

# The Law of the EUROPEAN UNION

Teaching Material



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# **1 EUROPEAN COMMUNITY SYSTEM: THE HISTORICAL PERSPECTIVE AND THE BASICS OF ECONOMIC INTEGRATION**



## **NOTE AND QUESTIONS**

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There are four readings for this section:

- The Schuman Declaration
- Two excerpts from J. Shaw, European Union Law

Please be sure to read the first of the two excerpts (Ch. 1). Ch. 2 is a concise history of European Integration and should, at least, be skimmed – in combination with an overview of the recent developments; to be found in the first part of your Primary Sources pack.

- An excerpt from Molle, The Economics of European Integration
- In addition, you should read carefully and compare the Preambles of the EC, EU Treaty and the draft Treaty establishing the Constitution, Articles 2 & 3 of the EC Treaty in pre- and post-Maastricht version as well as in the Amsterdam version. Also, Articles 1-6 (ex art. A-F) of the Treaty on European Union in its Maastricht Treaty, in the Amsterdam version and in the draft Constitutional Treaty.

Last, but not least, Articles 17-21 (ex art. 8-8d) TEC establishing European Citizenship and Article I-10 of the draft Constitutional Treaty.

Analysis of the Schuman Declaration – whose relationship to European law is somewhat analogous to the relationship of the American Declaration of Independence to the American Constitution – will be the subject of the first class.

The reading from Shaw recaps the genesis of the Community and surveys its basic structure. It provides an immediate framework, historical and structural, within which to situate the Treaties -- the Constitutional Charter of the Community.

The reading from Molle lays out the essential elements of the economic theory of Free Trade Areas, Customs Unions and the "Common Market." As will be seen, the European Court of Justice rarely resorts to an explicit discourse of economic theory, but the theory is the constant backdrop, real or mythical, against which much legislation and case-law is pronounced. One virtue of Molle is that he is remarkably free of obfuscating jargon.

Classroom discussion will try to contextualise the information; to explore some of the political and social ramifications of the historical and economic background.

The excerpts from the Treaty of Rome, Maastricht, Amsterdam, Nice and the most recent draft of the Constitutional Treaty are designed to situate the general historical and economic context back into positive law.

Consider while you are reading the following themes:

- European Integration and the Community as a long term architecture for peace: How does the Treaty of Rome compare with classical Peace Treaties -- e.g. the Treaty of Versailles which brought hostilities in World War I to an end?
- The extent to which the Treaty, in its objectives (Preamble, Articles 2, 3) reflect economic theory.
- The rise, demise and revival of political theories of integration: Functionalism, Social Communication, Neo-Functionalism.
- The different incentives for negative and positive integration as viewed from a Member State perspective and the Community perspective
- Have the various Treaty amendments changed the underlying economic theory of European integration?

On Maastricht and Amsterdam:

- The different basic structure (the so-called Three Pillars) of the Treaty of European Union (TEU) (Title I)
- The extent to which the objectives of the European Community (Articles 2 & 3 TEU) expand the notion of the Common Market and the Community by comparison with the EC Treaty. In this context consider carefully whether the establishment of a European citizenship modifies the objective of an Ever Closer Union among the Peoples of Europe.

## 1.1 *The Schuman Declaration of 9 May 1950*

[Emphases added]

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it.

The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a **united Europe**, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

**Europe will not be made all at once**, or according to a single plan. It will be built through **concrete achievements** which first create a **de facto solidarity**. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point:

It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe.

The pooling of coal and steel production should **immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe**, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that **any war between France and Germany becomes not merely unthinkable, but materially impossible**. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements.

In this way, there will be realized simply and speedily **that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions**.

By pooling basic production and **by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.**

To promote the realization of the objectives defined, the French Government is ready to open negotiations on the following bases:

The task with which this common High Authority will be charged will be that of securing in the shortest possible time the modernization of production and the improvement of its quality; the supply of coal and steel on identical terms to the French and German markets, as well as to the markets of other member countries; the development in common of exports to other countries; the equalization and improvement of the living conditions of workers in these industries.

To achieve these objectives, starting from the very different conditions in which the production of member countries is at present situated, it is proposed that certain transitional measures should be instituted, such as the application of a production and investment plan, the establishment of compensating machinery for equating prices, and the creation of a restructuring fund to facilitate the rationalization of production. The movement of coal and steel between member countries will immediately be freed from all customs duty, and will not be affected by differential transport rates. Conditions will gradually be created which will spontaneously provide for the more national distribution of production at the highest level of productivity.

In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production. [...]"

## **1.2 Preambles of the Treaties**

### **1.2.1 EC Treaty, pre-Maastricht-version**

#### **PREAMBLE**

[...]

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a European Economic Community and to this end have designated as their Plenipotentiaries:

[...]

## **1.2.2 EC Treaty, post-Amsterdam version**

### **PREAMBLE**

[...]

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less-favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

HAVE DECIDED to create a EUROPEAN COMMUNITY and to this end have designated as their Plenipotentiaries:

[...]

### **1.2.3 Treaty on European Union (Maastricht)**

#### **PREAMBLE**

[...]

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

REAFFIRMING their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions on justice and home affairs in this Treaty,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union and to this end have designated as their plenipotentiaries:

[...]

## **1.2.4 Treaty on European Union (Amsterdam)**

### **PREAMBLE**

[...]

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 17, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union and to this end have designated as their Plenipotentiaries

[...]

### **1.2.5 Treaty on European Union (Nice)**

#### **PREAMBLE**

[...]

RECALLING the historic importance of the ending of the division of the European continent,

DESIRING to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union,

DETERMINED on this basis to press ahead with the accession negotiations in order to bring them to a successful conclusion, in accordance with the procedure laid down in the Treaty on European Union,

HAVE RESOLVED to amend the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, and to this end have designated as their Plenipotentiaries:

[...]

### **1.2.6 Treaty establishing a Constitution for Europe**

#### **PREAMBLE**

[...]

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope,

DETERMINED to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis,

GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe,

[...]

## **1.3 Articles 1 to 6 EU Treaty**

### **1.3.1 Treaty on European Union (Maastricht) Title I: Common Provisions**

#### *ARTICLE A*

By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called "the Union". This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen. The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

#### *ARTICLE B*

The Union shall set itself the following objectives: -- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; -- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence; -- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; -- to develop close cooperation on justice and home affairs; -- to maintain in full the "acquis communautaire" and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community.

#### *ARTICLE C*

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the "acquis communautaire". The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers.

#### *ARTICLE D*

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or of Government of the Member State which holds the Presidency of the Council. The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

#### *ARTICLE E*

The European Parliament, the Council, the Commission and the Court of Justice shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

#### *ARTICLE F*

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

### **1.3.2 Treaty on European Union (Amsterdam<sup>+</sup>) Title I: Common Provisions**

#### *ARTICLE 1 (ex Article A)*

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union".

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

#### *ARTICLE 2 (ex Article B)*

The Union shall set itself the following objectives:

- to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;
- to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

#### *ARTICLE 3 (ex Article C)*

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.

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<sup>+</sup> Articles 1 – 6 of the TEU have not been amended by the Treaty of Nice.

*ARTICLE 4 (ex Article D)*

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.

The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council.

The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

*ARTICLE 5 (ex Article E)*

The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

*ARTICLE 6 (ex Article F)*

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

### **1.3.3 Treaty establishing a Constitution for Europe: Definition and objectives of the Union**

#### **Article I-1 Establishment of the Union**

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.
2. The Union shall be open to all European States which respect its values and are committed to promoting them together.

#### **Article I-2 The Union's values**

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

#### **Article I-3 The Union's objectives**

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in

particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.

**Article I-4**  
**Fundamental freedoms and non-discrimination**

1. The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.

2. Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

**Article I-5**  
**Relations between the Union and the Member States**

1. The union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

**Article I-6**  
**Union law**

The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

[...]

## **1.4 Articles 1 to 3 EC Treaty**

### **1.4.1 Pre-Maastricht version**

#### *Article 1*

By this Treaty, the High Contracting Parties establish among themselves a EUROPEAN ECONOMIC COMMUNITY.

#### *Article 2*

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

#### *Article 3*

For the purposes set out in Art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
- (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
- (d) the adoption of a common policy in the sphere of agriculture;
- (e) the adoption of a common policy in the sphere of transport;
- (f) the institution of a system ensuring that competition in the common market is not distorted;
- (g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
- (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;
- (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;
- (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;
- (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

## **1.4.2 Post-Maastricht version**

### *Article 1.*

By this Treaty, the High Contracting Parties establish among themselves a European Community.

### *Article 2.*

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

### *Article 3.*

For the purposes set out in Article 2, the activities of the Community shall include, as provided by this Treaty and in accordance with the timetable set out therein:

- (a) the elimination as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) Measures concerning the entry and movement of persons in the internal market as provided for in Article 100C;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the common market is not distorted;
- (h) the approximation of the laws of the Member States to the extent required for the functioning of the common market;
- (i) a policy in the social sphere comprising a European Social Fund;
- (j) the strengthening of economic and social cohesion;
- (k) a policy in the sphere of the environment;
- (l) the strengthening of the competitiveness of Community industry;
- (m) the promotion of research and technological development;
- (n) encouragement for the establishment and development of trans-European networks;
- (o) a contribution to the attainment of a high level of health protection;
- (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- (q) a policy in the sphere of development cooperation;
- (r) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- (s) a contribution to the strengthening of consumer protection;
- (t) measures in the spheres of energy, civil protection and tourism.

### **1.4.3 Post-Amsterdam version**

#### *Article 1*

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN COMMUNITY.

#### *Article 2*

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

#### *Article 3*

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
- (b) a common commercial policy;
- (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
- (d) measures concerning the entry and movement of persons as provided for in Title IV;
- (e) a common policy in the sphere of agriculture and fisheries;
- (f) a common policy in the sphere of transport;
- (g) a system ensuring that competition in the internal market is not distorted;
- (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
- (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
- (j) a policy in the social sphere comprising a European Social Fund;
- (k) the strengthening of economic and social cohesion;
- (l) a policy in the sphere of the environment;
- (m) the strengthening of the competitiveness of Community industry;
- (n) the promotion of research and technological development;
- (o) encouragement for the establishment and development of trans-European networks;
- (p) a contribution to the attainment of a high level of health protection;
- (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
- (r) a policy in the sphere of development cooperation;

- (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
- (t) a contribution to the strengthening of consumer protection;
- (u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

## 2 CITIZENSHIP OF THE UNION

### 2.1 Introduction

From: <http://www.historiasiglo20.org/europe/ciudad europea.htm>

See also: <http://www.europa.eu.int/scadplus/leg/en/s18000.htm>

The right of free movement of persons inside the Community was introduced in the constituent Treaty of the EEC, signed in Rome in 1957. This freedom didn't appear bound to any citizenship concept but rather it was closely linked to the acting of an economic activity. In consequence, the right of residence was recognised to workers and their families, linked to the right to exercise a labour activity in another member State of the EEC.

Although in the European Council, held in Paris in 1974, the necessity to grant special rights in the EEC to the citizens of the member States was put forward, it was the Tindemans Report, in 1976, when, for the first time, the purpose of going further of a mere common market with an objective of creating a community of citizens was clearly proposed. This report, edited by the Belgian prime minister to instances of the Summit of Paris 1974, had no success among the governments, though it had an important influence in later steps towards integration. In a chapter, titled *The Europe of the Citizens*, Tindemans proposed the enactment of different measures that made perceptible, by means of outward signs, the rise of a European awareness: unification of passports, the vanishing of border controls, the common use of the benefits of the Social Security systems, the accreditation of academic courses and degrees...

A second step was the calling in 1976 to elections by universal suffrage for the European Parliament. Although Parliament's competences were meagre, for the first time, one of the key elements of citizenship, democratic participation, turned up.

More audacious was the Project of Treaty of European Union, passed by the European Parliament, in February of 1984, and presented by the euro MP Alterio Spinelli (Spinelli Project).

In spite of its restraint, the Single European Act (1986) hardly included any of the Spinelli's project proposals, although it adopted, and that is fundamental, the objective of a political European Union. This way, few years later, two Intergovernmental Conferences were summoned to reform the Treaties. One of them was focused on the Economic and Monetary Union, the other one, solely in the political Union.

The Rome European Council, in October 1990, when establishing the IGCs guidelines, introduced a notion of European Citizenship, as an essential element of the Treaties reform, and with some characteristics and similar rights to those that later on were included in the Treaty of the European Union or Treaty of Maastricht. After diverse negotiation, and with the enthusiastic support of the European Parliament that passed two favourable resolutions in 1991, the Treaty of the European Union came finally to institutionalise European citizenship.

In comparison with citizenship of a State, citizenship of the Union is characterised by rights and duties and involvement in political life. It is designed to strengthen the ties between citizens and Europe by promoting the development of a European public opinion and a European political identity. This concept comes under the first pillar of the Treaty on European Union.

Under the terms of Article 17 (ex Article 8) of the EC Treaty, any person holding the nationality of a Member State is a citizen of the Union. Citizenship of the Union, which supplements national citizenship

without replacing it, is made up of a set of rights and duties that add to those that are already attached to the citizenship of a Member State.

This status of the citizenship of the Union means the following for any citizen of the Union:

- the right to move freely and to reside on the territory of the Member States (Article 18 of the EC Treaty);
- the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections in the Member State in which he resides, under the same conditions as nationals of that State (Article 19 of the EC Treaty);
- the right, in the territory of a third country in which his country is not represented, to protection by the diplomatic or consular authorities of another Member State, on the same conditions as the nationals of that State (Article 20 of the EC Treaty);
- the right to petition the European Parliament (Article 21 of the EC Treaty) and the right to apply to the ombudsman (Article 21 of the EC Treaty) in order to bring to his attention any cases of poor administration by the Community institutions and bodies, with the exception of the legal bodies.

It also means, following the entry into force of the Amsterdam Treaty (see, on this point the guide to the Amsterdam Treaty at <http://www.europa.eu.int/scadplus/leg/en/lvb/a12000.htm>):

- the right to apply to the European institutions in one of the official languages and to receive a reply in that language (Article 22 of the EC Treaty);
- the right to have access to European Parliament, Council and Commission documents under certain conditions (Article 255 of the EC Treaty).

The last three rights also apply to natural or legal persons with their residence or headquarters in a Member State.

Mention should also be made of:

- the principle of non-discrimination on grounds of nationality between citizens of the Union (Article 12 of the EC Treaty) and the principle of non-discrimination based on sex, race, religion, disability, age or sexual orientation (Article 13 of the EC Treaty);
- equal access to the Community civil service.

## 2.2 Key dates

1951: Treaty of Paris establishes the European Coal and Steel Community. It allows for freedom of movement in the Community for the workers of these industries.

1957: Treaty of Rome creating the European Economic Community allows for free movement in the Community based on economic activity.

1974: Paris Summit, at which attempts were made to define the special rights of nationals of the EEC.

1986: Single European Act includes provisions establishing an area without frontiers and abolishing checks on persons at internal frontiers, regardless of nationality. This was implemented in 1992.

1992: An extraordinary European Council is held in Birmingham, United Kingdom. It adopts a declaration entitled A Community close to its citizens.

1992: Maastricht Treaty introduces EU citizenship as a distinct concept guaranteeing additional rights.

1997: Treaty of Amsterdam extends the *rights* of EU citizenship. Introduces anti-discrimination clauses to protect EU citizens. The Schengen Agreement removing frontiers (except for those of Denmark, Ireland and the UK) is incorporated into the Treaty.

1999: Case C-85/96, Martnez Sala v Freistaat Bayern ruling. The European Court of Justice rules that nationals of a Member State can rely on their *European citizenship* for protection against discrimination by another Member State on grounds of nationality, within the scope of the application of the Treaty.

2000: Charter of Fundamental Rights of the EU proclaimed at Nice Summit.

2000: Declaration contained in the Treaty of Nice calls for a debate on the future of the European Union.

2000: Treaty of Nice reinforces provisions against discrimination and breach of fundamental rights by an EU Member State.

2001: Debate on the future of the European Union is launched.

2001: European governance: a White Paper, the European Commissions contribution to the debate on the future of the European Union.

2002: The Convention on the Future of Europe starts its work with the objective of drafting a Constitutional Treaty to the European Union.

2003: The Convention is due to present the results of its work.

2004: A new Treaty is due to be signed, clarifying the demarcation of responsibilities between the Union and the Member States, the status of the Charter of Fundamental Rights of the EU and the role of the national parliaments in relation to the institutions of the European Union.

## **2.3 Treaty Provisions on Citizenship**

### **2.3.1 EC Treaty, post-Nice version of Art. 17 to 21**

#### **PART TWO CITIZENSHIP OF THE UNION**

##### **Article 17**

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

##### **Article 18 \***

*(amended by the Treaty of Nice)*

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.
3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

##### **Article 19**

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

2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

#### ***Article 20***

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

#### ***Article 21***

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.

#### ***Article 22***

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.

### 2.3.2 Other Relevant Treaty Provisions

#### 1. Treaty of European Community (Amsterdam, 02/10/1997).

- **Article 12 EC Treaty** (ex Article 6).

*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality shall be prohibited.** The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.*

- **Article 13 EC Treaty** (ex art. 6A). Excerpt.

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action **to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.***

- **Protocol annexed to the Amsterdam Treaty.** [Protocol integrating the Schengen acquis into the framework of the European Community.](#)

#### 2. Treaty of European Community (Maastricht, 07/02/1992).

**Declaration annexed to the Maastricht Treaty (N 2) on nationality of a Member State.**

#### 3. Treaty of Nice (26/02/2001). Declaration n23.

*Excerpt: The Conference calls for a deeper and wider debate about the future of the European Union. The Conference recognizes the need to improve and to monitor **the democratic legitimacy and transparency of the Union** and its institutions in order to bring them **closer to the citizens** of the Member states*

#### 4. Charter of Fundamental Rights (07/12/2000). Preamble.

*Excerpt: The Union contributes to the preservation and the development of these common values while **respecting the diversity of the cultures and traditions of the peoples** of Europe as well as **the national identities of Member States** and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures **free movement of persons** , goods, services and capital and the **freedom of establishment** .*

#### 5. Treaty of the European Union (Amsterdam, 02/10/1997).

- **Preamble.**  
*to establish a citizenship common to the nationals of their countries.*
- **Article 2 EU Treaty** (ex art. B).  
*to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union .*
- **Article 6 EU Treaty** (ex Article F).

- *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*
  - *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*
  - *The Union shall respect the national identities of its Member States.*
  - *The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*
- **Article 7 EU Treaty (ex Article F.1).**
    - *The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine **the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1)**, after inviting the government of the Member State in question to submit its observations.*
    - *Where such a determination has been made, the Council, acting by a qualified majority, may decide **to suspend certain of the rights deriving from the application of this Treaty to the Member State in question**, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.*
    - *The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 2 in response to changes in the situation which led to their being imposed.*
    - *For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 1. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community. This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 2.*
    - *For the purposes of this Article, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its members.*

### 2.3.3 Treaty establishing a Constitution for Europe

#### Article I-10: Citizenship of the Union

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have:
  - (a) the right to move and reside freely within the territory of the Member States;
  - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
  - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
  - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted thereunder.

### 2.3.4 Excerpt from the Citizens' guide to the Draft Constitution

Citizenship of the Union complements national citizenship and does not replace it.

The draft Constitution clearly asserts the rights which stem from citizenship: the right **to move and reside freely**, the right to **vote and to stand as candidates in elections to the European Parliament** and in **municipal elections**, the right to **diplomatic and consular protection**, the right to **petition the European Parliament** and the right to **refer matters to the Ombudsman and to write to the institutions in one of the Union's languages** and receive a reply in that same language.

The above list is by no means exhaustive and other rights of citizens of the Union are listed in a specific title of the draft Constitution devoted to the "The democratic life of the Union"; this refers to the right to take part in **democratic life** and the **right of access to documents**.

*Citizenship of the Union to complement national citizenship*

*List of rights which the citizens of the Union enjoy*

*A part of the Constitution is devoted to democratic life*

## **2.4 Provisions on free movement of European Citizens in the Union**

Source:

[http://europa.eu.int/comm/justice\\_home/fsj/citizenship/movement/fsj\\_citizenship\\_movement\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/citizenship/movement/fsj_citizenship_movement_en.htm)

A directive adopted by the European Parliament and the Council on 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU brings together the complex body of legislation that existed in this area. It eliminates the need for EU citizens to obtain a residence card, introduces a permanent right of residence, defines more clearly the situation of family members and restricts the scope for the authorities to refuse or terminate residence of EU citizens who come from another member state. The member states have two years, until 30 April 2006, to transpose this directive.

Free movement of people has existed since the foundation of the European Community in 1957. It was introduced from an economic point of view, since the right was linked to a person's status as a salaried worker. The right was then extended to self-employed persons and service providers. *Family members* were entitled to the same rights. In effect, free movement of people was part of the broader project of realising a **common market** with free movement of capital, goods and services.

If at the start of the European Community, freedom of movement for people was only envisaged for economic reasons, this right has been extended during the years to encompass **all categories of citizens**. In 1990, three directives were adopted, which guarantee the rights of residence to categories of persons other than workers: retired persons, students, and inactive people.

### **2.4.1 Free movement as a fundamental right**

In 1992, the Maastricht Treaty introduced the concept of **citizenship of the European Union** which confers on every Union citizen a fundamental and personal right to move and reside freely without reference to an economic activity. The Amsterdam Treaty, which came into force in 1999, further strengthened the rights linked to European Union citizenship.

The new legal and political environment entailed by EU citizenship has allowed for a **fresh look** to be taken at arrangements for EU citizens to exercise their rights and for the creation of a single set of rules governing freedom of movement.

Union citizens should, *mutatis mutandis*, be able to move between Member States on similar terms as *nationals* of a Member State moving around or changing their place of residence inside their own country.

### **2.4.2 What are the current rights?**

EU citizens have the right to enter, reside and remain in the territory of any other Member State for a period of up to three months simply by presenting a valid passport or national identity card: no other formality is required. If they intend to remain for a period exceeding three months, a residence permit must be obtained. The conditions for granting a residence permit depend on the status of the citizen (employed or self-employed person, student, retired or inactive person).

Any EU citizen can take up an economic activity in another Member State either as an employed or self-employed person. In this case, he/she will be issued a residence permit by simply presenting an identity document (passport or ID) and proof of employment or self-employment.

If a citizen wants to reside in another Member State without exercising any activity or to study, he/she can do so provided he/she can prove (and in the case of students, declare) that he/she has sufficient financial resources not to become a burden for the host Member State's social assistance system and that he/she is covered by a sickness insurance policy. He/she must also prove that he/she has sufficient financial resources and sickness insurance for each member of his/her family who is entitled to reside with him/her.

Family members, irrespective of their nationality, have the right to accompany and establish themselves with a EU citizen who is residing in the territory of another Member State. Family members who can enjoy rights under Community law include the spouse, minor (under 21) or dependent children, and dependent ascendants, though in the case of students only the spouse and dependent children enjoy this right. If the family members are not EU citizens, they may be required to hold an entry visa by the Member State where they intend accompany the EU citizen. They shall be granted this visa free of charge and with all facilities by that Member State.

More information about your precise rights when you move to another country can be obtained at: *Dialogue with citizens* and business site.

Over the years, the Commission has initiated a wide range of measures designed to make the right to free movement a practical reality. For example, laws relating to the recognition of academic and professional qualifications across the EU are now in place.

### **2.4.3 Challenges on the road ahead**

Despite impressive advances, EU citizens may still face problems when they move to another Member State. Common difficulties concern notably the lack of information about the extent of their rights, lengthy administrative procedures in obtaining residence documents and the precise definition of the rights of family members.

In order to overcome these difficulties, the European Commission presented proposal for a directive on the right of the EU citizens and their family members to move and reside freely within the territory of the Member States in the new legal and political environment entailed by citizenship of the Union. The proposal was adopted by the Parliament and Council on 29 April 2004.

Its main objectives are:

- To simplify the conditions and administrative formalities associated with the exercise of the right of free movement and residence in the Member States. For residence of less than three months, the only requirement is the possession of a valid identity document. For residence of more than three months, the need to hold a residence card for citizens of the Union is abolished and replaced by registration in the population register of the place of residence, validated by a certificate issued immediately on presentation of proof that the conditions attached to the right of residence are complied with. EU citizens must be either workers or self-employed persons or else dispose of sufficient resources not to become a burden on the social assistance system of the host Member State and a comprehensive sickness insurance. Members of the family must provide proof of identity and of the family link to an EU citizen.

- To introduce the right of permanent residence for EU citizens after five years of continuous residence. They will no longer be subject to any conditions on the exercise of their right of residence, with virtually complete equality of treatment with nationals.
- To facilitate the movement of family members irrespective of whether they are EU nationals or not. The definition of 'family members' covers for the first time registered partners under the legislation of a Member State, if the legislation of the host Member State treats registered partners as equivalent to marriage. Other partners of EU citizens will not have an automatic right to entry and residence in the host member state. However, the host member state will have to "facilitate" the entry and residence of the partners with whom the EU citizen has a "durable relationship duly attested", taking into consideration their relationship with the EU citizen. Family members who are nationals of third countries also enjoy greater legal protection, for example in the event of death of the EU citizen on whom they depend, or the dissolution of the marriage under certain circumstances.
- To clarify the limitations to the right of residence on grounds of public policy, public security and public health. The proposal ensures that citizens of the Union enjoy better administrative and legal protection in the context of measures restricting their right of residence, and guarantees strong protection against expulsion for minors and persons who have resided in the host Member State for a long period of time.

#### **2.4.4 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member**

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

Full text: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l\\_229/l\\_22920040629en00350048.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_229/l_22920040629en00350048.pdf)

##### **Summary**

The new Directive does distinguish between economic and non-economic activity by retaining the sickness insurance and sufficient resources criteria for the latter. However, certain requirements currently imposed upon such claimants have been relaxed. Besides that, the directive confines these restrictions to the first four years of residence in the host State and thereafter, seeks to create a new, permanent right of residence. Reflecting the Court's approach in *Grzelczyk*, the proposed directive takes a slightly more complex approach to the residence rights of students. Other citizens would enjoy a right of free movement lasting for six months. The proposal does not specifically consider the status of Community nationals who enter another Member State in search of employment.

Member States will grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law provided that they themselves and the members of their family (spouse, dependent descendants and dependent relatives in the ascending line of the person concerned or his or her spouse) are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence.

Member States will issue a residence permit, the validity of which may be limited to five years on a renewable basis. However, they may, if they deem it to be necessary, require revalidation of the permit at the end of the first two years of residence. Furthermore, the right of residence continues for as long as the beneficiaries of that right fulfil the conditions set out in paragraph 1. Where a member of the family does not hold the nationality of a Member State, he or she will be issued with a residence document of the same validity as that issued to the national on whom he or she depends.

The spouse and the dependent children of a national of a Member State entitled to the right of residence within the territory of the Member State may take up any employed or self-employed activity anywhere within the territory of that Member State, even if they are not nationals of a Member State.

Member States may not derogate from the provisions of the Directive save on the grounds of public policy, public security or public health. The Directive does not affect existing law on the acquisition of second homes.

Not later than three years following the entry into force of the Directive, and then every three years, the Commission will draw up a report on the implementation of this Directive and present it to the Council and the European Parliament.

## 2.5 Case law on Citizenship



### **NOTE AND QUESTIONS**

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1. Following the introduction of EU citizenship in Maastricht many claimed that is no more than a political declaration without any added value and cannot be regarded as a source of rights that extends the scope of the rights already existing in the European Treaties. After having read the excerpts from the Treaty and draft of the Constitution and while reading the judgements of the ECJ bellow reflect on what were the possible reasons for the EU to develop the concept of citizenship and what meanings does citizenship have in the EU context nowadays. Will the eventual entry into force of the Constitution change it?
2. What functional impact does the concept of citizenship of the Union have with regard to free movement and residence? The three Council Directives (90/365, 90/364, 93/96) on rights of residence accorded a right of residence throughout the Community, but Article 18 due to its constitutional force, ensured that future legislation could not revoke or limit the three directives.
3. You will see from the cases bellow that the above mentioned directives on rights of residence grant no right of residence to those who cannot meet the standard of sufficient economic resources to avoid becoming a burden on the host state's social assistance. Is this compatible with Article 18? What did the Court say?
4. The Martinez Sala, the Grzelczyk and the Baumbast judgment illustrate the tendency of the Court to grant, based on the idea of equal treatment of nationals and non-nationals, comprehensive rights to Member State nationals residing on another Member State's territory, increasingly independent from the "economic categories" and based on the notion of "European Citizenship". Do such judgments render all harmonizing Community legislation concerning workers etc. obsolete?

## 2.5.1 Case C-85/96: Martinez Sala



### NOTE AND QUESTIONS

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After having read the excerpts from the Treaty and draft of the Constitution and while reading the judgements of the ECJ below reflect on what were the possible reasons for the EU to develop the concept of citizenship and what meanings does citizenship have in the EU context. Will the eventual entry into force of the Constitution change this?

The Martinez Sala, the Grzelczyk and the Baumbast judgment illustrate the tendency of the Court to grant, based on the idea of equal treatment of nationals and non-nationals, comprehensive rights to Member State nationals residing on another Member State's territory, increasingly independent from the "economic categories" and based on the notion of "European Citizenship". Do such judgments render all harmonizing Community legislation concerning workers etc. obsolete?

#### **Maria Martinez Sala and Freistaat Bayern**

**C-85/96**

12 May 1998

Court of Justice

1998 [ECR] I-2691

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of facts and procedure**

*The regional German authorities rejected the application of Mrs Sala Martinez, a Spanish national, legally resident in Germany, for child-raising allowance for her child. As the national court confirmed, the child-raising allowance was refused because the date of the child's birth fell within a period when Mrs Sala Martinez' residence permit had already expired and her application for extension was certified but not yet granted. In the course of the appeal proceedings, the national court addressed the Court of Justice for a preliminary ruling.*

#### **Judgment:**

[...]

46 By its fourth question the referring court seeks to ascertain whether Community law precludes a Member State from requiring nationals of other Member States to produce a formal residence permit in order to receive a child-raising allowance.

- 47 This question is based on the assumption that the appellant in the main proceedings has been authorised to reside in the Member State concerned.
- 48 Under the BErzGG, in order to be entitled to German child-raising allowance, the claimant, besides meeting the other material conditions for its grant, must be permanently or ordinarily resident in German territory.
- 49 A national of another Member State who is authorised to reside in German territory and who does reside there meets this condition. In that regard, such a person is in the same position as a German national residing in German territory.
- 50 However, the BErzGG provides that, unlike German nationals, 'a non-national', including a national of another Member State, must be in possession of a certain type of residence permit in order to receive the benefit in question. It is common ground that a document merely certifying that an application for a residence permit has been made is not sufficient, even though such a certificate warrants that the person concerned is entitled to stay.
- 51 The referring court points out, moreover, that 'delays in granting [residence permits] for purely technical administrative reasons can materially affect the substance of the rights enjoyed by citizens of the European Union'.
- 52 Whilst Community law does not prevent a Member State from requiring nationals of other Member States lawfully resident in its territory to carry at all times a document certifying their right of residence, if an identical obligation is imposed upon its own nationals as regards their identity cards (see, to that effect, Case 321/87 Commission v Belgium [1989] ECR 997, paragraph 12, and the judgment of 30 April 1998 in Case C-24/97 Commission v Germany [1998] ECR I-0000, paragraph 13), the same is not necessarily the case where a Member State requires nationals of other Member States, in order to receive a child-raising allowance, to be in possession of a residence permit for the issue of which the administration is responsible.
- 53 For the purposes of recognition of the right of residence, a residence permit can only have declaratory and probative force (see, to this effect, Case 48/75 Royer [1976] ECR 497, paragraph 50). However, the case-file shows that, for the purposes of the grant of the benefit in question, possession of a residence permit is constitutive of the right to the benefit.
- 54 Consequently, for a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in question to produce a document which is constitutive of the right to the benefit and which is issued by its own authorities, when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.
- 55 In the sphere of application of the Treaty and in the absence of any justification, such unequal treatment constitutes discrimination prohibited by Article 6 of the EC Treaty.
- 56 At the hearing, the German Government, while accepting that the condition imposed by the BErzGG constituted unequal treatment within the meaning of Article 6 of the Treaty, argued that the facts of the case being considered in the main proceedings did not fall within either the scope *ratione materiae* or the scope *ratione personae* of the Treaty so that the appellant in the main proceedings could not rely on Article 6.
- 57 As regards the scope *ratione materiae* of the Treaty, reference should be made to the replies given to the first, second and third questions, according to which the child-raising allowance in

question in the main proceedings indisputably falls within the scope *ratione materiae* of Community law.

- 58 As regards its scope *ratione personae*, if the referring court were to conclude that, in view of the criteria provided in reply to the first preliminary question, the appellant in the proceedings before it has the status of worker within the meaning of Article 48 of the Treaty and of Regulation No 1612/68 or of employed person within the meaning of Regulation No 1408/71, the unequal treatment in question would be incompatible with Articles 48 and 51 of the Treaty.
- 59 Should this not be the case, the Commission submits that, in any event, since 1 November 1993 when the Treaty on European Union came into force, the appellant in the main proceedings has a right of residence under Article 8a of the EC Treaty, which provides that: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. According to Article 8(1) of the EC Treaty, every person holding the nationality of a Member State is to be a citizen of the Union.
- 60 It should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit.
- 61 As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.
- 62 Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.
- 63 It follows that a citizen of the European Union, such as the appellant in the main proceedings, lawfully resident in the territory of the host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.
- 64 Since the unequal treatment in question thus comes within the scope of the Treaty, it cannot be considered to be justified: it is discrimination directly based on the appellant's nationality and, in any event, nothing to justify such unequal treatment has been put before the Court.
- 65 The answer to the fourth question must therefore be that Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

[...]

## 2.5.2 Case C-184/99: Grzelczyk

Rudy Grzelczyk and Centre public  
d'aide sociale d'Ottignies-Louvain-la-Neuve

C-184/99

20 September 2001

Court of Justice

2001 [ECR] I-06193

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure**

*Mr Grzelczyk, a French national, undertook a course of studies in Belgium. During the first three years of his course, he defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities. The fourth year of his studies being the most demanding, Mr Grzelczyk applied to the Public Social Assistance Centre ("the CPAS") for payment of the minimum subsistence allowance, or "minimex", for the year 1998/1999. He was initially granted the allowance.*

*His entitlement to the minimex was then withdrawn with effect from 1 January 1999 based on the fact that Mr Grzelczyk was a student.*

*When the benefit was introduced in 1974, entitlement was reserved to adults of Belgian nationality, residing in Belgium and not in possession of adequate resources. In 1987 entitlement was extended to include, amongst others, persons to whom the 1968 Community regulation on the freedom of movement of workers within the Community applied.*

*Mr Grzelczyk brought an action before the competent Belgian court challenging the CPAS's decision of 29 January 1999 to stop payment of the minimex.*

*The Labour Tribunal, Nivelles, referred a question to the Court of Justice of the European Communities concerning the compatibility of the Belgian law with Community law, that is, with the Treaty and, more specifically, the principles of European citizenship and non-discrimination enshrined in the Treaty. Was it contrary to Community law for entitlement to a non-contributory social benefit to be made conditional, in the case of nationals of other Member States (in this case France), upon their being regarded as workers, given that that condition did not apply to nationals of the host Member State (in this case Belgium)?*

## Judgment

[...]

27. In order to place the legal problem raised by this case in its context, it should be recalled that, in Case 249/83 Hoeckx [1985] ECR 973, concerning an unemployed Dutch national returning to Belgium where she made a fresh application for the minimex, the Court held that a social benefit providing a general guarantee of a minimum subsistence allowance, such as that provided for by the Belgian Law of 7 August 1974, constitutes a social advantage within the meaning of Regulation No 1612/68.
28. At the time of the facts giving rise to Hoeckx, all Community nationals were entitled to the minimex, although nationals of Member States other than Belgium had to satisfy the additional requirement of having actually resided in Belgium for at least five years immediately preceding the date on which the minimex was granted (see Article 1 of the Royal Decree of 8 January 1976, *Moniteur belge* of 13 January 1976, p. 311). It was the Royal Decree of 27 March 1987, which repealed the Royal Decree of 8 January 1976, which restricted entitlement to the minimex, in the case of nationals of other Member States, to persons to whom Regulation No 1612/68 applied. The residence condition, which had been amended in the meantime, was finally removed after infringement proceedings were brought by the Commission against the Kingdom of Belgium (Case C-326/90 *Commission v Belgium* [1992] ECR I-5517).
29. It is clear from the documents before the Court that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality.
30. Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article 6. In the present case, Article 6 must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.
31. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.
32. As the Court held in paragraph 63 of its judgment in *Martínez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law.
33. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (see Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16).
34. It is true that, in paragraph 18 of its judgment in Case 197/86 *Brown* [1988] ECR 3205, the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof (later Article 6 of the EC Treaty).
35. However, since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new chapter 3 devoted to

education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since *Brown*, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements.

36. The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in Article 6 of the Treaty.
37. As pointed out in paragraph 30 above, in the present case that prohibition must be read in conjunction with Article 8a(1) of the Treaty, which proclaims 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
38. As regards those limitations and conditions, it is clear from Article 1 of Directive 93/96 that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State.
39. Article 3 of Directive 93/96 makes clear that the directive does not establish any right to payment of maintenance grants by the host Member State for students who benefit from the right of residence. On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.
40. As regards more specifically the question of resources, Article 1 of Directive 93/96 does not require resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay (see paragraph 44 of the judgment in *Case C-424/98 Commission v Italy* [2000] ECR I-4001).
41. In merely requiring such a declaration, Directive 93/96 differs from Directives 90/364 and 90/365, which do indicate the minimum level of income that persons wishing to avail themselves of those directives must have. That difference is explained by the special characteristics of student residence in comparison with that of persons to whom Directives 90/364 and 90/365 apply (see paragraph 45 of the judgment in *Commission v Italy*, cited above).
42. That interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it.
43. Nevertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system.

44. Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.
45. Furthermore, a student's financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made.
46. It follows from the foregoing that Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State.

[...]

### 2.5.3 Case C-413/99: Baumbast

Baumbast, R and

Secretary of State for the Home Department

C-413/99

17 September 2002

Court of Justice

ECR [2002] I-07091

<http://www.curia.eu.int/en/content/juris/index.htm>

#### **Summary of facts and procedure**

*Mr and Mrs B, nationals of Germany and Colombia respectively, and their two children, who had respectively Colombian and dual German/Colombian nationality, were granted permits to reside in the UK for five years. Mr B was employed initially in the UK and subsequently in non-Community countries and his children went to school in the UK. On the Secretary of State's refusal to renew the residence permits at the end of the five-year period, proceedings were brought in which the adjudicator held inter alia that the children had a right of residence under art 12 of Regulation 1612/68 and Mrs B had a co-terminous right of residence, flowing from the same provision.*

*On the arrival in the UK of Mrs R, a US citizen, her husband, a French national, and their children, who had dual French/US nationality, Mrs R was granted leave to remain as the spouse of a Community national exercising a Community right. Mr and Mrs R divorced two years later. On subsequent applications by Mrs R and the children for indefinite leave to remain, the applications of the children were granted but that of Mrs R was refused, and the adjudicator upheld that decision.*

*On appeals in the two cases, the appeal tribunal referred to the European Court a number of questions on the rights of residence of the parties concerned, in the circumstances. Let us just note that the referring Court wanted to know whether persons admitted into the UK as members of the family of an EC migrant worker continue to enjoy the protection of Community law when he or she is no longer a migrant worker within the meaning of Article 39 EC.*

*Art 17(1) EC (ex art 8(1) of the EC Treaty) provides: "(1) ... Every person holding the nationality of a member state shall be a citizen of the Union." Art 18(1) EC (ex art 8a(1)) provides: "Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Art 12 of Council Regulation 1612/68 on freedom of movement for workers in the Community provides: "The children of a national of a member state who is or has been employed in the territory of another member state shall be admitted to that state's general educational [...] courses [...] if such children are residing in its territory. Member states shall encourage all efforts to enable such children to attend these courses under the best possible conditions."*

## **Judgment**

[...]

The second question

- 64 By its second question, the national tribunal seeks essentially to ascertain whether, where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.

Observations submitted to the Court

- 65 According to R and the Baumbast family, the provisions of Community law must be interpreted broadly so that the rights granted are effective, particularly where a right as fundamental as the right to family life is concerned. They thus submit that, in the case of minor children who have spent all their life living with their mother and continue to do so, the refusal to afford her a right of residence during the continuation of the children's education is an interference with their rights which impairs the exercise of those rights. They also submit that such a refusal is a disproportionate interference with family life, contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention').
- 66 The United Kingdom and German Governments as well as the Commission propose that the Court answer the second question in the negative. They submit that it is not possible to deduce from Article 12 of Regulation No 1612/68 a right of residence in favour of parents who are nationals of a non-member country. Their rights are determined by the criteria which directly govern the exercise of freedom of movement. Following divorce or termination by the spouse who is a Community national of his activity as a migrant worker in the host Member State, Community law does not confer on the spouse who is a national of a non-member country a right of residence derived from the children's right to be educated.
- 67 According to the United Kingdom Government, in circumstances where the host Member State is obliged to allow children to reside there in order to attend general educational courses under Article 12 of Regulation No 1612/68, its duty to encourage all efforts to enable such children to attend those courses under the best possible conditions is not to be interpreted as requiring that State to allow the person who is their carer to reside with them. The United Kingdom Government states that if and in so far as it is established that refusal of such a right of residence would unjustifiably interfere with family life as protected by Article 8 of the European Convention, the Home Office may grant exceptional leave to remain to the carer parent in derogation from the Immigration Rules.

Findings of the Court

- 68 First, Article 12 of Regulation No 1612/68 and the rights which flow from it must be interpreted in the context of the structure and purpose of that regulation. It is apparent from the provisions of the regulation, taken as a whole, that in order to facilitate the movement of members of workers' families the Council took into account, first, the importance for the worker, from a human point of view, of having his entire family with him and, secondly, the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in

treatment in relation to nationals of that State (see, to that effect, Case 249/86 Commission v Germany [1989] ECR 1263, paragraph 11).

- 69 As is clear from the answer to the first question, Article 12 of Regulation No 1612/68 seeks in particular to ensure that children of a Community worker can, even if he has ceased to pursue the activity of an employed person in the host Member State, undertake and, where appropriate, complete their education in that Member State.
- 70 Second, according to the case-law of the Court, just like the status of migrant worker itself, the rights enjoyed by members of a Community worker's family under Regulation No 1612/68 can, in certain circumstances, continue to exist even after the employment relationship has ended (see, to that effect, *Echternach and Moritz*, paragraph 21, and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 32).
- 71 In circumstances such as those of the main proceedings, where the children enjoy, under Article 12 of Regulation No 1612/68, the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their rights of residence as a result, in one case, of a divorce from the migrant worker and, in the other case, of the fact that the parent who pursued the activity of an employed person in the host Member State as a migrant worker has ceased to work there, it is clear that if those parents were refused the right to remain in the host Member State during the period of their children's education that might deprive those children of a right which is granted to them by the Community legislature.
- 72 Moreover, in accordance with the case-law of the Court, Regulation No 1612/68 must be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the European Convention. That requirement is one of the fundamental rights which, according to settled case-law, are recognised by Community law (see *Commission v Germany*, cited above, paragraph 10).
- 73 The right conferred by Article 12 of Regulation No 1612/68 on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his right to pursue his studies in the host Member State infringes that right.
- 74 As to the Commission's argument to the effect that a right of residence cannot be derived from Article 12 of Regulation No 1612/68 in favour of a person who is not the child of a migrant worker, on the ground that possession of that status is a *sine qua non* of any right under that provision, having regard to its context and the objectives pursued by Regulation No 1612/68 and in particular Article 12 thereof, that provision cannot be interpreted restrictively (see, to that effect, *Diatta*, paragraph 17) and must not, under any circumstances, be rendered ineffective.
- 75 In the light of the foregoing, the answer to the second question must be that where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State.

The third question

76. By the first part of its third question, the national tribunal seeks essentially to ascertain whether a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the European Union, enjoy there a right of residence by direct application of Article 18(1) EC.

#### Observations submitted to the Court

77. According to Mr Baumbast, the fact that the right to reside freely within the territory of the Member States under Article 18 EC is subject to restrictions and is laid down in the EC Treaty does not deprive the right of direct effect. That provision should be interpreted to mean that Mr Baumbast continues to exercise a right of residence in the United Kingdom while he is working outside the European Union. Such an application of Article 18 EC would enable the right of freedom of movement laid down in the EC Treaty to be exercised simply on proof of nationality, but is consistent with pre-existing legislation on the subject.
78. The United Kingdom and German Governments argue that a right of residence cannot be derived directly from Article 18(1) EC. The limitations and conditions referred to in that paragraph show that it is not intended to be a free-standing provision.
79. Whilst underlining the political and legal importance of Article 18 EC, the Commission submits that the very wording of that provision, and in particular its first paragraph, shows its limitations. As Community law stands at present, the right to move and reside established by that article is conditioned by the pre-existing rules, both primary and secondary, which define the categories of persons eligible for it. Those rights are still linked either to an economic activity or to sufficient resources. Since the point of departure for the third question is that Mr Baumbast has no other Community law foundation for his right to reside in the United Kingdom, the Commission concludes that Article 18 EC cannot, as the law stands at present and in such circumstances, be of any use to him.

#### *Findings of the Court*

80. According to settled case-law, the right of nationals of one Member State to enter the territory of another Member State and to reside there constitutes a right conferred directly by the EC Treaty or, depending on the case, by the provisions adopted to implement it (see, *inter alia*, Case 48/75 Royer [1976] ECR 497, paragraph 31).
81. Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC) (see Case C-363/89 Roux [1991] ECR I-273, paragraph 9), it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.
82. Under Article 17(1) EC, every person holding the nationality of a Member State is to be a citizen of the Union. Union citizenship is destined to be the fundamental status of nationals of the Member States (see, to that effect, Case C-184/99 Grzelczyk [2001] ECR I-6193, paragraph 31).
83. Moreover, the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two of the EC Treaty, on citizenship of the Union. Furthermore, there is nothing in the text of that Treaty to permit the conclusion that citizens of the Union who have

established themselves in another Member State in order to carry on an activity as an employed person there are deprived, where that activity comes to an end, of the rights which are conferred on them by the EC Treaty by virtue of that citizenship.

84. As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast therefore has the right to rely on Article 18(1) EC.
85. Admittedly, that right for citizens of the Union to reside within the territory of another Member State is conferred subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect.
86. However, the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect (see, to that effect, Case 41/74 Van Duyn [1974] ECR 1337, paragraph 7).
87. As regards the limitations and conditions resulting from the provisions of secondary legislation, Article 1(1) of Directive 90/364 provides that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.
88. As to the application of those conditions for the purposes of the Baumbast case, it is clear from the file that Mr Baumbast pursues an activity as an employed person in non-member countries for German companies and that neither he nor his family has used the social assistance system in the host Member State. In those circumstances, it has not been denied that Mr Baumbast satisfies the condition relating to sufficient resources imposed by Directive 90/364.
89. As to the condition relating to sickness insurance, the file shows that both Mr Baumbast and the members of his family are covered by comprehensive sickness insurance in Germany. The Adjudicator seems to have found that that sickness insurance could not cover emergency treatment given in the United Kingdom. It is for the national tribunal to determine whether that finding is correct in the light of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416). Particular reference should be made to Article 19(1)(a) of that regulation which ensures, at the expense of the competent Member State, the right for an employed or self-employed person residing in the territory of another Member State other than the competent State whose condition requires treatment in the territory of the Member State of residence to receive sickness benefits in kind provided by the institution of the latter State.
90. In any event, the limitations and conditions which are referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State.

91. However, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued (see, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paragraph 15).
92. In respect of the application of the principle of proportionality to the facts of the *Baumbast* case, it must be recalled, first, that it has not been denied that Mr *Baumbast* has sufficient resources within the meaning of Directive 90/364; second, that he worked and therefore lawfully resided in the host Member State for several years, initially as an employed person and subsequently as a self-employed person; third, that during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; fourth, that neither Mr *Baumbast* nor the members of his family have become burdens on the public finances of the host Member State and, fifth, that both Mr *Baumbast* and his family have comprehensive sickness insurance in another Member State of the Union.
93. Under those circumstances, to refuse to allow Mr *Baumbast* to exercise the right of residence which is conferred on him by Article 18(1) EC by virtue of the application of the provisions of Directive 90/364 on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right.
94. The answer to the first part of the third question must therefore be that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.

[...]

## 2.5.4 Case C-148/02: Garcia Avello v Belgium

Carlos Garcia Avello and État Belge

Case C-148/02

2 October 2003

Court of Justice

ECR [2003] I-0000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*Mr. Garcia Avello, a Spanish national, and his Belgian wife, Isabelle Weber, reside in Belgium and have two children. The two children born from their marriage, Esmeralda and Diego, who were born in 1988 and 1992 respectively, have dual Belgian and Spanish nationality. Belgian law requires children to take the surname of their father, whereas Spanish custom is for children to take the first surname of each of their parents. In line with this custom the parents requested the Belgian authorities to change the surname of their children to Garcia Weber, but their application was refused as contrary to Belgian practice. Mr Garcia Avello challenged that refusal before the Belgian Conseil d'Etat; which subsequently referred a question to the ECJ as to whether the refusal was contrary to Community law, in particular the principles relating to citizenship of the European Union and the freedom of movement for citizens.*

*In his opinion of May 22, 2003 Advocate General Jacobs inter alia states that the refusal amounts to unjustifiable discrimination on grounds of nationality, prohibited by Community law, as it treats objectively different situations in the same way. In the opinion of Advocate General Jacobs, as a change of surname is allowed under Belgian law when serious grounds are given for the application, a systematic refusal to grant a change when the grounds given are linked to or inseparable from the possession of another nationality, must be regarded as discriminating on grounds of nationality.*

### **Judgement:**

[...]

20. It is first of all necessary to examine whether, contrary to the view expressed by the Belgian State and by the Danish and Netherlands Governments, the situation in issue in the main proceedings comes within the scope of Community law and, in particular, of the Treaty provisions on citizenship of the Union.
21. Article 17 EC confers the status of citizen of the Union on every person holding the nationality of a Member State (see, in particular, Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 27). Since Mr Garcia Avello's children possess the nationality of two Member States, they also enjoy that status.
22. As the Court has ruled on several occasions (see, inter alia, Case C-413/99 Baumbast and R [2002] ECR I-7091, paragraph 82), citizenship of the Union is destined to be the fundamental status of nationals of the Member States.

23. That status enables nationals of the Member States who find themselves in the same situation to enjoy within the scope *ratione materiae* of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and *D'Hoop*, cited above, paragraph 28).
24. The situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16, *Grzelczyk*, cited above, paragraph 33, and *D'Hoop*, paragraph 29).
25. Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law (see, by way of analogy, Case C-336/94 *Dafeki* [1997] ECR I-6761, paragraphs 16 to 20), in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States (see, *inter alia*, Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33).
26. Citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23).
27. Such a link with Community law does, however, exist in regard to persons in a situation such as that of the children of Mr Garcia Avello, who are nationals of one Member State lawfully resident in the territory of another Member State.
28. That conclusion cannot be invalidated by the fact that the children involved in the main proceedings also have the nationality of the Member State in which they have been resident since their birth and which, according to the authorities of that State, is by virtue of that fact the only nationality recognised by the latter. It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty (see in particular, to that effect, Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, paragraph 10). Furthermore, Article 3 of the Hague Convention, on which the Kingdom of Belgium relies in recognising only the nationality of the forum where there are several nationalities, one of which is Belgian, does not impose an obligation but simply provides an option for the contracting parties to give priority to that nationality over any other.
29. That being so, the children of the applicant in the main proceedings may rely on the right set out in Article 12 EC not to suffer discrimination on grounds of nationality in regard to the rules governing their surname.
30. It is for that reason necessary to examine whether Articles 12 EC and 17 EC preclude the Belgian administrative authority from turning down an application for a change of surname in a situation such as that in the main proceedings.
31. It is in this regard settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way (see, *inter alia*, Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 61). Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued (see, *inter alia*, *D'Hoop*, paragraph 36).

32. In the present case, it is agreed that persons who have, in addition to Belgian nationality, the nationality of another Member State are, as a general rule, treated in the same way as persons who have only Belgian nationality on the ground that, in Belgium, persons having Belgian nationality are exclusively regarded as being Belgian. In the same way as Belgian nationals, Spanish nationals who also happen to have Belgian nationality will normally be refused the right to change their surname on the ground that, in Belgium, children take the surname of their father.
33. Belgian administrative practice, which, as is clear from paragraph 12 of the present judgment and from the question submitted, allows derogations from this latter rule, refuses to countenance among such derogations the case of persons who are in a situation such as that here in the main proceedings and who seek to rectify the discrepancy in their surname resulting from the application of the legislation of two Member States.
34. It is for that reason necessary to determine whether those two categories of persons are in an identical situation or whether, on the contrary, their situations are different, in which case the principle of non-discrimination would mean that Belgian nationals, such as the children of Mr Garcia Avello, who also have the nationality of another Member State may assert their right to be treated in a manner different to that in which persons having only Belgian nationality are treated, unless the treatment in issue can be justified on objective grounds.
35. In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned. More specifically, in a situation such as that in issue in the main proceedings, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father.
36. As the Advocate General has pointed out in paragraph 56 of his Opinion, it is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals. As has been established in paragraph 33 of the present judgment, the solution proposed by the administrative authorities of allowing children to take only the first surname of their father does not resolve the situation of divergent surnames which those here involved are seeking to avoid.
37. In those circumstances, Belgian nationals who have divergent surnames by reason of the different laws to which they are attached by nationality may plead difficulties specific to their situation which distinguish them from persons holding only Belgian nationality, who are identified by one surname alone.
38. However, as has been pointed out in paragraph 33 of the present judgment, the Belgian administrative authorities refuse to treat applications for a change of surname made by Belgian nationals in a situation such as that of the children of the applicant in the main proceedings with a view to avoiding a discrepancy in surnames as being based on serious grounds, within the meaning of the second paragraph of Article 3 of the abovementioned Law of 15 May 1987, solely on the ground that, in Belgium, children who have Belgian nationality assume, in accordance with Belgian law, their father's surname.
39. It is necessary to examine whether the practice in issue can be justified on the grounds submitted, by way of alternative argument, by the Belgian State and by the Danish and Netherlands Governments.

40. The Belgian State submits that the principle of the immutability of surnames is a founding principle of social order, of which it continues to be an essential element, and that the King can authorise a change of surname only in quite exceptional circumstances, which do not obtain in the case in the main proceedings. In the same way as the Belgian State, the Netherlands Government argues that the infringement of the rights of the children of the applicant in the main proceedings is reduced inasmuch as those children can in any event rely on their Spanish nationality and the surname conferred in accordance with Spanish law in every Member State other than Belgium. The practice in issue makes it possible to avoid risks of confusion as to identity or parentage of those concerned. According to the Danish Government, that practice, in so far as it applies the same rules to Belgian nationals who are also nationals of another Member State as it does to persons who are nationals of Belgium alone, contributes to facilitating integration of the former in Belgium and to attainment of the objective pursued by the principle of non-discrimination.
41. None of those grounds can provide valid justification for the practice in issue.
42. First, with regard to the principle of the immutability of surnames as a means designed to prevent risks of confusion as to identity or parentage of persons, although that principle undoubtedly helps to facilitate recognition of the identity of persons and their parentage, it is still not indispensable to the point that it could not adapt itself to a practice of allowing children who are nationals of one Member State and who also hold the nationality of another Member State to take a surname which is composed of elements other than those provided for by the law of the first Member State and which has, moreover, been entered in an official register of the second Member State. Furthermore, it is common ground that, by reason in particular of the scale of migration within the Union, different national systems for the attribution of surnames coexist in the same Member State, with the result that parentage cannot necessarily be assessed within the social life of a Member State solely on the basis of the criterion of the system applicable to nationals of that latter State. In addition, far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents.
43. Second, with regard to the objective of integration pursued by the practice in issue, suffice it to point out that, in view of the coexistence in the Member States of different systems for the attribution of surnames applicable to those there resident, a practice such as that in issue in the main proceedings is neither necessary nor even appropriate for promoting the integration within Belgium of the nationals of other Member States.
44. The disproportionate nature of the refusal by the Belgian authorities to accede to requests such as that in issue in the main proceedings is all the more evident when account is taken of the fact that, as is clear from paragraph 12 of the present judgment and from the question submitted, the practice in issue already allows derogations from application of the Belgian system of handing down surnames in situations similar to that of the children of the applicant in the main proceedings.
45. Having regard to all of the foregoing, the answer to the question submitted must be that Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.

[...]

## 2.5.5 Case C-138/02: Collins

**Brian Francis Collins v Secretary of State for Work and Pensions**

**Case C-138/02**

23 March 2004

Court of Justice

ECR [2004] 00000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*Mr Collins was born in the US but holds dual Irish and American nationality. As part of his studies, he spent one semester in the UK, where he returned in 1980 and spent approximately 10 months doing casual and part-time work in pubs, bars and shops; to then again return to the US. On 31 May 1998 he came back to the UK with the intention of seeking work. Eight days later he claimed income-based jobseekers' allowance, which was refused because he was not habitually resident in the UK. He appealed to the UK courts which now refer a number of questions to the Court of Justice on the freedom of movement for workers and the principles of Community law applicable in the circumstances of the claimant, in particular, rights of European citizenship.*

*AG Ruiz-Jarabo in his Opinion of 10/7/2003 inter alia finds: Community law as it now stands does not require that an income-based social security benefit be provided to a citizen of the Union who seeks work in a Member State with whose employment market he lacks any connection or link.*

### **Judgement:**

[...]

Question 1

Observations submitted to the Court

- 21 Mr Collins contends that, as Community law currently stands, his position in the United Kingdom as a person genuinely seeking work gives him the status of a worker' for the purposes of Regulation No 1612/68 and brings him within the scope of Article 7(2) of that regulation. At paragraph 32 of its judgment in Case C-85/96 Martínez Sala [1998] ECR I-2691, the Court deliberately laid down the rule that persons seeking work are to be considered to be workers for the purposes of Regulation No 1612/68 if the national court is satisfied that the person concerned was genuinely seeking work at the appropriate time.
- 22 The United Kingdom Government, the German Government and the Commission of the European Communities, on the other hand, submit that a person in Mr Collins' position is not a worker for the purposes of Regulation No 1612/68.
- 23 The United Kingdom Government and the Commission argue that Mr Collins cannot claim to be a former' migrant worker who is now merely seeking a benefit under Article 7(2) of Regulation No 1612/68, because there is no relationship between the work which he did in the course of 1980 and 1981 and the type of work which he says he wished to find in 1998.

- 24 In Case 316/85 Lebon [1987] ECR 2811, the Court held that equal treatment with regard to social and tax advantages, which is laid down by Article 7(2) of Regulation No 1612/68, applies only to workers, and that those who move in search of employment qualify for such equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of that regulation.
- 25 The German Government draws attention to the specific circumstances in *Martínez Sala*, cited above, which were characterised by very close connections of long duration between the plaintiff and the host Member State, whereas in the main proceedings there is clearly no link between the earlier work carried out by Mr Collins and the work sought by him.

#### The Court's answer

- 26 In accordance with the Court's case-law, the concept of worker', within the meaning of Article 48 of the Treaty and of Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, *Martínez Sala*, paragraph 32, and Case C-337/97 *Meeusen* [1999] ECR I3289, paragraph 13).
- 27 The Court has also held that migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (Case C-35/97 *Commission v France* [1998] ECR I-5325, paragraph 41, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-0000, paragraph 34).
- 28 As is apparent from the documents sent to the Court by the Social Security Commissioner, Mr Collins performed casual work in the United Kingdom, in pubs and bars and in sales, during a 10-month stay there in 1981. However, even if such occupational activity satisfies the conditions as set out in paragraph 26 of this judgment for it to be accepted that during that stay the appellant in the main proceedings had the status of a worker, no link can be established between that activity and the search for another job more than 17 years after it came to an end.
- 29 In the absence of a sufficiently close connection with the United Kingdom employment market, Mr Collins' position in 1998 must therefore be compared with that of any national of a Member State looking for his first job in another Member State.
- 30 In this connection, it is to be remembered that the Court's case-law draws a distinction between Member State nationals who have not yet entered into an employment relationship in the host Member State where they are looking for work and those who are already working in that State or who, having worked there but no longer being in an employment relationship, are nevertheless considered to be workers (see Case 39/86 *Lair* [1988] ECR 3161, paragraphs 32 and 33).
- 31 While Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers (see in particular, *Lebon*, cited above, paragraph 26, and Case C-278/94 *Commission v Belgium* [1996] ECR I-4307, paragraphs 39 and 40).

- 32 The concept of worker' is thus not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the regulation this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of worker' must be understood in a broader sense.
- 33 Accordingly, the answer to the first question must be that a person in the circumstances of the appellant in the main proceedings is not a worker for the purposes of Title II of Part I of Regulation No 1612/68. It is, however, for the national court or tribunal to establish whether the term worker' as referred to by the national legislation at issue is to be understood in that sense.

[...]

### Question 3

#### Observations submitted to the Court

- 45 In Mr Collins' submission, there is no doubt that he is a national of another Member State who was lawfully in the United Kingdom and that jobseeker's allowance is within the scope of the Treaty. The result, as the Court held in Case C-184/99 Grzelczyk [2001] ECR I-6193, is that the payment of a non-contributory means-tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr Collins acknowledges that the habitual residence test is applied to United Kingdom nationals as well. However, it is well established that a provision of national law is to be regarded as discriminatory for the purposes of Community law if it is inherently more likely to be satisfied by nationals of the Member State concerned.
- 46 The United Kingdom Government and the German Government argue that there is no provision or principle of Community law which requires that a benefit such as the jobseeker's allowance be paid to a person in the circumstances of Mr Collins.
- 47 With regard to the possible existence of indirect discrimination, the United Kingdom Government submits that there are relevant objective justifications for not making income-based jobseeker's allowance available to persons in the situation of Mr Collins. Unlike the position in Case C-224/98 D'Hoop [2002] ECR I-6191, the eligibility criteria adopted for the allowance at issue here do not go beyond what is necessary to attain the objective pursued. They represent a proportionate and hence permissible method of ensuring that there is a real link between the claimant and the geographic employment market. In the absence of such criteria, persons who have little or no link with the United Kingdom employment market, as in the case of Mr Collins, would then be able to claim that allowance.
- 48 According to the Commission, it is not disputed that Mr Collins was genuinely seeking work in the United Kingdom during the two months following his arrival in that Member State and that he was lawfully resident there in his capacity as a person seeking work. As a citizen of the Union lawfully residing in the United Kingdom, he was clearly entitled to the protection conferred by Article 6 of the Treaty against discrimination on grounds of nationality in any situation falling within the material scope of Community law. That is precisely the case with regard to jobseeker's allowance, which should be considered to be a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.
- 49 The Commission also observes that it is clear that the right to stay in another Member State to seek work there can be limited to a reasonable period and that Mr Collins' right to rely on Articles

6 and 8 of the Treaty in order to claim the allowance, on the same basis as United Kingdom nationals, is therefore similarly restricted to that period of lawful residence.

- 50 None the less, the Commission submits that a requirement of habitual residence may be indirectly discriminatory because it can be more easily met by nationals of the host Member State than by those of other Member States. Whilst such a requirement may be justified on objective grounds necessarily intended to avoid benefit tourism' and thus the possibility of abuse by work-seekers who are not genuine, the Commission notes that in the case of Mr Collins the genuine nature of the search for work is not in dispute. Indeed, it appears that he has remained continuously employed in the United Kingdom ever since first finding work there shortly after his arrival.

#### The Court's answer

- 51 By the third question, the Social Security Commissioner asks essentially whether there is a provision or principle of Community law on the basis of which a national of a Member State who is genuinely seeking employment in another Member State may claim there a jobseeker's allowance such as that provided for by the 1995 Act.
- 52 First of all, without there being any need to consider whether a person such as the appellant in the main proceedings falls within the scope *ratione personae* of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (Regulation No 1408/71'), it is clear from the order for reference that the person concerned never resided in another Member State before seeking employment in the United Kingdom, so that the aggregation rule contained in Article 10a of Regulation No 1408/71 is inapplicable in the main proceedings.
- 53 Under the 1996 Regulations, nationals of other Member States seeking employment who are not workers for the purposes of Regulation No 1612/68 and do not derive a right of residence from Directive 68/360 can claim the allowance only if they are habitually resident in the United Kingdom.
- 54 It must therefore be determined whether the principle of equal treatment precludes national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement.
- 55 In accordance with the first paragraph of Article 6 of the Treaty, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty, without prejudice to any special provisions contained therein. Since Article 48(2) of the Treaty is such a special provision, it is appropriate to consider first the 1996 Regulations in the light of that article.
- 56 Among the rights which Article 48 of the Treaty confers on nationals of the Member States is the right to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment (Antonissen, cited above, paragraph 13).
- 57 Nationals of a Member State seeking employment in another Member State thus fall within the scope of Article 48 of the Treaty and, therefore, enjoy the right laid down in Article 48(2) to equal treatment.

- 58 As regards the question whether the right to equal treatment enjoyed by nationals of a Member State seeking employment in another Member State also encompasses benefits of a financial nature such as the benefit at issue in the main proceedings, the Court has held that Member State nationals who move in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 48 of the Treaty and Articles 2 and 5 of Regulation No 1612/68, but not with regard to social and tax advantages within the meaning of Article 7(2) of that regulation (Lebon, paragraph 26, and Case C-278/94 Commission v Belgium, cited above, paragraphs 39 and 40).
- 59 Article 2 of Regulation No 1612/68 concerns the exchange of applications for and offers of employment and the conclusion and performance of contracts of employment, while Article 5 of the regulation relates to the assistance afforded by employment offices.
- 60 It is true that those articles do not expressly refer to benefits of a financial nature. However, in order to determine the scope of the right to equal treatment for persons seeking employment, this principle should be interpreted in the light of other provisions of Community law, in particular Article 6 of the Treaty.
- 61 As the Court has held on a number of occasions, citizens of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (see, in particular, Grzelczyk, cited above, paragraphs 31 and 32, and Case C-148/02 Garcia Avello [2003] ECR I-0000, paragraphs 22 and 23).
- 62 It is to be noted that the Court has held, in relation to a student who is a citizen of the Union, that entitlement to a non-contributory social benefit, such as the Belgian minimum subsistence allowance (*minimex*'), falls within the scope of the prohibition of discrimination on grounds of nationality and that, therefore, Articles 6 and 8 of the Treaty preclude eligibility for that benefit from being subject to conditions which are liable to constitute discrimination on grounds of nationality (Grzelczyk, paragraph 46).
- 63 In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.
- 64 The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon and in Case C-278/94 Commission v Belgium.
- 65 The 1996 Regulations introduce a difference in treatment according to whether the person involved is habitually resident in the United Kingdom. Since that requirement is capable of being met more easily by the State's own nationals, the 1996 Regulations place at a disadvantage Member State nationals who have exercised their right of movement in order to seek employment in the territory of another Member State (see, to this effect, Case C-237/94 O'Flynn [1996] ECR I2617, paragraph 18, and Case C-388/01 Commission v Italy [2003] ECR I-721, paragraphs 13 and 14).

- 66 A residence requirement of that kind can be justified only if it is based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraph 27).
- 67 The Court has already held that it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question (see, in the context of the grant of tideover allowances to young persons seeking their first job, D'Hoop, cited above, paragraph 38).
- 68 The jobseeker's allowance introduced by the 1995 Act is a social security benefit which replaced unemployment benefit and income support, and requires in particular the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount.
- 69 It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.
- 70 The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.
- 71 The United Kingdom is thus able to require a connection between persons who claim entitlement to such an allowance and its employment market.
- 72 However, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.
- 73 The answer to the third question must therefore be that the right to equal treatment laid down in Article 48(2) of the Treaty, read in conjunction with Articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.

[...]

## 2.5.6 AG Opinion in Case C-209/03: *Bidar*

Dany Bidar v London Borough of Ealing Secretary of State for Education

Case C-209/03

11 November 2004

AG Geelhoed

ECR [2004] 00000

<http://www.curia.eu.int/en/content/juris/index.htm>

### **Summary of facts and procedure:**

*In the UK, assistance with living costs for students is primarily provided by means of a student loan from the State. This is offered at a rate linked to inflation which is lower than commercial rates and the student begins to pay back the loan only once they start earning above a certain amount. A national of a Member State is entitled to receive this loan if they are "settled" in the UK and have been resident in the UK for the three years prior to commencing their course. In order to be "settled" a person has to have lived in the UK for four years other than for the purposes of receiving full-time education.*

*Dany Bidar, a French national, moved to the UK in August 1998 and completed his final three years of secondary education in London. In September 2001 he enrolled on a course at University College London and applied to the London Borough of Ealing for funding. While he was granted assistance with tuition fees, he was refused a maintenance loan on the basis that he was not "settled" in the UK.*

*Mr Bidar challenged this decision, claiming that the residence requirement constituted discrimination on grounds of nationality, prohibited by the EC Treaty. The High Court asked the Court of Justice whether, following changes to the EC Treaty, notably the introduction of EU citizenship, assistance with living costs for students still remained outside the scope of the EC Treaty and if not what criteria should be used to determine whether the eligibility conditions were based on objective considerations.*

### **Opinion:**

1. In its judgments of 21 June 1988 in *Lair* and *Brown*, the Court ruled that at the stage of development of Community law at the material time, financial assistance granted to students for maintenance costs and training, as opposed to assistance to cover costs related to access to education, fell in principle outside the scope of the EEC Treaty.<sup>8</sup> In view of the evolution of Community law since that time, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), in this preliminary reference essentially asks the Court whether such assistance with maintenance costs for students, in either the form of grants or loans, continues to fall outside the scope of the EC Treaty for the purposes of the application of Article 12 EC and if not, under which conditions the Member States may restrict eligibility for such assistance.

[...]

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<sup>8</sup> Case 39/86 *Lair* [1988] ECR 3161, at paragraph 15 of the judgment, and Case 197/86 *Brown* [1988] ECR 3025, at paragraph 18 of the judgment.

21. In various cases the Court has had occasion to consider whether EU citizens could derive entitlement to social benefits of various kinds from Article 18(1) EC. I refer in particular to *Martínez Sala*, *Grzelczyk*, *D'Hoop*, *Collins* and *Trojani*.<sup>9</sup>
22. In its judgments in cases concerning Article 18(1) EC, the Court has repeatedly emphasised that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.<sup>10</sup> Citizens lawfully resident in the territory of a Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law.<sup>11</sup> Those situations include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty and those involving the exercise of the right to move and reside freely in another Member State as conferred by Article 18(1) EC. This right to reside is, moreover, conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty, as the Court held in *Baumbast*.<sup>12</sup> It can therefore be invoked by individuals in proceedings before the national courts.
23. In its first judgment in this field, *Martínez Sala*, the Court ruled 'that a citizen of the European Union, ..., lawfully resident in the territory of the host Member State, can rely on Article [12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.'<sup>13</sup> As the child-raising allowance at issue in that case was covered by both Regulation No 1408/71<sup>14</sup> and Regulation No 1612/68 and was therefore within the scope *ratione materiae* of the EC Treaty, Mrs Martínez Sala was entitled to that benefit on the same conditions as German nationals.
24. The case of *Grzelczyk* concerned a French student studying in Belgium who, after having managed to provide for himself in the first three years of his studies, in his fourth and final year applied for a minimum subsistence allowance (minimex), as the combination of work and studies would be too demanding at that stage of his course. This benefit was first granted and then withdrawn as he was not a worker, but a student, and he did not have Belgian nationality. Although recognising the conditions imposed by Article 1 of Directive 93/96 on a student's right to reside in another Member State and that under Article 3 of that directive students are not entitled to maintenance grants by the host Member State, the Court observed that there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.<sup>15</sup> Where this implied *Grzelczyk* becoming a burden on the social assistance system, thus no longer fulfilling one of the conditions of residence, the Court pointed out that Directive 93/96 only requires students to make a declaration that they have sufficient resources at the beginning of their stay in the host Member State and that their financial position may change for reasons

<sup>9</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk*, cited in footnote 16; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-138/02 *Collins* [2004] ECR I-0000 and Case C-456/02 *Trojani* judgment of 7 September 2004 [2004] ECR I-0000.

<sup>10</sup> E.g. *Grzelczyk*, cited in footnote 16 at paragraph 31 of the judgment.

<sup>11</sup> E.g. *Martínez Sala*, cited in footnote 18 at paragraph 63 of the judgment.

<sup>12</sup> Case C-413/99 *Baumbast* [2002] ECR I-7091 at paragraph 84 of the judgment.

<sup>13</sup> At paragraph 63 of the judgment.

<sup>14</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1.

<sup>15</sup> *Grzelczyk*, cited in footnote 16, at paragraph 39 of the judgment.

beyond their control. The fact that the directive aims at preventing students from becoming an ‘unreasonable’ burden on the public finances of the host Member State means that the directive ‘accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary’.<sup>16</sup> As it had been established in earlier case-law that the minimex was within the scope *ratione materiae* of the EC Treaty and the conditions governing eligibility were contrary to Article 12 EC, Grzelczyk was entitled to this benefit.

25. In *D’Hoop*, a Belgian student was refused a tideover allowance (an unemployment benefit granted to young people who have just completed their studies and are seeking their first employment) by the Belgian authorities on the sole ground that she had completed her secondary education in France. Here, the Court considered that making eligibility for this allowance conditional on the school diploma having been obtained in Belgium places certain of its nationals at a disadvantage simply because they have exercised their freedom to move in order to pursue education in another Member State. ‘Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move’.<sup>17</sup> The Court did accept, however, that in view of the aim of the tideover allowance to facilitate for young people the transition from education to the employment market, it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned. A single condition concerning the place where the diploma of completion of secondary education was obtained was, however, too general and exclusive in nature.<sup>18</sup>
26. The *Collins* Case arose from an Irish national, who had gone to the United Kingdom in order to find work there, being refused a jobseeker’s allowance on the ground that he was not habitually resident in the United Kingdom. Although Articles 2 and 5 of Regulation No 1612/68 do not refer to financial benefits assisting persons seeking access to the employment market, the Court considered that these provisions<sup>19</sup> ‘should be interpreted in the light of other provisions of Community law, in particular Article [12] of the Treaty’.<sup>20</sup> It went on to state that ‘[i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article [12] of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’.<sup>21</sup> As in *D’Hoop*, the Court recognised that the Member States may lay down conditions in order to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographical employment market in question. A residence requirement could be considered to be appropriate for this purpose, but must not go beyond what is necessary to attain that objective. In particular, its application must rest on clear criteria which are made known in advance and provision must be made for judicial protection.<sup>22</sup>
27. Finally, in *Trojani*, a French national working at a Salvation Army hostel in Belgium in return for board and lodging and some pocket money was refused the Belgian minimex benefit on the same

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<sup>16</sup> Ibid., at paragraph 44 of the judgment.

<sup>17</sup> *D’Hoop*, cited in footnote 18, at paragraph 35 of the judgment.

<sup>18</sup> Ibid. at paragraphs 38 and 39 of the judgment.

<sup>19</sup> The Court in paragraph 60 of its judgment uses the term ‘this principle’, though it appears from the context that Articles 2 and 5 are the subject of this consideration.

<sup>20</sup> *Collins*, cited in footnote 18, at paragraph 60 of the judgment.

<sup>21</sup> Ibid., at paragraph 63 of the judgment.

<sup>22</sup> Ibid., at paragraphs 67 to 72 of the judgment.

grounds as *Grzelczyk*: he did not have Belgian nationality and could not benefit from the application of Regulation No 1612/68. In this case the Court found, that the applicant could not derive a right of residence from Article 18(1) EC in conjunction with Directive 90/364 due to his lack of resources. However, as he was in possession of a residence permit and was lawfully resident in Belgium, he was entitled to benefit from the fundamental principle of equal treatment as laid down in Article 12 EC. The Court therefore concluded that, in so far as national legislation does not grant a social assistance benefit to EU citizens from other Member States, who reside lawfully within its territory even though they satisfy the conditions required of nationals of that Member State, this constitutes discrimination on grounds of nationality prohibited by Article 12 EC.<sup>23</sup>

### C – Citizenship and social benefits: overall picture

28. If these judgments are viewed together, a number of principles emerge in relation to EU citizenship as such and, subsequently, to the entitlement of EU citizens to non-contributory benefits of a social nature. By placing emphasis on the fundamental character of EU citizenship, the Court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States, giving rise to certain rights and privileges in other Member States where they are resident. In particular, EU citizenship entitles nationals of other Member States to equal treatment with nationals of the host Member State in respect of situations coming within the substantive scope of Community law. Pursuing studies in another State than that of which the EU citizen is a national cannot of itself deprive him of the possibility of relying on Article 12 EC.<sup>24</sup> As the cases described above make clear, various social benefits which Member States previously granted to its nationals and to economically active persons under Regulations Nos 1612/68 or 1408/71 now have been extended to EU citizens who are lawfully resident in the host Member State. I refer to the child-raising benefit in *Martínez Sala*, the minimex benefit in *Grzelczyk* and *Trojani* and the tideover allowance in *D’Hoop*. In these cases the benefits were covered by existing Community regulations and therefore clearly were within the scope *ratione materiae* of the Treaty.
29. In contrast, it is interesting to note that in *Collins*, the Court did not place the jobseeking allowance claimed by the applicant explicitly within the scope *ratione materiae* of the Treaty. Rather, in the context of interpreting the provisions in Regulation No 1612/68 on access to employment in other Member States, it used the concept of citizenship to draw it within the scope of the Treaty: ‘in view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] EC ... a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.’ In other words, it would appear that citizenship itself may imply that certain benefits can be brought within the scope of the Treaty, if these allowances are provided for purposes which coincide with objectives pursued by the primary or secondary Community legislation.
30. It is also clear from the case-law that entitlement by lawfully resident EU citizens to social benefits in these situations is not absolute and that the Member States may subject eligibility to these benefits to certain objective, i.e. non-discriminatory, conditions in order to protect their legitimate interests. In the two cases involving benefits which were aimed at assisting the beneficiary to gain access to the employment market, *D’Hoop* and *Collins*, the Court recognised that the Member States may impose requirements to ensure that the applicant has a real link with the relevant geographical employment market. These requirements must be applied in such a way that they comply with the basic Community principle of proportionality.

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<sup>23</sup> *Trojani*, cited in footnote 18, at paragraph 44 of the judgment.

<sup>24</sup> *Grzelczyk*, cited in footnote 16, at paragraph 36 of the judgment.

31. As indicated, an EU citizen must also be lawfully resident in the host Member State in order to be eligible for social benefits. Under Directives 90/364 and 93/96, the EU citizen or student must possess sufficient resources to avoid becoming a burden on the public finances of the host Member State and he must be adequately insured against sickness costs. Here, too, these limitations and conditions must be applied in compliance with the general principles of Community law, in particular the principle of proportionality.<sup>25</sup> In *Grzelczyk* the Court thus held that the condition that an EU citizen must not become an unreasonable burden on the public finances of the host Member State did not preclude him, in the given circumstances, from being entitled to a social benefit. Neither, for that matter, did the fact that Article 3 of Directive 93/96 excludes students from entitlement to maintenance grants preclude him from receiving the minimex benefit. The notion of 'unreasonable burden' is apparently flexible and, according to the Court, implies that Directive 93/96 accepts a degree of financial solidarity between the Member States in assisting each other's nationals residing lawfully on their territory. As the same principle is at the basis of the conditions imposed by Directive 90/364, there is no reason to presume that this same financial solidarity does not apply in that context, too.
32. The question arises as to what is meant by the term 'a degree' of financial solidarity. Clearly the Court does not envisage the Member States opening up the full range of their social assistance systems to EU citizens entering and residing within their territory. To accept such a proposition would amount to undermining one of the foundations of the residence directives. It would seem to me that this is a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance. On the one hand, the Member States are entitled to ensure that the social benefits which they make available are granted for the purposes for which they are intended. On the other hand, they must accept that EU citizens, who have been lawfully resident within their territory for a relevant period of time, may equally be eligible for such assistance where they fulfil the objective conditions set for their own nationals. In this respect, they must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review.<sup>26</sup> To this I would add that it should also be possible to apply them with sufficient flexibility to take account of the particular individual circumstances of applicants, where refusal of such assistance is likely to affect what is known in German constitutional law as the 'Kernbereich' or the substantive core of a fundamental right granted by the Treaty, such as the rights contained in Article 18(1) EC. It is interesting to note that this principle has been laid down in Article II-112 of the Charter of Fundamental Rights of the Union which is incorporated in the Draft Treaty establishing a Constitution for Europe.<sup>27</sup> This provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of these rights and freedoms. Article II-105 of the Charter guarantees the freedom of EU citizens to move and reside within the territory of the Member States in terms which are essentially identical to Article 18(1) EC.
33. There has, in other words, been a marked development in EU citizenship (Articles 17 and 18(1) EC) in conjunction with the prohibition of discrimination on grounds of nationality (Article 12 EC) in providing a basis for entitlement to certain social benefits in the Member States in which EU citizens are lawfully resident. As I observed in paragraph 29, where the benefits concerned were required to be explicitly within the scope *ratione materiae* of the EC Treaty, the Court in *Collins* apparently accepted that this is the case if the benefit concerned is provided for purposes which coincide with the objectives of primary or secondary Community law. Persons who have moved to another Member State and have, at least initially, complied with the residence conditions laid down in the residence directives, but have since found themselves in a situation in which they

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<sup>25</sup> *Baumbast*, cited in footnote 21, at paragraph 91 of the judgment.

<sup>26</sup> *Collins*, cited in footnote 18, at paragraph 72 of the judgment.

<sup>27</sup> CIG 87/04 of 6 August 2004.

need to apply for financial assistance are, subject to the limitations and conditions laid down by the Community legislature, entitled to such assistance on an equal footing with nationals of the host Member State. These limitations and conditions must be applied in such a way that the final result is not disproportionate to the aims for which they are imposed. Neither may that result amount to a discrimination of the EU citizen which cannot be objectively justified, where that EU citizen finds himself in the same material circumstances as a national of the host Member State and is sufficiently socially integrated in that Member State. In this regard, depending on the nature of the benefits concerned, the Member States may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory.

## **V – The preliminary questions**

### *A – The first question: citizenship and maintenance assistance*

34. The first question referred by the High Court is aimed at ascertaining whether financial support provided by the Member States to students to assist them with maintenance costs continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC, in view of the addition of Article 18 EC to the EC Treaty and in view of the developments in the field of education, since the Court gave its judgments in *Lair* and *Brown*.
35. Bidar observes, first, that he should be regarded as an EU citizen student who resided lawfully in the United Kingdom for more than three years before his courses commenced. Consequently, he is not in the position of an EU national falling within the ambit of Directive 93/96. As Community competence has been extended to the field of education, the material scope of the Treaty is not restricted to matters related to access to education, but also covers matters related to the encouragement of student mobility, including the provision of assistance with maintenance costs. He states that *Grzelczyk* confirms that the Court's judgment in *Brown* has been overtaken by these developments in Community law. Even if he is considered as falling within the scope of Directive 93/96, Bidar observes that the conditions imposed by that directive are not absolute and must be applied in accordance with the general principles of Community law, in particular the principle of proportionality. In this respect he points out that his education is already very much bound up with the United Kingdom education system. Finally, he submits that it is artificial to make a distinction between assistance with tuition fees on the one hand and maintenance grants and subsidised loans on the other, as denial of access to either constitutes an obstacle for students to the enjoyment of free movement.
36. As to Bidar's personal status the United Kingdom Government points out that, before the national court, he relied on Directive 93/96 and as such he cannot be regarded as being 'settled' within the United Kingdom. The German Government adds that by applying for a loan even before commencing his studies, Bidar deprived himself of the possibility of acquiring the right of residence under Directive 93/96 and of invoking Article 18 EC in conjunction with Article 12 EC.
37. All Member State Governments having submitted written observations and the Commission consider that financial assistance with maintenance costs provided to students continues to fall outside the scope of application of the EC Treaty. Various arguments were advanced in support of this assertion, e.g. The introduction of Article 149 EC which recognises the responsibility of the Member States for the content of teaching and the organisation of education systems. According to them this includes systems of student support. They point out that the right of residence provided for in Article 18(1) EC is subject to limitations and conditions laid down in the Treaty and the measures adopted to give it effect. Article 3 of Directive 93/96 excludes a right of migrant students to maintenance grants which, in their view, was confirmed by the Court in *Grzelczyk*. Reference was also made to Directive 2004/38 on free movement and residence within the

territory of the Member States<sup>28</sup> which must be transposed by the Member States by 30 April 2006. Article 24(2) of this directive explicitly provides that prior to acquisition of permanent residence, a right which is obtained after a continued period of five years of legal residence in the host Member State, that State is not obliged to grant maintenance aid for studies consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

38. More generally, the Austrian Government points out that the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, adopted in the framework of the Council of Europe in 1969, is based on the principle that the home state is responsible for the payment of scholarships and that if the host state also were to become responsible in this regard, there would be danger of duplicate payments. Similarly, the Netherlands Government observes that as there is no coordination in this field at Community level, intermingling the home state and host state principles could have disruptive effects. The Danish and Finnish Governments also refer to the possible effects of a negative answer to the first question on their rules for granting maintenance assistance to students.
39. Firstly, I would observe that the answer to the first question of the High Court depends on the factual situation of the case. Although it focuses on whether or not assistance with maintenance costs for students now comes within the ambit of the EC Treaty, it is essential to establish under which set of rules that question must be appreciated. On the one hand, the United Kingdom in particular contends that, as Bidar is a national of another Member State who is in the United Kingdom in order to follow university education, he falls exclusively within the scope of Directive 93/96. Bidar, on the other hand, refers to the fact that he had already been resident in the United Kingdom for three years prior to taking up his studies and that he had also followed his secondary education in the United Kingdom. In that respect he submits that he is in the same factual situation as Ms D'Hoop and must be regarded as an EU citizen who had made use of his right to move to another Member State under Article 18(1) EC. This implies that the question as to his right to a student maintenance loan should be considered under that Treaty provision in conjunction with Article 12 EC. In my view there are strong indications on the basis of the facts set out in paragraph 5 that Bidar does indeed come within the second category and that he fulfils the conditions laid down in Directive 90/364. However, as it is up to the referring court to establish the facts and thereby determine which set of rules is applicable to the case, I will discuss both options.
40. Article 18(1) EC subjects the rights of EU citizens to move and reside within the territory of the Member States to the limitations and conditions laid down in the EC Treaty and the measures adopted to give it effect. As far as students are concerned, their situation is governed by Directive 93/96. This directive applies to students who have gone to another Member State to take up a course of studies. In other words, following a course of studies in the host Member State is the reason for them using the rights conferred upon them by Article 18(1) EC. Students in this situation must meet the conditions already mentioned in paragraph 18 above, particularly in respect of their financial independence. They must not become an unreasonable burden on the public finances of the host Member State nor, according to Article 3 of Directive 93/96, are they entitled to maintenance grants.

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<sup>28</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77, as corrected in OJ 2004 L 229, p. 35.

41. In *Grzelczyk* the Court confirmed these principles as such, but attenuated their severity in the light of the circumstances of the case at hand. Although barring entitlement to a maintenance grant, it found that the directive was silent as to the possibility of acquiring a social security benefit, such as a minimum subsistence allowance. In addition, though the directive was aimed at avoiding students becoming an unreasonable burden on public finance, the Court considered that this principle was not to be applied in an absolute sense, but must be understood as meaning that in certain cases, such as that of *Grzelczyk* who had run into financial difficulty in his final year of studies, Member States must accept a degree of financial solidarity by supporting each other's nationals.
42. If *Bidar* is to be regarded as a student coming solely within the ambit of Directive 93/96, it is abundantly clear that Article 3 of the directive presents a considerable barrier for him being eligible for a maintenance grant in the United Kingdom. However, what is at issue is not eligibility for a maintenance grant, but eligibility for a (subsidised) loan to cover maintenance costs. Student loans are not covered explicitly by Article 3 of Directive 93/96 and indeed, in view of the fact that they now have been explicitly excluded by the parallel provision in Directive 2004/38, Article 24(2), it could be inferred that eligibility for such loans is not excluded by Article 3 of Directive 93/96.
43. That being said, the question as to whether students coming from other Member States should be eligible for student loans for maintenance costs must be answered by reference to the general principle of Article 1 of Directive 93/96 that in order to obtain the right to residence in the host Member State, students must declare that they possess sufficient resources to avoid becoming a burden on the social assistance system during their period of residence. As the Court stated in *Grzelczyk*, the directive only requires a declaration by the student to that effect at the beginning of his period of residence within the Member State. There are two reasons for querying whether this condition also applies to student loans for maintenance costs. The first is that such loans generally are not part of the social assistance systems of the Member States and indeed, in *Grzelczyk*, the Court made just this distinction. The second is that, although such loans are usually provided at non-commercial conditions and repayment in certain cases is waived, the burden on the public finances resulting from these aspects is smaller than in the case of benefits that do not have to be repaid.
44. Nevertheless, it is clear from the basic condition that students must of themselves possess sufficient resources on arriving in the host Member State, that they are precluded from applying for a (subsidised) loan in respect of maintenance costs. The cumulative effect of loans provided under conditions, such as those of the Student Support Regulations, constitutes a considerable burden on public finance, as is also apparent from the information provided by the national court on this point.<sup>29</sup> This justifies them being treated in the same manner as maintenance grants for the purposes of Article 3 of Directive 93/96.
45. I could, however, envisage an exception to this rule and, indeed, the Netherlands Government also suggested that in certain exceptional circumstances there may be reasons for applying Article 3 leniently. Referring to my earlier observation in paragraphs 31 and 32 that the conditions imposed by Directive 93/96 must be applied in accordance with the general principles of Community law, particularly the principle of proportionality, it must be ensured that the core of the fundamental rights accorded by Article 18(1) EC is respected. For instance, a student who first complied with the basic conditions of the directive may encounter financial difficulties at a later stage of his studies. In such a situation, it would seem to me that the logic of the *Grzelczyk* judgment should apply. Where, according to that judgment, under Articles 18(1) and 12 EC, an EU citizen, as a student, is entitled to a minimum subsistence allowance in his final year of

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<sup>29</sup> See paragraph 70 of this Opinion.

studies on an equal footing with nationals of the Member State if his financial position has changed since he took up his studies, there would be no reason to exclude entitlement of EU citizens in a similar situation under those provisions to the less burdensome instrument of a student loan. In such exceptional situations the principle of financial solidarity between the nationals of the Member States entails that once a student has commenced a course of studies in another Member State and has progressed to a certain stage of these studies, that State should enable him to complete these studies by providing the financial assistance which is available to its nationals.

46. The second situation to be considered is based on the presumption that Bidar should not be regarded as a student falling within the scope of Directive 93/96, but as an EU citizen who has exercised his right to move to and reside on the territory of another Member State. This involves examining whether following the introduction of the provisions on EU citizenship and education, the scope of the EC Treaty now extends to financial support provided by the Member States for student'-s' maintenance costs.
47. In its judgments of 21 June 1988 the Court held that in view of the stage of development of Community law at that time, assistance for maintenance and training given to students, who did not enjoy worker or worker-derived status, in principle, falls outside the scope of the E(E)C Treaty for the purposes of Article 12 EC. This was explained by the fact that such assistance is to be regarded, on the one hand, as a matter of educational policy which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy which falls within the competence of the Member States in so far as it is not covered by specific provisions of the E(E)C Treaty.
48. After those judgments a number of provisions were added by the Treaty of Maastricht to the EC Treaty on education. Articles 3(1), sub q, and 149 EC now provide a basis for Community action in this area. The scope of these provisions is limited. Any action taken by the Community in this field is restricted to promoting cooperation between the Member States in various respects, including the mobility of students and teachers. Harmonisation is excluded explicitly. Though opening the possibility to take certain incentive measures in the field of education, the Treaty provisions in this area are based on the principle that the Member States retain responsibility for the content of teaching and the organisation of education systems.
49. I am not convinced that assistance granted for maintenance costs must still be regarded as falling outside the scope of Community law for the sole reason that such assistance must be regarded as an aspect of the 'organisation of education systems'. What is important in this context is that, although conferring limited powers on the Community institutions, these provisions do make it possible for the Community itself to adopt measures for facilitating the mobility of students, including the provision of financial assistance with maintenance costs. Not only is educational policy as such therefore now within 'the spheres entrusted to the Community institutions', this also applies to financial measures adopted to facilitate student mobility. In *Grzelczyk* the Court, too, attached importance to these developments since its judgment in *Brown*.<sup>30</sup>
50. The inclusion of these provisions on education is therefore indicative of the fact that the subject of assistance with maintenance costs now falls within the substantive scope of the EC Treaty. Furthermore, it is important that, in comparison with the situation in 1988 under the EEC Treaty, the EC Treaty grants fundamental rights to move and reside within the territory of the Member States not only to economically active nationals of the Member States, but also to nationals of the Member States who are not economically active. Certainly, the exercise of these rights has been made subject to limitations and conditions and to measures adopted to facilitate the exercise of

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<sup>30</sup> *Grzelczyk*, cited in footnote 16, at paragraph 35 of the judgment.

this right. As has repeatedly been emphasised by intervening parties, these include conditions relating to the financial independence of these economically inactive EU citizens. It does not follow from this, however, that social benefits of various kinds, including financial support for maintenance costs, fall by their nature outside the scope of the Treaty. In this respect I need only refer to the case-law on EU citizenship and social benefits, reproduced above. The directives adopted to facilitate the exercise of the rights granted by Article 18(1) EC may lay down rules concerning eligibility for benefits provided by the Member States or even excluding such eligibility, this does not place these benefits outside the scope of the Treaty.

51. Maintenance assistance has long been regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.<sup>31</sup> In *Lair* the Court observed that such assistance is particularly appropriate from a worker's point of view for improving his professional qualifications and promoting his social advancement.<sup>32</sup> In a more general vein, the Court considered in *Echternach and Moritz* that equal treatment as regards benefits granted to members of workers' families contributes to their integration in the society of the host country, in accordance with the aims of the freedom of movement of workers.<sup>33</sup> Where it is acknowledged that such a benefit comes within the scope *ratione materiae* of the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty.
52. Furthermore, it is important in this regard to point to the development of the case-law described above in respect of the rights adhering to EU citizenship under Article 18(1) EC since the Court's judgment in *Martínez Sala*. Not only are EU citizens entitled to equal treatment with nationals of the host Member State in which they are lawfully resident with respect to matters coming within the scope *ratione materiae* of the Treaty, citizenship itself may provide a basis for bringing certain matters within that scope where the objectives pursued by the national measure correspond with those pursued by the Treaty or secondary legislation as is apparent from the Court's judgment in *Collins*. The Court has already recognised that benefits of the kind at issue in this case contribute to the integration of the recipients in the society of the host Member State in accordance with the aims of free movement of workers. As the provisions on citizenship likewise aim to facilitate the free movement of economically inactive persons, this provides a further reason for considering that they come within the scope *ratione materiae* of the EC Treaty.
53. I therefore conclude that the first question referred by the High Court should be answered in the negative, i.e. that since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.

#### B – The second question: grounds for justifying differential treatment

54. By its second question the High Court asks the Court which criteria must be applied by the national court in determining whether the conditions governing eligibility for maintenance assistance are based on objectively justifiable conditions not dependent on nationality. This question is based on the premiss that the conditions laid down in the Student Support

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<sup>31</sup> *Lair* and *Brown*, both cited in footnote 2, at paragraph 24 and paragraph 25 of the judgments respectively.

<sup>32</sup> *Lair*, *ibid.*, at paragraph 23 of the judgment.

<sup>33</sup> *Echternach and Moritz*, cited in footnote 11, at paragraph 20 of the judgment.

Regulations in respect of eligibility of EU citizens, who do not enjoy worker status or a status which is derived from a worker, for maintenance assistance, constitute discrimination within the meaning of Article 12 EC.

55. In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies. I would only remark in this regard that where the eligibility conditions are more cumbersome for EU citizens who are lawfully resident in the United Kingdom than for British nationals, it is quite clear that this amounts to an indirect discrimination on grounds of nationality within the meaning of Article 12 EC. Consequently, it must be considered whether such a difference in treatment can be justified under Community law.
56. Bidar and the United Kingdom, Austrian and German Governments assert that a difference in treatment of this type may be justified by objective considerations which are unrelated to the nationality of the persons concerned and are proportionate to the legitimate aim of the national provisions. The United Kingdom, German, Austrian and Netherlands Governments and the Commission assert further that the Member States are entitled to ensure that there is a real link between the student and the Member State or its employment market or that there is a sufficient degree of integration in society. The Finnish Government refers in this regard to a permanent structural and real link with the society of the Member State of study. The United Kingdom submits that it is legitimate for a Member State to ensure that the parents of students have made or the students themselves are likely to make, a sufficient contribution through work and hence taxation to justify the provision of subsidised loans. Referring to Advocate General Ruiz-Jarabo Colomer's Opinion in *Collins*, the Austrian, German and Netherlands Governments add that the Member States have a legitimate interest in preventing abuse of their student support schemes. As to the proportionality requirement, various Governments and the Commission contend that a minimum period of residence is both necessary and appropriate. In order to determine what is an adequate period, they refer to the period of five years required for permanent residence laid down in Article 16 of Directive 2004/38.
57. I have already had the opportunity in my Opinion of 27 February 2003 in *Ninni-Orasche*<sup>34</sup> to express my views on the circumstances in which EU citizens enjoy equal treatment under Articles 18(1) and 12 EC in respect of obtaining financial support with study costs. The facts of that case were comparable to those of the present case, but differed as to the basis of the right of residence and the personal circumstances of the persons concerned. However, the legal assessment of the grounds of justification for differential treatment is essentially the same.
58. As the Court has held on various occasions<sup>35</sup> and as all parties having submitted written and oral observations state, inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and it is proportionate to the legitimate aim of the national provisions. In this respect the Court has recognised that it is legitimate for a national legislature to wish to ensure that there is a real link between the applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question.<sup>36</sup>

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<sup>34</sup> Case C-413/01 *Ninni-Orasche* 2003 ECR I-0000.

<sup>35</sup> See e.g. *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 36 and 66 of these judgments.

<sup>36</sup> See *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 38 and 67 of the judgments.

59. In both these cases the social benefits, the tideover allowance in the case of *D'Hoop* and the jobseeker's allowance in the case of *Collins*, were aimed at providing financial assistance to the beneficiaries either in the transition from education to employment or them otherwise genuinely seeking employment. In order to ensure that there was sufficient connection with the domestic employment market, the Court considered in *Collins* that a residence requirement is in principle appropriate, but that it must not go beyond what is necessary in order to attain that objective. The criteria used in applying this requirement must be clear, made known in advance and provision must be made for a means of redress of a judicial nature. Where a period of residence is required in order to be eligible, 'the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'.<sup>37</sup> In *D'Hoop* the Court found that the requirement that a school diploma be obtained in Belgium in order to be eligible for the tideover allowance was 'too general and exclusive in nature', as 'it unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for that benefit and the geographic employment market, to the exclusion of all other representative elements'.<sup>38</sup>
60. In the case of maintenance assistance for students, be it in the form of a subsidised loan or a grant, the real link to be established is not primarily with the employment market of the host Member State, although that may be an aspect which may be taken into consideration. Rather, this link is to be found in the degree of affinity which the applicant for this assistance has with the educational system and the degree of his integration into society.<sup>39</sup> It would seem to me that where an EU citizen has followed his secondary education in a Member State other than that of which he is a national, which is more adapted to preparing him for entry to an establishment of higher or tertiary education in that Member State than elsewhere, the link with the education system of the host Member State is evident. In assessing the degree of integration, the individual circumstances of the applicant must necessarily be taken into account. As far as this is concerned, it should be emphasised that the situation of an EU citizen who has come to another Member State as a minor, as the dependant of another EU citizen, must be distinguished from EU citizens who have moved to another Member State as adults making their own choices. The chances that an EU citizen in the situation of *Bidar* has integrated into society as a young person, having lived there under the legal guardianship of his grandmother, who was already settled in the United Kingdom, and having followed secondary education in the host Member State, surely must be deemed to be greater than EU citizens arriving at later stages of life.
61. Obviously a Member State must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In this respect, and as the Court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection under the conditions set out in that judgment and cited in paragraph 59 above. It may be inferred from these conditions that the Court recognises that a residence requirement may be imposed as a starting point of the assessment of the situation of an individual applicant. The fact that it states that the period must not exceed what is necessary for the purpose of enabling the national authorities to satisfy themselves that a person is genuinely seeking work in the domestic employment market, indicates, however, that other factors must be able to be taken into account in that assessment. This is further borne out by its consideration in *D'Hoop* that the single condition applied by the national authorities in that case was too general and exclusive and that no account could be taken of other representative factors. Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a person, who can

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<sup>37</sup> *Collins*, *ibid.*, at paragraph 72 of the judgment.

<sup>38</sup> *D'Hoop*, *ibid.*, at paragraph 39 of the judgment.

<sup>39</sup> Cf. for children of workers, *Echternach and Moritz*, cited in footnote 11 at paragraph 35 of the judgment.

demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, this result would be contrary to the principle of proportionality.

62. Additional factors which could be taken into account in a case such as the present one are the need for ensuring continuity in the education of the applicant,<sup>40</sup> the likelihood that he indeed will enter the national employment market and the possibility that he may not be eligible for maintenance assistance from other sources, such as the Member State of which he is a national as he no longer fulfils the eligibility criteria in that Member State.
63. It may also be recalled in this connection that the Court, in the context of Regulation No 1612/68, has stated that the freedom of workers must be guaranteed in compliance with the principles of liberty and dignity and the best possible conditions for the integration of the Community worker's family in the society of the host country.<sup>41</sup> There is no reason why this general principle should not apply in the context of the free movement of EU citizens as well.
64. All governments intervening in this case and the Commission point out that, according to Article 24(2) of Directive 2004/38, the Member States are not obliged to grant maintenance aid for studies to economically inactive EU citizens prior to acquisition of permanent residence. This status is only achieved after five years of continuous residence in the host Member State. Leaving aside that this directive entered into force on 30 April 2004, i.e. after the facts in the present case arose, and that it must be transposed by 30 April 2006, it would seem to me that in applying this condition, the fundamental rights conferred directly by the EC Treaty on EU citizens must be fully respected. This implies that the considerations set out above in respect of applying a residence requirement in individual cases are valid in respect of the application of a settlement requirement such as that contained in the Student Support Regulations and that account must be taken of all relevant factors in determining whether or not a genuine link exists with the educational system and the society of the host Member State. I do not consider that this amounts to an undermining of the requirement adopted by the Community legislature. Rather it is necessary to ensure that this requirement is applied in conformity with the fundamental provisions of the EC Treaty.
65. The United Kingdom Government contends that it is legitimate for a Member State to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted. This argument suggests that there is a direct or indirect link between the obligation of residents of a Member State to pay taxes and the entitlement to benefits of the kind at issue in the present case. If it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom seriously would accept the social discrimination inherent to this position. Furthermore, as it is loans which are at issue here, it is illogical to require that a person has first contributed to public finances in order to be eligible for a loan which he thereafter must repay even though there is an element of subsidy in the terms for granting this loan. This ground for justification therefore is inherently contradictory
66. Finally, it was submitted by various intervening Governments that the Member States have a legitimate interest in preventing abuse of their student support schemes and in preventing 'benefit tourism'. I do consider that this is indeed a legitimate concern of the Member States, but the

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<sup>40</sup> *Echternach and Moritz*, *ibid.*, at paragraph 22 of the judgment.

<sup>41</sup> See *Di Leo*, cited in footnote 13, at paragraph 13 of the judgment; *Baumbast*, cited in footnote 21, at paragraph 50 and 59 of the judgment, and Case C-356/98 *Kaba* [2000] ECR I-2623 at paragraph 20.

manner in which this should be ensured should not be such as to undermine the fundamental rights of EU citizens residing lawfully within their territory. A simple residence requirement is too non-selective for achieving this aim. In my view it can be achieved adequately in the context of establishing whether or not an applicant has a genuine link with the national education system or society as set out above.

67. These considerations lead me to the following conclusion: where the result of the application of a settlement requirement, such as that laid down in the Student Support Regulations, to an EU citizen, who is sufficiently integrated into society in the host Member State, whose education is closely linked to the education system in the Member State and who is in a comparable situation to a national of the host Member State, is to deny that EU citizen access to assistance with maintenance costs, this amounts to an unjustified discrimination within the meaning of Article 12 EC in conjunction with Article 18(1) EC. In those circumstances, the result of the application of such a settlement requirement is not in proportion with the aim it seeks to achieve, i.e. that maintenance assistance is granted to those who have a genuine link with the national educational system.
68. In the light of the foregoing observations the following answer must be given to the second question. Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

[...]

## **VI – Conclusion**

73. I am, therefore, of the opinion that the Court should give the following answers to the questions referred by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court):
- (1.) Since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.
- (2) Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.
- (3) Article 12 EC may only be relied upon to claim entitlement to assistance with maintenance costs from the date of the judgment of the Court except in cases where legal proceedings were already initiated for the same purpose prior to that date.

[...]

### 3 FURTHER READING

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- O' Leary, S (1999a) 'Putting Flesh on the Bones of European Union Citizenship' 24 ELRev. 68.
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- Wilkinson, B (1995) 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union' 1 EPL 417.