states, "[t]he Member States may refuse to grant the status of long-term resident if the personal behavior of the person concerned repre-

allows Member States more freedom. Article 6(1) merely lists the factors to be considered by the Member State in question in its decision-making: severity or type of the offence against public policy or public security, or the danger that emanates from the person concerned, while having proper regard to the duration of the residence and to the existence of links with the country of residence. According to Article 6(2), economic grounds may not be considered. Article 6 of Directive 2003/86 contains a similar specification of the Member States' powers to restrict the right to family reunification.[136]

The restrictive interpretation of the public policy and public security exception of Article 28 of Directive 2004/38, however, does apply if a Member State wishes to expel a long-term resident from its territory: this is only possible if she or he represents a present and sufficiently serious threat to public policy or public security (Article 12).

We regret that the rights of migrating third country nationals in the Directives differ from the public policy and public security exceptions applicable to EU citizens. The Member States should have followed the basic philosophy, i.e., to stay, as much as possible, close to the regime for EU citizens. This discrepancy between the professed basic objective of the Directive and the wording of the actual rules may also create legal uncertainty about the significance of the exceptions. It may be up to the Court to align the actual wording with the stated objective in the preamble. In doing so, the ECJ will be, once again, on familiar turf: It also gave a restrictive interpretation of the exceptions to the freedoms in the EC Treaty.

The Court will also have to consider the significance of Article 64 EC, which stipulates that Title IV of the Treaty does not affect the Member States' responsibilities with regard to public policy and public security. Does Article 64 constitute a general exception that can be invoked by the Member States, even if in this area harmonization legislation has been adopted? In our opinion, the answer is negative. It can be assumed that Article

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sents a present threat to public policy or public security." Article 7, paragraph 2, states, "[t]he existence of criminal convictions does not in itself constitute a ground for the refusal referred to in paragraph 1. This cannot be based on economic grounds."

136. Again, the original Commission proposal agreed with the interpretation given to the exceptions to the rules for free movement of persons. *See* Proposal for a Council Directive on the right to Family Reunification, COM (1999) 638 final (Jan. 12, 1999).

64 is primarily relevant if the Directives based on Title IV do *not* include safeguard clauses for public policy and public security. If the Directives do include such clauses, as the Directives discussed here do, the *Tedeschi* case law should be applied accordingly.[137] In that case, the Directive determines whether national measures are allowed and it is no longer possible to rely on Article 64. Otherwise, the safeguard clauses contained in the Directives would lose their meaning.

But even in the improbable case that the Directive does not provide for safeguard clauses, Article 64 does not give the Member States a free hand to deviate from the standards set by the Directives on grounds of public policy and public security. When compared to Article 46 EC, Article 64 appears to leave the Member States considerable latitude to take measures to protect public policy or public security.[138] Progressive harmonization of the rules for third country nationals will make it desirable and probable that in interpreting Article 64, the Court will be inspired by its case law on Article 46.

CONCLUSION

The relation between harmonization rules on migrating EU citizens and third country nationals and the Treaty regime follows the same basic principles as the free movement of goods. If harmonization rules—regulating a certain issue exhaustively—are adopted, those rules constitute the relevant framework for review. When the Directive allows the national legislation to adopt more stringent or more lenient rules, such national legislation should be compatible with the free movement rules of the Treaty.

This does not mean, however, that the system for review is the same as that for the free movement rules. There is, in the case of harmonized rules for migrating EU citizens or third country nationals, no Treaty provision similar to Article 95(4) and (5) EC allowing Member States to adopt national measures on grounds of major needs. Moreover, there are still major discrepancies between the rules for EU citizens and those for third

137. *See generally Tedeschi*, Case 5/77, [1977] E.C.R. 1555, [1978] 1 C.M.L.R. 1.

138. *See* L. Schmahl, *in* 1 KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 1863-66 (H. von der Groeben & J. Schwarze, eds.).

country nationals. The former are more harmonized than the latter. The rules applicable to EU citizens are embedded in a framework for review. By contrast, the rules for third country nationals leave the Member States more scope for the adoption of restrictive measures. Gradually, however, convergence between the two systems is taking place, which will inevitably reduce the Member States' powers.

The introduction of EU citizenship and the Court's interpretation of Article 18 of the EC Treaty has resulted in a general framework for review with a fundamental character for the benefit of the EU citizens. The case law of the ECJ on EU citizenship has extended both the scope *ratione personae* and the scope *ratione materiae* of EC law and thus the right to equal treatment contained in Article 12 EC. As a result, the debate shifts from the question of when EU citizens can rely on Article 12, to the question of which obligations for the Member States arise from this Article. Which conditions—other than nationality criteria—may Member States set to grant access to certain facilities without violating Article 12?

Many questions about the harmonization of the rules for migrating third country nationals still remain unanswered. Because there is not yet a clear framework for review embedded in the Treaty, the Court has little guidance when it has to interpret national measures. In our view, when the ECJ is called upon to interpret the regulations on migrating third country nationals, it would be desirable and perhaps inevitable for the ECJ to follow as much as possible the application of the principles governing the free movement of EU citizens. This approach is desirable, because it does justice to the basic principle of the Directives for third country nationals—i.e., to give them rights that resemble those of EU citizens as much as possible. It also does justice to the objective of Title IV of the Treaty—i.e., to create an area of freedom, security and justice. But it also seems inevitable that the adoption of the Title IV Directives will result in a convergence of the rights of third country nationals and EU citizens. The existing principles governing the free movement of EU citizens will inevitably guide the interpretation of questions resulting from new harmonization legislation. Those principles should, of course, not be applied uncritically, but in our view there seems to be a presumption that these principles apply to this area as well and that not applying them requires justifica-

tion. The recognition that the Directives bring third country nationals within the scope of Community law and thus enable them to rely on Article 12 EC could be an important step towards such convergence.