

An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident within the European Union, with Particular Reference to the Case Law of the European Court of Justice

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1. Introduction

In sharp contrast with the current wide-ranging, fairly uniform and comprehensive regime of EU rules on social, economic and political rights afforded to nationals of the EUMember States (or “MSNs”), there is no coherent body of EU Law setting out the rights and status pertaining to third country nationals residing in the Union (hereafter: “TCN residents”).¹ As has been readily commented elsewhere,² the EU is far from the point of establishing a common corpus of substantive rules for TCN residents, notwithstanding the fact that

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1. The literature on Community law in relation to TCNs is extensive. See e.g.: Oliver, “Non-Community nationals and the Treaty of Rome”, 5 YEL (1985), 57; Weiler, “Thou shalt not oppress a stranger: On the judicial protection of human rights of non-EC nationals”, 3 EJIL (1992), 65; O’Keeffe, “Union citizenship” in O’Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994); Evans, “Third country nationals and the Treaty on European Union”, 5 EJIL (1994), 199; Cholewinski, “The protection of the right of economic migrants to family reunion in Europe”, (1994) ICLQ, 568; Cremona, “Citizens of third countries: movement and employment of migrant workers within the European Union”, (1995/2) LIEI, 87; Hervey, “Migrant workers and their families in the European Union”, in Shaw and More (Eds.), *New Legal dynamics of the EU* (Wiley, 1995); Peers, “Towards equality: Actual and potential rights of third country nationals in the European Union”, 33 CML Rev. (1996), 8; Hedemann-Robinson, “Third country nationals, European Union citizenship and free movement of persons: A time for bridges rather than divisions”, 16 YEL (1996), 321; Martin and Guild, *Free Movement of Persons in the EU* (Butterworths, 1996); Peers, “Undercutting integration: Developments in Union policy on third country nationals”, 22 EL Rev. (1997), 76; Peers, “Building Fortress Europe: The development of EU migration law”, 35 CML Rev. (1998), 1235; Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer, 1999).

2. See e.g. Cremona, op. cit. *supra* note 1.

they constitute a significant portion of the Union's total population.³ In large part this has been due to the fact that TCN residence has traditionally been perceived by EU Member States to be an issue lying outside the parameters of the Union's project of furthering European integration.

Until quite recently, EU Member State governments considered the subject of third country national residents' status in the Union as being a policy area subject to the jurisdiction of "host" individual nation States.⁴ Intergovernmental discussions have usually presented a standpoint which has linked TCN long-term residence issues indissociably with matters concerning immigration and border controls in general. The result has been to institutionalize a perception that political and legal questions on TCN residence should be resolved at national level alone, it being taken as read that they directly impinge upon prerogatives and boundaries of national self-determination. In contrast, the supranational dimension of TCN residence within the Union has been underplayed, with little or no public discussion on how it informs ongoing debates on ways and means of enhancing the political, economic and social legitimacy and functioning of the single market. The approach of the Community's political institutions has also been one which has traditionally tended to mirror that adopted by Member State governments, namely to distance discussions of TCN residents' interests from the supranational political agenda of "ever closer union". The orthodox position, as most closely and consistently followed by the Council of the European Union, has been to view TCN residence as a subject for political discussion and negotiation in the context of its external bilateral and multilateral trade relations with third countries, rather than in terms of developing the Union's internal rules on the operation of the single market.

The rules of Community law on TCN residents' status have reflected the lack of any clear political direction from the Union's Member States and legislative institutions. Currently, the legal position at Community level on TCN residents' rights is in a fractured, highly complex and confused state. This is hardly surprising, given the absence of any codified set of Community

3. It is estimated that over 10 million TCNs reside within the European Union. See data compiled in EUROSTAT (OOPEC, 1997 Yearbook) and COM(94)23fin. Commission Communication on Immigration and Asylum Policies, at para 118. From the data available, it would appear that TCNs currently represent approximately 3% of residents within the EU. This figure easily exceeds the combined population of the three Member States with the smallest number of inhabitants: i.e. Denmark, Ireland and Luxembourg.

4. As exemplified in the *Immigration Consultation* case, in which no less than five Member States challenged the competence of the Commission to promulgate Decision 85/381 (O.J. 1985, L 217/25) setting up a prior consultation and communication procedure on migration policies in relation to non-member countries under the auspices of Art. 137 EC (ex 118 EEC): Cases 281, 283–285 & 287/85, *Germany, France, The Netherlands, Denmark and the UK v. Commission* [1987] ECR 3245.

norms on the subject. Until the Treaty of Amsterdam 1997 (ToA), little or no competence was vested in the Community legislature to enact any measures addressing the challenges raised in connection with the interdependency and interrelationship between the evolving European internal market space and TCN residence, a fact aptly illustrated in the *Immigration Consultation* case.⁵ Political disagreements and hesitancy within the Union membership compounded the legal problems relating to competence; the history of the EU on this subject is littered with failed or stalled Community legislative proposals.⁶ Instead, the EU Member State governments agreed to make only a few non-binding law statements on TCN residents' status under the auspices of the old third pillar on justice and home affairs.⁷ The results of this legacy of inaction are still very much apparent, as the bulk of current substantive Community rules that do touch upon issues connected with TCN integration have principally developed within the context of the external relations of the EC, namely as components of individually tailored trade agreements concluded with various third States. Accordingly, an erratically constructed collection of rules have evolved at Community level affecting TCN residents, their reach being contingent upon the factor of nationality rather than residence of the individual concerned.

The vast majority of existing EC rules on TCN residents' rights are scattered amongst a host of international agreements concluded with non-Member States. At the close of 2000, some thirty association and cooperation agreements had been concluded between the European Community, its Member States and third countries, all affecting TCN residents' legal status in varying degrees. Thus, the extent to which Community law addresses issues relevant to the legal status of a TCN living within the EU varies according to the existence of any social or economic rights for natural and legal persons which have been agreed between the Union and particular third country of nationality. In many instances the texts of such Community agreements are vague, ambiguous or silent on key issues connected with entry, residence, mobility and family reunion matters. Each agreement may contain rights and obligations which are uniquely applicable to TCN residents with nationality of the particular contracting third State. As a consequence, it is frequently the case that certain TCN residents within the Union are privileged over others,

5. Cases 281, 283–285 and 287/85, *supra* note 4.

6. Notable examples include the Commission's proposals for a directive on the right of third country nationals to travel in the Community (COM(95)346 fin), for a Council regulation amending Regulation 1408/71 as regards its extension to nationals of third countries (COM(97)561 fin) and for a Council act establishing a convention on the rules for the admission of third country nationals to the Member States of the EU (COM(97)387 fin).

7. In particular, see the EU Council Resolution of 4 March 1996 on the status of third country nationals residing on a long-term basis in the territory of the Member States (O.J. 1996, C 80/2).

due to the fact that certain EC international accords contain a greater range of individual rights for migrants than others. Even where an agreement may address itself to TCN residence matters, it is clear that in the vast majority of cases the legal position of such residents continues to be regulated principally at national level. The EC Treaty and accompanying first pillar legislation provides even less in the way of addressing the legal position of TCN residents in the EU. In this respect, the Union's legal system has so far singularly failed to provide adequate substantive recognition of the fact that TCN residence is, and has always been, an indispensable component of its social, political and economic foundations and evolution.

However, since the EC Treaty amendments introduced by the Treaty of Amsterdam in 1997 on immigration⁸ and subsequent political initiatives, most notably expressed in the Presidency Conclusions at the European Council's summit in Tampere in October 1999⁹ and the recently inaugurated EU Charter on Human Rights,¹⁰ there may be signs that this situation might be beginning to be re-evaluated.¹¹ Whilst it is not the intention in this article to focus on these most recent of post-Amsterdam developments, it is perhaps worth briefly noting their contextual relevance, in particular that of the Tampere summit, to this discussion. At Tampere, the European Council specifically called for the establishment of a set of uniform rights to be granted to TCN residents which are to be "as near as possible to those enjoyed by EU citizens".¹² TCN residence issues were itemized as being a constituent part of the post-Amsterdam agenda on freedom, security and justice. Whilst the potential constitutional significance of these political developments should not be underestimated, the extent of the European Council's commitments are far from having been clarified. Notwithstanding the European Council's sanctioning of a general upgrading of TCN residents' rights to a level "comparable to those of EU citizens" at the Tampere summit,¹³ the Presidency Conclusions

8. See Title IV to the EC Treaty on Asylum, Immigration and Other Policies Related to the Free Movement of Persons, Arts. 61–69 EC.

9. The text of the Presidency Conclusions of the European Council summit at Tampere, Finland (15–16 Oct. 1999) is reproduced on the EU's website (www.europa.eu.int).

10. E.g. Art. 45(2) of the EU Charter on Human Rights, recently approved by the European Council at its Nice Summit on 7 Dec. 2000, envisages the possibility that freedom of movement and residence rights "may be granted, in accordance with the [EC] Treaty, to nationals of third countries legally resident in the territory of a Member State". That this issue was placed formally onto an agenda of fundamental human rights discourse at Union level is, in itself, a significant step. The text of the Charter (CHARTE 4487/1/00 REV 1 CONVENT 50) is available for inspection on the Union's website at www.europa.eu.int.

11. See the favourable views expressed by recent editorial comments in this journal on the impact of Tampere, in 36 CML Rev., 1119–1125.

12. See point 21 of the Tampere Presidency Conclusions, contained within Section III "Fair Treatment of Third Country Nationals".

13. Point 18 of the Presidency Conclusions, *ibid*.

hint at this commitment being qualified as one operating primarily, perhaps even solely, within the parameters of host Member State territories and jurisdictions. In particular, the Conclusions appear to express the view that TCN residents may not necessarily be granted inter-State mobility rights or other Community rights on the same basis as that currently granted to MSNs.¹⁴ The emphasis on the national as opposed to supranational dimension to equality of treatment for TCN residents has been reiterated by the European Council on subsequent occasions.¹⁵ In any event, it is highly likely that a considerable period of time will elapse before any substantive changes are made to the existing *acquis* on TCN residents. No specific deadlines or commitments on TCN residents' Community rights have been made at European Council or other EU institutional level.¹⁶

It is against this fractured constitutional backdrop that the European Court of Justice has developed its case law on the extent of Community rights applicable to TCN residents. This article seeks to assess the often difficult

14. See point 21 of the Tampere Presidency Conclusions in which the European Council specifies in further detail what it means by "Fair Treatment of Third Country Nationals" (Section III of the Conclusions). Here, it calls for TCN residents who are in possession of a long-term residence permit from a Member State to be "granted in *that* Member State a set of uniform rights which are as near as possible to those enjoyed by EU Citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination *vis-à-vis* the citizens of the State of residence." (our emphasis). Arguably, the concern of the European Council here appears to be centred on ensuring that each Member State affords national treatment to those persons admitted into their respective territories under the auspices of national immigration rules. This would seem to contradict the European Council's earlier introductory statements made in points 2 and 3 of the Tampere Conclusions that "[t]he challenge of the Amsterdam Treaty is now to ensure that freedom [based on human rights, democratic institutions and the rule of law], which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all", a freedom which "should not, however, be regarded as the exclusive preserve of the Union's own citizens". For a critical assessment of the recent constitutional developments taken at EU level in respect of TCN residents, see Hedemann-Robinson, "Continuation of second class citizenship under European Union law? An overview of recent developments in law and policy on third country nationals resident within the European Union" (2001) YEL, forthcoming.

15. See point 22 of Annex v. of the European Council's Presidency Conclusions at Santa Maria da Feira 19–20 June 2000, on a Common Strategy of the EU on the Mediterranean Region, which states that in respect of nationals of Mediterranean third States lawfully residing in a EU Member State there should be an approximation "of their legal status *in that Member State* to that enjoyed by EU citizens" as a means of ensuring their "integration into society" (our emphasis). In addition, Art. 45(2) of the Charter of Fundamental Rights of the European Union, as recently enunciated by the European Council at its Nice Summit on 7 Dec. 2000, merely states that freedom of movement and residence "*may* be granted . . . to nationals of third countries legally resident in the territory of a Member State" (our emphasis).

16. The Tampere summit has timetabled "a full debate assessing progress" to occur at the European Council's summit under the Belgian Presidency in December 2001. However, it is unclear what this will mean in terms of there being (any) definitive change.

role of the Court in developing the rights of TCN residents under Community law. In addition, it will also take account of recent changes that have been instituted at Community level in the wake of a number of new agreements concluded between the EC, the Member States and third countries.¹⁷ Mainly for reasons of space, this paper will only devote relatively brief attention to the Court's jurisprudence on the impact of first pillar norms in relation to TCN residents. Pending the accumulation of sufficient political will amongst the EU Member States to assist in crafting a comprehensive code of rights at Community level, the ECJ continues to be the EU institution at the forefront of evolving this area of Community law, notably by virtue of its powers and responsibilities for interpreting Community law under the preliminary rulings procedure in Article 234 EC. In carrying out this task, the Court faces a particularly difficult challenge. On the one hand, in accordance with its duty under the EC Treaty to uphold the rule of law¹⁸ and boundaries of EU institutional jurisdiction and competence,¹⁹ the Court has a duty to ensure that it interprets Community norms faithfully in accordance with the intentions of the legislature and contracting parties responsible for concluding Community measures and international agreements on third country national issues. On the other hand, a purely positivist approach to the task of judicial interpretation carries with it certain dangers. Specifically, the tiering and fracturing of Community rights on the basis of nationality may lead to the point where fundamental rights, as recognized by the Court to be an integral part of the general principles of Community law, may or do become undermined.²⁰ In a number of cases involving TCNs, the Court has been faced with the unenviable task of attempting to reconcile the principles of legal certainty and natural justice, both of which underpin the foundations of Community law. This tension has not infrequently reflected itself in the case law of the Court.

Criticism for the fractured and unpredictable state of the law cannot, though, be directed solely at the Court. The fact is that the existing written sources of Community law on TCN residents' rights and status are wholly inadequate to ensuring that all inhabitants within the EU are afforded appropriate legal recognition and protection in order to secure genuine political, economic and

17. See for a fuller account of the legal arrangements in place on TCN residents pre-Amsterdam, the article by Peers published in this *Review* (1996), *supra* note 1.

18. Art. 220 EC.

19. See in particular, Arts. 5 and 7 EC.

20. This particular issue is made all the more poignant with the recent institution of the EU Charter on Human Rights, a constitutional restatement of the importance of ensuring the Union's adherence to minimum standards of fundamental rights and freedoms for individuals located within its territory.

social integration on an equal footing within the European Union.²¹ Responsibility for this ultimately rests with the EU Member States themselves, who hold final power over reforming the founding Union treaties and passing Community legislation through the Council of the EU.

2. The external dimension: TCN residents' status under international agreements concluded between the European Community, its Member States and third countries

As noted above, there are currently some thirty international agreements which have been signed by the European Community together with its Member States and third countries purporting to grant rights to TCN residents.

The number is set to rise in the wake of depolarization of international relations since the end of the Cold War and increase in initiatives designed to broaden and intensify global trading relations, such as those brought under the auspices of the World Trade Organization. Due to mainly political and economic reasons, the agreements have differed significantly in terms of the extent to which TCN resident interests are addressed.²² For instance, on the one hand, a number of agreements with the EU offer TCN residents significant rights of access to domestic labour and trading markets within the Union, such as the European Economic Area (EEA) Agreement 1992,²³ the recently

21. This state of affairs echoes the critical sentiments expressed by various judges of the European Court of Human Rights in the context of aliens' rights guaranteed under the European Convention on Human Rights and Fundamental Freedoms 1950. Many have criticized continued reliance on the haphazard evolution and limited scope of rights protection afforded under the Convention, an instrument ill-suited to dealing with the subject of resident alien integration. See for instance, the opinions of Judges Martens and Pettiti in *Boughanemi v. France* [1996] 22 EHRR 228; Judge Palm in *Bouchelkia v. France* [1997] 25 EHRR 686 at 708; Judges Baka and Van Dijk in *Boujlifa v. France* of 21 Oct. 1997 and Judges Costa and Tulkens in *Bhagli v. France* of 30 Nov. 1999. (The latter two judgments can be located on the ECHR website www.echr.coe.int/hudoc).

22. Detailed overviews of the provisions and effects of the various EU bilateral agreements with regard to third country nationals' rights include: Cremona, *supra* note 1; Guild (Ed.), *The Legal Framework and Social Consequences of Free Movement of Persons in the EU*, (1999 Centre of European Law, KCL); Hakura, "The external EU immigration policy: The need to move beyond the orthodoxy", 3 EFA Rev. (1998), 115; Handoll, *Free Movement of Persons in the EU*, (1994, Wiley) especially Chapter 10; Martin and Guild, *supra* note 1; Peers (1996), *supra* note 1; Staples, *supra* note 1.

23. Agreement creating a European Economic Area (O.J. 1994, L 1/3). This agreement was concluded between the European Economic Community, together with the European Steel and Coal Community and Member States, and Austria, Finland, Iceland, Norway and Sweden (essentially the membership of the European Free Trade Association at the time bar Switzerland and Liechtenstein). Liechtenstein acceded finally in 1995, this delay accounted for by the Swiss rejection of ratification by way of referendum in late 1993.

signed agreement with Switzerland on the free movement of persons,²⁴ as well as the association agreements concluded with Turkey²⁵ and with various central and eastern European nations (the so-called European Agreements (EAs)).²⁶ Other agreements contain little in the way of legal safeguards for TCN residents.

The differing levels of rights granted to TCN residents is not, of course, surprising given the context in which they have been discussed. Having been traditionally viewed as a matter falling within the remit of Community external relations policy, such issues appear to have been negotiated as bargaining chips in trade-related negotiations with the third State. Moreover, due to the fact that usually the Community and EU Member States have considered the issues of TCN residents' rights as being indissociable from concerns associated with potential and actual TCN migration into the Union in general, the degree of economic convergence between the respective contracting parties appears to have been a dominant factor in determining whether any rights are to be accorded to TCN residents. Thus, many of the agreements contain particularly weak provisions on TCN resident interests, where for instance EU accession is considered to be a remote possibility due to severe economic problems in the third State (such as is the case with the agreements concluded with the countries which have been constituted out of the former Soviet Union) and/or because of domestic political concerns of the EU Member States over TCN immigration (such as has characterized the relations with the so-called Maghreb group of countries²⁷).

Common, though, to all the international agreements concluded at Community level with third countries is the fact that, apart from the EEA and EC-Swiss arrangements, they do not ensure that any nationals of the third country signatories who reside within the Union enjoy rights remotely commensurate to those currently enjoyed by MSNs under Community law. In particular, apart from TCNs covered by those two accords²⁸ and, to very limited extent, by the Europe Agreements, no rights of mobility into and within the EU territory are granted to individuals under the agreements, either in a commercial capacity (e.g. as a self-/employed migrant) or in another context (e.g. as a family member). Without doubt this can be explained to a large degree by the fact that EU Member States have so far been steadfastly resistant, especially for domestic political reasons, to accord TCN residents with EU-wide access to labour and trading markets. Instead, the policy of prioritizing access for MSNs, or for persons who are nationals of particularly wealthy neighbouring European countries, persists.

An approximate pattern of hierarchy exists between the various agreements in terms of the range of individual rights granted. Without doubt, it is the EEA and EC-Swiss agreements which offer the greatest range and depth of TCN resident rights. EEA and Swiss nationals resident within the Union are, by virtue of these accords, vested with virtually the same economic and social rights as those granted to Union Citizens under the EC Treaty. The EC-Turkish association arrangements constitute the next most significant source of TCN resident rights.

24. The Agreement between the EC, its Member States and the Swiss Confederation on the Free Movement of Persons, signed on 21 June 1999. It is likely to enter into force in late 2001. A copy of the Agreement can be inspected on the website www.europa.admin.ch/e/int/.

25. Agreement establishing an Association between the EEC and Turkey 1963 (O.J. 1973, C 113/2).

26. The so-called Europe Agreements, concluded with Hungary, Poland, the Czech and Slovak Republics, Bulgaria, Romania, the Baltic States and Slovenia.

27. The Maghreb group is composed of Algeria, Libya, Morocco and Tunisia.

28. Namely, those with Liechtenstein, Norwegian or Icelandic nationality (given the EU accession of Austria, Finland and Sweden on 1 Jan. 1995).

Under these arrangements, Turkish workers and their family members residing within the EU Member States have various rights ensuring non-discriminatory treatment as well as limited access to host national labour markets. Relations between the EU and other third States have yielded far weaker rights for TCNs, notably those with North Africa, the Middle east and Central and Eastern Europe. The external relations between the EU and southern Mediterranean and Middle Eastern countries (now commonly referred to as the “Euro-Mediterranean dialogue”) has evolved since the early 1960s into the conclusion of a number of cooperation and, most recently, association agreements (Euro-Mediterranean Agreements). These agreements purport to afford those TCN residents with nationality of particular countries of the Maghreb, other North African and Middle Eastern countries certain rights to non-discrimination in the fields of work and social security. Agreements with former Soviet satellites in central and eastern Europe have resulted in a number of important association agreements (the “Europe Agreements” (EAs)) and Partnership and Cooperation Agreements (PCAs) which provide certain central and eastern European nationals with a range of self-employment related rights within the Union. Arrangements in respect of those nations having former colonial links with the EU Member States, namely the African, Caribbean and Pacific States (or ACP group), have resulted in various forms of non-discrimination guarantees for TCN residents who are ACP nationals. Apart from these agreements, there are a small number of other international instruments with other particular regions and nations inside and outside Europe which address the issue of TCN resident integration in different ways. These include the arrangements in place in relation to the overseas countries and territories of the EU Member States (OCT) as identified in Part Four of the EC Treaty), the UK’s Channel Islands and Isle of Man,²⁹ and San Marino.³⁰ For reasons of space, the Community’s relations with these territories will not be discussed in this article.³¹

Before examining each group of agreements in turn, it is important first to reflect briefly upon their status and impact within the European Union legal order.³² The importance of the agreements may not be underestimated, given that they constitute currently and for the immediate future at least the most important source of legal protection for TCN residents in the virtual absence of any clear cut Community law measures or provisions offering legal safeguards for TCN residents.³³ All of the agreements which encompass rules on TCN activity within the EU territory are “mixed”: i.e. the European Community and its Member States jointly conclude such international treaties. This is accounted for by the fact that the subject matter of the individual agreements lies part within the legal competence of the European Communities and part with the Member States.³⁴ It has been the ECJ which has played a central

29. See Arts. 2,4 and 6 of Protocol No.3 on the Channel Islands and the Isle of Man of the Treaty of Accession as between the UK and the EEC.

30. O.J. 1991, C 302/12.

31. In practice, relatively few inhabitants of these regions will encounter problems in terms of being able to integrate into the European Union. In particular, a substantial number of the inhabitants of these regions possess nationality of a Member State (e.g. British, French or Italian), and will therefore encounter few real problems in practice in being able to rely on the EU Law rights accorded to other Member State nationals residing within the EU territory (see Art. 6 of Protocol No. 3 of First Treaty of Accession 1972). For discussion of immigration implications in relation to Member State nationals residing in the Channel Islands and Isle of Man, see e.g. Plender, “The rights of European Citizens in Jersey” (1998) 2(3) *Jersey Law Rev.* 220–242; C-171/96, *Roque*, [1998] ECR I-4607, annotated by Stanley in 35 *CML Rev.*, 1091.

32. For recent overviews of the legal status and effects of international agreements involving the EU in relation to immigration policy, see e.g. Cremona, “External Relations and External Competence: The Emergence of an Integrated Policy”, in Craig and De Burca (Eds.), *The Evolution of EU Law* (1998, Oxford); Handoll, *op. cit. supra* note 22, Ch. 10; McGoldrick,

International Relations Law of the EU, (1997, Longman).

33. As recognized by Staples, op. cit. *supra* note 1 at p. 239.

34. The orthodox view hitherto is that the EU has no legal personality or capacity to conclude such agreements. (See, for a differing view on the EU's status in international law: Wessel, "International legal status of the European Union", 2 EFA Rev. (1997), 109–129). In terms of international practice, it is has been instead the European Communities and the individual Member States of the EU which have been the vehicles used for implementing the EU's external relations. Essentially, competence is divided on the following basis: whereas the former have responsibility for concluding agreements as regards matters in respect of which they have exclusive competence internally under the three Community treaties (Treaties of Rome 1957 and Paris 1951) and in respect of the Common Commercial Policy under Art. 133 EC, the latter represent the EU in all other areas (such as the second and third pillars under the Treaty on European Union 1992 as amended). The division of competence between Community and Member States, as determined under Arts. 133 and 300 EC in conjunction with the ECJ's case law, is highly complex and nuanced. In particular, further refinements to

role in establishing and developing individual rights contained in the third country agreements. In holding that such agreements and any decisions passed thereunder collectively by the contracting parties constitute “acts” within the meaning of Article 234(1)(b) (ex 177(1)(b)) EC, the ECJ has acquired a central position in assessing their validity, interpretation and effects within the EU legal order.³⁵ The fact that an international agreement may be mixed or require further implementation at national level has not been a deterrent from the Court asserting jurisdiction to assess its validity or interpretation on the basis of Article 234 EC,³⁶ or finding that its norms may have direct effect.³⁷ The ECJ has held that such norms may have direct effect where the provision in question contains a clear, precise and unconditional obligation, regard being had to the wording, purpose and nature of the agreement itself.³⁸ What has been and remains difficult to predict, though, is when the ECJ will confirm or deny that a particular norm in an agreement may have any direct effects. The root of the uncertainty lies in the fact that the Court has not been prepared to accept the existence of direct effect from the wording of the provision alone, even where identically phrased norms enshrined within the EC Treaty have already been held by it to be directly effective.³⁹ More crucial for the Court is whether conferral of direct effect accords with the purpose and nature of the particular agreement. The closer an agreement appears to resemble the market integrative elements of the EU, such as the establishment of a free trade area or customs union between the third country and the Union, the more likely it is that the ECJ will be amenable to arguments that its provisions should have direct effect. In contrast, agreements envisaging looser ties, such as those which seek to develop political dialogue and gradually establish trading relations to be based on reciprocity and most-favoured-nation status (MFN)⁴⁰ are less likely to be vested with this legal characteristic.⁴¹ As long as the Court’s case law remains unpredictable and unclear, though, legal uncertainty is going to continue to feature strongly in the evolution of TCN resident rights at Community level. Many of the international agreements inhere the risk that the ECJ may come to deny that they should have direct effect, given the situation of mixity are envisaged in the services sector as a result of amendments to Art. 133 EC by the Treaty of Nice 2000.

35. Cases 183/73, *Haegemann v. Belgium*, [1974] ECR 449; C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461.

36. Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

37. *Sevince*, *supra* note 35.

38. *Sevince*, *supra* note 35 and C-18/90, *ONEM v. Kziber*, [1991] ECR I-199.

39. Case 270/80, *Polydor Ltd*, [1982] ECR 329.

40. Such as the Partnership and Co-operation agreements with independent States of the former Soviet Union.

41. See e.g. the ECJ’s analysis of the Community’s involvement in the GATT in Case 21–24/72, *International Fruit Co. NV*, [1972] ECR 1219.

an insufficient degree of intensity of integration in terms of economic relations between the European Community and third country involved. So far, the ECJ has only decided upon a few of the many international agreements which broach the subject of TCN resident issues, notably those with Turkey, Morocco and Algeria.⁴² The Court has affirmed the existence of direct effect in respect of particular provisions in those agreements.

There is a strong case for arguing that the Court should abandon the “purpose and nature” rule in relation to provisions on TCN residents in Community agreements and use instead its standard test for direct effect as applicable to norms of the first pillar.⁴³ First, it is significant that the provisions are primarily designed to regulate the operation of the internal dimension to the single market, as opposed to directing trade relations between the contracting parties to the agreement. In other words, when present in an agreement, the provisions are there to secure greater involvement and integration of individuals within the Union. Thus, they focus on the relationship between the EU and individual inhabitant, a matter which is to a considerable degree removed from the issues connected with trading relations between Community and third State. Given the fact that frequently TCN residents may live within the Union on a long-term or indefinite basis, it is not realistic to accept that the contracting parties agree to the legal status of the TCN resident being exclusively or even predominantly governed according to the nature of the Community’s external relations with the third country of nationality, even where TCN resident rights are housed within the framework of an international trade-related agreement. Second, it can usually be taken as read that the contracting parties, in having agreed to insert legal guarantees for TCN residents in an international agreement, do not intend to make their operative force contingent upon the intensity of market integration between the Community and third State in question. Third, the “purpose and nature” rule runs the danger of frustrating the legitimate expectations of individuals of being able to rely on clauses crafted in the form of specific legally binding guarantees, in particular those which use similar wording to first pillar provisions which have already been held to be directly effective by the ECJ and where direct effect has not been expressly excluded in the text of the agreement.⁴⁴ In applying its standard test

42. Currently, cases are pending in relation to particular agreements with central and eastern European countries. See section 2.4.1 below.

43. Namely whether a norm fulfils the requirements of being sufficiently clear, precise and unconditional.

44. One possible route that the Court could take would be to attach more importance to the presence or absence of any clauses in an agreement which expressly purport to exclude the possibility of direct effect. Such a clause has not been used in any of the thirty agreements which contain provisions on TCN migration. In the preamble of its Decision concluding the WTO Agreement, the Council inserted a clause stating that “by its nature the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible

of direct effect in relation to clauses on TCN residents issues in Community agreements with third States, the ECJ would reflect the human reality that TCN residence is a matter in respect of which the Union has a substantial degree of responsibility.

Other outstanding issues yet to be addressed by the Court are whether the agreements are capable of creating horizontal and/or vertical direct effects, as well as any State liability.⁴⁵ All these legal issues are of key importance in ensuring that the rights contained in the agreements are enforceable against intransigent or negligent private parties or State authorities. Given the Court's rules on direct effect in relation to Community agreements with third countries, it is quite clear that TCN residents face a substantially more difficult task than MSNs when enforcing equivalently worded norms under the auspices of the EC Treaty and Community secondary legislation. It remains to be seen whether the Court will continue to pursue its current approach to individual rights enforcement under international treaties concluded by the Community, given the danger that this may serve to entrench the current fractured and haphazard nature of TCN residents' treatment under Community law

2.1. The European Economic Area (EEA) Agreement and EC-Swiss Agreement on Free Movement of Persons

Of all the international agreements with third countries, it is the European Economic Area (EEA) Agreement 1992⁴⁶ and the recent EC-Swiss Agreement on Free Movement of Persons 1999⁴⁷ which afford the greatest range and depth of legal protection for TCN residents. The EEA Agreement was designed essentially for the purpose of creating a free trade zone between the members of the European Free Trade Association (EFTA) and the EU, incorporating virtually all of the personal free movement provisions enshrined in the EC Treaty and secondary measures. Switzerland, in having failed to ratify the agreement owing to a rejection of EEA membership in a 1992 referendum, is not covered under the EEA agreement.⁴⁸ Instead, a separate bilateral arrangement on free movement for persons has been agreed upon, and is due to being directly invoked in Community or Member State courts". (Council Decision of 22 Dec. 1994, O.J. 1994, L 336/1). Pending clarification from the ECJ, it is moot whether or not this clause has the effect that it intends. See e.g. De Witte, "The nature of the legal order" in Craig and De Burca, op. cit. *supra* note 32, p. 186.

45. See McGoldrick, *supra* note 32, at 132.

46. The EEA Agreement was signed on 2 May 1992 at Oporto, and entered into force on 1 Jan 1994 (O.J. 1994, L 1/3).

47. A full text of the EC-Swiss agreement can be located on the www.europa.admin.ch/e/int/ website.

48. On 10 Dec. 1998 the EU Council of Ministers concluded political negotiations on an agreement with Switzerland regarding the free movement of persons (i.e. Swiss and EU nationals), the terms of which are substantially to mirror those adopted under the EEA Agreement, but transitional provisions. See EC-Bull. 12/1998 and *General Report on the Activities of the EU in 1998* (1999, OJEC) at point 793.

to come into force in 2001 upon ratification by all the parties. The agreement forms an integral part of a bundle of seven bilateral accords in all, which aim to eliminate particular trade barriers and establish cooperation in relation a number of sectors of the economy.⁴⁹

As has been widely acknowledged,⁵⁰ the EEA Agreement's provisions grant the nationals of the EFTA signatories substantially the same rights of free movement within the EU as the EC Treaty provisions afford to MSNs. Article 28 EEA in conjunction with Annexes V and VI of the agreement essentially reproduce the text of Article 39 EC and accompanying key EU secondary legislation on migrant workers. They guarantee EEA nationals the same rights to work and to receive national treatment in any EEA State as those afforded to MSN migrant workers under the EC Treaty. Articles 31 and 36 EEA guarantee EEA nationals the right of establishment and freedom to provide services respectively, again reproducing the exact wording of Articles 43 and 49 EC. Accompanying annexes also seek to incorporate the Community *acquis* as regards the self-employed, including the rights of students, retired persons and those of independent means to migrate.⁵¹ In addition, the agreement also includes a non-discrimination clause which replicates the wording of Article 12 EC.

The EC-Swiss Agreement on the free movement of persons contains a similar catalogue of rights. Many of the provisions resonate with the content and spirit of the Community *acquis* on the rights of migrant workers, the self-employed, tourists, students and self-sufficient persons, as well as on the aspects of mutual recognition of diplomas. There are, though, some qualifications contained in the agreement, which serve to differentiate the Swiss position from the one established under the EEA Agreement. Apart from the transitional provisions which will delay the substantive operation of the EC-Swiss accord,⁵² Swiss nationals in some areas are granted a more restricted range of rights. A few notable examples can be cited here. For instance, the

49. The seven agreements relate to technical barriers to trade, free movement of persons, research, public procurement, overland transport, civil aviation and agricultural produce. All are inextricably linked to one another, so that if one were to be cancelled by a party, all the others would be rendered inapplicable at the same time.

50. For analysis on the EEA arrangements, see e.g.: Martin and Guild, *supra* note 1 Ch. 12; Handoll, *op. cit. supra* note 22, at point 10.5 et seq.; Sevón and Johansson, "The protection of the rights of individuals under the EEA Agreement", 24 *EL Rev.*(1999), 373.

51. Annex VII to the EEA incorporates the Community *acquis* on mutual recognition of professional qualifications and Annex VIII applies the EC Treaty rules on the freedom of establishment.

52. See Art. 10(2) of the EC-Swiss agreement which permits the Community to maintain existing controls with respect to prioritizing workers for two years after entry into force of the agreement. Switzerland has reserved for itself lengthier derogations, spreading up to 12 years:

see Arts. 10(1),(3) and (4).

provisions on equal treatments⁵³ do not include reference to “social advantages” as contained in Article 7(2) of Regulation 1612/68.⁵⁴ Moreover, the rules on employment in the public sector⁵⁵ and exercise of powers regulated by public law⁵⁶ appear to be notably more restrictive than that applicable to EEA nationals. There is also a rather poorly drafted clause in the agreement seeking to rein in the jurisdiction of the ECJ, principally by limiting the effects of its case law dated after signature of the agreement.⁵⁷

Notwithstanding the lack of case law from the ECJ on the effects of the EEA Agreement, it is not seriously disputed that the Court will accept that it and the EC-Swiss agreement, when the latter comes into force, confer directly effective rights to nationals of Norway, Iceland, Liechtenstein and Switzerland residing within the Union. It appears clear that, in having extended the boundaries of the EC Treaty’s market integration aims to include these particular third country signatories, the parties have intended that the same or nearly the same level of intensity of rights protection be afforded to such nationals as are granted to MSNs under the EC Treaty.⁵⁸ This argument is reinforced by the fact that the ECJ has confirmed that certain provisions on TCN resident rights contained in other third country agreements which foster looser trade relations with the Community are directly effective (such as those with Turkey and the Maghreb States⁵⁹).

It must be remembered, of course, that, notwithstanding the far-reaching effects of these agreements, substantial differences still remain in respect of the quantity and quality of Community law rights enjoyed between MSNs and EFTA nationals covered by the EEA and EC-Swiss agreements. Notably, neither agreement incorporates the provisions contained in Articles 17–22 EC on European Union Citizenship. Just like other TCN residents, these TCN nationals remain outside the range of European Union Citizenship

53. Art. 9 of Annex I, *ibid*.

54. Council Regulation 1612/68/EEC on freedom of movement for workers within the Community O.J. Sp Ed 1968 (II) 475.

55. Art. 10 of Annex I, *ibid*.

56. Arts. 9(5) and 16 of Annex I, *ibid*.

57. Art. 16(2) of the EC-Swiss agreement states: “In so far as the application of this agreement involves concepts of Community law, account shall be taken of the relevant case law of the [ECJ] prior to the date of its signature. Case law after that date shall be brought to Switzerland’s attention. To ensure that the Agreement works properly, the Joint Committee, shall, at the request of either Contracting Party, determine the implications of such case law”. A reasonable inference to be drawn from this clause is that the Community itself will be bound by future case law, but special procedures will need to be set up in respect of Switzerland.

58. See e.g. the non-discrimination prohibition contained in Art. 4 EEA, which prohibits differential treatment applied by the signatories to EEA nationals on grounds of national origin.

59. Discussed below at sections 2.2 and 2.3 respectively.

status and rights. Thus, their rights to free movement remain contingent upon the individual exercising a specific economic activity or proving economic self-sufficiency. Thus, the implications of the ECJ's judgment in *Martinez Sala*,⁶⁰ which may open the possibility of non-economic actors being able to derive directly effective residence and equal treatment rights by virtue of the European Union Citizenship provisions of Articles 17 and 18 EC in conjunction with the discrimination prohibition enshrined in Article 12 EC, will not in principle be of benefit to any TCN residents, even those covered under the EEA and EC-Swiss accords.⁶¹ Moreover, unlike MSNs under the EC Treaty and in common with all other TCN residents, EEA nationals under the EEA Agreement who reside within the Union are neither entitled to vote nor eligible to stand for election to the European Parliament. Neither are they enfranchised in respect of Member States' municipal elections, despite being subject to local, regional and national taxation, the revenue from which goes to fund these fora. In addition, both agreements are devoid of any catch-all "single market deadline" provision as contained in Article 14 EC, although the potential effect of this provision in terms of free movement of persons generally has been muted since the UK and Irish governments secured an opt-out protocol in relation to this treaty provision at the Amsterdam IGC.⁶² Specific economic sectors are excluded or restricted from both agreements' free movement provisions. Both Iceland and Norway secured derogations in terms of self-employment in the fisheries sector⁶³ and special provisions apply in respect of temporary employment agencies and financial services in the EC-Swiss accord.⁶⁴ None of the signatories to the EEA agreement are obliged to provide national treatment in relation to existing vocational tuition fee systems, and the subject of access to vocational training and maintenance assistance is outside the remit of the EC-Swiss agreement.⁶⁵ Finally, mention should be made of various provisions in the EEA Agreement which reserve the right for the contracting parties to derogate from their free movement

60. Case C-85/96, *Martinez Sala v. Freistaat Bayern*, [1998] ECR I-2691; but see also annotation by Tomuschat in 37 CML Rev., 449–457.

61. The general non-discrimination provisions contained in the agreements (Art. 2 EC Swiss Agreement and Art. 4 EEA), prohibiting discrimination on grounds of nationality are unlikely to be of assistance here, as their application is limited to the respective scope of the agreements, neither of which addresses the issue of citizenship.

62. See Hedemann-Robinson, "The Area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The 'opt-in opt-outs' under the Treaty of Amsterdam", in O'Keefe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (1999, Wiley).

63. Paras. 9–10 of Annex VIII of the EEA Agreement.

64. See Art. 22(3) of Annex I, *ibid*.

65. See Protocol 29 on Vocational Training to the EEA Agreement. For further analysis of the implications of this in relation to Art. 4 EEA, see Peers (1996), *supra* note 1 at 18. See also Art. 24(4) of Annex I to the EC-Swiss Agreement.

obligations in exceptional circumstances.⁶⁶ It is fair to assume, though, that these clauses are unlikely to be used by EU Member States,⁶⁷ given the *de minimis* economic impact of migration of these nationals to and within the EU.⁶⁸

2.2. *The EC-Turkey Association*

The association arrangements between the EEC and Turkey dating back to the early 1960s arguably contain, after the EEA Agreement, the next most significant body of law in terms of securing rights for TCN residents that has emerged from the Community's external relations.⁶⁹ Under the arrangements, Turkish residents in the Union are endowed with fewer rights pertaining to their integration within the EU thereunder than EEA or Swiss nationals.

However, they are provided with substantially more legal protection relative to most other TCNs. The written sources of rights and obligations laid down in respect of Turkish TCN residents under the arrangements are contained in the 1963 EEC-Turkey Association Agreement (the "Ankara" Agreement), the 1970 Additional Protocol to the Association Agreement and the Association Council's Decisions 1/80 and 3/80.⁷⁰

66. Notably, Art. 112 EEA provides that any contracting State may of its own motion take safeguard measures "if serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising". See also the Declaration by the EEA Council on Free Movement of Persons of 10 March 1995 (reproduced in Martin and Guild, *supra* note 1 at p. 249).

67. Even Luxembourg, with a relatively high population of resident aliens (some 30%) and which has a derogation as regards EU Regulation 1251/70 on the right of EU-MSN workers to remain, decided not to apply this to EEA-EFTA nationals: see para 4 of Annex v. of the EEA Agreement.

68. An EU Member State would have to prove that a "serious" economic, societal or environmental difficulty had arisen (Art. 112(1) EEA) as well as ensure that any unilateral measures were restricted "to what is strictly necessary in order to remedy the situation" (Art. 112(2) EEA). It is virtually inconceivable that the ECJ would countenance any such measures as being compatible with these norms. Thus, Art. 112 EEA is, in effect a paper tiger as far as residence within the EU is concerned.

69. For more detailed commentary on the association in respect of migrants' rights, see Rogers, *A Practitioner's Guide to the EC-Turkey Association Agreement*, (Kluwer, 2000).

70. All the sources are reproduced in *EEC-Turkey Association Agreement and Protocols and Other Basic Texts*, (1992 OPOEC). EEC-Turkey Association Agreement 1963 (signed 12 Sept. 1963; entered into force 1 Dec. 1964) O.J. 1964, L 217. Additional Protocol 1970 (signed 23 Nov. 1970; entered into force 1 Jan. 1973) O.J. 1972, L 293. Decision 1/80 on the development of the Association, Decision 3/80 on the application of the social security schemes of the Member States of the EC to Turkish workers and their families (both signed 19 Sept. 1980 and entered into force as from 1 Dec. 1980). The recent customs union agreement entered into between the European Community and Turkey on 31 Dec. 1995 (by virtue of Decision 1/95 of the EC-Turkey Association Council O.J. 1996, L 35/1) has not affected the position regarding Turkish TCN resident rights: Peers, "Living in sin: Legal integration under the EC-Turkey Customs Union", 7 EJIL (1996), 411 at 414.

Since the initial formalization of links between the EEC and Turkey in the early 1960s, the rights of Turkish residents in the EU have been gradually developed and crystallized through subsequent international instruments. In addition, and in practice more crucially, the legal picture has developed through judicial interpretation by the ECJ. The EC-Turkey arrangements have so far focused principally on the position of Turkish migrant workers. The Ankara Agreement establishes the framework under which these developments could take place. It envisages the progressive, gradual establishment of closer economic links between Turkey and the EC with the intention of facilitating eventual accession of Turkey to the Community.⁷¹ To this end, the parties are to be guided by the EC Treaty provisions on free movement of workers and the self-employed in seeking to secure freedom of movement of persons as between them.⁷² This guidance has had a significant influence on the ECJ's approach to interpreting the scope of the association accords and instruments, notably where the arrangements are silent on definitions and explanations of various key phrases in the texts. Due to the programmatic nature of the agreement itself, most its provisions in relation to migration do not appear capable of being directly effective,⁷³ although Article 9 does contain a non-discrimination provision mirroring Article 12 EC.⁷⁴ The 1970 Additional Protocol (AP) sought to crystallize the rights of Turkish immigrants within the EU, in particular in relation to migrant workers.⁷⁵ Article 36 AP programmes the securing of freedom of movement of workers between the EU and Turkey between the end of the twelfth and twenty second year after entry into force of the Ankara agreement. This transitional period elapsed in December 1986. In its judgment in *Demirel*,⁷⁶ the ECJ rejected submissions that Article 36 AP became directly effective after the elapse of that period, on the grounds that its operative force remains contingent upon

71. See the third recital to the Preamble and Art. 28 of the Ankara Agreement.
72. See Arts. 12–14 Ankara Agreement.
73. The ECJ has, for instance, denied that Arts. 12–13 of the Ankara Agreement have direct effect in *Demirel*, *supra* note 36; C-37/98, *R v. SSHD, ex parte Abdulnasir Savas*, judgment of 11 May 2000, nyr.
74. See *Demirel*, *supra* note 36 at para 23 of judgment; Martin and Guild, *supra* note 1 at p. 253; Cremona, *supra* note 1 at 93. This particular provision might well have direct effects in conjunction with other legal instruments underpinning the association arrangements, by way of analogy with Art. 12 EC. See Peers (1996), *supra* note 1 at 18 who refers to Art. 9 as a potential “wild card”, and recent cases which seem to lend support to the argument that Art. 9 may have important residual legal effects: A.G. Pergola's second Opinion of 17 Dec. 1998 in C-262/96, *S'ur'ul v. Bundesanstalt f'ur Arbeit*, [1999] ECR I-2685, and the Court's comments at para 36 of its judgment in Joined Cases C-102 & 211/98, *Kocak v. Landesversicherungsanstalt Oberfranken und Mittelfranken and Ramazan O'rs v. Bundesknappschaft*, of 14 March 2000.
75. Title II (Movement of Persons and Services): Arts. 36–42.
76. Cited *supra* note 36.

a decision of the EEC-Turkish Association Council to implement freedom of movement. Nevertheless, the Protocol does contain at least some provisions which are sufficiently clear, precise and unconditional to be directly effective. The Court has recently affirmed in *Savas*⁷⁷ that the standstill clause in relation to the freedom of establishment and provision of services contained in Article 41(1) AP is directly effective, so that Member States are not entitled to tighten immigration controls in relation to self-employed Turkish migrants subsequent to entry into effect of the Protocol.⁷⁸ Taking into account recent ECJ case law on analogous provisions contained in cooperation agreements with countries of the Maghreb,⁷⁹ the prohibition of discrimination on grounds of nationality in relation to working conditions and pay enshrined in Article 37 AP is also directly effective.⁸⁰ However, it was only really when the ECTurkish Association Council began to pass specific decisions in relation to Turkish migrant workers in the 1970s and 1980s that the latter's rights under Community law were expanded. Two Association Council decisions are of particular interest in this regard, namely Decisions 1/80 and 3/80 which deal with employment and social security rights in relation to Turkish migrant workers and family members. Both are examined later below.

In contrast with the position in relation to EEA and Swiss nationals, Turkish nationals have not been granted any rights of entry into the territory of the EU under the association's arrangements. Individual EU Member States retain exclusive control over whether to admit an individual and under what terms into their respective territories.⁸¹ Thus, for instance, they reserve controls over the initial decision whether to issue work permits or to admit family members into the country for the purposes of family reunion. In addition, it is clear that under the association arrangements, Turkish nationals and family members permitted to reside in an EU Member State are not granted any rights of free movement between EU Member States.⁸² Thus, a decision by one EU Member State to permit the entry and stay of a Turkish national creates no immigration obligations on other Member States. This position contrasts with

77. *Abdulnasir Savas*, *supra* note 73.

78. In this particular case, the standstill clause applied with effect from the entry into force of the date of accession of the UK to the EEC in Jan. 1973.

79. See *Kziber*, *supra* note 38; C-58/93, *Youfsi v. Belgium*, [1994] ECR I-1353; C-126/95, *Hallouzi-Choho v. Bestuur van de Sociale Verzekeringsbank*, [1996] ECR I-4807; C-416/96, *El-Yassini v. SSHD*, [1999] ECR I-1209; Arts. 40–41 EEC-Morocco Cooperation Agreement 1976. Cases C-103/94, *Krid v. CNVATS*, [1995] ECR I-719; C-113/97, *Babahenini v. Belgian State* [1998] ECR I-183; Art. 39 EEC-Algeria Cooperation Agreement 1976.

80. See also recent comments by the Court in para 38 of its judgment referring to Art. 37 AP in *Kocak and O'rs*, *supra* note 74.

81. The ECJ has consistently confirmed this: see e.g. C-36/96, *G'unaydin et al. v. Freistaat Bayern*, [1997] ECR I-5143 at para 23 of judgment; C-1/97, *Birden v. Stadtgemeinde Bremen*, [1998] ECR I-7747 at paras. 37–38 of judgment.

82. See para 22 of judgment in *G'unaydin*, *supra* note 81.

that organized by the EU in relation to EEA and Swiss migrants. However, the ECJ has made it clear that once a Member State has authorized the entry of a Turkish national and granted permission for that individual to engage in employment, this implies necessarily a concomitant right of residence for the purpose of being able to exercise the employment rights granted under the association arrangements, notably those contained in Decision 1/80 of the Association Council.⁸³ It has adopted a similar approach in respect of family members' rights to work under Article 7 of Decision 1/80. The ECJ has held that residence rights are implicitly guaranteed for the purposes of enabling family beneficiaries to exercise such rights.⁸⁴ In effect, the Court has developed the principle that, subsequent to the initial decision made by the host Member State permitting entry for the purposes of work and/or family reunion, issues of residence and conditions of stay are subject to the obligations contained under the association arrangements. Accordingly, the powers of Member States in relation to immigration are heavily qualified *ex post* the decision by an EU Member State to permit entry to work.

Turkish residents in the EU are not specifically granted any rights to remain in the Union after the definitive cessation of paid work. The residence protection afforded to migrant MSN workers and the self-employed under Regulation 1251/70⁸⁵ and Directive 75/34⁸⁶ has not been expressly transplanted into any of the Association Council's decisions. This is the position irrespective of the period of residence spent in a host EU Member State or of events outside the individual's control, including redundancy, retirement, occupational accident, disease or death. In principle, the ECJ has refused to accept arguments to the effect that such rights are implicitly, if not expressly, enshrined in the association arrangements, even though these specify that the development of Turkish workers' rights are to be guided by Article 39 EC.⁸⁷ Whilst the Court has refused to accept the existence of rights for ex-workers to remain in the host Member State, it has, however, recently accepted that retirement of a Turkish migrant worker and his return to his country of nationality does not

83. See e.g. *Sevince*, *supra* note 35.

84. See *Sevince*, *supra* note 35; C-355/93, *Eroglu v. Land Baden Württemberg*, [1994] ECR I-5131; C-351/95, *Kadiman v. Freistaat Bayern*, [1997] ECR I-2139; C-210/97, *Akman v. Oberkreisdirektor des Rheinisch-Bergischen-Kreises*, [1998] ECR I-7519. The Court rightly rejected the view proffered by defendant Member State governments that no such residency rights could be implied from the texts, as this would have completely undermined the employment rights conferred by Decision 1/80: see comments by Zuleeg 33 CMLRev., 93 at 100, on the *Eroglu* case.

85. Commission Regulation on the right of workers to remain in the territory of a Member State after having been employed in that State (O.J. Sp Ed 1970 (II) 402).

86. Directive 75/34 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (O.J. 1975, L 14/10).

87. Case C-434/93, *Bozkurt*, [1995] ECR I-1475.

trigger the collapse of rights under the association arrangements in respect of family members.⁸⁸ Notwithstanding this recent development, the fact remains that Turkish migrants' residence rights under the association arrangements remain relatively limited and precarious, for to a large extent they remain predicated upon the primary right holder being able to find employment.⁸⁹ Residence status is largely determined by host national immigration laws, which in turn are subject to compliance with the human rights guarantees contained in the European Convention on Human Rights and Fundamental Freedoms.⁹⁰ Therefore, residence status for Turkish migrants, as is the case for most TCN residents,⁹¹ is a matter principally regulated by individual EU Member States.

The rights that the association arrangements actually do grant to individuals refer almost exclusively to the field of employment. With respect to self-employment, Turkish nationals have neither a right of establishment nor a freedom to provide services. Where, however, individual EU Member States decide to facilitate entry of Turkish nationals for the purposes of self-employment, certain legal consequences do flow as a result by virtue of the

association arrangements.⁹² Notably, EU Member States have to ensure that they do nothing to add to existing restrictions applicable to Turkish nationals in the field of self-employment.⁹³ The general prohibition of discrimination on grounds of nationality contained in Article 9 of the Ankara Agreement 88. *Akman*, *supra* note 84, where the ECJ held that the son of a retired Turkish worker, formerly employed in Germany, should continue be able to exercise his employment rights under Art. 7(2) of Decision 1/80 in Germany, notwithstanding the fact that his father had moved to live in Turkey. For comments on this case, see Peers 36 CML Rev., 1027. Of course, as and until family members become entitled to any of the rights contained in Art. 7 of Decision 1/80, their rights to remain in the host territory under the association arrangements is wholly contingent upon the residency status of the primary right-holder, namely the migrant worker. 89. See similar comments by Cremona, *supra* note 1 at 105.

90. Notwithstanding the fact that the text of the ECHR does not appear to contain much legal protection for immigrants located within the jurisdiction of its contracting parties, the ECtHR has developed a significant body of case law on the compatibility of immigration rules with the Convention's rights and freedoms. In particular, Art. 8 ECHR, which guarantees respect for privacy, family life, home and correspondence, and Art. 3 ECHR (torture, inhuman and degrading treatment and punishment) have been important in this respect. For an overview of recent Strasbourg case law, see e.g. Marin and O'Connell, "The European Convention and the relative rights of resident aliens", 5 ELJ (1999), 4.

91. Greater residency rights are afforded under Community law to EEA or Swiss nationals, and those closely related to a MSN resident.

92. The creation of a freedom of establishment and freedom to provide services commensurate with that existing under the EC Treaty's self-employment provisions were foreseen in the Ankara Agreement but never implemented: see Arts. 13–14 EEC-Turkish Association Agreement. As Staples has pointed out these programmes for future action constitute only "paper" rights: Staples, *supra* note 1 at pp. 255, 259.

93. By virtue of Art. 41(1) AP. See the judgment in *Savas*, *supra* note 73.

may also have some impact.⁹⁴ For the most part, however, rights are afforded to those Turkish nationals permitted to reside in an EU Member State in their capacity as employees, and/or as family members of migrant workers. Chapter 2 (Social Provisions) of Decision 1/80 grants a number of important employment rights for Turkish TCN residents, albeit that they fall far short of matching those granted to EEA and Swiss migrant workers. Article 6(1) provides them with a graduated form of access to the host EU Member State's labour market once they have been "duly registered as belonging to the labour force". Specifically, they have the following rights in Article 6(1): after one year's legal employment, the right to renew the work permit for another year with the same employer, subject to availability of the employment; after three years' legal employment, the right to respond to an offer of employment in the same occupation from another employer, subject to first priority given to "workers of Member States of the Community"; and after four years of legal employment, the right to enjoy "free access in that Member State to any paid employment of his choice". This latter right would appear to derogate from the long-standing policy adopted by the EU of seeking to ensure that MSN workers have first priority over employment vacancies within the single market.⁹⁵ Article 6(2) stipulates that for calculating periods of legal employment, annual holidays, "short" absences due to sickness, and other absences due to accidents at work and maternity shall be included as part of legal employment, whereas involuntary unemployment and "long absences" due to sickness will not. However, such events will not jeopardize any acquired rights. Article 10 obliges EU Member States to ensure equal treatment as regards pay and working conditions and equal access to employment service assistance, and Article 13 applies a standstill obligation in relation to restric-

94. The remit of the prohibition in Art. 9 is subject to its application being "within the scope of this Agreement". Clarification is needed from the ECJ as to whether the absence of any specific non-discrimination clause contained in the association arrangements with respect to self-employment means that Art. 9 cannot apply to the field of establishment or services. To exclude the reach of Art. 9 from the self-employment field would be unconvincing, not least as a common intent of eliminating barriers between the Contracting Parties in the areas of establishment and services is expressed in the Ankara Agreement (Arts. 13–14) and is regulated to a limited extent by the Additional Protocol (Arts. 41–42 AP). Thus, self-employment is a matter clearly falling within the scope of the Ankara Agreement.

95. The EC's EURES (European Employment Services) vacancy clearance system operates on the basis of priority of Community nationals over third country migrant workers: see Art. 19(2) of Regulation 1612/68 (O.J. 1968 Sp.Ed., as amended by Regulations 312/76 and 2434/92 respectively: O.J. 1976, L 39/2; O.J. 1992, L 245/1) and Commission Decision 93/569 (O.J. 1993, L 274/32). See recent Commission report on the EURES system, COM(2000)607fin. EURES activity report 1997–1998 "Towards an integrated European labour market: the contribution of EURES". (The degree of free access accorded under the third indent of Art. 6(1) in Decision 1/80 is rendered slightly unclear by the effect of Art. 8(1) which requires Member States and their employment services to "endeavour" to prioritize Turkish workers whenever jobs cannot be placed with MSN workers).

tions regarding access to the labour market for Turkish workers and family members.

In addition to employment rights for migrant Turkish workers, the 1970 Additional Protocol and Decision 1/80 make specific provision for family members of Turkish migrant workers. Article 39(3) AP requires EU Member States to pay family allowances to those family members residing with the Turkish worker, and, by virtue of the effect of Article 9 of the Ankara Agreement, these must be paid on a national treatment basis. Article 7 of Decision 1/80, as a complement to Article 6(1), grants family members residing with the worker tiered rights of access to the labour market of the host EU Member State: after three years' legal residence in the host Member State the right to respond to any offer subject to MSN priority; after five years' legal residence, free access to any paid employment; or, after having completed a course of vocational training in the host country, the right to respond to any offer of employment subject to a parent having been legally employed for three years in the host country. Article 9 grants Turkish children legally residing with parents who have at some time been legally employed in the host State equal treatment in respect of entry qualification requirements to general education, apprenticeship and vocational training. The same provision, however, rather meekly states that such children "may" be eligible to benefit from the "advantages provided for under the national legislation in this area". This presumably would cover issues such as access to educational grants and tuition fee waivers. Such a large degree of discretion afforded to EU Member States here though would appear to rule out direct effect.⁹⁶

As far as the area of social security is concerned, Decision 3/80 of the Association Council was introduced to complement the employment rights contained in Decision 1/80 and to move towards aligning the position of Turkish migrant workers to that applicable to migrant MSN workers under Regulation 1408/71.⁹⁷ The decision was already programmed in the 1970 Additional Protocol, Article 39 AP stipulating that such a decision's purpose is to co-ordinate the social security position of Turkish workers "moving within the Community". Accordingly, Decision 3/80 is designed to aggregate the periods of social security insurance cover acquired by a Turkish worker in more than one EU country, and excluding periods in Turkey (Article 39(2) AP). Notwithstanding that the decision contains no specific details on the

96. See Peers (1996) *supra* note 1 at 27; Martin/Guild, *supra* note 1 at 274.

97. EC Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community O.J. Sp Ed 1971 (II).

timing of its entry into force,⁹⁸ the ECJ has confirmed that it has binding effects as from the time when it was agreed, namely 19 September 1980.⁹⁹ Before turning to consider the ECJ's case law on the scope of Turkish residents' rights, it is perhaps first useful to note as a general point the considerable impact that the ECJ has had in general in terms of their definition and evolution. That the Court has been particularly influential in terms of developing the breadth and depth of rights of Turkish nationals under these association arrangements is a factor common to all the other association and co-operation agreements agreed with third countries. Its role has been especially important, given the frequent lack of clarity and specificity contained in the texts themselves. One notable source of assistance that the Court has referred to with increasing vigour in connection with its task of interpreting the scope and meaning of the association arrangements is the commitment contained in the Ankara Agreement that the Contracting parties are to be guided by the EC Treaty's provisions on the free movement of the employed and self-employed in realizing the aims of the association relationship.¹⁰⁰ In many instances, the Court has used this as a means of interpreting the meaning and scope of key phrases contained in the agreement and decisions of the Association Council. Thus, for instance, the ECJ has drawn from its EC Treaty case law in order to assist it in defining open-textured concepts contained in the association instruments, such as "worker",¹⁰¹ the *locus* of a contract of employment,¹⁰² public sector employment¹⁰³ as well as the parameters of public policy derogations.¹⁰⁴ Similarly, it has held that entitlement to the rights under the arrangements flow from the association instruments themselves, as opposed to being dependent upon any prior formal administrative documents issued by the Member States in connection with work or

98. Art. 32 of Decision 3/80 simply requires the Contracting Parties to "take the necessary steps" to implement its provisions.

99. Case C-227/94, *Taflan-Met v. Bestuur van de Social Verzekeringsbank*, and *Akol v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, [1996] ECR I-4085.

100. See Arts. 12–14 of the Ankara Agreement.

101. In Case C-171/95, *Tetik v. Land Berlin*, [1997] ECR I-329 the ECJ drew from its case law in respect of Art. 39 EC in order to hold that a Turkish seaman, who had voluntarily discharged himself from employment as a mariner after completing over four years' continuous work with the same German employer so that he could seek work on the German mainland, remained a "worker" for the purposes of Art. 6(1) of Decision 1/80. See also *Birden*, *supra* note 81.

102. In *Bozkurt*, *supra* note 87, the ECJ drew inspiration from its MSN migrant worker case law (Case 9/88, *Lopes da Veiga*, [1989] ECR 2989) in order to determine whether a Turkish international lorry driver's employment had a sufficiently close connection with the Netherlands for him to be deemed to be part of the Dutch workforce. For comments on *Bozkurt*, see Peers 33 CML Rev., 103 at 106.

103. *Birden*, *supra* note 81.

104. C-340/97, *Omer Nazli et al. v. Stadt Nurnberg*, judgment of 10 Feb. 2000, nyr.

residence. Thus, in *Ertanir*¹⁰⁵ the Court held that where an EU Member State issued work and residence permits with retroactive effect to cover periods in respect of which a Turkish migrant worker had initially failed to apply within the relevant time limits as prescribed in national law, these periods would nevertheless be deemed to be periods of “legal employment” for the purposes of Article 6(1). This approach again mirrors the substantive as opposed to formalistic approach adopted by the Court in relation to national immigration and registration requirements to be fulfilled by MSN migrant workers.¹⁰⁶ However, unfortunately, this teleological approach has by no means been applied by the Court in all cases.¹⁰⁷ Indeed, the Court has on a number of occasions seen fit to draw tight boundaries around certain provisions, narrowing the scope of some rights even where the clauses are fairly open-ended or suggestive of alignment with the EC Treaty position. Notable examples include the refusal by the ECJ to imply a right to remain in the employment rights catalogue contained in Decision 1/80¹⁰⁸ and its refusal to confer direct effect to certain social security clauses contained in Decision 3/80, despite the fact that it was clear from the outset that Regulation 1408/71 should apply *mutatis mutandis*.¹⁰⁹ The case law has become somewhat unpredictable as a result of the ECJ’s sporadic reference to EC Treaty and secondary legislative sources. One explanation for the conflicts and contradictions that have emerged from the case law is that the Court has, in effect, tried to reconcile two major competing interests underpinning the association arrangements: namely, the legitimate expectations of Turkish residents in the Union in being able to derive a more comprehensive range of integration rights within the parameters of the association, and those of the Member States in being able to retain as much residual sovereignty as possible over TCN migration issues. This tension has featured as an important if subliminal element underlying the Court’s legal reasoning, and is set to continue to feature in the absence of clearer legislative guidance given by the Association Council.

There is little doubt, though, that the ECJ has played a fundamental role in the development of rights protection for Turkish TCN residents under the association arrangements. On a number of occasions, for instance, it has confirmed that as long as the individual Turkish worker (or family member) has been issued with a valid work permit, this in principle precludes EU

105. Case C-98/96, *Ertanir*, [1997] ECR I-5179. See also *Bozkurt*, *supra* note 87 where the Court (at para 29) held that the Netherlands could not rely on the fact that it did not require either the issue of a work or residence permit for *Bozkurt*’s contract as lorry driver in order to argue that he was outside the remit of “legal employment” for the purposes of Art. 6(1).

106. See e.g. Case 157/79, *R v. Pieck*, [1979] ECR 2171.

107. See Peers, note on *Bozkurt* (*supra* note 87), *supra* note 102, at 106.

108. *Bozkurt*, *supra* note 87.

109. *Taflan-Met*, *supra* note 99.

Member States from being able to undermine his/her residence status for purely economic reasons during the period of validity of the permit. This is, however, subject to the individual's status as a member of the labour force being stable and secure in the first place.¹¹⁰ A person's status is not stable or secure, for instance, if s/he is appealing against a deportation decision on grounds of having allegedly deceived immigration authorities as to the genuine nature of a marital situation in order to gain entry into the country,¹¹¹ or against a refusal to extend a residence permit where the person had not been issued with a work permit prior to the appeal.¹¹² Otherwise, as long as the individual concerned has objectively and lawfully fulfilled the conditions specified in Article 6(1), then s/he is entitled in principle to rely on the rights contained in that provision, notwithstanding that s/he was admitted originally into the host country in some other capacity, such as a family member,¹¹³ or as a temporary worker.¹¹⁴ Thus, for instance, in *G'unaydin*¹¹⁵ the German immigration authorities were precluded by the ECJ from refusing to extend a residence permit on grounds that the Turkish worker concerned had been only granted a work permit on condition that he had agreed from the outset to return to Turkey after obtaining specific training and work experience in Germany. Mr G'unaydin had been employed with Siemens as a trainee manager in 1986, specifically with a view to his eventual posting with a Turkish subsidiary of the company. Some four years later, he requested to be able to remain indefinitely in Germany, having come to consider that the Federal Republic had become his and his family's home. The Court accepted that over time it was reasonable for him to change his intentions regarding residence and work in relation to the host State, as long as this change was not intended from the outset. Moreover, it seems that even if the individual has failed to adhere to conditions stipulated by the host State necessary for continuation of lawful residence under national law, such as continuation of a marriage or continued cohabitation with a spouse, Member States will be

110. *Sevince*, *supra* note 35; C-237/91, *Kus v. Landeshauptstadt Wiesbaden*, [1992] ECR I-6781; *Eroglu*, *supra* note 84; C-285/95, *Kol v. Land Berlin*, [1997] ECR I-3069; *G'unaydin*, *supra* note 81. See also commentators' assessments of this case law: "Cases and legislation – EEC (Casenote on *Kus*), 7/2 INLP (1993), 71; Lichtenberg, "The rights of Turkish workers in Community Law", 24 ILJ (1995), 90; Vedder and Folz, note on *Eroglu*, 7 EJIL (1996), 130.

111. *Kol*, *supra* note 110.

112. This seems to be the position after the judgment in *Kol*, *supra* note 110, where the ECJ refused to allow a Turkish worker to be able to rely on periods of work completed pending the outcome of his appeal against a refusal to extend his residence permit in order to qualify for the three year rule in Art. 6(1). Instead *Kol* could only rely on the period of work completed under the auspices of the original work permit (i.e. only qualify for the rights pertaining to one year's employment).

113. *Sevince*, *supra* note 35; *Kus*, *supra* note 110; *Eroglu*, *supra* note 84.

114. Cases *Ertanir*, *supra* note 105; *G'unaydin*, *supra* note 81.

115. Case *G'unaydin*, *supra* note 81.

barred from denying the possibility of continued residence so long as the individual has already fulfilled the requisite criteria laid down in one of the indents of Article 6(1) of Decision 1/80.¹¹⁶ In a similar vein, the ECJ has held that the period of cohabitation in Germany between a Turkish worker and his spouse, which was continuous notwithstanding the fact that the couple had divorced and subsequently remarried, should count in its entirety for the purposes of calculating entitlements in respect of family members' rights under Article 7 of Decision 1/80.¹¹⁷

The ECJ has also begun to develop some guidelines on the effects of temporary lapses¹¹⁸ in employment in relation to migrant workers' and family members' rights under Articles 6–7 of Decision 1/80. In cases where a Turkish migrant worker has already accumulated a substantial period of work experience within the host territory, the Court appears to be prepared to require Member States to allow for intermittent breaks in employment, even fairly lengthy ones, taken by the employee. Thus, for instance, in the case of *Nazli*,¹¹⁹ the fact that a Turkish worker had been detained in custody for over a year in connection with drug trafficking offences did not have the effect of deregistering him from the labour force under Article 6(1). *Nazli* had been in continuous employment for some 11 years in Germany prior to his arrest. The ECJ stated that his detention pending trial would not effect a forfeiture of employment rights under Article 6(1), as long as the break from work was of a temporary nature and the worker involved found employment within a "reasonable period of time" subsequent to the period of unemployment.¹²⁰ Similarly, in *Tetik*,¹²¹ the Court construed that the third indent of Article 6(1) of Decision 1/80 included the right of workers to resign their posts and have a "reasonable period" of time to seek alternative employment.¹²² In *Ergat*,¹²³ the ECJ adopted a similarly flexible approach in relation to employment rights of family members under Article 7, ruling that an absence of a year from the host Member State's territory did not effect a termination of employment

116. *Sevince*, *supra* note 35; C-386/95, *Eker v. Land Baden Württemberg*, [1997] ECR I-2707; *Birden*, *supra* note 81. This is subject, of course, to compliance with public policy, security or health requirements as set down in Art. 14 of Decision 1/80.

117. C-65/98, *Safet Eyüp v. Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg*, judgment of 22 June 2000, nyr.

118. Permanent retirement from employment, for whatever reason, will trigger a collapse of

these rights. See Case *Bozkurt*, *supra* note 87.

119. *Omer Nazli*, *supra* note 104.

120. See paras. 40–45 of judgment, *ibid*. In *Nazli*'s case, he had been given a suspended instead of custodial sentence, a factor which the Court used to underline the point that, far from having definitively left the workforce, he had been invited to rejoin the labour market by the host State as part of a process of offender rehabilitation.

121. Case *Tetik*, *supra* note 101.

122. See para 30 of judgment, *ibid*.

123. C-329/97, *Sezgin Ergat v. Stadt Ulm*, judgment of 16 March 2000, nyr.

rights in respect of a Turkish worker's son under Article 7 of Decision 1/80, who had otherwise been living in Germany for over fifteen years. Thus, it seems clear that at least in respect of workers and family members who have already attained the maximum amount of employment rights under Decision 1/80 through long-term residence, the Court has restricted the possibilities for Member States to determine that periods of absence from the labour market constitute a cessation of individuals' rights under Decision 1/80. Its case law here resonates strongly with its approach in relation to Article 39 EC and MSN migrant job seekers.¹²⁴ To what extent the Court is prepared to tolerate brief absences from work in relation to Turkish migrants who have not already acquired maximum employment rights under Articles 6–7 still needs to be clarified. In *Kadiman*,¹²⁵ though, the Court has confirmed that absences for a “reasonable” period for legitimate reasons (such as annual holidays and visits to country of origin) or for reasons beyond the family member's control do not constitute an interruption of the requirement of three years continuous residence for the purposes of the first indent of Article 7(1) of Decision 1/80. In addition, by virtue of a recent judgment in relation to one of the Maghreb co-operation agreements, it appears that the non-discrimination clause contained in Article 37 AP and Article 10 Decision 1/80 work might preclude an EU Member State from withdrawing the right to residence prior to elapse of the validity of a work permit, bar the usual derogations on grounds pertaining to public policy, health or security.¹²⁶ This judgment may have important implications for those workers who have become unemployed within a year of entry into the host State, as they may well be entitled to seek work and possibly draw welfare benefits at least up and until the expiry of the residence permit. This will depend, though, on how the ECJ evolves its case law.

Derogations from the rights provided under Decision 1/80 are limited. They are confined to an emergency safeguard option in the form of Article 12¹²⁷ and a general public policy, public security and public health exception in Article 14 commensurate with that applicable to Article 39(3) and 46 EC in respect of migrant MSN workers under EU Law. Recent case law strongly suggests that the ECJ is keen to align these derogations with those applicable in relation to MSN migrant workers under the auspices of Article 39(3)

124. C-292/89, *R v. IAT, ex parte Antonissen*, [1991] ECR I-745.

125. Case *Kadiman*, *supra* note 84.

126. *El-Yassini*, *supra* note 79.

127. Art. 12 states that the Contracting parties may refrain from automatically applying Arts. 6–7 in the event of employment market disturbances that “might seriously jeopardize the standard of living or level of employment in a particular region, branch of activity or occupation”. Although this derogation appears wider than that employed in relation to the EEA Agreement (Art. 112 EEA), there appears little doubt that the ECJ would subject EU Member States to a proportionality test in the event of its activation within the EU.

and 46 EC. For instance, in *Nazli*,¹²⁸ the ECJ recently held that a decision to expel a Turkish migrant worker as part of a general deterrence strategy connected with public policy on crime was incompatible with Article 14. Instead, in line with its decisions in respect of MSN migrants,¹²⁹ the Court confirmed that immigration authorities must be sure that the personal conduct of the individual concerned constitutes a present threat to the requirements of public policy before expulsion could be considered as a possibility.

As far as social security issues are concerned, the ECJ has already had opportunity to comment on the scope and effects of Decision 3/80 of the Association Council. In *Taflan-Met*¹³⁰ the Court was required to adjudicate on the effects of the Decision in relation to the principle of aggregation it introduces in respect of social security claims as result of employment in more than one EU Member State. Three of the plaintiffs were surviving spouses of Turkish workers who had worked in various EU Member States including the Netherlands. They had applied for but had been denied widows' pensions in the Netherlands. The fourth plaintiff, a Turkish migrant worker residing in Germany who had worked in other EU Member States, had been denied an invalidity pension in Germany. It is clear from the text that the relevant provisions contained in Decision 3/80 on invalidity and survivors' pensions¹³¹ were intended to adopt the principles of non-discrimination and aggregation employed by Regulation 1408/71. Nevertheless, in *Taflan-Met* the Court refused to accept that either provision is directly effective, given the failure by the Council to have adopted a specific implementing measure akin to Regulation 574/72,¹³² as required in the case of Regulation 1408/71. The judgment is surprising and disappointing, not least given the fact that the formal omission in Decision 3/80 itself of any provision detailing the date of its entry into force did not restrain the Court from determining that it had binding effects.

Recently, the ECJ has confirmed that notwithstanding the impression it conveyed in *Taflan-Met*,¹³³ Decision 3/80 is not completely devoid of direct effect. In *S'ur'ul*,¹³⁴ the Court confirmed that the prohibition of discrimination

128. *Omer Nazli et al.*, *supra* note 104.

129. Notably, the judgments in 67/74, *Bonsignore*, [1975] ECR 297; 115–116/81, *Adoui & Cornuaille*, [1982] ECR 1665 and C-348/96, *Donatella Calfa*, [1999] ECR I-11.

130. Cited *supra* note 99. For commentaries on this case, see Bulterman 34 CML Rev., 1497 and Peers, "Equality, Free Movement and Social Security", 22 EL Rev.(1997), 342.

131. Arts. 12 and 13 respectively.

132. Council Regulation 574/72 laying down the procedure for implementing Regulation 1408/71 O.J. Sp Ed 1972 (I), 159. The Commission proposed an implementing measure in 1983 but this is still waiting for Council approval: COM(83)13fin O.J. 1983, C 110/1.

133. Most commentators had thought that the ECJ had ruled out direct effect in respect of the Decision entirely: Bulterman (1997) *supra* note 130, at 1503; Peers (1997) *supra* note 130 at 347 and 349.

134. *S'ur'ul*, *supra* note 74.

contained in Article 3(1) of Decision 3/80 in relation to social security for migrant workers and their families is directly effective, as it requires no further implementation at national level in order to be enforced. This judgment has ensured that rules on access to and amounts of social security benefits are paid to host nationals and Turkish workers and their families on an equivalent basis.¹³⁵ This aligns the position to that applicable in respect of a number of other third country agreements containing equal treatment clauses in the social security field, such as those with countries of the Maghreb. However, the system underpinning Article 3(1), as confirmed by the Court, is limited in its effects as it does not, for instance, require recognition of acquired social security rights or status in other EU Member States or Turkey.¹³⁶

Notwithstanding increasing instances of the Court referring to the EC Treaty *acquis* on free movement of workers when interpreting the nature and scope of rights contained within the EC-Turkey association instruments, this does relatively little to ameliorate the fact that the arrangements offer far less in the way of legal protection to Turkish residents within the Union than Community law affords to MSNs (EEA and Swiss residents apart). This is, of course, abundantly clear from the provisions of the association's legal instruments themselves. In particular, free access to the host labour market is only granted after a substantial period of time by virtue of Articles 6–7 of Decision 1/80. Turkish migrant workers and their families are to a certain extent subject to the so-called “Community worker” priority policy implemented through EURES (European Employment Services), so long as they have not acquired four years' employment experience as a worker, completed five years' lawful residence as a family member or finished vocational training as a child of a migrant worker.¹³⁷ Furthermore, there is no coherent policy on the right to remain the host State in respect of ex-employees and their families. Unlike

135. The ECJ decided to rule out the retrospective effect of its judgment in *Sürül*, *supra* note 74, on the grounds that the legal status of Decision 3/80 had been left unclear in the light of its decision in *Taflan-Met*, *supra* note 99 (see para 113 of judgment). That migrant workers have had effectively to forfeit rights due to the misleading comments of the ECJ itself has rightly been the subject of criticism: see Peers, “Social Security Equality for Turkish Nationals”, 24 *EL Rev.* (1999), 627.

136. See the recent Joined Cases *Kocak and O'rs*, *supra* note 74. The ECJ rejected submissions by the plaintiffs' and Commission's argument that German social security rules were indirectly discriminatory, in refusing to take account of foreign court judgments which had rectified dates of birth entered on the plaintiffs' original birth certificates. The Court appeared to ignore the fact that the effect of the German rules were far more likely to affect adversely Turkish workers than German nationals in practice, due to the relatively higher rates of belated registration of births with the authorities in Turkey. See also C-336/94, *Dafeki v. Landesveranstalt Württemberg*, [1997] ECR I-6761, where the ECJ held that German rules on evidence of civil status, which at the time differed according to whether the individual concerned was a German or of other nationality, was contrary to Community law under Arts. 39–42 EC.

137. The ECJ has confirmed recently that children who have completed a course of vocational training within a host Member State for the purposes of Art. 7(2) of Decision 1/80 are not subject to the policy of preferential access to Community workers: para 36 of judgment in *Akman*, *supra* note 84. For comments on *Akman*, see Peers 36 *CML Rev.*, 1027–1041. For further information on EURES, see Commission Decision 93/569/EEC on the implementing of Council Regulation 1612/68 on freedom of movement of workers with the Community as regards, in particular, a network entitled EURES (European Employment Services) O.J. 1993, L 569/118. (EURES operates under the auspices of Title II to Council Regulation 1612/68).

the Community law guarantees afforded to MSN, other EEA and certain Maghrebi migrant workers, Turkish employees are not expressly secured equal treatment with respect to dismissal from employment. Article 37 AP and Article 10 of Decision 1/80 only require non-discrimination in relation to working conditions and pay.¹³⁸ In addition, Turkish workers are not able to take advantage of the catalogue of employment rights listed in Regulation 1612/68, as applicable to MSNs.¹³⁹ In particular, there is no right to claim the same “social advantages” as those afforded to host nationals and family members.¹⁴⁰

In relation to family reunion issues, the divergence with standards applicable to MSN migrant workers is even more entrenched. A fundamental drawback of the association arrangements is that they do not include any rights to family reunion, in contrast with the situation applicable to EEA and Swiss migrants. It would appear also that EU Member States also retain ultimate control in defining the personal scope of membership of the relatives wishing to reside with the migrant worker, as the term “family member” is not defined in Decision 1/80.¹⁴¹ Even when a family member is formally admitted into the host territory, Decision 1/80 does not interfere with Member State decisions on regulating conditions of stay until substantial periods of residence in the

138. Although it could be argued that the concept of “working conditions” should be interpreted broadly so as to include dismissal and redundancy situations, given that their exclusion would be wholly anomalous and the fact that the concept of “working conditions” has been used elsewhere in EC Law in close association with the area of dismissal: see Art. 5 of EC Directive 76/207 on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (O.J. 1976, L 39/40). The Court has construed that the reference to “working conditions, including conditions governing dismissal” in Art. 5 of Directive 76/207 embraces redundancy schemes: Case 152/84, *Marshall v. Southampton and South-West Hampshire AHA*, [1986] ECR 723.

139. *Supra*, note 54.

140. Art. 7(2) of Regulation 1612/68.

141. Notably, Art. 7 of Decision 1/80 does not expressly incorporate the persons listed in Art. 10 of Regulation 1612/68, namely the family members applicable to MSN migrants. In contrast, family members are defined when it comes to questions of access to social security benefit: see Art. 1 of Decision 3/80. Interestingly, recent case law in respect of the EEC Moroccan Cooperation Agreement, suggests that in the absence of any specific reservation made by the Contracting Parties, the term “family members” has an autonomous meaning independent of national law: C-179/98, *Belgium v. Mesbah*, judgment of 11 Nov. 1999. To what extent this ruling, which turned upon access to social security, applies in the context of the employment rights afforded in Art. 7 of Decision 1/80 is unclear.

host territory have elapsed.¹⁴² Moreover, the educational rights pertaining to children contained in Article 9 of Decision 1/80 would appear to fall short of the standards applicable in respect of children of MSN workers under Articles 7(2) and 12 of Regulation 1612/68 in two major respects: the text refers only “Turkish children”, which might appear to exclude from its remit non-Turkish minors.¹⁴³ EU Member States retain discretion to afford them equal access when it comes to financial assistance in respect of education and training.¹⁴⁴ It remains, of course, unclear as to whether and to what extent the ECJ will venture to bolster Turkish family members’ rights by means of interpreting the association arrangements more in line with EC Treaty obligations in connection with the free movement of persons and/or by increased reference to minimum human rights standards guaranteed within the Community legal order as part of the general principles of Community law.¹⁴⁵

It would not be true to say that the Court has consistently promoted an expansive view of the range and depth of rights embodied within the texts of the various EC-Turkey association instruments. Instead, it is perhaps more accurate to suggest that the case law reflects an ambivalent attitude on the part of the ECJ in interpreting the scope obligations entered into on the part of the Member States in respect of Turkish residents in the Union. In a number of cases, the ECJ has chosen to interpret some of the provisions rather restrictively. For instance, the Court has held that no rights accrue to a worker under Article 6(1) in the event of a change of employer before the elapse of one year, even where this has been condoned by the host State’s authorities.¹⁴⁶ 142. For instance, the earliest opportunity when a family member acquires rights to engage in paid employment under Art. 7 of Decision 1/80 is after 3 years of residency in the host State (or after completion of a course of vocational training in the case of a child). See *Demirel*, *supra* note 36, especially at para 28 of judgment.

143. It is conceivable that the ECJ might decide to construe the reference to “Turkish” as being surplusage or a reference to the nationality of the parent(s), given that Art. 7 makes no distinction on grounds of national origin as regards access to the host labour market, as well as the fact that it has been prepared to depart from the literal wording of Art. 12 of Regulation 1612/68 in order to secure equal treatment for migrant MSN workers’ children: e.g. Cases 9/74, *Casagrande*, [1974] ECR 773; 389–390/87, *Echternach and Moritz*, [1989] ECR 723.

144. Art. 9(2) of Decision 1/80.

145. As most recently expressed in the draft EU Charter of Human Rights which affirms the Union’s commitments to the minimum guarantees afforded under the ECHR in relation to migration issues.

146. C-386/95, *Eker*, *supra* note 116. At para 29 in its judgment, the Court stated that the Community worker priority system would otherwise be compromised, a wholly unconvincing explanation which sits uneasily with the Court’s case law elsewhere concerned with the need to extend migrants’ rights to be in greater alignment with the EC Treaty migrant worker rules. Moreover, in such a case the legitimate expectations of the migrant worker should be a primary concern, in order that compliance with basic human rights standards and essential legal principles within the Community legal order is maintained (cf. *Demirel*, *supra* note 127). Whether or not the Court will be prepared to amend its stance, for instance in the light of the EU Charter on Human Rights, it would appear that Art. 6(1) offers no protection in the event of a change of employer due to bankruptcy, or perhaps even a takeover.

Other notable examples include its refusal to confer direct effect on Article 36 AP,¹⁴⁷ its denial of there being any existence of any implied rights to remain within the parameters of Article 6 of Decision 1/80¹⁴⁸ and its refusal to accept that the aggregation principles in relation to social security matters under Decision 3/80 are directly effective.¹⁴⁹ One of the most questionable rulings on the part of the ECJ so far in relation to the association instruments has been its ruling in *Kadiman*¹⁵⁰ concerning the scope of residence and employment rights of spouses under Article 7 of Decision 1/80. In that case, the Court held that, in order for a spouse to be entitled to exercise his/her rights to access the labour market by virtue of the first indent of Article 7, there must be shown to have been continuous cohabitation between spouse and Turkish migrant worker during the period of the first three years' residence.¹⁵¹ The applicant, who was the wife of a Turkish migrant worker residing in Germany, became separated from her husband before the elapse of three years' legal residence in that State, *inter alia*, for reasons connected with alleged incidents of domestic violence. She was refused an extension to her residence permit on the ground that she was no longer living with her husband. Had three years' residence already elapsed, she would have been able to rely on the employment right contained in the first indent of Article 7 of Decision 1/80.¹⁵² The ECJ denied that periods of non-cohabitation could be deemed periods of "legal residence" in respect of a spouse in accordance with Article 7, holding that EU Member States had a legitimate concern to prevent any undermining of the principle of family unity and to curtail the risk of sham marriages being used to facilitate illegal immigration.¹⁵³

A particularly disturbing feature of this judgment is its active participation in increasing differentiation between the family reunion rights of TCN spouses 147. *Demirel*, *supra* note 36. Art. 36 AP stipulates that freedom of movement of workers between the Contracting Parties shall be secured between the twelfth and the end of the twenty second year after the entry into force of the Ankara Agreement.

148. *Bozkurt*, *supra* note 87.

149. *Taflan-Met*, *supra* note 99.

150. Case *Kadiman*, *supra* note 84.

151. See paras. 32–40 of the judgment, *supra* note 84.

152. She could not rely on Art. 6(1) of Decision 1/80 as a worker, as she had not engaged in paid work in Germany with the same employer for at least one year during this period (notwithstanding the fact that she had received work permits). The Court's judgment also seems to imply that national immigration authorities are entitled to require cohabitation between spouses as a condition attached to the first year of paid work under Art. 6(1). Thus, nonfulfilment of a condition of one year's cohabitation during paid work would entitle a Member State to prevent a spouse from being able to rely on that provision in order to secure continued residency in the host territory, notwithstanding any willingness on the part of an employer to extend the contract of employment indefinitely.

153. Para 38 of judgment, *supra* note 84.

of Turkish migrant workers as compared with those afforded TCN spouses of EEA and Swiss migrant employees under Community law. In a case prior to *Kadiman*, the ECJ had held that, under Regulation 1612/68, spouses of migrant MSN workers retain their rights under that Regulation in the event of the married couple becoming separated and no longer living together under the same roof, as long as no formal divorce had been decreed.¹⁵⁴ The Court had come to this decision, notwithstanding the fact that the wording in Article 10 of Regulation 1612/68 on residence is strongly suggestive of cohabitation, in granting spouses the “right to install themselves with a [MSN] worker”. In contrast, the rhetoric of preserving “family unity” and prevention of sham marriages emphasized by the Court in *Kadiman* steers national courts to come to a completely different outcome. The judgment is all the more surprising, given the Court’s recognition that it is “essential to transpose, so far as possible, the principles enshrined” in the free movement of workers provisions contained in the EC Treaty. Admittedly, spousal rights of EEA and Swiss nationals under Community law are not made subject to a prior period of “legal residence” in the host territory as they are in respect of Turkish migrants. However, just as in the case of Regulation 1612/68, the issue of cohabitation is not clearly addressed in the legislation. Overall, therefore, the judgment in *Kadiman* is inconsistent with the existing case law on family reunion¹⁵⁵ matters and human rights commitments.¹⁵⁶ More worryingly, it resonates strongly with the self-perception of victimhood not infrequently expressed by Member State governments in relation to actual or potential TCN migratory movements to and within the Union.¹⁵⁷

2.3. Cooperation Agreements with Mediterranean and Middle Eastern Countries

From the mid 1970s onwards, the European Economic Community had made a start at addressing the interests of TCN residents with nationality of North

154. Cases 267/83, *Diatta*, [1985] ECR 567; 131/85, *Gül*, [1986] ECR 1573.

155. See also the recent ECJ judgment in *Safet Eyüp*, *supra* note 117. The Court held that a period of over 7 years, during which a Turkish couple were divorced before deciding to remarry, should be taken into account for the purposes of calculating the acquisition of rights under Art. 7, given that they had never stopped cohabiting throughout their joint residency in Austria.

156. That the ECJ is prepared to contemplate the construction of differing degrees of family reunion protection based on grounds of nationality appears to conflict with the principles set out by the ECtHR in relation to the human rights guarantees of privacy, family and home secured under Art. 8 and non-discrimination under Art. 14 of the ECHR: *Abdulaziz, Cabales and Balkandali v. UK* [1985] 7 EHRR 471.

157. See e.g. the Council Resolution on measures to be adopted on the combating of marriages of convenience O.J. 1997, C 382/1.

African Mediterranean and Middle East countries, as part of a continuing process of trade liberalization with the region as a whole. In 1976, the European Economic Community together with its Member States concluded co-operation agreements with Tunisia,¹⁵⁸ Morocco¹⁵⁹ and Algeria¹⁶⁰ (i.e. countries of the Maghreb region), primarily in order to consolidate trading relations between the contracting parties and aid stimulation of economic growth within these countries. As part of the trade packages negotiated in each of these agreements, TCN resident issues were addressed, albeit to a far lesser extent than has been the case in respect of either the EEA, Swiss or Turkish contexts. Notwithstanding the fact that various other international trade agreements have been concluded with other neighbouring North African and Middle Eastern nations, it is still essentially only the arrangements in place with these three particular countries which have made any notable progress in terms of securing and consolidating TCN resident rights under Community law.

The political and diplomatic climate has now begun to change, however, since the signing of the so-called “Barcelona Declaration”¹⁶¹ at the 1995 Euro-Mediterranean Conference between the EC, its Member States, the countries of the Maghreb and Mashrek¹⁶² regions, as well as Israel and The Palestinian Authority. The major policy goal agreed under the Declaration is the gradual establishment of a Euro-Mediterranean free trade zone by 2010. Various social and economic development measures supported by the Union are to flank this goal, initially by way of financial assistance through aid¹⁶³ and European Investment Bank sponsored loans. In order to implement this aim the EU, as represented in the usual bicephalous form of the European Community together with its constituent Member States, has been in the process of concluding association agreements with its Mediterranean and Middle Eastern partners (the so-called Euro-Mediterranean Agreements or “EMAs”). Four EMAs have so far been signed,¹⁶⁴ one of which has recently entered into force.¹⁶⁵ A major motivation behind the EU’s involvement in the “Barcelona process” has been the need to assist in securing an area of political

158. O.J. 1978, L 265/2.

159. O.J. 1978, L 264/2.

160. O.J. 1978, L 263/2.

161. Reproduced in full in (1997) EFA Rev. 125.

162. This group is composed of Egypt, Jordan, Lebanon and Syria.

163. Namely, EURO 4.685bn over the period 1995–1999.

164. Namely, EMAs with Morocco (signed 26 Feb. 1995:), Tunisia (signed 17 July 1995), Jordan (signed 24 Nov. 1997) and Israel (20 Nov. 1995), the text of which are reproduced in the European Communities Section of HMSO Treaties under the following references respectively: EC No.2 (1997) cm3532; EC No.6 (1996) cm3519; EC No.3 (1998) cm3946; EC No.11 (1996) cm3239.

165. The Tunisian EMA entered into force on 1 March 1998 (O.J. 1998, L 132).

and economic stability and greater prosperity surrounding its southern and south eastern frontiers.¹⁶⁶ Previous trade co-operation agreements had had limited success in promoting economic growth and political stability.¹⁶⁷ In addition, fear of large-scale immigration has been a major factor in the Union's decision to develop closer links with the southern Mediterranean and Middle Eastern region. Indeed, this factor is directly apparent from the terms of the Declaration itself which, in "acknowledg[ing] the importance of the role played by migration in their relationships", seeks to reduce migratory pressure through the targeting of training and job creation in those third countries as well as to combat illegal immigration through the mechanism of readmission agreements.¹⁶⁸

On the other hand, the Declaration makes some positive though ultimately non-binding commitments which impact on TCN resident integration issues. For instance, the parties undertake in the declaration of principles, in addition to usual human rights commitments,¹⁶⁹ to: "– respect and ensure a commitment in respect for diversity and pluralism in their societies, promote tolerance between different groups in society and combat manifestations of intolerance, racism and xenophobia. The participants stress the importance of proper education in the matter of human rights and fundamental freedoms".¹⁷⁰ In addition, the Declaration contains a more direct albeit rather vague commitment on the part of the contracting parties to address the welfare of TCN residents: "They undertake to guarantee protection of all the rights recognized under existing legislation of migrants legally resident in their respective territories".¹⁷¹ To what extent the ECJ will take account of these international soft law undertakings when interpreting the existence and extent of private individual rights under the EMAs is unclear and remains to be seen. Potentially, they could constitute an important legal source of influence in steering the ECJ towards adopting a broad, purposive interpretation of the scope of EMA provisions on TCN resident rights, and bring them in closer alignment with the Turkish association arrangements. However, analogies with the latter association need to be drawn with caution, given that

166. Aghrout and Alexander, "The Euro-Med new strategy and the Maghreb countries", 2 EFA Rev. (1997), 307.

167. Hakura, "The Euro-Med policy: the implications of the Barcelona Declaration", 33 CML Rev. 337; Aghrout and Alexander, *supra* note 166 at 13.

168. See section of the Declaration on "Partnership in Social, Cultural and Human Affairs: Developing Human Resources, Promoting Understanding Between the Cultures and Exchanges Between Civil Societies".

169. See first and third indents of section of the Declaration entitled "Political and Security Partnership: Establishing a Common Area of Peace and Stability".

170. 6th indent, *ibid*.

171. Tenth indent of section entitled "Partnership in Social, Cultural and Human Affairs: developing human resources, promoting understanding between the cultures and exchanges between civil societies".

none of the EMA arrangements envisage leading the third countries towards possible accession to the Union. In particular, the Court may decline to apply by way of analogy its case law on the EC-Turkish association, notwithstanding the existence of similar wording in the EMA and forerunner Maghreb Cooperation instruments.¹⁷² The absence of a similar level of intensity in terms of market and political integration between the Euro-Med contracting parties may well prove to remain a material factor for the ECJ in interpreting the scope of TCN resident rights under the EMAs.

2.3.1. *Agreements with the Maghreb countries*

Of all the international agreements concluded by the EU with the North African Mediterranean and Middle Eastern nations, it is those concluded with Algeria, Tunisia and Morocco (as part of the Maghreb region¹⁷³) which contain significant legal guarantees for TCN residents within the EU. Since the initial 1976 co-operation agreements, both Morocco and Tunisia have signed EMAs with the Union. Ongoing political instability and human rights difficulties concerning the domestic situation in Algeria have delayed negotiations with that country indefinitely.¹⁷⁴ In terms of TCN resident rights, though, the EMAs concluded with the two Maghreb countries have added relatively little to the rights granted under the original agreements.¹⁷⁵ In common with the position in respect of Turkish TCN residents, and in contrast with the level of rights granted to EEA nationals under the EEA Agreement, the 1976 co-operation arrangements do not grant nationals of the Maghreb signatories and their family members any rights of entry into the territory of the EU, freedom of movement as between the EU Member States or rights to remain in the EU after termination of employment. The position has not changed with the arrival of the EMAs. Movement of persons between the EU and its Maghreb partners remains a matter to be resolved

172. This approach was recently favoured by A.G. Leger in *El-Yassini*, *supra* note 79 at para 33 of Opinion.

173. Libya is part of the Maghreb region. However, due to the long-standing political tensions and difficulties surrounding the EU's international relations with this country, no formal cooperation agreements have yet been signed. However, this situation may well begin to change in the wake of the recent decision by the Council of the European Union in May 1999 to suspend the restrictive economic measures hitherto applied against Libya, after the Libyan Government decided to co-operate with the progress of criminal proceedings in the Netherlands in connection with the bombing of Pan Am flight 103 over Lockerbie, Scotland. See Council's Common Position 1999/261/CFSP O.J. 1999, L 103 (EC Bull. 5/99 at 1 April 1999).

174. At the time of writing only the EMA with Tunisia has entered into force, namely on 1 March 1998.

175. See comments by Hakura (1997), *supra* note 167 at 351.

exclusively at national level,¹⁷⁶ including the subject of family reunion. A joint declaration attached to the EMAs contains a weak promise to the effect that the contracting parties are to “examine” the issue of family unification arrangements.¹⁷⁷ However, both the Moroccan and Tunisian EMAs focus attention instead on the aspect of illegal immigration, envisaging programmes towards reducing migratory pressures and repatriating illegal aliens,¹⁷⁸ and excluding illegally residing aliens from the ambit of rights granted.¹⁷⁹ In common with the EC-Turkish association, the agreements in place with the Maghreb States only grant rights to TCN residents within the context of employment. No rights are afforded in the field of self-employment.¹⁸⁰ However, unlike the position in relation to Turkish TCN residents, there is no possibility of either Maghrebi workers or their immediate families obtaining the right of access to or rights to remain within host labour markets after a period of residence within the Union. The decision whether or not to admit a person into the labour force remains within the exclusive competence of the host EU Member State, irrespective of the period of residence spent in the host country.¹⁸¹ In essence, the current arrangements with the Maghreb countries contain only two, albeit very significant, basic rights. These are the right to equal treatment in the contexts of employment and of social security. However, even these minimal rights are limited in scope, and are nowhere near comprehensive enough to form the basis of ensuring the implementation of adequate arrangements for economic, social or cultural integration of Maghrebi nationals within each host EU Member State, let alone within the Union as a whole. The prohibition of discrimination contained in the 1976

176. See Martin and Guild, *supra* note 1 at p. 282. Of course, EU Member States immigration laws remain subject to the human rights guarantees enshrined in other international instruments, notably the ECHR 1950.

177. See the Joint Declarations relating to Art. 64 in the Moroccan and Tunisian EMAs. The declarations only refer to the possibility of reunion with “spouse and children”, and this solely “for the duration of the worker’s authorized stay”.

178. See Art. 71(1)(a)-(b) of Ch. 3 (Co-operation in the Social Field) of Title VI (Co-operation in Social and Cultural Matters) and Joint Declarations relating to Readmission in the Moroccan and Tunisian EMAs.

179. Art. 66, *ibid.* This arguably constitutes a weakening of TCN residents’ rights, as none of the 1976 agreements expressly excluded illegal aliens from the scope of their provisions. However, it is doubtful that the ECJ would construe references to Maghrebi nationals in these first generation agreements to include illegal aliens, given the clear intentions of the contracting parties to afford only rights to a narrowly defined class of individuals (i.e. migrant workers and their families).

180. The Tunisian and Moroccan EMAs merely envisage the parties at some future unspecified date agreeing to widen the scope of the agreements “to cover the right of establishment of one Party’s firms on the territory of the other and liberalization of the provision of services by one Party’s firms to consumers of services in the other”, the Association Council merely having the power to make recommendations in this regard (see Art. 31).

181. As noted by Cremona, *supra* note 1 at 95; Martin and Guild, *supra* note 1 at p. 282.

co-operation agreements and the Moroccan and Tunisian EMAs in the field of employment is narrow in scope. The 1976 agreements require EUMember States to ensure that Maghrebi workers employed within their territories be “free from discrimination based on nationality as regards working conditions or remuneration” in relation to their own nationals.¹⁸² The EMAs have extended the scope of this commitment to include the subject of “dismissal” in addition to pay and working conditions.¹⁸³ However, it is arguable that the concept of “working conditions” embraces scenarios of involving the termination of employment contracts, such as redundancy and dismissal.¹⁸⁴ The EMAs, unlike the 1970s Cooperation Agreements, also stipulate that workers employed on a “temporary basis” benefit from the guarantees in relation to working conditions and pay.¹⁸⁵

The ECJ has recently confirmed in *El-Yassini* that these particular nondiscrimination clauses in relation to employment are directly effective.¹⁸⁶ In this case, a Moroccan migrant worker residing in the UK sought to rely on the 1976 EEC-Moroccan Cooperation agreement in order to secure renewal of a residence permit. Having originally entered the UK with a visitor’s visa, the UK immigration authorities had issued him with a standard one year residence and work permit subsequent to his marriage with a British Citizen. The Home Office refused to renew his residence permit after the couple separated, with the wife moving to Canada. The ECJ refused to accept that the nondiscrimination prohibition contained in Article 40 of the 1976 co-operation agreement had been breached on the grounds that British workers did not face similar treatment, since it was clear that their situations were not comparable with one another given the impossibility under international law for a State to be able to deport its own nationals.¹⁸⁷ In concluding that the 1976 agreement did not therefore preclude an EU Member State from refusing to renew El-Yassini’s residence permit, the ECJ emphasized the differences between the co-operation agreement and the Turkish association arrangements. In particular, it considered the absence of rights of labour market access and aspirations towards free movement of labour between the contracting parties

182. Title III (Co-operation in the field of labour) of the 1976 Co-operation Agreements: Art. 38(1) (Algeria); Art. 40(1) (Morocco); Art. 39(1) (Tunisia).

183. See Art. 64(1) of Moroccan and Tunisian EMAs.

184. See comments *supra* note 138.

185. See Art. 64(2) of Moroccan and Tunisian EMAs. However, it is not unlikely that the ECJ would include this category of employee within the concept of “worker” in the first generation of cooperation agreements, given the absence of any specific reservations or derogations in the texts.

186. *El-Yassini*, *supra* note 79. For comments on this case, see Melis, 36 CML Rev., 1357–1364.

187. Paras. 45–46 of judgment, *supra* note 79. Even under Art. 39 EC it is clear that stricter measures may be applied to aliens as compared with nationals of the host State, such as expulsion: Case 41/74, *Van Duyn*, [1974] ECR 1337.

to be relevant factors. However, the Court in that case was prepared to hold that this non-discrimination prohibition does preclude a Member State from withdrawing the right to reside if this would be shorter than any period granted under the auspices of a work permit, subject to the usual public policy, security and health caveats.¹⁸⁸ The implications of this ruling are quite significant, in that Member States appear to be precluded from deporting a Maghrebi national solely on grounds of involuntary unemployment prior to expiry of a work permit. This would seem to suggest also that individuals must have an implicit complementary right to be able to seek employment during that period, albeit subject to the usual policy of Community worker priority.¹⁸⁹ Otherwise, EU Member States would be able in most instances to induce *de facto* an immediate termination of residence in the event of redundancy, if they were able to deny Maghrebi migrants the possibility of obtaining an income from employment.¹⁹⁰ What is clear from the Court is that it will not be prepared to infer any residence rights for unemployed Maghrebi migrant workers without their holding a current valid work permit or other form of licence to enter into employment.

The co-operation and association arrangements with countries of the Maghreb are similarly very limited in terms of facilitating the integration of family members into the host economies of the EU Member States. As is the case with the Turkish association instruments, family reunion remains an issue to be decided upon by individual host countries. An obscurely placed, non-binding Exchange of Letters annexed to the original 1976 agreements expressed the hope that the contracting parties would extend the equal treatment principle in general to cover migrant workers and their families.¹⁹¹ However, the substantive position has not changed, notwithstanding the arrival of a new generation of association arrangements in the form of the Moroccan

188. *Ibid.* para 64 of judgment.

189. The ECJ could draw inspiration from its case law in relation to Art. 39 EC, where it has held that unemployed migrant MSNs have the right to seek work in other EU Member States for a “reasonable period” of time: *Antonissen*, *supra* note 124.

190. A similar argument could be made in relation to the question of equal access for Maghrebi “workers” and their families to social security benefits (in particular unemployment and family benefits) up until the expiry of the existing work permit. Under the EMA and Maghrebi agreements, the prohibition of discrimination on grounds of nationality is extended to the field of social security. Whether the ECJ will be prepared to interpret “worker” as including those made involuntarily unemployed remains to be seen. Further clarification from the Court is needed on the wider effects of its judgment in *El Yassini*, *supra* note 79.

191. The Exchange of Letters on Algerian, Moroccan and Tunisian labour employed in the Community annexed to the 1976 agreements stipulates that the EU Member States were “ready” to exchange views: “to examine possibilities of making progress towards the attainment of equality of treatment for Community and non-Community workers and the members of their families in respect of living and working conditions, having regard to the Community provisions in force. Such exchange of views, which would not be concerned with matters covered by the Agreement would deal in particular with social and cultural questions.”

and Tunisian EMAs. EUMember States still remain exclusively competent to determine whether and which family members may accompany the migrant worker.¹⁹² The EMAs only create the framework for further political dialogue on these issues, without any specific commitments or aims, deadlines or the Association Councils having any power to take binding decisions.¹⁹³ Such a state of affairs is not surprisingly regarded as unsatisfactory as far as the Maghreb countries are concerned.¹⁹⁴

However, the Maghreb agreements do provide a basic commitment that discrimination on grounds of nationality be prohibited in the field of social security in relation to migrant workers and accompanying family members.¹⁹⁵ The ECJ has been crucially important in terms of fortifying this clause.¹⁹⁶ On a number of occasions the ECJ has confirmed that this basic prohibition is directly effective so that workers and family members may rely on it to ensure that benefits are paid to them on an equal footing to that enjoyed by host nationals, notwithstanding the fact that the agreements envisage that this principle needs to be first implemented in decisions taken by the relevant Co-operation and Association Councils.¹⁹⁷ In the 1976 Cooperation agree-
192. See Art. 65 of the Tunisian and Moroccan EMAs, which only grants rights to family members “living with” migrant workers. This confirms that authorization to live with the worker is in the domain of the host State. See also the Joint Declaration relating to Art. 65 attached to the two EMAs, which expressly states: “It is understood that the term ‘members of their family’ shall be defined according to the national legislation of the host country concerned.”

193. Art. 69 of the two EMAs (Chapt. II on Dialogue in Social Matters of Title VI Cooperation in Social and Cultural Matters) states: “1. The Parties shall conduct regular dialogue on any social matter which is of interest to them. 2. Such dialogue shall be used to find ways to achieve progress in the field of movement of workers and equal treatment and social integration for [Tunisian/Moroccan] . . . nationals residing legally in the territories of their host countries. 3. Dialogue shall cover in particular all issues connected with: (a) the living and working conditions of the migrant communities; (b) migration; . . . (c) schemes and programmes to encourage equal treatment between [Tunisian/Moroccan] and Community nationals, mutual knowledge of cultures and civilizations, the furthering of tolerance and the removal of discrimination.”

194. E.g. the Declaration attached to the Tunisian EMA by Tunisia on Art. 69 of the agreement states: “-Considering family reunification as a basic right of Tunisian workers residing abroad, – Bearing in mind that this right is a key factor in maintaining the balance of the family and guaranteeing success at school and the children’s social and occupational integration, – Notwithstanding the bilateral agreements concluded between Tunisia and certain EU Member States, *Tunisia wishes the question of family reunion to be the subject of in-depth discussions with the Community with a view to easing and improving the conditions for family reunion.*” (Emphasis added).

195. Arts. 39(1), 41(1) and 40(1) of the 1976 Co-operation agreements with Algeria, Morocco and Tunisia respectively, and now replicated in Art. 65(1) of the Moroccan and Tunisian EMAs.

196. See commentaries by Burrows, “Non-discrimination and social security in Co-operation Agreements”, 22 EL Rev. (1997), 166; Neuwahl, “Social Security under the EEC-Morocco Co-operation Agreement”, 17 EL Rev. (1992), 326.

197. See in relation to Art. 41 of the 1976 Moroccan Co-operation Agreement: *Kziber, supra* note 38; *Youfsi, supra* note 79; *Hallouzi-Choho, supra* note 79; *Mesbah, supra* note 141. See *Babahenini, supra* note 79.

ments no clear indication is provided as to which benefits are to be covered within the concept of “social security” contained in the non-discrimination provisions.¹⁹⁸ None of the arrangements envisage a progressive establishment of a regime regarding free movement for workers comparable with that in place for MSNs, nor the establishment of reciprocal social security rights for MSNs in the Maghreb countries. In addition, all of them specifically exclude unemployment benefits from aggregation arrangements and money transfers in relation to Maghrebi migrant workers. In spite of this, the Court has held that the term “social security” mirrors that employed in Regulation 1408/71 in respect of MSN migrant workers, rejecting opposing views voiced by one Advocate General¹⁹⁹ and various EU Member States.²⁰⁰

Likewise, the Court has construed the reference to “worker” contained in the same clauses as being commensurate with the broad definition contained in Regulation 1408/71, so as to ensure that family members are able to rely on them in the event of the migrant worker either dying or becoming inactive due to retirement or as a result of materialization of one of the risks conferring entitlement to social security benefit.²⁰¹ The reference to “family members” in the agreements has been construed broadly by the Court in the context of non-discriminatory access to State benefits. In its judgment in *Mesbah*,²⁰² the ECJ refused to accept the defendant Belgian Government’s argument that the personal scope of the right to equal treatment could be confined simply to blood relatives.²⁰³ The ECJ has in addition refused to apply a distinction between personal and derived rights in the in relation to Art. 39 of the 1976 Algerian Co-operation Agreement: *Krid, supra* note 79;

198. Art. 65(1) second para of the Tunisian and Moroccan EMAs specify which social security benefits are covered. This list matches that employed in Art. 4 of Regulation 1408/71 as regards MSN workers, bar any reference to benefits in respect of accidents at work and occupational diseases. Whether or not the ECJ would construe that these benefits are covered under the reference in Art. 65 of the EMAs to the “branches of social security dealing with sickness” (my emphasis) remains doubtful, given that the whole approach of the EU towards accepting TCN integration has been based on the primary holder of immigration rights being able to work. See e.g. *Bozkurt, supra* note 176 in relation to Turkish workers in the EU.

199. See A.G. Van Gerven’s Opinion in *Kziber, supra* note 38.

200. The German Government unsuccessfully requested the ECJ to reconsider its decision taken in *Kziber, supra* note 38 and in the subsequent case of *Youfsi, supra* note 79 (see para 16 of latter judgment).

201. See *Kziber, supra* note 38: unemployment benefit payable to daughter of retired Moroccan worker; *Krid, supra* note 79: supplementary OAP allowance paid to widow of Algerian worker; *Hallouzi-Choho, supra* note 79: OAP benefit payable to spouse of Moroccan pensioner; *Babahenini, supra* note 79: disability allowance for spouse of retired Algerian worker.

202. *Mesbah, supra* note 141.

203. This enabled the plaintiff, who was the mother-in-law of and residing with a retired Moroccan worker, to be able to claim invalidity benefit on the same terms as a relative of a retired Belgian worker.

context of family members' social security rights under the agreements,²⁰⁴ in contrast with the stance it adopted until recently in relation to TCN family member rights of MSN migrant workers under the EC Treaty.²⁰⁵ This has ensured family members of Maghrebi migrant workers being able to claim social security benefits on a more equal footing with host nationals. Finally, the Maghreb agreements, like the Turkish association with the Community, requires the payment of family allowances to workers in respect of family members residing in the Community.²⁰⁶ As with the Turkish arrangements, the rules regarding aggregation of insurance periods within the EU of Maghrebi workers have yet to be implemented by the Association Council and would seem in their current state, as a consequence, to be devoid of having any direct effect.²⁰⁷

Notwithstanding recent judicial developments in relation to the Maghreb Cooperation agreements, rights for TCN residents under these arrangements remain very limited. In particular, none of the agreements specifically regulate the issue of residence status, a feature acknowledged by the Court. Individual EU Member States remain competent to control the length and conditions of stay, irrespective of the number of years that a Maghrebi national has lived within the host territory. In addition, the Court has begun to make it clear that its interpretation of the scope of rights contained in the agreements will be shaped according to the degree of intensity in terms of the economic relationships struck between the Contracting parties, as opposed to the social and human rights implications of TCN residence.²⁰⁸ For instance, in *Mesbah*²⁰⁹ the ECJ refused to apply by way of analogy its important ruling in *Micheletti*²¹⁰ to a person with dual Belgian and Moroccan nationality residing in Belgium. In *Micheletti*, the Court had held that a MSN migrant worker with dual nationality, one of which is not that of an EU Member State, may choose which nationality to rely upon when enforcing his/her Community law rights to free movement. Instead, in *Mesbah* it held the Belgian State was entitled to rely on its own rules to determine which nationality a migrant

204. *Kziber*, *supra* note 38; *Youfsi*, *supra* note 79 and *Hallouzi-Choho*, *supra* note 79.

205. Prior to its decision in Case C-308/93, *Cabanis-Issarte*, [1996] ECR I-2097, the ECJ had held that TCN family members under Regulation 1408/71 had rights to access to social security benefits on the same terms as host nationals solely in their capacity as family members, not as individuals in their own right. The "derivative rights" doctrine thus precluded them from accessing a large range of benefits determined on a personal as opposed to family status: see e.g. Case 40/76, *Kermaschek*, [1976] ECR 1669.

206. See Art. 39(3), 41(3) and 40(3) of the 1976 Co-operation agreements with Algeria, Morocco and Tunisia respectively, and Art. 65(3) of the Moroccan and Tunisian EMAs.

207. See discussion above of *Taflan-Met*, *supra* note 99.

208. See e.g. *El-Yassini*, *supra* note 79 at paras. 44–61 of the judgment.

209. *Mesbah*, *supra* note 141.

210. Case C-369/90, *Micheletti v. Delegacion del Gobierno en Canatabria*, [1992] ECR I-4239.

worker is deemed to possess for the purposes of applying Article 41(1) of the EC-Moroccan Cooperation Agreement.²¹¹ In so doing, the Court underpinned the perception voiced by Member States that TCN residents cannot be deemed to be in a comparable legal position to that applicable to MSNs in relation to the Union.

2.3.2. *The Mashrek and Middle Eastern countries*

The arrangements agreed between the EU and the rest of the contracting parties to the Barcelona Declaration have so far not provided other TCN residents with any notable immigration or equal treatment rights commensurate with those granted under the Maghreb agreements. To date, the EU has signed Euro-Mediterranean Association Agreements with Israel (1995)²¹² and Jordan (1997),²¹³ which barely address any TCN resident issues. At the time of writing, neither had yet entered into force. To a large extent their progress will be dominated by political and diplomatic developments connected with the Palestinian-Israeli peace process. Other EMAs are in the pipeline, and are likely to be modelled upon the agreement with Jordan. Neither of these agreements devotes any particular or specific attention to the question of TCN resident integration within the EU. No rights of free movement are granted in respect of migration into the Union or as between EU Member States to Israeli or Jordanian nationals in an employment, self-employment, family reunion or other contexts.²¹⁴ The Israeli EMA simply requires the aggregation of all insurance periods effected with EU Member States, the right of free cross-border transfer of certain pensions and allowances and the securing of family allowances in respect of resident family members residing with Israeli workers in an EU Member States.²¹⁵ There are no provisions

211. This accords with the general position under international law in cases of multiple nationality, according to which a State may reserve itself the right to determine a person's effective and genuine nationality: see *Nottebohm Case (Liechtenstein v. Guatemala)* (Second Phase) ICJ Rep 1955 4.

212. For a general overview of the EMA with Israel, see Hirsch, "The 1995 trade agreement between the European Communities and Israel: three unresolved issues" 1 EFA Rev. (1996), 87.

213. The text of the EMAs with Israel (signed 20 Nov. 1995) and Jordan (signed 24 Nov. 1997) are reproduced in HMSO's UK Treaty Series, European Communities No. 11 (1996) cm3239 and No. 3 (1998) cm3946 respectively.

214. Arts. 57 and 63 of the Israeli EMA simply require that the parties will co-operate with a view to "defining areas of mutual interest concerning policies on immigration" and discuss matters of mutual interest as regards "social problems of post-industrial societies". Art. 42 of the Jordanian EMA expressly reserves to the parties the power of stipulating conditions regarding "entry and stay, work, labour conditions and establishment of natural persons and supply of services". It focuses on reducing migratory pressure and combating illegal immigration, rather than addressing TCN residents' issues: see Art. 82(2) of Jordanian EMA and Joint Declaration on the co-operation for the prevention and control of illegal immigration.

215. Art. 64(1) EMA with Israel.

specifically addressing the issue of equal treatment for migrant workers. The contracting parties have agreed to consider widening the scope of the agreement in order to allow for a right of establishment and cross-border provision for services of Israeli “firms” at some unspecified future date.²¹⁶ However, the Association Council has merely the power to make recommendations rather than decisions in this matter.²¹⁷ The Jordanian EMA contains no employment or social security rights for Jordanian residents in the EU. Neither does it even aspire towards creating a right of establishment for Jordanian firms or nationals,²¹⁸ simply granting most-favoured-nation MFN status.²¹⁹ On the other hand, a Jordanian company allowed by an EU Member State to establish itself in that State is to be entitled to employ “key personnel” of Jordanian nationality.²²⁰

2.4. Agreements with Central and Eastern European nations and independent States of the former Soviet Union

Since the historic collapse of the Berlin Wall in November 1989 and radical defrosting of East-West relations following the demise of Soviet Union styled communism in central and eastern Europe, the EU has been quick to strike up association and partnership agreements in the region. Specifically, arrangements have been made with the former satellite States and constituent republics of the ex-USSR. As far as alliances with the former category are concerned, the European Community together with its Member States have concluded ten association agreements, commonly known as the “Europe Agreements”, with various central and eastern European nations. The principal aim of the European Agreements (EAs) is to facilitate the rapid creation of a free trade zone with each associate State, typically within a ten year period. The association relationship is seen as being a platform for building towards ultimate accession to the European Union. Apart from the EAs, the EC and Member States have signed eleven “Partnership and Co-operation Agreements” with the independent States that have emerged from the former

216. Art. 29(1) of Title III (Right of Establishment and Supply of Services) of the Israeli EMA.

217. Art. 29(2), *ibid.*

218. There is a commitment in Art. 35 of the Association Council examining the steps needed to provide for mutual recognition of qualifications in order to “make it easier for . . . Jordanian nationals to take up and pursue regulated professional activities in . . . the Community”. However, this sounds rather hollow given that there is no deadline and no power of the Co-operation Council to take binding decisions in respect of this matter.

219. Art. 30 of Jordanian EMA.

220. Art. 34, *ibid.* This clause is similar to ones used in various agreements with Central and Eastern European nations, which are considered below (in section 2.4.1).

territory of the Soviet Union of Socialist Republics. The objectives underlying these agreements are qualitatively different to those expressed applicable to the EAs. They are principally designed to promote political and economic stability within these partner countries, so as to assist in combating the consequences of long-term economic decline. Each group of agreements will be considered in turn below, in order to evaluate their impact on integration rights of TCN residents in the Union.²²¹

2.4.1. *The Europe Agreements (EAs)*

Since 1991, the EU has concluded ten Europe Agreements (EAs) with central and eastern European nations, (Poland, Hungary, the Czech and Slovak Republics, Romania, Bulgaria, Slovenia, Estonia, Latvia and Lithuania), all of which are now in force.²²² The agreements establish the framework for a progressive development of the contracting parties' economic relations into collective free trade zones, ultimately with a view to facilitating accession to the Union. All of the EAs contain provisions which materially affect the rights and interests of nationals of the central and eastern European countries (hereinafter referred to as "CEE nationals") living and working within the European Union. Although at the time of writing the ECJ had not yet had the opportunity to rule upon the legal effects of these agreements, there is little doubt that it will find that some of the terms of the EAs to be directly effective.²²³ In a number of respects the immigration provisions in the EAs draw from the rules existing under the EEA, Turkish and Maghreb arrangements. As far as rules on entry, residence status and conditions of stay are concerned, apart from special provision in relation to the self-employed, the

221. For detailed overviews of the impact of the European Agreements and Partnership and Co-operation Agreements from the viewpoint of immigration rights and controls, see Eisl, "Relations with the Central and Eastern European Countries in Justice and Home Affairs: Deficits and options", 2 EFA Rev. (1997), 351; Guild, *A Guide to the Right of Establishment under the Europe Agreements*, (1996 Baileys Shaw and Gillett, London); Guild op. cit. *supra* note 22 Ch. 9; Martin and Guild, *supra* note 1 Ch. 16.

222. The Europe Agreements were signed and entered into force on the following dates: Poland and Hungary (16 Dec. 1991 and 1 Feb. 1994); Romania and Bulgaria (8 March 1993 and 1 Feb. 1995); the Czech and Slovak Republics (4 Oct. 1993 and 1 Feb. 1995); Estonia, Latvia and Lithuania (12 June 1995 and 1 Feb. 1998); Slovenia (10 June 1996; 1 Feb. 1999). The texts of the agreements are reproduced respectively as follows: O.J. 1993, L 347/2 and L 348/3; O.J. 1994, L 357/2 and O.J. 1994, L 358/3; O.J. 1994, L 360/2 and 359/2; O.J. 1998, L 68, L 26 and L 51; O.J. 1999 L 51/3.

223. At the time of writing two Advocates General had opined that certain provisions of the Polish, Czech and Bulgarian EAs had direct effect in relation to self-employed migrants. See A.G. Alber's Opinions in Cases C-63/99, *R v. Secretary of State for the Home Department, ex parte Gloszczuk and Gloszczuk* and C-235/99, *R v. Secretary of State for the Home Department, ex parte Kondova*, of 14 Sept. 2000 and A.G. Mischo's Opinion in Case C-257/99, *R v. Secretary of State for the Home Department, ex parte Barkoci and Malik*, of 26 Sept. 2000.

EAs do not expressly touch upon the subject of TCN migration. All the EAs, without exception, confirm that, in principle, the individual EU Member States retain sovereignty over the question of entry and stay of CEE nationals into and within their respective borders.²²⁴ In relation to the field of employment, a specific declaration has been attached to each agreement, stressing that nothing in the EAs' provisions in respect of movement of workers (namely Chapter 1 of Title IV) compromises this basic position.²²⁵ Thus, the EAs operate on the basis that they are not in principle designed to regulate the movement of CEE nationals into the EU or between EU Member States, either in employment or family reunion contexts. Moreover, the EAs do not confer any right to remain in EU territory commensurate with that afforded to EEA nationals. Particular treatment, though, is reserved for the area of freedom of establishment. The EAs confer specific rights for firms and nationals conducting and managing businesses on a long-term basis within the EU, the scope and limitations of which are considered later below.

In comparison with other international agreements with third States discussed so far, the employment provisions in the EAs offer pretty modest commitments for the benefit of CEE nationals and their families. The most important provisions pertaining to issues connected with TCN resident integration in the EAs are housed within Title IV of the agreements, entitled "Movement of workers, establishment, supply of services". The Title has rightly been criticized as being misleading, as the EAs provide very little in the way of TCN labour mobility either within or between EU Member States.²²⁶ None of the EAs afford protection to workers illegally employed within the EU, nor to their family members. In common with the EMAs agreed with Tunisia and Morocco, the EAs all contain a clause prohibiting discrimination on grounds of nationality in relation to pay, working conditions and dismissal.²²⁷ There is a question-mark over whether or not these provisions are directly effective, given that they are qualified by the phrase "subject to

224. See Chapt. IV (General Provisions) of Title IV (Movement of workers, establishment, supply of services) in the EAs: Art. 58(1) re Poland and Hungary; Art. 59(1) re Romania, Bulgaria, Slovakia and the Czech Republic; Art. 57(1) re Slovenia; Art. 56(1) re Latvia and Lithuania; Art. 55 re Estonia.

225. Declaration by the European Community regarding Ch. 1 of Title IV states: "The Community declares that nothing in the provisions of Chapter 1: 'Movement of Workers' shall be construed as impairing any competence of Member States as to the entry into and stay on their territories of workers and their family members".

226. So Martin and Guild, *supra* note 1 at p. 296.

227. Art. 36(1) first indent of Estonian EA; Art. 37(1) first indent of Polish, Hungarian, Latvian, Lithuanian EAs; Art. 38(1) first indent of Czech, Slovak, Romanian, Bulgarian and Slovenian EAs.

the conditions and modalities applicable in each Member State”.²²⁸ However, it does appear plausible that the ECJ could confirm that these obligations are directly effective, as their caveats would not appear to detract from the clarity and precision of the basic legal requirement.²²⁹ The EAs provide no express rights to reside or remain for EA migrant workers in the Union. However, it seems likely that in the light of the recent *El-Yassini* judgment²³⁰ the non-discrimination clauses do preclude EU Member States from withdrawing a residence permit on grounds of involuntary unemployment prior to the expiry of a work permit.²³¹

In all other respects, the EAs contain indefinite and soft law commitments in relation to migrant workers. They require that co-ordination of EU Member State social security systems include the aggregation of all national insurance periods spent by the individual within the EU, free pension and annuity transferability, and the securing of family allowance payments. These commitments are to be implemented through the relevant Association Councils.

Therefore, they are unlikely on their own to be construed as being directly effective.²³² In addition, all the EAs envisage a possible future improvement of existing facilities of access for employment and the movement of migrant workers with nationality of an EA signatory into the Union, this being subject to ongoing assessments of the employment situation within the Community.²³³ This last consideration reflects an implicit adherence to the “Community worker priority” policy of the EU. The Polish EA contains an extra commitment on the part of the EU Member States to “examine” the possibility of granting work permits to Polish nationals already having residence permits in the EU Member States, bar those admitted as tourists or visitors.²³⁴ However, this is an open-ended provision with no possibility of being deemed sufficiently unconditional as to confer direct effect.²³⁵ Finally, in addition to

228. This qualification might suggest that the contracting parties have retained sufficient discretion

over implementing this provision, an interpretation which would render it insufficiently

unconditional for the purposes of determining direct effect.

229. Comparison may be made with the Court’s case law in relation to the Turkish and Maghreb agreements as discussed above in sections 3.1.2 and 3.1.3.1 respectively, in which it confirmed the direct effect of non-discrimination provisions in social security matters, notwithstanding the absence of any specific implementing measures taken by the contracting parties.

230. *El Yassini*, *supra* note 79.

231. For a similar view, see Martin and Guild, *supra* note 1 at p. 297.

232. Arts. 37–38 of Estonian EA; Arts. 38–39 of Polish, Hungarian, Lithuanian, Latvian EAs; Arts. 39–40 of Czech, Slovak, Romanian, Bulgarian and Slovenian EAs. See Cremona, *supra* note 1 at 114.

233. Arts. 40–41 of Estonian EA; Arts. 41–42 of Polish, Hungarian, Lithuanian, Latvian EAs; Arts. 42–43 of Czech, Slovak, Romanian, Bulgarian and Slovenian EAs.

234. Art. 41(3) of Polish EA.

235. See Martin and Guild, *supra* note 1 at p. 300.

being denied any rights of access to Member State labour markets,²³⁶ CEE workers have not been granted any other employment rights, such as those contained in Regulation 1612/68 applicable to migrant MSN workers. As far as family reunion issues are concerned, the EAs appear to some extent to be more generous than the Turkish and Maghrebi arrangements. Again, subject to the “conditions and modalities applicable in each Member State”, all the EAs provide for the spouse and children of the CEE worker to have the right to access the labour market of the host EU Member State during the period in which the worker has been authorized stay with a work permit.²³⁷ Although the effect of the qualification is by no means clear, a plausible interpretation of the text would be that the family members’ rights are directly effective, subject to the “Community worker” priority policy and public sector employment reservations. Clarification from the ECJ is, however, obviously needed. As with the Turkish and Maghreb agreements, the EAs offer little in the way of legal protection for the migrant worker and family members in terms of facilitating their integration within the EU. It is clear that under the arrangements Member States retain control in relation to family reunion matters; they determine whether and under what conditions relatives may reside with the CEE migrant worker.²³⁸ Furthermore, there is no possibility of guaranteeing continued residence to family members beyond the validity of the migrant worker’s labour permit. There is also no guarantee of equal treatment in the context of social security entitlements or social assistance.²³⁹ However, each agreement does contain a general but rather vague commitment to non-discrimination²⁴⁰ which the ECJ might conceivably use to ensure that EU Member States adhere as closely as possible to the equal treatment commitments enshrined in the EEA, Turkish and Maghreb arrangements. In contrast with the provisions regarding TCN resident employment matters, those in the EAs with respect to self-employment would appear to contain

236. Cremona, *supra* note 1 at 105.

237. Art. 36(1) second indent of Estonian EA; Art. 37(1) second indent of Polish, Hungarian, Latvian, Lithuanian EAs; Art. 38(1) second indent of Czech, Slovak, Romanian, Bulgarian and Slovenian EAs.

238. Joint Declarations by the contracting parties have been attached to each EA clarifying that reference to “children” and “members of their family” are defined in accordance with national legislation.

239. See Peers (1996), *supra* note 1 at 32.

240. Art. 111 of the Polish EA states: “Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals of the competent courts and administrative organs of the Community and Poland to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property.” This provision is mirrored in Arts. 113 of the Hungarian, Czech and Slovakian EAs, Art. 114 of the Bulgarian EA, Art. 115 of the Romanian EA, Art. 118 of the Estonian EA, Arts. 119 of the Latvian and Slovenian EAs and Art. 120 of the Lithuanian EA.

significant legal consequences for EU Member States” immigration policies. All the EAs contain a basic obligation on the part of the EU Member States to afford CEE companies and nationals the right of establishment and the right to conduct business operations on the same terms as those afforded to host companies and nationals.²⁴¹ Establishment is defined in the EAs so as to mirror essentially that used in the context of Article 43 EC, albeit with some important caveats. Notably, this freedom is not to extend to “seeking or taking employment in the labour market or to confer a right of access to the labour market of another Party”.²⁴² In terms of corporate mobility, the EAs require that in order for a business registered in one of the central and eastern European associated States to be able to set up a subsidiary, agency or branch in an EU Member State, there must be evidence of a “real and continuous link” with the economy of the origin CEE State.²⁴³ Particular sectors of the economy are excluded from the right of establishment in five of the association agreements.²⁴⁴ It may be anticipated that the ECJ will confirm that these treaty commitments confer direct effect.²⁴⁵ However, the general caveat regarding migration policy contained in Chapter IV of Title IV of the agreements signals that the rights are heavily qualified. For instance, Article 58 of the Polish EA specifies that EU Member States retain power to apply their laws and regulations regarding “establishment of natural persons and supply of services”, although goes on to state that these must not be applied so as to nullify or impair any rights accrued under the agreement.

A number of requests for preliminary rulings are currently pending before the ECJ on the scope of the right of establishment granted under the EAs, namely *Gloszczuk*,²⁴⁶ *Barkoci and Malik*²⁴⁷ and *Kondova*²⁴⁸ in relation to the Polish, Czech and Bulgarian EAs respectively. All three cases involve applicants wishing to utilize the establishment provisions in the EAs as a means of securing entry and residence within the UK. The Advocates Gen-

241. Art. 43 of the Estonian EA; Art. 44(1) of the Lithuanian and Latvian EAs; Art. 44(3) of the Polish and Hungarian EAs; Art. 45(1) of the Romanian and Bulgarian EAs; Art. 45(3) of the Czech, Slovakian and Slovenian EAs. Nationals of Hungary, Estonia and Slovenia are only allowed to take advantage of the right of establishment in their capacity as natural persons as from 1 Feb. 1999, 1 Jan. 2000 and 1 Feb. 2005 respectively: see Arts. 44(4), 43(1)(iii) and 45(4) of the respective EAs.

242. See e.g. Art. 44(4)(a) of Polish EA.

243. Martin and Guild, *supra* note 1 at p. 14; Staples, *supra* note 1 at p. 258. This qualification is thought to have been inserted in order to prevent an incentive for the creation of paper companies in central and eastern Europe in order to circumvent EUMember State immigration requirements.

244. Namely, the Romanian, Bulgarian and Baltic EAs.

245. Such as Martin and Guild, *supra* note 1 at p. 314.

246. *Gloszczuk*, *supra* note 223.

247. *Barkoci and Malik*, *supra* note 223.

248. *Kondova*, *supra* note 223.

eral involved in the cases have delivered opinions which advise the ECJ to construe these provisions as not providing immigration and settlement rights commensurate with those enshrined in Article 43 EC, notwithstanding the similarity of the wording used in the EA provisions to that employed in the EC Treaty. Each has opined that, whilst the EA provisions guaranteeing a right of establishment are directly effective in prohibiting EU Member States from imposing discriminatory conditions on the practice of a self-employed activity,²⁴⁹ the right of establishment as enshrined in the EAs does not imply a parallel right to enter and reside within the territory of a Member State. Instead, immigration of CEE nationals remains a matter principally within the competence of the latter.

However, both Advocates General have added riders to their interpretations. They have submitted that the EAs preclude an EU Member State from making it in practice impossible or very difficult for a CEE national to exercise their rights to freedom of establishment. As a consequence, EU Member States should not be allowed to set up general immigration restrictions on entry and stay for CEE self-employed nationals.²⁵⁰ This interpretation of the EAs would suggest that Member State immigration authorities must direct themselves specifically to the merits of individual residence applications and arrive at a decision which accommodates the EAs' aim of facilitating establishment of CEE nationals as far as possible with Member States' interests in ensuring that applications are genuine and economically viable. Accordingly, it also implies that national immigration controls do not remain exclusively within the purview of Member States, but instead are subject to a particular test of proportionality. If the Court should follow these guidelines set by the Advocates General, then it will be clear that Member States' immigration rules will become subject to a significant amount of qualification and scrutiny by virtue of the provisions of the EAs on freedom of establishment. In this respect, CEE migrants would have arguably more extensive legal protection than is afforded to Turkish and Maghreb nationals.

A parallel right contained within the EA freedom of establishment provisions is the right granted to certain "key personnel" of a CEE registered company to move to and within the Union to work in subsidiaries or branches registered or based in a Member State.²⁵¹ The individuals concerned must have already been on the enterprise's payroll for at least one year. The EAs define "key personnel" narrowly so as to include only either senior employees

249. See especially paras. 76 and 85 of A.G. Alber's Opinions in *Gloszczuk and Kondova* respectively, and para 22 of A.G. Mischo's Opinion in *Barkoci and Malik*, *supra* note 223.

250. See paras. 91 and 100 of A.G. Alber's Opinions in *Gloszczuk and Kondova* respectively, and paras. 69–73 of A.G. Mischo's Opinion in *Barkoci and Malik*, *supra* note 223.

251. Art. 48 of Estonian EA; Art. 49 of Latvian and Lithuanian EAs; Art. 50 Slovenian EA; Art. 52 of Polish and Hungarian EAs; Art. 53 of Czech, Slovak, Romanian and Bulgarian EAs.

charged with directing the management of the business, subject to supervision and direction from either the board of directors or shareholders, or employees vested with technical qualifications or knowledge essential to the business's service, research equipment, techniques or management. Apparently the subject of particularly detailed scrutiny by the EU Member States during EA treaty negotiations,²⁵² this provision clearly reflects the wish on their part to restrict EA nationals' mobility into and within the Union to the absolute minimum necessary to ensure viability of the establishment freedoms. The "key personnel" provisions contrast sharply with the counterpart rights afforded to companies established in the EU Member States under Articles 43 and 49 EC, which provide those companies with a good deal more autonomy in terms of posting TCN resident personnel in other Member States. A similar right of free movement is accorded to CEE nationals in the service provision context. Although none of the EAs confer a general, directly effective commitment to freedom to provide services within the EU, there is specific limited provision for the possibility of key personnel being able to move to the EU Member States in order to negotiate for the sale of cross-border services.²⁵³ Although there is some doubt as to whether these provisions confer direct effect, it would seem likely that the ECJ would answer this in the affirmative.²⁵⁴

2.4.2. *The Partnership and Co-operation Agreements (PCAs) with the independent States of the former Soviet Union*

Running in parallel with the evolution of the Europe Agreements has been process of negotiation and conclusion of various important trade agreements with the independent European and other neighbouring States of the former Soviet Union. To date, the EU has signed eleven Partnership and Co-operation Agreements (PCAs) with many of the independent States of the former Soviet Union, four of which have entered into force.²⁵⁵ Unlike the EAs, these agree-

252. See comments by Martin and Guild, *supra* note 1 at p. 315.

253. Such individuals are not allowed either to make direct sales to the public or supply services themselves directly. See Art. 51(2) of Estonian EA; Art. 52(2) of Latvian and Lithuanian EAs; Art. 53(2) of Slovenian EA; Art. 55(2) of Polish and Hungarian EAs; Art. 56(2) of Czech, Slovak, Romanian and Bulgarian EAs.

254. The provisions are qualified by being required to be "in step with the liberalization process mentioned in paragraph 1". As this phrase does not appear to amount to a particular pre-condition, but instead mere rhetorical surplusage, the basic commitments would appear to satisfy the usual criteria of precision, clarity and unconditionality for the purposes of direct effect. For an opposing viewpoint, see Martin and Guild, *supra* note 1 at p. 318.

255. The PCAs which have been signed between the EU and the independent States of the ex-USSR are listed below. (A second date indicates the date of entry into force if applicable). PCA with the Ukraine (14 June 1994), the Russian Federation (24 June 1994; 1 Dec. 1997), Moldova (28 Nov. 1994); Kazakhstan (23 Jan 1995); Kyrgyz (9 Feb. 1995); Belarus (6 March 1995); Armenia, Azerbaijan and Georgia (22 April 1996; 1 July 1999); Uzbekistan (21 June 1996) and Turkmenistan (25 May 1998). The texts of the agreements are reproduced respectively as follows: O.J. 1998, L 49; O.J. 1997, L 327; O.J. 1998, L 181; O.J. 1999, L 196; HMSO EC Treaty Series No 7 (1995) Cm 2972; O.J. 1999, L 239, L 246 and L 205; O.J. 1999, L 229 and HMSO EC Treaty Series No 3 (1999) Cm 4189.

ments do not aspire to creating free trade areas between the respective parties or future EU accession. This factor is likely to have an important bearing on the ECJ's approach to their interpretation. In particular, this may well be significant in determining the question of direct effect in relation to provisions impacting upon TCN resident issues.

In common with the Turkish and Maghreb agreements discussed above, none of the PCAs purport to confer any rights to free movement to TCNs. Immigration into the EU and between its constituent Member States remains a matter to be dealt with at national level. A number of the agreements focus on the aim of co-operating with a view to combating illegal immigration.²⁵⁶ No rights to remain in the EU are granted either to nationals of the independent States. The PCAs offer very little in terms of assisting in the task of integrating TCN residents within the Union. In the field of employment, all of the agreements contain a basic commitment in Chapter 1 (Labour Conditions) of Title IV (entitled "Provisions affecting Business and Investment") obliging the EU Member States to adhere to the principle of equal treatment in matters pertaining to aspects of pay, working conditions and dismissal.²⁵⁷ However, Member States are only required to "endeavour" to secure national treatment. In addition, the commitments are "subject to the laws, conditions and procedures applicable in each Member State". Collectively, these qualifications are likely to render the provisions insufficiently unconditional to warrant direct effective status.²⁵⁸ Both the Belarussian and Russian PCAs contain framework obligations for EU Member States with respect to social security co-ordination akin to those contained in the EAs, none of which are likely to be held by the ECJ to be directly effective. No other rights are offered in the field of employment, including any pertaining to family members. In the context of self-employment, the PCAs contrast strongly with the EAs. The PCAs do not contain any rights of establishment or freedom to provide services for TCNs. Instead, the independent States are guaranteed either immediately or over time merely most-favoured-nation (MFN) status follows: O.J. 1998, L 49; O.J. 1997, L 327; O.J. 1998, L 181; O.J. 1999, L 196; HMSO EC Treaty Series No 7 (1995) Cm 2972; O.J. 1999, L 239, L 246 and L 205; O.J. 1999, L 229 and HMSO EC Treaty Series No 3 (1999) Cm 4189.

256. See e.g. Art. 72 of Armenian PCA.

257. As contained in Art. 20(1) of the Moldovan PCA: "Subject to the laws, conditions and procedures applicable in each Member State, the Community and the Member States shall endeavour to ensure that the treatment accorded to Armenian nationals legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared with its own nationals." This provision is mirrored in the other PCAs: Art. 18 (Turkmenistan); Art. 19 (Kazakhstan, Kyrgyz, Uzbekistan); Art. 20 (Azerbaijan, Georgia); Art. 23 (Belarus, Moldova, Russian Federation); Art. 24 (Ukraine).

258. See e.g. Martin and Guild, *supra* note 1 at p. 353.

in terms of the issue of corporate establishment within the EU. If, however, the EU Member States do decide to allow businesses of the PCA countries to establish themselves within the EU, then “key personnel” are granted the right to move to the EU in order to supervise operations. These provisions are akin to the arrangement provided for in the EAs.²⁵⁹

2.5. Relations with the African, Caribbean and Pacific States (ACP) and the Overseas Countries and Territories (OCT)

Ever since its inception, the European Community has been keen to develop special trading relationships with those third countries with whom its Member States share existing or recent colonial ties. The relations with the ACP countries which have obtained independence from EU Member States since the Second World War were until recently governed under the auspices of the ten year Fourth Lomé ACP/EEC Convention, signed on 15 December 1990.²⁶⁰ On 23 June 2000, the ACP group, the Community and EU Member States signed the so-called Cotonou Agreement in Benin. This is an accord designed to replace Lomé as the umbrella framework to be used for developing the ACP-EU relationship over the next two decades.²⁶¹

Unlike its immediate predecessor, the Cotonou Agreement does contain some specific provisions within the main body of the accord which provide some rights for ACP nationals residing within the European Union. These are contained principally within Article 13 of the Agreement on migration.²⁶²

Article 13 contains two clauses which are directly relevant to the question of integration of ACP nationals resident within the EU. The most significant in legal terms is Article 13(3), which contains a clear and fairly comprehensive prohibition of discrimination against ACP migrant workers in the context of various employment-related matters.²⁶³ The clause appears sufficiently clear, precise and unconditional to merit direct effect status, and constitutes a significant improvement on previous equal treatment undertakings contained in Lomé accords. Under the Fourth Lomé Convention guarantees on nondiscrimination were housed in the soft form of joint declarations attached to

259. See e.g. Art. 28 of the Armenian PCA.

260. The text of the Convention is reproduced in the Official Journal: O.J. 1991, L 229/3.

261. The text of the agreement can be located on the website www.europa.eu.int/comm/development/cotonou. It will enter into force after approval from the European Parliament and ratification by the Contracting Parties.

262. Art. 13 (Migration) is housed within Title II (The Political Dimension (Arts. 8–13)) of Part 1 (General Provisions) of the Agreement.

263. Art. 13(3) first sentence states: “The treatment accorded by each [EU] Member State to workers of ACP countries shall be free from any discrimination based on nationality as regards working conditions, remuneration and dismissal, relative to its own nationals.”

the convention as if by way of an afterthought.²⁶⁴ Previous arrangements had also been very limited in terms of scope and effect.²⁶⁵ Article 13(2) of the Cotonou Agreement contains a more general and aspirational commitment on the part of the contracting parties to secure “fair treatment” of TCNs residing within their respective territories.²⁶⁶ Due to its essentially programmatic character, though, this clause is in contrast with its neighbouring clause Article 13(3) unlikely to confer any directly enforceable rights.

Even if ACP migrant workers residing in the EU do derive directly effective rights under Article 13(3) of the Cotonou accord, it is clear that these will be relatively minimal compared with those accorded to TCN residents covered under other international agreements involving the Community and third States. Notably, there are no rights to equal treatment outside the confines of the employment context for ACP migrants and family members. Issues connected with access to educational, social security, housing and other public or private facilities and services are not specifically addressed in the text. No provisions are set out in relation to ACP nationals resident within the EU who are self-employed, students, retired or of independent means. All this leads to the conclusion that the interests of TCN residents within the EU of ACP nationality are poorly served by the Cotonou Agreement. Much will depend on the political will underpinning the ACP-EU Council to craft specific measures out of the general human rights and non-discrimination undertakings currently

264. Namely, the Joint Declaration of the Contracting Parties on ACP Migrant Workers and ACP students and the Joint Declaration on Workers who are Nationals of one of the Contracting Parties and are legally resident in a territory of a Member State or an ACP State (contained in Annexes V and VI of the Final Act of Lomé IV). Due to the fact that equal treatment guarantees were enshrined in declarations attached to rather than in articles within the Fourth Convention, uncertainty exists as to whether any of them are directly effective. See comments and differing views on the declarations, e.g. Martin and Guild, *supra* note 1 at p. 293 and Peers (1996) *supra* note 1 at 29. Factors pointing towards direct effect include the fact that they are agreed by all parties, housed within specific Annexes and divided up into specific sections. This arguably reflects a collective intention on the part of the contracting parties to treat them as legally binding norms, and therefore constitute an integral part of the Convention in accordance with Art. 31 of the 1969 Vienna Convention on the Law of Treaties. Some judicial light has recently been shed on this issue by the ECJ; see *R v. SSHD, ex parte Manjit Kaur*, judgment of 20 Feb. 2001, nyr, where the ECJ pronounced on the legal effects of unilateral declarations adopted by the UK, annexed to the Final Act of the First Treaty of Accession 1972 and 1981 as a result of changes in UK nationality law.

265. E.g. the ECJ had construed the “national treatment” obligations contained in the First Lomé Convention in relation to self-employment to mean non-discrimination as between nationals of ACP countries, rather than between host Member State nationals and ACP residents: see Case 65/77, *Jean Razanatsimba*, [1977] ECR 2229.

266. Art. 13(2) of the Cotonou Agreement states: “The Parties agree to consider that a partnership implies, with relation to migration, fair treatment of third country nationals who reside legally on their territories, integration policy aiming at granting them rights and obligations comparable to those of their citizens, enhancing non-discrimination in economic, social and cultural life and developing measures against racism and xenophobia.”

contained in the Agreement.²⁶⁷ The paucity of specific guarantees for effective integration of ACP nationals resident within the EU territory strongly suggests that the equal treatment commitments in relation to employment were inserted just as much for fears of wage dumping as for reasons connected with social integration. It is also illuminating that the issue of illegal immigration is dealt with in the same treaty article which addresses TCN residence rights. Article 13(5) seeks to create a no-questions-asked return and readmission obligation on the part of ACP States.²⁶⁸ In essence, the Cotonou package as it stands is still light years away from securing adequate integration rights for ACP residents within the EU.

A separate legal framework under Community law exists which impacts on the position of TCN residents within the Union who are nationals of the so-called Overseas Territories and Countries (OCT). Relations between the Union and the OCT, namely those third countries and regions which have not obtained independent status recognized under international law from certain EU Member States²⁶⁹ and are outside the ACP group, are dealt with under the framework of the provisions of the Treaty of Rome itself, as opposed to being under the EC-ACP arrangements. Specifically, the arrangements are governed under the auspices of Articles 182–188 (ex 131–136a) of Part Four of the EC Treaty on Association of the OCT.²⁷⁰ According to Article 182 EC, the EU Member States agree to associate with the OCT in order to promote their economic and social development as well as to establish close economic relations with the Union. The OCT association arrangements in place so far have brought relatively little in the way of rights for TCN residents within the Union. As far as the field of employment is concerned, Article 186 EC makes free movement within the EU for OCT migrant workers contingent upon agreements concluded with the unanimous approval of the EU Member States. As no agreements have yet been concluded, no specific Community rights have yet crystallized.²⁷¹ As far as self-employment is

267. Recitals 7, 8 and 12 in the preamble to the agreement contain a number of references to human rights instruments, notably of the UN and the ILO. Specifically within the context of migration issues, Art. 13(1) reaffirms the contracting parties' existing obligations under international law to ensure respect for human rights, including prohibitions of discrimination based on origin, sex, race, language and religion.

268. Art. 13(5)(c)i obliges ACP States to accept any of its nationals illegally present in a EU Member State "at that Member State's request and without further formalities". This clause, as currently drafted, appears to be incompatible with existing human rights commitments binding on the Community and Member States in relation to deportation and extradition scenarios, as elucidated in particular by the ECtHR in relation to Arts. 3 and 8 of the ECHR 1950.

269. This includes Denmark, France, the Netherlands and the UK, as identified in Annex II of the EC Treaty.

270. Annex II to the Treaty of Rome provides a list of the OCTs.

271. As confirmed by the ECJ in C-100–101/89, *Kaefer and Procacci v. France*, [1990] ECR I-4667.

concerned, nationals of the OCT fare a little better. The effect of Article 183(5) EC²⁷² appears to be that they are entitled to enjoy the freedom of establishment and freedom to provide services under Articles 43 and 49 EC respectively, as long as they hold nationality of an EU Member State.²⁷³ This would presumably include all the relevant EC secondary legislation passed under the auspices of Chapters 2 and 3 of Title III (Free Movement of Persons) of the EC Treaty (Articles 43–55 EC).²⁷⁴ It should not be overlooked that many TCN residents with OCT nationality may already have or be willing and able to acquire nationality of a Member State. This obviously has an important bearing on the question of TCN resident integration, as the ECJ has confirmed that in principle nationality vests Community law rights in the individual irrespective of any period of residence spent in the EU.²⁷⁵

3. The internal dimension: Community law under the first pillar and TCN residents

The fractured approach to dealing with issues concerning TCN residents, so clearly reflected in the differing outcomes reached in the context of Union's external relation with third States, is also deeply entrenched in the internal dimension of Community law regulating the operation of the single market. An examination of the various international arrangements in place between the European Union and third States clearly discloses a disjointed and incohesive body of law in existence in relation to TCN residents within the Union. The net effect is that the quantity and quality of rights that are afforded under the arrangements vary widely according to the nationality of the individual, as opposed to the intensity of social links with their immediate environment. Due

272. Art. 183(5) EC: "In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 187."

273. Martin and Guild, *supra* note 1 at p. 230.

274. Notably, EC Council Directives 73/148, 75/34 and 75/35 on general rights to free movement of the self-employed and their families and Directives 89/48 and 92/51 on mutual recognition of qualifications, as well as all the sectoral directives on liberal professions.

275. *Micheletti*, *supra* note 210. In this connection it is interesting to note that the UK Government is in the process of preparing the way for legislation to the effect of granting British Citizenship to cover all its outstanding overseas territories and dependencies, in the wake of Hong Kong having been seceded to China. See the UK Government's White Paper of March 1999 "Partnership for Progress and Prosperity: Britain and the Overseas Territories" (HMSO 1999 cm4264) at pp. 16–19. British Citizenship was granted to Falkland Islanders already in 1983. Possession of nationality of a Member State remains, of course, subject to the qualification contained in Art. 186 EC in respect of migrant OCT workers.

to the fact that the EC Treaty places a great deal of emphasis on possession of nationality of a Member State as a means of acquiring rights, the legal position of TCN residents under first pillar law is made all the more vulnerable to social, political and economic exclusion within the EU polity and marketplace. In a number of ways, the law of the first pillar of the Union's constitutional framework has served to prioritize MSNs' interests as inhabitants within the territory of the Union. In comparison, the legal regulation of TCN residents' status within the Union has received much less attention. The result has been the presentation of a legal picture of European Union society which has airbrushed out the presence and role of TCN residents as an integral and self-standing part of the Union polity. The most notable examples of direct exclusion of TCN residents from the remit of first pillar rights are those connected with European Union citizenship, free movement and the mutual recognition of qualifications. That Title IV in the first pillar has hived off various aspects of TCN residence issues from the rest of the EC Treaty²⁷⁶ is indicative of a legal order which predicates many rights upon the possession of Member State nationality.

Under the EC Treaty, Union citizenship is reserved currently for those inhabitants within the EU who possess nationality of one of the Member States.²⁷⁷ A number of rights are attached with this status, exclusively enjoyed by Union citizens. These include electoral rights in relation to the European Parliament,²⁷⁸ rights as a resident to vote and stand as a candidate in local government elections in any Member State on the same basis as host nationals,²⁷⁹ rights to free movement and residence within the Union²⁸⁰ and rights to diplomatic protection in third States.²⁸¹ Recent case law from the ECJ raises the possibility that the mobility and residence rights for Union citizens contained in Article 18 EC, particularly in connection with the non-discrimination clause contained in Article 12 EC, may now extend beyond the traditional parameters of occupational activity and economic self-sufficiency traditionally set by first pillar law for MSN migrants.²⁸² If this is to be explicitly confirmed in future case law of the Court, it would effect an intensification of the civic-type legal bonds that MSNs currently share in relation to the EU and at the same time exacerbate the existing inferior legal status afforded to TCN residents under Community law.

276. See in particular Arts. 63(3)(a) and 63(4) EC.

277. Art. 17(1) EC.

278. Art. 19(2) EC.

279. Art. 18(1) EC.

280. Art. 18(1) EC.

281. Art. 20 EC.

282. See e.g. the Opinions of the A.G.s La Pergola and Jacobs respectively in *Martinez Sala*, *supra* note 60 and *C-274/96 Bickel and Franz*, [1998] ECR I-7637 at 7645.

As is well known, TCN residents are in principle also excluded from the range of free movement of persons norms provided under the first pillar.²⁸³ Notably, it is only MSNs who are entitled as persons in their own right to exercise the freedoms set out in the EC Treaty and secondary legislation to move across internal frontiers to engage in employment,²⁸⁴ self-employment²⁸⁵ or in other specified capacities.²⁸⁶ In addition, TCN residents who work in one or more Member States are currently excluded from benefiting from the nondiscrimination and aggregation arrangements in relation to social security entitlements under Regulation 1408/71.²⁸⁷

The absence of free movement rights has led to instances where TCN residents have derived lesser protection under Community or national legislation than MSN migrants. A classic illustration of this appeared in the recent case of *Awoyemi*,²⁸⁸ a Nigerian national residing in Belgium. Mr Awoyemi was charged with having breached Belgian law in having failed to have applied to exchange his UK driving licence for a Belgian one within the first year of residence. Under the Community Directive on mutual recognition of driving licences in force at the time,²⁸⁹ as accepted by the Court, Member States were entitled to require that licences be exchanged and invoke criminal penalties to enforce these rules.²⁹⁰ The ECJ held that there was no implied duty on the part of the Belgian authorities to ensure that such penalties had to be set in proportion to the gravity of the offence. This was notwithstanding the fact that in an earlier case,²⁹¹ involving a Greek motorist employed by a company in Germany who had similarly failed to exchange driving licences as required under German law, the Court had invoked the principle of proportionality in relation to the criminal sanctions applied. In *Awoyemi*, the ECJ refused

283. The exceptions concern EEA and Swiss migrant nationals, discussed above, and family members of MSN migrants.

284. Art. 39 EC. Notwithstanding the open-textured nature of the text, the ECJ has held that

the reference to “migrant workers” in Art. 39 only refers to workers possessing nationality of a Member State: Case 238/83, *Meade*, [1984] ECR 2631.

285. Art. 43 EC (establishment) and Art. 49 EC (service provision).

286. See the following Community directives providing migration and residence rights to

students, retired persons and those of independent means: Council Directives 93/96 O.J. 1993, L 317/59 (as amended), 90/365 O.J. 1990, L 180/28 and 90/364 O.J. 1990, L 180/26 respectively.

287. Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community O.J. Sp Ed 1971 (II) (as amended). The Commission has proposed to extend its remit to cover TCN

residents (see COM(97)561 fin).

288. C-230/97, *Criminal proceedings against Ibiyinka Awoyemi*, [1998] ECR I-6781.

289. Directive 80/1263 on the introduction of a Community driving licence O.J. 1980, L 375. Directive 91/439 on driving licences, which abolishes the requirement to apply for an exchange of Member State licences, only came into effect in July 1996 (O.J. 1991, L 237/1).

290. See Art. 8(1) of Directive 80/1263. The Directive was silent on the issue of criminal

penalties.

291. Case C-193, *Criminal proceedings against S Skanavi et al.*, [1996] ECR I-929.

to apply a ruling similar to *Sknavi*, on the grounds that the proportionality test is only applicable in order to ensure that the free movement rights of individuals guaranteed under Community law are not subject to unwarranted obstacles. The Court held that this case law was not available to Mr Awoyemi as a third country national.²⁹² According to the Court, it was irrelevant that he possessed a Member State driving licence.

Differences of treatment between TCN residents and MSNs under first pillar norms has also appeared in the context of Community rules on the mutual recognition of qualifications. In *Tawil-Albertini*,²⁹³ the ECJ held that Member States were not obliged to recognize the equivalence of status of dental diplomas acquired by a TCN resident under Community Directive 78/686 on the mutual recognition of dental qualifications,²⁹⁴ even where other EU Member States had recognized the certificate as being equal in status to their own diplomas. However, in *Haim (I)*²⁹⁵ the Court held that the German Government was required under Article 43 EC to enter into a comparison of equivalence in the context of a diploma acquired by an Italian national from Turkey, notwithstanding the fact that third State dental diplomas were not covered under Directive 78/686.

The migration rights that any TCN residents do enjoy under the first pillar are essentially derivative in nature. They arise from fact of the person in question of either being a family member of a MSN,²⁹⁶ or a employee of a branch, agency or subsidiary of a company registered in a Member State.²⁹⁷ The rights cease when the family bond or contractual relationship with the company is deemed to have terminated.²⁹⁸ Not only are the rights of family

292. See paras. 26–27 of the judgment.

293. Case C-154/93, *Tawil-Albertini v. Ministre des Affaires Sociales*, [1994] ECR I-458.

294. O.J. 1978, L 233/1.

295. Case C-319/92, *Haim v. Kassen“ arztliche Vereinigung Nordrhein (Haim I)*, [1994] ECR I-439. See also the recent preliminary ruling on the issue of State liability relating to this case in C-427/97, *Haim v. Kassen“ arztliche Vereinigung Nordrhein (Haim II)*, Judgment of 4 July 2000.

296. See e.g. Arts. 10–12 of Regulation 1612/68 O.J. Sp Ed 1968(II) and Art. 1 of Directive 73/148 O.J. 1973, L 172/14. See for a recent illustration of the conditionality and dependency of TCN family members' rights on the MSN migrant under Community law Case C-356/98, *Arben Kaba v. SSHD*, Judgment of 11 April 2000, nyr.

297. See e.g. Cases C-113/89, *Rush Portuguesa*, [1990] ECR I-1417 and C-43/93, *Vander Elst*, [1994] ECR I-3803. See in this connection, Directive 96/71 concerning the posting of workers in the framework of the provision of services O.J. 1997, L 18/1 and the recent Commission document COM(99)3 proposing two directives on the posting of workers who are third country nationals for the provision of cross-border services and on extending the freedom to provide cross-border services to third country nationals established within the Community.

298. Thus, a TCN spouse of a migrant MSN worker currently forfeits his/her Community rights of residence and employment in the event of a divorce (although not in the event of separation): Cases 267/83, *Diatta v. Land Berlin*, [1985] ECR 567 and C-370/90, *R v. IAT, ex parte Secretary of State for the Home Department*, [1992] ECR I-4265. All TCN family members similarly lose Community rights to remain and work in the host Member State where the MSN migrant decides to emigrate from that country, bar the limited rights afforded to them in Regulation 1251/70 O.J. Sp Ed 1970 (II) and Directive 75/34 O.J. 1975, L 14/10 in respect of formerly employed and self-employed migrant MSNs.

members narrow in scope under Community legislation,²⁹⁹ the Court has been especially inconsistent in its interpretation of the scope of the nondiscrimination clause contained in Article 7(2) of Regulation 1612/68 “social advantages”³⁰⁰ and in the context of accessing social security benefits under Regulation 1408/71 for family members.³⁰¹

All these developments within the context of the first pillar norms underline the inferior status which Community law effectively assigns to TCN residents in comparison with their fellow MSN neighbours. The implicit but clear message underlying this legal state of affairs is an assimilationist one, namely that individual migrants living within the European Union may not acquire independent economic, political or social status or rights within the supranational legal order of the EU unless they first acquire nationality of one of the Member States of the Union. A recognition of belonging to the European Union as a valued member of the polity is, at the moment, heavily predicated upon the individual accepting the prospect of naturalization, in accordance with the individual nationality laws of the Member States.

4. Some conclusions

There is little doubt that the ECJ has been of crucial importance in fortifying TCN residents’ rights *vis-à-vis* the European Union. Without its case law, it is doubtful whether any meaningful body of rights could have been derived from let alone enforced under the auspices of the various Community agreements and first pillar legal sources. Since its seminal decision in *Demirel*, the Court has offered in the main an important source of support for ensuring that TCN residents’ rights granted under Community law are respected and secured within the Community legal order. There have, however, been occasions where the Court has produced questionable decisions, such as in *Kadiman* and *Bozkurt*. These instances could be avoided in the future if the Court

299. A point that was criticized in the 1997 Report of the High Level Panel on the Free Movement of Persons (The Veil Report) presented to the Commission – especially Chapt. VI (DOC XV/A/1/642/97). See Bull. 3-1997, point 1.1.4.

300. Consider, for instance, the mutually inconsistent reasoning adopted in Case 94/84, *Office Nationale de L’Emploi v. Deak*, [1985] ECR 1873 with C-243/91, *Belgium v. Taghavi*, [1992] ECR I-4401.

301. It was only relatively recently in *Cabanis-Issarte*, *supra* note 205, that the ECJ abandoned the notion that under Regulation 1408/71 family members should only be entitled to receive rights in their capacity as family members rather than rights *in personam*.

focused more consistently on the human rights implications of the Community norms involved. Particularly since the recent approval of the EU Charter of Human Rights by the European Council, the Court has every justification in emphasizing the importance of ensuring the Community's adherence to fundamental rights standards.

However, notwithstanding the actual and potential influence of the ECJ in clarifying the extent of individual rights in this field of Community law, ultimately it alone cannot solve the current basic problems underlying the existing Community legal position in relation to TCN residents' status and rights. The stark reality is that the ECJ has to operate within a supranational legal framework which accords TCN residents a relatively inferior bundle of rights in comparison with those enjoyed by MSNs as European Union Citizens. The cumulative effect of the legal arrangements in place under the Community agreements and first pillar is that Community law accords varying degrees of second rate citizenship or "denizenship" status to non-Union citizens. Even those TCN residents covered by the EEA and EC-Swiss agreements do not have the same rights as MSNs under Community law. This situation can only be improved through constitutional changes carried out by the EU Member States themselves. Whether or not they have the political will to rise to the challenge remains an open question. Tellingly, it may well be the case that legal developments become ultimately driven by demographic rather legal or moral pressures facing the Union.