Free Movement, Equal Treatment, and Citizenship of the Union

Robin Ca White

International and Comparative Law Quarterly / Volume 54 / Issue 04 / October 2005, pp 885 - 905
DOI: 10.1093/iclq/lei041, Published online: 17 January 2008

FREE MOVEMENT, EQUAL TREATMENT, AND CITIZENSHIP OF THE UNION

ROBIN CA WHITE*

I. INTRODUCTION

The prohibition of discrimination, at least on grounds of nationality, has always been a constitutional principle of Community law.[1] Such discrimination can take many forms, since Community law prohibits not only direct discrimination but various forms of indirect discrimination.[2] Furthermore, the Court of Justice has indicated that where discrimination on grounds of nationality is in issue, the requirement of proof is not a heavy one on the complainant. All that is needed to place the burden on the respondent to justify the potentially differential treatment is that complainants show that the requirement applied to them is intrinsically likely, or susceptible by its very nature, to affect them adversely in comparison with the State's own nationals.[3] The modern formulation of the prohibition of discrimination recognizes that protection from discrimination on grounds of nationality is central to the concept of citizenship of the Union. Advocate General Jacobs has said:

> Freedom from discrimination on grounds of nationality is the most fundamental right conferred by the treaty and must be seen as a basic ingredient of Union citizenship.[4]

The Court of Justice has repeatedly stated that citizenship of the Union 'is destined to be the fundamental status of nationals of the Member States'.[5]

* Professor of Law and member of the Centre for European Law and Integration, University of Leicester.

[1] See Art 6 of the EEC Treaty, now Art 12 of the EC Treaty: 'Within the scope of application of this Treaty . . . any discrimination of grounds of nationality shall be prohibited.' Discrimination on grounds of sex has also always been a part of the Treaty framework, and more recently the EC Treaty has addressed, through Art 13, other forms of discrimination. See generally A Dashwood and S O'Leary *The Principle of Equal Treatment in European Community Law* (Sweet & Maxwell London 1997); M Bell *Anti-Discrimination Law and the European Union* (Hart Publishing Oxford 2002); and A van der Mei *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (OUP Oxford, 2003).

[2] Sometimes referred to as overt and covert discrimination.

[3] Case C-297/94 *O'Flynn* [1996] ECR I-2617. See also the discussion of the standard by Lord Slynn of Hadley in the English Court of Appeal in *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, at paras 17–24.

[4] Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para 24 of the Opinion.

[5] See, eg Case C-184/99 *Grzelczyk,* [2001] ECR I-6193, para 31 of the judgment; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82 of the judgment; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 22 of the judgment; Case C-200/02 *Zhu and Chen,* Judgment of

[*ICLQ* vol 54, October 2005 pp 885–906] doi: 10.1093/iclq/lei041
wyt@leicester.ac.uk

Following the introduction of citizenship of the Union, the right to move and reside in the Member State of choice has become a constitutional right flowing from the status of citizenship of the Union. In a case concerning the citizenship rights of a young child, the Court of Justice has said:

> As regards the right to reside in the territory of the Member States provided for in Article 18(1) EC, it must be observed that that right is granted directly to every citizen of the Union by a clear and precise provision of the Treaty. Purely as a national of a Member State, and therefore as a citizen of the Union, [the child] is entitled to rely on Article 18(1) EC. That right of citizens of the Union to reside in another Member State is recognised subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect (see, in particular, *Baumbast and R,* paragraphs 84 and 85).[6]

It is the argument of this article that there are two key incidents of citizenship of the Union. The first is the right to be free from immigration control in all the Member States. The second is the right for all citizens of the Union to be treated equally with nationals of the host Member State when lawfully present in that Member State. To what extent does the current state of Community law justify these propositions?

II. THE RIGHT TO BE FREE FROM IMMIGRATION CONTROL

It is not the thesis of this article that there is no distinction between the nationals of the various Member States; nationality of one of the Member States and citizenship of the Union remain different concepts. The rights of a citizen of the Union who is not a national of a particular Member State are not the same as those of a national of that State. For example, under Community law a non-national who is a citizen of the Union can be excluded or expelled from the territory of a Member State on grounds of public policy, public security or public health,[7] whereas such exclusion or expulsion is not, under international law, open to the State of which a person is a national. The issue is therefore how close the rights of citizens of the Union against a Member State are, in terms of their being subject to immigration control, when compared with the position of nationals of that State.

The case can be made that citizens of the Union are *essentially* free from immigration control in moving around the territory of the Member States. This is because of the range of rights citizens of the Union have to travel to, stay in, and reside in, other Member States under Community law as a constitutional right flowing from their status as citizens. [8]

19 Oct 2004, para 25 of the judgment; and Case C-209/03 *Bidar,* Judgment of 15 Mar 2005, para 31 of the judgment.

[6] Case C-200/02 *Zhu and Chen,* Judgment of 19 Oct 2004, para 26 of the judgment.

[7] Art 39(3) EC; Art 46; and Art 55.

[8] See generally E Spaventa 'From *Gebhard* to *Carpenter:* Towards a (Non)economic European Constitution' (2004) 41 CMLRev 743.

A citizen can travel freely as a tourist or other recipient of services, or as a provider of services. A citizen of the Union engaged in employment or self-employment has a very significant bundle of rights flowing from the EC Treaty and its secondary legislation. A citizen of the Union can travel to and reside in another Member State, subject to fairly minimal conditions, as a student, retired person, or person of independent means. A citizen of the Union can travel to and stay in a Member State for a limited period in order to look for work.

The Citizenship Directive,[9] which must be implemented by the Member States by 30 April 2006, largely recasts the provisions of the repealed directives in the language of residence entitlements. Hence, the structure of the Citizenship Directive supports the view that citizens of the Union are largely free from immigration control. The first preambular paragraph broadly repeats Article 18 EC, while the second preambular paragraph refers to the free movement of persons as one of the fundamental freedoms of the internal market. The third preambular paragraph, echoing the mantra used by the Court of Justice in recent cases, provides:

> Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

The structure of the Citizenship Directive and its abolition of the Community residence permit for nationals of the Member States[10] indicate that it is much more concerned with liberating citizens from immigration control than with the categorization of the economic activity which provides the entitlement to rights to enter and reside in a Member State other than that of the citizen's nationality. The directive also makes provision for the first time for the acquisition of a right of permanent residence which is not linked to the pursuit of economic activity.[11]

The argument that citizens of the Union are essentially free from immigration control could not have been maintained with quite this vigour prior to the

[9] Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr 2004 on the right of citizens of the Union and their families 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, 72/192/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC [2004] OJ L158/77, corrected at [2004] OJ L229/35, referred to in this article as 'the Citizenship Directive'. Note that the corrigendum states the number of the Directive as 58 in error; other language editions retain the number 38.

[10] A document certifying permanent resident status is introduced in Chapter IV of the Citizenship Directive, but this is not a replacement of the 'old' residence permit referred to in Art 4 of Directive 68/360/EEC.

[11] Chapter IV of the Citizenship Directive; acquisition of this status is conditional on having resided legally for a continuous period of five years in the host Member State.

Court's judgment in the *Baumbast* case.[12] The ruling in the *Baumbast* case is that Article 18 EC is capable of giving rise to direct effect, and contains rights which fill in gaps in the scheme set up in Title III of the EC Treaty. The Court said:

> 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 institutions and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with general principles of Community law and, in particular, the principle of proportionality.[13]

In the *Baumbast* case, the Court downplays the significance of the need for engagement in economic activity in order to trigger the right to move and reside in the Member State of choice; the need for economic activity has been subordinated to a general right to move and reside without being subject to immigration control which flows from the status of citizen of the European Union.[14]

An even more dramatic example of the de-coupling of the requirement of economic activity for residence rights is provided in the *Zhu and Chen* case.[15] Mr and Mrs Chen are Chinese nationals; they were living in the United Kingdom. They planned matters so that their second child, a girl, was born in Belfast; the purpose was to enable her to acquire Irish nationality. The child duly obtained an Irish passport attesting her Irish nationality, since the Republic of Ireland allowed any person born in the whole of the island territory to acquire Irish nationality. The essential question put to the Court of Justice was whether the child's status as a citizen of the Union entitled her to reside in the United Kingdom under Community law and whether her mother, a third country national, could also reside with the child there in order to care for her as a parent. The Court's answer in respect of the child was:

> Article 18 and Directive 90/364 confer on a young minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in that State.[16]

[12] Case C-413/99 *Baumbast and R* [2002] ECR I-7091. See M Dougan and E Spaventa 'Educating Rudy and the non-English patient: A double bill on residency rights under Article 18 EC' (2003) 28 ELRev 699; see also O Golynker 'Partial Migration in the EU after the *Baumbast* case: Bringing Social and Legal Perspectives Together' (2004) 15 KCLJ 367.

[13] Para 94 of the judgment.

[14] See, eg para 83 of the judgment.

[15] Case C-200/02 *Zhu and Chen,* Judgment of 19 Oct 2004.

[16] Para 41 of the judgment.

The Court also ruled that the mother also had a right to reside in the United Kingdom under Community law, since otherwise the child's right to reside would be deprived of any useful effect.

It must, however, be acknowledged that there are a number of factors which counter the proposition that citizens of the Union are free from immigration control when moving within the territories of the Member States. Both Article 18 EC and the judgments of the Court of Justice in the *Baumbast* and *Zhu and Chen* cases, as well as the Citizenship Directive, refer to limitations and conditions provided in the EC Treaty.

This is also reflected in the way in which citizenship of the Union is presented in the Treaty establishing a Constitution for Europe.[17] Article I-10 provides:

> 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) ….
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted under it.

There are restrictions on employment and self-employment by reason of the nature of the activity which reserve certain sectors of employment and self-employment for a Member State's own nationals. There is the exclusion of employment in the public service in Article 39(4) EC, and the exclusion of activities involving the exercise of official authority in Article 45 EC. While the existence of such exceptions might be regarded as problematic in the era of citizenship of the Union,[18] it is the argument of this article that they do not operate in a manner which subjects nationals of other Member States to immigration control. There is merely a limitation in the range of activities which may be undertaken other than by nationals of the host Member State. It can therefore be argued that, rather than affecting their rights of entry and residence, they are limitations on the activities which citizens can undertake while resident in a Member State other than that of their own nationality. As such it can be argued that the restrictions are more concerned with equality of treatment than limitations on rights of entry and residence.

[17] Signed on 29 Oct 2004, [2004] OJ C310/1. Though there is no difference of substance, there is a difference in emphasis in the way in which the rights are presented.

[18] The areas reserved for nationals of the host Member State can vary enormously. Note, for example, that provisions of the Police Reform Act 2002 make provision for the removal of the requirement of British nationality as a requirement to serve as a police officer. Furthermore, service in the armed forces in the United Kingdom is open to Commonwealth citizens who have been resident for a requisite period in the United Kingdom. See further R White *Workers, Establishment and Services in the European Union* (OUP Oxford 2004) ch 5.

The limitations justified on grounds of public policy, public security and public health are rather more problematic. These do mean that, where the existence of such grounds can be established, having regard to the requirements of Community law,[19] a Member State can refuse entry to, or expel, a national of another Member State. This is not something a Member State can do in respect of its own nationals. The existence of these exceptions means that persons in the territory of the host Member State are treated more as privileged aliens than as persons sharing the rights of citizens of the host Member State by virtue of their shared citizenship of the Union. However, the use of the limitations is not simply a matter for the discretion of the host Member State. The exceptions are narrowly conceived. The grounds have been more and more closely defined.[20] The test of proportionality is of major importance in determining whether it is appropriate to exclude or expel someone. So, it was not open to Greece to exclude Donatella Calfa from Greece for life when she was convicted of possession of illegal drugs which were exclusively for her personal use, while on holiday in Crete.[21] It has never been open to a Member State to use the limitations to serve economic ends.[22]

The trend of narrowing the application of the limitations on grounds of public policy, public security and public health can be seen in the provisions of Article 28 of the Citizenship Directive. This requires the presence of *serious* grounds of public policy or public security to be established where citizens of the Union and their families have a right of permanent residence under the directive.[23] Where citizens of the Union have resided in the host Member State for the previous ten years, expulsion is only available where there are *imperative* grounds of public policy or public security which justify this.[24] There are, of course, likely to be references to the Court of Justice on the distinction between 'ordinary' grounds of public policy and public security, and both 'serious' and 'imperative' grounds. It is nevertheless quite clear, in the context of the current case law on these exceptions, that only the most serious matters will justify exclusion.

The exposition so far has tended to treat the right to enter and to reside without distinction. But there are important points of distinction to which attention should be drawn. At the point of entry there is a very wide right. For

[19] Including in due course the restatement of the elaboration of the exceptions in the Citizenship Directive which will replace the provisions of Directive 64/221/EEC in 2006.

[20] Note in particular, Commission Communication to the Council and the European Parliament on the Special Measures concerning the Movement and Residence of Citizens of the Union which are Justified on Grounds of Public Policy, Public security or Public health, COM(1999) 372 of 30 July 1999. See further R White *Workers, Establishment and Services in the European Union* ch 5.

[21] Case C-348/96 *Calfa,* [1999] ECR I-11. She was sentenced to three months' imprisonment and lifelong exclusion from Greece. See also Arts 27(2) and 32 of the Citizenship Directive.

[22] Art 2(2) of Directive 64/221/EEC and Art 27(1) of the Citizenship Directive.

[23] The right of permanent residence arises when citizens of the Union have 'resided legally for a continuous period of five years in the host Member State': Art 16(1).

[24] Art 28(3) of the Citizenship Directive.

those countries which participate in the Schengen arrangements, there will be no border controls. However, the right to reside is more limited. It is conditional in those cases where the person is not engaged in economic activity on meeting the requirements of the relevant directive.[25] The condition is that citizens must be able to support themselves without recourse to public funds. Even here, decisions of the Court of Justice which require equality of treatment with nationals of the host Member State have eroded the significance of some of those conditions.[26] It is also possible to claim a right to enter and reside arising directly from Article 18 EC, though here there is also a requirement of self-sufficiency. The requirement that citizens of the Union are not an unreasonable burden on the public finances of the host Member State has led to suggestions that the right to reside is lost at the point at which self-sufficiency comes to an end. However, the *Grzelczyk* case[27] imposes limitations on the ability of the host Member State to terminate the right of residence flowing from citizenship because the Court of Justice imposes a condition of proportionality on such a drastic step, which requires the decision to be taken in the light of all the surrounding circumstances. By implication, this includes consideration of the extent to which the citizen is integrated into the host Member State, and the consequences for him or her of deportation from the host Member State.

An issue which arose in both the *Trojani* case[28] and the *Bidar* case[29] concerned the status of a non-national's residence. The issue essentially related to the evidence available to establish the legal basis of a person's residence in a particular Member State. For the Schengen countries, there is no control on entry, and so presumably the status of citizens residing in a country other than that of their own nationality will have to be determined by looking at all the circumstances of the case, including any administrative system operating within the State of residence.

The difficulty is rather more marked in non-Schengen countries, and can be illustrated by reference to United Kingdom practice. There is a practical difficulty concerning national decision-making in relation to entry to the United Kingdom, which may well be replicated in some other Member States. Many who enter and reside do so on production of their passports at a port of entry in a line reserved for nationals of the European Union, European Economic Area, and Switzerland. On production of a passport to an immigration officer in order to establish identity as a national of one of the privileged countries,

[25] On students, retired persons or persons of independent means, all of which are consolidated into the Citizenship Directive.

[26] See below.

[27] Case C-184/99 *Grzelczyk* [2001] ECR I-6193. See also Case C-456/02 *Trojani,* Judgment of 7 Sept 2004; and Case C-215/03 *Oulane,* Judgment of 17 Feb 2005.

[28] Case C-456/02 *Trojani,* Judgment of 7 Sept 2004.

[29] Case C-209/03 *Bidar,* Judgment of 15 Mar 2005.

individuals are waved through without any formal decision as to their status being made.[30] A formal decision as to status is only likely to be made if some event triggers the need for one, or if the migrant makes an application to the immigration authorities for recognition of some more formal status. Yet much can turn on the legal basis for the right to enter and reside. It might be possible to say that where a citizen of the European Union enters another Member State, that citizen's right to reside arises under Article 18 EC unless there is some evidence to the contrary. Alternatively, it might be possible to argue that there is a presumption that admission of a citizen of the European Union admitted to another Member State gives rise to lawful residence under national law in the absence of evidence to the contrary. What is deeply unsatisfactory is a situation in which it is unclear whether residence in the United Kingdom (or, indeed, any other Member State) arises under national law or Community law, or both.

In the *Bidar* case, the Court does not address specifically the residence status of Bidar in the United Kingdom, but proceeds on the basis that he has a community right to reside as a student.

In the *Trojani* case, the Court of Justice ruled that Trojani, a single man of French nationality living in Belgium in a hostel, had no Community right to reside, but that he did appear to have been lawfully resident under Belgian law for some time.[31] This would be sufficient to bring the equal treatment requirements of the Treaty into play in terms of his entitlement to the minimex.[32] In the absence of clear evidence of fraud or improper purpose[33] at the point of entry, it may be difficult for a Member State to show that residence is unlawful under national law where there has been actual residence for a certain amount of time.

Before turning to the second core right which it is argued attaches to citizenship of the Union, it is appropriate to make a few remarks about enlargement of the Union in the context of the right to be free from immigration control. This is justified not only because of the importance of the entry of ten new Member States into the Union, but also because the May 2004 enlargement has been characterized by some intense nervousness about the free movement of persons and the possible migration patterns which might be seen in a Union of 25.

All enlargements have been accompanied by some transitional provisions, and there is nothing new in having transitional provisions relating to the free

[30] Of course, in many cases Community law precludes any suggestion that leave to enter under national immigration law is involved, but Community law does permit administrative checks or enquiries to be made.

[31] Since it appeared that any right of residence arose under national law, the Luxembourg Court left the determination of his precise status for determination by the referring court.

[32] See below.

[33] And it is now well established that using Community law to your advantage does not count as an improper purpose: see Case C-109/01 *Akrich,* Judgment of 23 Sept 2003 [2003] 3 CMLR 26.

movement of workers.[34] A transitional period of seven to ten years for the free movement of workers provisions was put in place when Spain and Portugal joined. The full operation of the Treaty provisions was, in fact, achieved in six years. The May 2004 enlargement initially raised worries in the so-called front-line States who were concerned that geographical proximity, considerable variations in earnings levels, differential levels of unemployment, and a greater propensity for labour migration might result in flows of people which would be difficult to manage. So there is a two-plus-three-plus-two-year transitional arrangement,[35] except in the cases of Cyprus and Malta, where the full Treaty provisions on the free movement of workers apply immediately. Until 1 May 2006, Member States may choose to apply national rules to the admission of workers from the new Member States. After this initial two-year period, the Commission will report on migration patterns and the Fifteen will be required to define their position from 1 May 2006 on the application of the rules on the free movement of workers. The hope is that the labour market will be opened up; those countries applying the Treaty rules would for a period of three years be able to apply for safeguard measures in the event of their experiencing serious and unexpected disturbances of the labour market.[36] From 1 May 2009, those current Member States still applying national rules would be called upon to open up their labour markets subject to the possibility of seeking safeguard measures to address serious and unexpected disturbances of their labour markets. From 1 May 2011 full operation of the Treaty provisions must be applied in all Member States. No Member State may introduce measures relating to the free movement of workers that is more restrictive than the position as at 1 May 2004.

The limitation of the transitional arrangements to the free movement of *workers* means that there is an immediate right to entry and residence for those exercising the right of establishment, or the right to provide or receive services, or as students, retired persons or persons of independent means. The way was paved for the application of the provisions on freedom of establishment by provisions of the Europe Agreements, though the entry of persons meeting the requirements of those Agreements arose under national law rather than Community law.

Although it might be argued that the existence of transitional arrangements in relation to enlargements and the free movement of workers weakens the case for arguing that citizenship of the Union entails freedom from immigration control within the Member States, this represents only a postponement of

[34] See A Adinolfi 'Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures' (2005) 42 CMLRev 469.

[35] These arrangements apply both to the new Member States and to the existing Member States, though it is anticipated that the new Member States will take a more liberal approach to the application of the Treaty provisions than the existing Member States.

[36] Malta may make such an application during the period of seven years beginning on 1 May 2004.

full rights in relation to certain movements of people and does not defeat the argument. It should also be noted that, if a national of one of the new Member States is admitted as a worker, then their residence will be lawful. Even if that is lawful residence under national law,[37] then the ruling in the *Trojani* case establishes that a right to equal treatment arises under Community law with nationals of the host Member State. This may be very helpful to a national of one of the accession countries who falls on hard times.[38]

In summary, it is argued that none of the limitations or exceptions to the right of citizens of the Union to enter and reside in a Member State other than that of their own nationality constitutes their being subject to immigration control. Though engagement in economic activity arguably still gives citizens a greater bundle of rights,[39] and more security, the limitations which apply to those not engaged in economic activity have been significantly reduced in their effect by the case law of the Court of Justice, and will be further reduced when the Citizenship Directive comes into effect. We are very close to the position in which all citizens of the Union are free from immigration control when moving within the territory of the Member States.

III. THE RIGHT TO EQUAL TREATMENT

The second incident of citizenship of the Union is the right of citizens of the Union who are not nationals of the host Member State to be treated on an equal footing with nationals of that Member State.

Article 24 of the Citizenship Directive provides a good starting point; it is entitled 'Equal treatment':

> 1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.
>
> 2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans, to persons other than workers, self-employed persons, persons who retain such status and their families.

[37] It is unclear whether residence in such circumstances arises under national law or community law.

[38] See R White 'Residence, Benefit Entitlement and Community Law' (2005) 12 JSSL 10.

[39] The rights are explicitly defined in the EC Treaty and Community secondary legislation.

The first sentence of the first paragraph already needs qualification having regard to the decision of the Court of Justice in the *Trojani* case.[40] This made it clear that entitlement to equal treatment under community law could flow from lawful residence for a certain time under national law. The rights referred to in Article 24(1) accrue to this group in addition to those 'residing on the basis of this Directive'.

Before considering the citizenship line of cases, some brief observations will be offered on those provisions of Regulation 1612/68[41] and Regulation 1408/71[42] which concern the social protection of citizens of the Union. Regulation 1612/68 confers benefits on workers, though the Court of Justice tells us in the *Collins* case[43] that the meaning of 'worker' varies in the context of the provision of this Regulation. However, for Part II of the Regulation, the beneficiaries are those who have actually found work, and work seekers are excluded.[44] There are specific applications of the prohibition of discrimination in Article 1(2) on eligibility for employment; in Article 7 on conditions of employment, and in the availability of social and tax advantages;[45] in Article 8 on trade union rights; and in Article 9 on access to housing. Article 42 of the Regulation provides:

> This Regulation shall not affect measures taken in accordance with Article 51 of the Treaty.[46]

It is the view of the United Kingdom Government[47] that where Regulation 1408/71 applies, Regulation 1612/68 has no application. It follows, according to this argument, that in such circumstances, the benefit the claimant is seeking does not amount to a social or tax advantage within Regulation 1612/68 if it falls within Regulation 1408/71. In the *Bobezes* case, the English Court of Appeal refused to elaborate on the relationship between the two regulations despite Counsel for the Department of Work and Pensions 'forcefully contending that it is essential that the court should decide under which of the two regulations this question has to be resolved.'[48] The case concerned entitlement to a child addi-

[40] Case C-456/02 *Trojani,* Judgment of 7 Sept 2004.

[41] Council Regulation 1612/68/EEC of 15 Oct 1968 on freedom of movement for workers within the Community [1968] II OJ Eng Sp Ed 475, as amended.

[42] Council Regulation 1408/71/EC of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to member of their families moving within the Community, see consolidated text incorporated in Council Regulation 118/97/EC [1997] OJ L28 (as further amended).

[43] Case C-138/02 *Collins* [2004] ECR I-2703.

[44] See also Case 316/85 *Lebon,* [1987] ECR 2811. However, those excluded as work seekers may be able to rely on the citizenship line of cases discussed below in order to gain access to social assistance.

[45] On social and tax advantages, see generally E Ells 'Social advantages: a new lease of life?' (2003) 40 CMLRev 639.

[46] Now Art 42 EC. The legal base of Regulation 1408/71 is Art 51 (now 42) EC.

[47] See *Secretary of State for Work and Pensions v Bobezes,* [2005] EWCA Civ 111, at para 12 of the Judgment.

[48] ibid.

tion as part of a means-tested benefit payable to a retired worker. The English Court of Appeal concluded that, since both parties conceded that the prohibition of discrimination in Article 3 of Regulation 1408/71 applied, there was no need to respond to the question about the relationship of the two regulations.[49]

Regulation 1408/71 contains an important set of rules enabling differing social security systems to work together to ensure that there is no disadvantage to those exercising their rights of free movement. Its personal scope has been considerably widened over time, so that it now covers all those who have been subject to the social security legislation of any Member State. It contains a prohibition on discrimination in Article 3, though this will only apply where the benefit in issue is within the material scope of the Regulation.[50] This excludes social and medical assistance, and benefit schemes for victims of war or its consequences.[51]

It was the *Martínez-Sala* case[52] which first hinted that citizenship of the Union may bring new rights. The referring court had conceded that Maria Martínez-Sala's residence as a Spanish national in Germany was lawful. The Court of Justice ruled that this entitled her to equal treatment with nationals in relation to entitlement to social assistance. There was, however, some feeling that the case might have turned on its special facts and the finding of fact by the referring court of her long-standing lawful residence in Germany.

The *Grzelczyk* case[53] established that the decision in the *Martínez-Sala* case was not a flash in the pan. Grzelczyk was a French national who was studying in Belgium. He seems to have supported himself for the first three years of his course. During this time he seems to have done some part-time work, though this does not appear to be material to the Court's decision; he was not regarded as being a worker. However, in his fourth year he experienced financial strains, and applied for social assistance. This was initially granted, but when the social assistance agency sought reimbursement from the relevant central authority in Belgium, it was refused because Grzelczyk was not a Belgian national. The Court notes that, from the file submitted by the national court, it is clear that the national court had concluded that Grzelczyk was not a worker within the meaning of Article 39 EC. The question the Court of Justice addresses is whether the Belgian authorities could make entitlement to social assistance conditional on a national of another Member State having

[49] The Social Security Commissioner, whose decision had been appealed to the Court of Appeal, had concluded that the claimant was entitled to rely on Art 7(2) of Regulation 1612/68 notwithstanding that his claim also fell within Regulation 1408/71: see *CIS/825/2001*.

[50] For a summary of the provisions of the regulation, see R White *Workers, Establishment and Services in the European Union* chap 9.

[51] Regulation 1408/71, Art 4(4).

[52] Case 85/96 *Martínez-Sala* [1998] ECR I-2691; see S O'Leary 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68.

[53] Case C-184/99 *Grzelczyk,* [2001] ECR I-6193; see also C Jacqueson 'Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship' (2002) 27 ELRev 260. See also Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

the status of worker, when no such conditions applied to their own nationals. The Court noted that this was prima facie discrimination on grounds of nationality which is prohibited by the Treaty. The Court said that Article 12 EC must be read in conjunction with the provisions of the EC Treaty on citizenship of the Union. The Court goes on:

> 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.[54]

A few paragraphs later, the Court says:

> 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.[55]

Directive 93/96/EEC[56] on the free movement of students indicates that they are not entitled to maintenance grants, but does not 'preclude those whom it applies for receiving social security benefits' on equal terms with nationals of the Member State of residence. It would follow that students who start a course not needing to have recourse to public funds, are not precluded from making a claim if their circumstances change. Nor, it seems, do they lose their status as students entitled to reside in the host Member State; such rights flow both from the directive on students and from citizenship of the Union.[57] This is a significant enhancement of the position of citizens of the Union resident in a country other than that of their own nationality. Equality of treatment in all matters is required unless there is some exception applicable to their circumstances. This moves the case law on from the earlier decisions.

This trend can be seen in the recent decision of the Court of Justice in the *Collins* case.[58] The case concerned a citizen of the Union who was not a worker within the meaning of Article 39 EC and Regulation 1612/68, and whose right to reside did not flow from Directive 68/360. Despite this, his status as a citizen of the Union meant that he had a right to equal treatment; any national legislation which made entitlement to a social security benefit conditional on meeting residence requirements would only be lawful if such requirements could be justified on the basis of objective considerations independent of the

[54] Para 31 of the judgment.

[55] Para 35 of the judgment.

[56] Council Directive 93/96/EEC of 29 Oct 1993 on the right of residence for students [1993] OJ L317/59, as amended; see [1995] OJ L1/1.

[57] Art 18(1) EC gives an independent right to reside subject on the limitations and conditions in the Treaty and in the measures to give effect to it. In the *Grzelczyk* case, the Court limited the circumstances in which a Member State can deprive a person of an entitlement arising under the directive on students.

[58] Case C-138/02 *Collins* [2004] ECR I-2703. For the decision of the Social Security Commissioner on the reference back to the national court, see *CJSA/4065/1999,* decision of 4 Mar 2005.

nationality of the persons concerned.[59] Furthermore the application of the residence requirements must 'rest on clear criteria known in advance'.[60]

The *Trojani* case[61] is particularly instructive. Trojani was a single man of French nationality. He clearly fell on hard times. He was living in a Salvation Army hostel in Belgium under an arrangement where he undertook various jobs for the hostel as part of a personal rehabilitation scheme, in exchange for which he received board and lodging and an allowance of €25.00 per week. He claimed the minimex.[62] His claim was refused on the grounds that he was not a Belgian national. Trojani brought proceedings before the Labour Court in Brussels to challenge this refusal. That Court referred questions to the Court of Justice. For our purposes the most important question is the second one referred to the Court,[63] which essentially concerned the possible entitlement of Trojani to the minimex as a person exercising his right to reside in Belgium as a citizen of the European Union. The Advocate General concluded that it was open to Belgium to deny Trojani a right of residence because he did not have the means to support himself. The Court was a little more circumspect. Referring to the ruling in the *Baumbast* case, the Court indicated that it would not be disproportionate to deny Trojani a right of residence on the basis that he did not have the means to be self-sufficient. In other words, he had no *Community* right to reside. But the Court went on to note that he may have a right to reside under *national law*, since he had been issued with a residence permit under national law by the municipal authorities in Brussels. The Court made three points:[64]

(a) Social assistance falls within the scope of the EC Treaty.
(b) A citizen of the Union who is not economically active may rely on the prohibition of discrimination on grounds of nationality where he has been 'lawfully resident' in the host Member State 'for a certain time or possesses a residence permit'.[65]
(c) Restricting entitlement to social assistance to the nationals of the host Member State constitutes discrimination on grounds of nationality contrary to Article 12 EC.

It would follow that, if the national court concludes that Trojani was 'lawfully resident' in Belgium under *national law*, then the prohibition of discrimination in Community law would be engaged, and the restriction of entitlement to the minimex to Belgian nationals in the circumstances of this case would breach the equality provisions of the EC Treaty.

[59] Case C-138/02 *Collins,* para 73 of the judgment.
[60] Para 72 of the judgment.
[61] Case C-456/02 *Trojani,* Judgment of 7 Sept 2004.
[62] The minimum subsistence allowance in Belgium.
[63] The first concerned whether Trojani was a worker.
[64] Case C-456-02 *Trojani,* Judgment of 7 Sept 2004, paras 41–6.
[65] ibid, para 43 of the judgment.

The expanding role of equal treatment is most recently illustrated by the Court's judgment in the *Bidar* case.[66] Bidar, a French national, came to the United Kingdom to live with his grandmother at the age of 15 since his mother was to undergo treatment there for a terminal illness. He attended public-sector secondary education and secured the entry requirements for admission to University College London. He then applied for a student loan, but was refused because he did not meet the conditions of entitlement for such a loan.[67] Three questions are raised in the reference: first, whether financial assistance for living expenses granted to students should now be regarded as within the scope of the EC Treaty; and, secondly, what criteria the national court should apply in determining whether the conditions of entitlement for such assistance could be objectively justified.[68]

The first issue was whether assistance granted to students to cover their maintenance costs should, notwithstanding the Court's earlier decisions in the *Lair*[69] and *Brown*[70] cases, now be regarded as within the scope of the EC Treaty. The Court refers to the settled case law of the Court under which a citizen of the Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which are within the material scope of the EC Treaty. Furthermore, movement to another Member State to pursue secondary education there 'exercises the freedom to move guaranteed by Article 18 EC'.[71] The Court then refers to the proposition in its judgment in the *Trojani* case relating to social assistance:

> a citizen of the Union who is not economically active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time. . . .[72]

Significant developments since the judgments in the *Lair* and *Brown* cases were the introduction of citizenship of the Union, and what is now Title XI of the EC Treaty which contains a chapter devoted to education and vocational training. For these reasons 'assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs' falls within the material scope of the EC Treaty. This, says the Court, is confirmed by Article 24 of the Citizenship Directive.[73] In answer to the second question,

[66] Case C-209/03 *Bidar,* Judgment of 15 Mar 2005. See also Case C-147 *Commission v Austria*, Judgment of 7 July 20.

[67] Essentially a requirement that he was 'settled' in the United Kingdom, and had been resident there for three years. Under the national regulations, residence as a student in secondary education does not count as residence for this purpose.

[68] The third question related to the temporal application of any ruling of the Court of Justice.

[69] Case 39/86 *Lair* [1988] ECR 3161. [70] Case 197/86 *Brown* [1988] ECR 3205.

[71] Case C-209/03 *Bidar,* Judgment of 15 Mar 2005, para 35 of judgment, referring to the Court's decision in Case C-224/98 *D'Hoop* [2002] ECR I-6191.

[72] Para 37 of the judgment.

[73] Which provides that the host Member State 'shall not be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons,

the Court ruled that Article 12 EC precluded the use of a condition of being settled in the United Kingdom under national immigration rules as a condition of entitlement to a student loan where nationals of other Member States who had received 'a substantial part' of their secondary education in the host Member State could not acquire settled status.[74]

In the *Trojani* case,[75] the Advocate General had noted:

> 10. . . . As Community law now stands, this right of residence has the following principal characteristics:
>
> (a) The right of residence is a fundamental right of every European citizen. That right may be restricted as little as possible.
>
> (b) Community law recognises as a ground for limiting that right the interest of a Member State in preventing any unreasonable burden being placed on the public finances.
>
> (c) In the EC Treaty a distinction is made between economic migrants and non-economic migrants. Both groups have a right of residence, the only difference being the scope of their respective claims. Economic migrants have the stronger claim. Thus, they do not need to prove that they can provide for themselves.
>
> (d) The Court interprets the concept of worker broadly. This tends to strengthen the right of residence to the greatest extent possible.[76]

The Advocate General had also commented in this case:

> The basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State.[77]

The tension presented by the case law is accordingly the extent to which this principle is eroded by rights flowing from citizenship of the Union. The tenor of the Court's case law is that there is an entitlement to equal treatment in all areas of social protection where there is a sufficient degree of integration of the Union citizen into the fabric of the host Member State. In the *Trojani* case that could be established by his lawful residence under national law for a certain time; in the *Collins* case it could be established by a period of residence coupled with activity which indicated that Collins was genuinely engaged with the labour market of the host Member State; and in the *Bidar* case, there was a 'genuine link'[78] as a result of the completion of a substantial part of Bidar's secondary education in England.

The entitlement to equality of treatment with nationals is surprisingly powerful. The logical consequence of the entitlement is that much of the

persons who retain such status and members of their families'. Permanent residence is acquired when Union citizens have resided legally for a continuous period of five years: Art 16 of the Citizenship Directive.

[74] Case C-209/03 *Bidar,* Judgment of 15 Mar 2005, paras 49–63 of the judgment.
[75] Case C-456-02 *Trojani,* Judgment of 7 Sept 2004.
[76] ibid, para 10 of the Advocate General's Opinion.
[77] Case C-456-02 *Trojani,* Judgment of 7 Sept 2004, para 70 of the Opinion.
[78] Case C-209/03 *Bidar,* Judgment of 15 Mar 2005, para 63 of the judgment.

secondary legislation spelling out the Community rights which flow from economically active status are no longer needed. There will, however, continue to be a need for Community provisions coordinating the differing national social security systems, as well as those providing for mutual recognition of qualifications. There will also be a need for those provisions which secure an entitlement under Community law which is higher than that required in some Member States, that is, where national treatment falls below the standard required by Community law.[79]

IV. REVERSE DISCRIMINATION

In an era in which citizenship of the Union is 'destined to be the fundamental status of nationals of the Member States', the continuing existence of reverse discrimination is highly problematic.[80] It does not seem compatible with a shared citizenship and with the requirement for equal treatment that a Member State should remain free to treat its own nationals worse than it is required to treat the nationals of other Member States under Community law. Equality works both ways. If a citizen of the Union who is a national of another Member State can claim equal treatment when in the United Kingdom, why cannot a national of the United Kingdom claim equal treatment against the United Kingdom with the rights enjoyed by the citizen of the Union from another Member State? There is something distinctly odd in citizenship of the Union as a fundamental status about having rights which are Community rights which can only be asserted against other Member States but not against the Member State whose nationality is held, unless Community law is engaged by the exercise of certain rights under the EC Treaty. Whereas, prior to the introduction of citizenship of the Union, it might have been acceptable to say that the problem rested with the Member States who could easily extend the 'missing' rights to their own nationals, the case today for not recognizing the Community-accorded rights of citizens available against every Member State in all circumstances is even less satisfactory.

V. EQUALITY AND THE OTHER CITIZENSHIP RIGHTS IN THE EC TREATY

Article 19 EC gives citizens of the Union the right to stand for election at municipal elections,[81] and to vote in such elections, under the same conditions as nationals, and similar rights in relation to elections to the European

[79] A good example is entitlement arising under Regulation 1612/68 to bring certain relatives to live with you which are not included in national immigration law, as exemplified by cases on reverse discrimination such as Joined Cases 35 and 36/82 *Morson & Jhanjan* v *Netherlands* [1982] ECR 3723.

[80] See generally N nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 29 CMLRev 731.

[81] But not in national elections.

Parliament. The development of the requirement to accord equal treatment would require an extension of this provision to cover national elections. But a provision dealing with election rights would not be needed at all if the scope of application of the rule of equal treatment were to be extended to this area.[82]

Article 20 makes provisions for shared diplomatic or consular protection, thus ensuring such protection in a country where the State of nationality is not represented but other Member States are. Article 20 only arises where the State of nationality has no representation in the third country.

Perhaps these qualified rights indicate the remaining difference between citizenship of the Union and nationality of one of the Member States. In relation to voting rights, it can be argued that a better approach would be to permit election rights in relation to national elections when the citizen has achieved permanent resident status, and so has achieved the requisite degree of integration into the national community whose legislature is being elected. This would recognise an entitlement to participation in national democratic processes as an incident of citizenship of the Union where a sufficient degree of integration into the Member State in question could be established.

VI. FUNDAMENTAL RIGHTS

Freedom from immigration control and equal treatment with nationals of the host Member State are, it is argued, the twin pillars on which citizenship of the Union has been constructed. However, these pillars are not human rights in the universal sense. They are rights which attach to citizenship. The language of fundamental and human rights in Community law is sometimes rather too loose. The rights addressed so far in this article are fundamental rights for citizens of the Union, but they are not fundamental or human rights in the universal sense. Fundamental or human rights in this sense are not conditioned on the beneficiary holding citizenship of the Union. Human rights protection is not, and should not be, conditioned on the holding of citizenship of the Union. Human rights are matters of entitlement for all people regardless of their nationality. That has always, and rightly so, been the position under the European Convention on Human Rights. The rights set out in the European Convention are to be secured for all within the jurisdiction of the Contracting State Party. The position is the same in relation to the protection of human rights which flows from Community law. Happily, the Charter of Fundamental Rights of the European Union makes the distinction between those rights of citizens of the Union and those of everyone, regardless of their nationality.[83]

[82] Equal treatment is only required where the subject matter in issue is within the scope of the EC Treaty; standing and voting in municipal and national elections (as distinct from elections to the European Parliament) would clearly be outside the scope of the EC Treaty in the absence of Art 19 EC.

[83] See generally S Peers and A Ward *The EU Charter of Fundamental Rights. Politics, Law and Policy* (Hart Publishing Oxford 2004).

The impact of human rights considerations in the Community law context can best be seen in cases concerning nationals of States which are not Member States of the Union. After many years in which the interests of third country nationals were largely ignored, Community law is increasingly viewing the rights of third country nationals lawfully resident in one of the Member States as being much the same as those of citizens of the Union. This can be seen in the directives made under Title IV of the EC Treaty.[84] It is also evident in the case law of the Court of Justice. The *Akrich* case[85] is a good example of the impact of human rights on the requirements community law imposes. The case concerned the rights of a Moroccan national who had married a United Kingdom national, had then moved to Ireland where both worked, and sought to return to the United Kingdom in reliance on Community law. Akrich had a bad record as an illegal immigrant, and the United Kingdom, perhaps understandably, resisted his attempts to rely on Community law to secure his entry and residence in the United Kingdom. In its judgment on a reference from the High Court, the Court of Justice stressed the need for the United Kingdom immigration authorities in considering the application of a third country national to be admitted to the United Kingdom to have regard to Article 8 of the European Convention and to respect for family life. Those rights belonged, in the case in question, to both the third country national and to the citizen of the Union to whom he was married.

VII. SOME CONCLUDING REMARKS

A. The rights of the economically active

This article has touched only adjectivally on the substantial bundle of rights accorded to those who can bring themselves within the Community definitions of workers, self-employed persons and providers or recipients of services.[86] The distinction between migrants engaging in economic activity and those not engaged in economic activity has been, and remains to some extent, central to the development of a body of rights for those moving within the European Union. The rights of those who are economically active are less circumscribed than the rights of those who are not economically active. This reflects a view that those who qualify as economic migrants will be able to provide for their own needs from the proceeds of their economic activity. By contrast, the right

[84] See eg Council Directive 2003/86/EC of 22 Sept 2003 on the right to family reunification [2003] OJ L251/12; and Council Directive 2003/109/EC of 25 Nov 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44.

[85] Case C-109/01 *Akrich* [2003] ECR I-9607. See also R White 'Conflicting competences: free movement rules and immigration laws' 385; and (2005) 42 CMLRev 225.

[86] Expansively, and controversially, extended in scope in Case C-60/00 *Carpenter* [2002] ECR I-6729.

to reside under Community law for those who are not economically active is conditioned on their having sufficient resources of their own to avoid becoming an unreasonable burden on the public finances of the host Member State. The result is that the conditions, and consequences, of a right to reside under Community law differ depending upon the activities of the migrant. The advantages which a migrant may claim will still depend upon the underlying basis of their movement to another Member State. Secondary legislation of the Union also provides detailed rights for those who are economically active when things go wrong, for example, when a worker becomes involuntarily unemployed, or where a worker is unable to continue work as a result of some accident or injury.[87]

It is possible to view these different situations as merely affecting what the citizen of the Union must show in order to acquire rights in the Member State of residence. Where the citizen is economically active,[88] there is a presumption of entitlement to the full bundle of rights attaching to citizenship of the Union, and there is no need to show financial independence; that is presumed. Where citizens fall within the terms of the directives on students, retired persons and persons of independent means, their entitlement is prescribed by those legislative provisions. Finally, in other cases,[89] the rights of citizens to equal treatment with nationals is conditioned on their establishing a sufficient link with the host Member State to be regarded as integrated with nationals of that State for securing particular benefits.

This position might be considered to be supported by the decision of the Court of Justice in the *Oulane* case,[90] in which the Court confirmed that the host Member State may still require citizens of the Union to comply with certain administrative formalities in order to have their rights as citizens recognized.[91] The onus will be on the citizens of the Union to establish their entitlement,[92] and failure to be able to do so may make them liable to deportation 'subject to the limits imposed by Community law'.[93]

B. Resource allocation

The range of rights enjoyed by citizens of the Union in a Member State other than that of their own nationality raises the issue of social solidarity versus

[87] Note that the Citizenship Directive opens up broader opportunities for permanent residence than the provisions of the directives concerned with staying on after a period of employment or self-employment.

[88] Or has been economically active and can now under Community secondary legislation be treated as if he or she continued to be a worker or self-employed person.

[89] This might include those falling within the first two groups where the provisions governing those situations leave gaps in entitlement.

[90] Case C-215/03 *Oulane*, judgment of 17 Feb 2005.

[91] Para 49 of the judgment.

[92] In the *Oulane* case, establishing a right to reside as a recipient of services was in issue.

[93] Para 55 of the judgment.

unreasonable burden. There has always been a link between social protection and the nation State which is challenged by the pooling of some of the rights of citizenship of the individual Member States in citizenship of the Union. The erosion of national borders challenges the nation State model of social protection, because it raises questions about the allocation of national resources. Free movement also highlights the differing levels of social protection among the Member States.

Member States[94] still remain nervous that they will find national resources stretched as a result of migratory patterns. There remains the strong myth in some Member States that there are substantial numbers of economic migrants unwilling to work their way to better economic status roaming the Member States seeking social assistance. If the hypothesis put forward in this article has any validity, then there are resource issues which will arise. They go to the heart of the responsibility of the State to its nationals. At present, there is in many Member States a distinction between the rights which a national enjoys and those which third country nationals enjoy in relation to social assistance or health care.[95] This seems to be traceable back to some notion of a State's having a particular responsibility to its own nationals which it is not obliged to extend to nationals of other States. That approach has led to differential treatment of a Member State's own nationals and nationals of other Member States, but such differential treatment is now largely outlawed by the requirement of equal treatment of nationals of other Member States with a State's own nationals as a consequence of the possession of citizenship of the Union.

The current position under which a genuine link with the host Member State is required before lawful residence triggers equal treatment seems to be a fair and effective way to accommodate the concerns of some Member States. The need for Member States to justify in objective terms, which includes a requirement of proportionality, restrictions on access to the full range of social protection, will prevent the application of rules which essentially offer assistance only to nationals, and will require thought to be given to the inherent fairness of access to such support. There remains some uncertainty about the precise nature of what will be regarded as a genuine link. For example, in relation to financial assistance for student maintenance costs, the Member States clearly felt that a condition of residence for five years was reasonable, since that is the period during which there is no entitlement under Article 24 of the Citizenship Directive. But such a period would seem to be somewhat longer than the Court of Justice envisaged in giving its judgment in the *Bidar* case.[96]

[94] Particularly those who perceive themselves as offering a high level of social protection.

[95] See, for a good example of the debate, *Secretary of State for Health v R on the application of Yvonne Watts* [2004] EWCA Civ 166, referring questions to the Court of Justice on provision of health care.

[96] Case C-209/03 *Bidar*, Judgment of 15 Mar 2005, though it should be noted that the case did not concern the interpretation of the Citizenship Directive.