RECENT DEVELOPMENTS ON THE FREE MOVEMENT OF PERSONS IN THE EUROPEAN UNION

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Abstract

Today, the Treaty on the Functioning of the European Union ("TFEU") and secondary legislation confer citizens of the Union wide rights of free movement. On the one hand, economically active persons (*i.e.* workers, self-employed persons and providers of services) have a right to move and reside freely within the European Union to pursue that activity. On the other hand, the provisions on citizenship confer upon EU citizens the right of free movement despite the lack of a nexus with an economic activity, provided that they do not become a burden on the social security system of the host Member State.
The aim of this paper is to analyse some major rulings of the ECJ which, together with secondary legislation, have contributed to developing the rights of free movement of persons granted by the European citizenship.

Keywords

Citizenship of the Union, free movement of persons, workers, social benefits, nationality, European Union.

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Introduction

One has to be careful when analysing the rights of free movement granted by the Treaty on the Functioning of the European Union ("TFEU") and by secondary legislation: the introduction of the citizenship of the Union has created a dichotomy of rights which differ in scope and in their level of protection depending on whether or not the underlying reason for the person's movement is linked to an economic activity. On the one hand, there are rights granted by Title IV of Part III of the TFEU, which refer to economically active persons (workers, self-employed persons and providers of services). On the other hand, the provisions on citizenship confer upon EU citizens the right of free movement despite the lack of a nexus with an economic activity. However, the two sets of rules are obviously interlinked and the European Court of Justice ("ECJ") has consistently used the provisions on citizenship to extend the rights granted to workers or self-employed persons.
After their introduction, the rights linked to the citizenship of the Union have been further developed and clarified first by the ECJ and then by the European legislator. Directive 2004/38/EC[1] ("the Directive"), which amends and codifies most of the previous legislation on free movement of persons, unifies the two sets of rights outlined above by introducing the concept of permanent residency.
The limited scope of this paper does not permit a general analysis of the rights connected to the free movement of persons. It therefore simply aims at analysing some major rulings of the ECJ which, together with secondary legislation, have helped developing the rights of free movement of persons granted by the European citizenship.

2. Scope of Application

Article 21 TFEU 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 the Treaties and by the measures adopted to give them effect".*

One of the fundamental questions clarified by the ECJ's jurisprudence concerns the scope of application of this provision in order to understand "who" the beneficiaries of the rights granted by the Treaty are. Article 20 of the TFEU establishes that

> "*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".*

[1] 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 L 158, 30.4.2004, p. 77–123.

As clarified by the ECJ in *Micheletti*[2] and confirmed in *Chen*[3], the issuance of nationality is of sole discretion of the individual Member State.
In the second case, Ms Chen, entered the UK in May 2000 when she was six-month pregnant. In July of the same year, she travelled to Belfast and gave birth to her daughter Catherine in September 2000. According to the Irish legislation, any person born on the Irish island may acquire Irish citizenship if he cannot acquire another citizenship. Therefore, as Catherine did not have the right to acquire Chinese or UK citizenship, she acquired Irish citizenship. It is undisputed that Ms Chen travelled to Belfast with the aim of allowing Catherine to obtain the Irish citizenship and, consequently, to allow herself to reside in the UK. As affirmed previously in *Micheletti*, the ECJ confirmed that:

> "*[…], under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality ".*[4]

In another recent judgment on citizenship of the Union, *Rottmann*,[5] the ECJ went even further by interfering with the powers of the Member States to withdraw the national citizenship in case this withdrawal would entail the loss of EU citizenship.

In this case, Mr Rottman, who had originally been an Austrian national, transferred his residence to Munich in 1995, after having been suspected of having committed serious fraud on an occupational basis in the exercise of his profession. In 1997, the Criminal Court of Graz issued a national warrant for the arrest of Rottmann. In 1998, Rottmann applied for German nationality but failed to mention the proceedings against him in Austria. Consequently, a naturalisation document was issued to him in February 1999 with the effect that he lost his Austrian nationality.

However, in August 1999, the city of Munich was informed about the warrant for Rottmann's arrest. As a result, the naturalisation was withdrawn with retroactive effect on the grounds that Rottmann had not disclosed the fact that he had been subject of judicial investigation in Austria and had therefore obtained German nationality by deception. Rottmann brought an action for annulment of that decision. The ECJ, through a reference for a preliminary ruling, was requested to rule whether it was contrary to European Union law for a Member State to withdraw from a citizen of the Union the nationality of that State which had been acquired by naturalisation and obtained by deception when the withdrawal would deprive him of the status as citizen of the Union and the rights attached to it by making him stateless since he had lost the nationality of his Member State of origin.

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[2] Case 369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria,* [1992] ECR p. I-4239.
[3] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, [2004] ECR p. I-9925.
[4] *Ibid.*, at § 37.
[5] Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of 2 March 2010.

Several Member States and the European Commission submitted to the ECJ that the rules on the acquisition and loss of nationality fell within the competence of the Member States.

The ECJ ruled that the withdrawal decision had to comply with the principle of proportionality as to its consequences for the person concerned in light of European Union law. The loss of rights enjoyed by citizens of the Union had therefore to be justified in relation to the gravity of the offence, the lapse of time between the naturalisation decision and the withdrawal decision and the possibility of the person in question to recover his original nationality.

Although the ECJ left it for the national court to determine whether the withdrawal decision was proportionate, it held that the observance of the principle of proportionality required that the person concerned be given a reasonable time in order to try to recover the nationality of his Member State of origin.

The judgment in *Rottmann* is a far-reaching encroachment on Member States' competence in the ambit of nationality. As long as the Member State whose nationality a citizen of the Union has obtained by deception is obliged to wait for a decision about the possible reacquisition of that citizen's nationality of origin, it also has certain obligations towards that citizen even though the rights of the citizen derive from his deception. It does not seem very reasonable that a person may retain the rights acquired by deception since he has intentionally deceived the authorities in order to obtain those rights. Furthermore, the authorities of the Member State in which the naturalisation took place had concluded that the behaviour of the EU citizen satisfied the conditions required under national law to withdraw the nationality of the Member State in question, so one may presume that they had already weighed the gravity of the offence against the consequence for that citizen of becoming stateless. In addition, if a person wilfully commits an offence knowing that the result will be the loss of the citizenship of the Union, he has nobody but himself to blame for his subsequent statelessness. Any citizen of the Union should be required to act in a responsible way in order to maintain the rights conferred to him or her by the citizenship of the Union. The situation would be different if the loss of citizenship of the Union would be a result of an excusable error or misunderstanding.

As explained above, Rottman constitutes the first case in which the ECJ interferes in Member States' competences concerning acquisition and loss of nationality. As argued by Germany and Austria, the ECJ could also have held that the situation was purely internal in that Rottmann was a German national, living in Germany, to whom a German authority had addressed an administrative act. Consequently, European Union law would not be applicable to this case. Indeed, the citizenship of the Union does grant rights only to persons who have used their right of free movement. Thus, these provisions are not capable of affecting internal situations. However, the ECJ was not convinced and reiterated its previous case law, according to which even when a matter falls within the competence of the Member States, the national rules concerned must have due regard to European Union law in situations covered by European Union law. Accordingly, if a citizen of the Union is faced with a decision withdrawing his naturalisation with the result that he would lose the status as citizen of the

Union and the rights attached to it, that situation falls, by reason of its nature and its consequences, within the ambit of European Union law.

In *Singh*[6], the Court found another way of overcoming the argument of a purely internal situation. In this case, Mr. Singh, an Indian national who had been living and working in Germany with his British wife, was refused an indefinite leave to remain as the spouse of a British national on the grounds that a decree nisi of divorce had been pronounced against him. Mr. Singh's opposition to the subsequent decision of expulsion led to a preliminary ruling in which the ECJ held that

> "[a] *national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.*
>
> *He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.*
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> *[…] this case is concerned […] with the rights of movement and establishment granted to a Community national […]. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. […]".*[7]

Also in *Eind*[8] a cross-border element could be found due to the fact that the EU citizen was moving back to his own Member State after a period of residence in another Member State.

Ms Eind, a national of Suriname and daughter of a Dutch national who had exercised his right of free movement before returning to the Netherlands was refused a residence permit on the grounds that she was not a family member of an EU citizen benefiting from the right of free movement. The ECJ was not convinced and stated that an EU citizen who had been benefiting

[6] Case C-370/90, *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department,* [1992] ECR p. I-4265.
[7] *Ibid.*, at § 19-21.
[8] Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R.N.G. Eind,* [2007] ECR p. I-10719.

from the right of free movement and decided to return to his State of origin came within the scope of application of the Treaty. Indeed, according to the ECJ,

> *"A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.*
>
> *That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.*
>
> *Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter".*[9]

In *Carpenter*[10], the ECJ extended the rules on free movement to spouses of EU citizens although the EU citizen was residing in his own Member State. The catch was the fact that Carpenter did often travel to other Member States to provide services.
Indeed, Mr Carpenter's business, which consisted in selling advertising space in medical journals, was also conducted in other Member States of the European Union. Therefore, when the UK issued a deportation order against his wife who was a third country national, she argued that she had a right to reside in the UK as the spouse of an EU citizen and that her deportation would restrict her husband's right of free movement since she was the one taking care of her husband's children (from his first marriage). The ECJ agreed with Ms Carpenter. The Court affirmed that

> *"Mr Carpenter is therefore availing himself of the right freely to provide services guaranteed by Article 49 EC. Moreover, as the Court has frequently held, that right may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State (see, among others, Alpine Investments, cited above, paragraph 30)*
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> .
>
> *[…] It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully*

[9] *Ibid.*, at § 35-37.
[10] Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR p. I-6279.

> *effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse […]".*[11]

Last but not least, Directive 2004/38 extends the rights of free movement to the family members of European citizens. Consequently, the family members, as defined in Article 2(2) of the Directive, who are legally resident with the citizen of the EU, enjoy the same rights independently of their nationality. The Directive includes, among the right to equal treatment (Article 24), the right to take up employment as a worker or a self-employed person. The latter right is of utmost importance for members of the citizen's family who are third country nationals.

3. Right to equal treatment

The ECJ confirmed in *Martinez Sala*[12] that an EU citizen legally resident in a Member State different from the Member State of his nationality may not be discriminated on the ground of his nationality.

Ms Martinez Sala had been living in Germany for 25 years and had been alternating periods of employment and periods of unemployment. After having given birth to her son, she requested child care allowance which was refused by the Freistaat Bayern. The refusal was based on the fact that she did not hold German citizenship or a valid residence permit. At the time of the refusal, her residence permit had expired and she was holding a document which certified that she had applied for an extension of her residence permit.

The Court, after having ascertained which conditions a German citizen had to comply with in order to be granted the child care allowance, made it clear that Germany was not allowed to impose different conditions for the obtainment of the child care allowance on a citizen of another Member State on the ground that he does not hold German nationality.

According to the ECJ,

> *"[…]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".*[13]

[11] *Ibid.*, at § 30 and 39.
[12] Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [1998] ECR p. I-2691.
[13] *Ibid.*, at § 54.

The ECJ went further in *Grzelczyk*[14] and affirmed that even EU citizens, whether or not they are workers, are entitled to equal treatment with the nationals of the host Member State when the situation falls within the scope of application of EU law by stating 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*".[15]

In this case, Rudy Grzelczyk, a French national who had been studying at a Belgian university for 3 years, requested a non contributory social benefit (the minimex). His request was rejected because he did not hold Belgian nationality.

The EJC, after having ascertained that the only reason for the rejection of Mr Grzelczyk's request was the fact that he was not a Belgian citizen, affirmed that the Treaty prohibited the exclusion of nationals of other Member States from having access to a non-contributory social benefit - such as the minimex - in case they did fall under the category of workers, where this was not the case for Belgian nationals.

Furthermore, the ECJ held that the recourse to the social security system of a Member States may not lead to an automatic withdrawal of a student's residence permit.

Indeed, the ECJ argued that although the secondary legislation on students did not establish a right to payment of maintenance grants by the host Member State it did however grant

> *"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."*[16]

This right to equal treatment has been reaffirmed by the Directive 2004/38, which states in Article 24:

> "*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."*

Furthermore, the Directive states in Article 14(3) that the recourse to the social security scheme of a Member State shall not automatically lead to an expulsion decision, therefore

[14] Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR p. I-6193.
[15] *Ibid.*, at § 31.
[16] *Ibid,*, at § 44.

implying a certain degree of acceptance of financial solidarity between the host Member State and citizens of another Member State.

4. Social security shopping

Member States have obviously been concerned about the potential effects of the rights of free movement on their social security systems. If accepted by the ECJ, intentionally abusive behaviours such as Collins'[17] could have had far reaching effects.

In *Collins*, he ECJ held that Member States are entitled to make the enjoyment of a social security benefit, such as the jobseeker allowance, conditional on the existence of a link to the national employment market. Indeed, Brian Francis Collins, who held American and Irish nationality and had been living in the United States since he was born, spent 6 months in the UK in 1978 during his studies and returned to the UK for approximately 10 months in 1980 where he worked sporadically. After this experience in the UK Mr Collins returned to the United States. In 1998, Mr Collins came back to the UK in order to seek a job and applied for the jobseeker allowance. His application was rejected because he was not habitually resident in the UK.

First, the ECJ stated that Collins did not qualify as a worker given the fact that no link could be established between his previous activities and the search for a job 17 years after the former had come to an end.

Secondly, the ECJ affirmed that EU law had been further developed after the ECJ's statement in *Lebon*[18]. In that case, the ECJ affirmed that jobseekers were entitled to equal treatment only in relation to the access to the labour market but not with regard to social security benefits. Consequently, the judges repeated the statements in *Grzelczyk* and *Bidar* by underlining that the citizen's rights to equal treatment applies

> *"in all situations which fall within the scope ratione materiae of Community law"*[19]

and continued by stating the following:

> *"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*

[17] Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, [2004] ECR p. I-2703.
[18] Case 316/85, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon*, [1987] ECR p. 2811.
[19] Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, [2004] ECR p. I-2703, at § 61.

> *from being subject to conditions which are liable to constitute discrimination on grounds of nationality)".*[20]

However, although the UK legislation provided a different treatment for UK nationals compared to citizens of other Member States, the ECJ admitted that the unequal treatment could 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".*[21]

Obviously, the ECJ was satisfied with the fact that a Member State makes the grant of a social benefit conditional upon the existence of a real link between the applicant and its employment market. The ECJ has also been sensitive to the concerns of the Member States relating to students' grants and subsidies. Although, at first sight, the decision in *Bidar* seemed to open the door for foreign nationals to obtain grants and subsidies, it established the possibility of a Member State to refuse such claims in case there was no serious link between the person requesting the grant or subsidy and the Member State.

Bidar[22], a French national who accompanied his mother to the UK to undergo medical treatment, resided in the UK with his grandmother and attended and completed his secondary studies without requesting access to social assistance. He then enrolled at the university and applied for assistance to cover his tuition fees and for a student loan. While he was granted the first form of assistance, he was denied the access to the latter on the ground that he was not settled in the UK. However, the obtainment of settled status as a student was precluded by UK law.[23] Consequently, the ECJ acknowledged Member States' right to reject requests for grants and loans to EU citizens who cannot prove a certain degree of integration in the UK. Nevertheless, the UK rules made it impossible for an EU citizen in the position of Bidar to satisfy the condition necessary to obtain settled status. Consequently, the Court stated that

> "*the first paragraph of Article 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that State".*

The ECJ has then further developed this jurisprudence in *Förster*.[24]

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[20] *Ibid.*, at § 62.
[21] *Ibid.*, at § 64.
[22] Case C-209/03, *The Queen (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills*, [2005] ECR p. I-2119.
[23] *Ibid.*, at § 61.
[24] Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep,* [2008] ECR p. I-8507.

Jacquelin Förster was a German national who moved to the Netherlands in 2000 to pursue pedagogical studies. During her studies, Ms Förster took up several paid employments and was the beneficiary of a maintenance grant. However, during June 2003 and December 2003 Ms. Förster had not been gainfully employed. Therefore, the Dutch authorities held that she could no longer be regarded as a worker and was therefore not entitled to the maintenance grant for the said period. She appealed the decision to withdraw the maintenance grant.

The ECJ, ruling on the question concerning Ms Förster's entitlement to the maintenance grant, stated that an economically inactive citizen of another Member State may claim equal treatment in relation to social security benefits in case he has resided for a certain period of time in the host Member State.

The Court repeated what it had already stated in *Bidar* by underlining that

> *"although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State."*[25]

Consequently, the ECJ underlined Member States' right to refuse to grant access to its social security system to citizens of other Member States who do not show a certain degree of integration in the host Member State. In addition to that, the ECJ stated that

> *"[…] such a condition of five years' uninterrupted residence is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State.*
>
> *[…] A condition of five years' continuous residence cannot be held to be excessive having regard, inter alia, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State".*[26]

However, from the Court's reasoning it is obvious that there was a fundamental difference between *Bidar* and *Förste*r: The UK legislation was discriminatory due to the fact that a student, who was a national of a Member State, could in no case acquire the settled status and was therefore excluded from the social security benefits no matter what his relation with the UK territory was. In *Förster*, the legislation adopted by the Netherlands was in a way "indistinctly applicable". Indeed, after 5 years of legal residence, a student of a Member State who was not a national of the Netherlands would be regarded as being in the same situation as a citizen of the Netherlands.

[25] *Ibid.*, at § 48.
[26] *Ibid.*, at § 52 and 54.

Recently, the ECJ seems to have somewhat adjusted its stance on social security benefits by making a considerably more extensive interpretation of the extent of the rights granted to a worker who is the citizen of the Union in order to enable him to fully enjoy the right to move and reside freely within the European Union. In two judgments given on the same day, *Ibrahim*[27] and *Teixeira*,[28] the ECJ held that, under Article 12 of Regulation No 1612/68, the parent who is the primary career for the children of a national of a Member State who has worked in the host Member State has a right of residence in the host Member State regardless of whether he or she has sufficient resources and comprehensive sickness insurance in that Member State. The primary career for the children derives her right of residence from her children's right to complete their education in the host Member State. The children of a national of a Member State, in turn, have a right of residence because one of their parents has been employed in the host Member State and they reside and are enrolled at an educational establishment in that Member State for the purpose of studying there. Thus, they maintain an independent right of residence even if the citizen of the Union ceases to reside in the host Member State with the children.

In *Ibrahim*,[29] a Somali national who had been married to a Danish citizen but had divorced from him after he had left the United Kingdom, was residing with their four children in the United Kingdom. The two eldest children had been attending schools in the United Kingdom since they arrived there with their mother in order to join their father. Since Ms Ibrahim was not working and depended entirely on social assistance in order to maintain herself, she applied for housing assistance for herself and her four children. Her application was rejected by the London Borough of Harrow on the ground that neither Ms Ibrahim nor her husband were resident in the United Kingdom under European Union law. However, when the ECJ was asked in a reference for a preliminary ruling whether the children and the parent who is their primary carer have a right of residence in the host Member State on the sole basis of Article 12 of Regulation No 1612/68 or whether they must also satisfy the conditions in Directive 2004/38 regarding sufficient resources and comprehensive sickness insurance cover in the host Member State, the ECJ held that

> "[…] *there is no such condition in Article 12 of Regulation No 1612/68 and that, as the Court has already held, that article cannot be interpreted restrictively and must not, under any circumstances, be rendered ineffective".*[30]

According to the ECJ, Article 12 of Regulation No 1612/68 must be applied independently of the provisions of European Union law, which govern the conditions of exercise of the right to reside in another Member State in order to ensure the aim of integrating the migrant worker's family into the host State. Accordingly, the children of a worker who is a national of a

[27] Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*, Judgment of 23 February 2010.
[28] Case C-480/08, *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department*, Judgment of 23 February 2010.
[29] Case C-310/08, *London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department*, Judgment of 23 February 2010.
[30] *Ibid.*, at § 52.

Member State must be able to undertake and complete their education in the host Member State. This right is not affected by Directive 2004/38, which has not repealed Article 12 of Regulation No 1612/68 but, on the contrary, aims to simplify and strengthen the right of free movement and residence of all Union citizens. In other words, the children of a national of a Member State who (works or) has worked in the host Member State and the parent who is their primary carer have a right of residence in that Member State on the sole basis of Article 12 of Regulation 1612/68 even if they do not satisfy the conditions laid down in Directive 2004/38 regarding sufficient resources and comprehensive sickness insurance cover in the host Member State. As a consequence, children who are in education and their primary carer have a right of residence in the host Member State until the children complete their studies even though they do not have sufficient resources and comprehensive sickness insurance cover. Neither is this right of residence affected by the departure (or death) of the migrant worker who is a citizen of the Union.

In *Teixeira*,[31] the dispute also concerned the right of residence of the primary career for a child that was in education in the United Kingdom and had its origin in an application for housing assistance. Contrary to *Ibrahim*, where Ms Ibrahim was a national of a third country, Ms Teixeira was a citizen of the Union of Portuguese nationality. She and her husband, also of Portuguese nationality, had moved to the United Kingdom in 1989 where their daughter was born. Ms Teixeira and her husband were then divorced. After 1991 Ms Teixeira worked from time to time until early 2005. Her daughter attended school in the United Kingdom and in March 2007 went to live with her. The following month Ms Teixeira applied for housing assistance for homeless persons and based her right of residence in the United Kingdom on Article 12 of Regulation No 1612/68. Her application was denied on the ground that Article 12 of Regulation No 1612/68 had been modified by Directive 2004/38 and because Ms Teixeira had no right of residence as she was not self-sufficient.

When asked to give a preliminary ruling on the issue, the ECJ repeated its reasoning in *Ibrahim* according to which the primary career of a child in education in the host Member State derives her right of residence from her child's right to complete her education in the host Member State and therefore it is not necessary that the primary carer satisfies the condition of self-sufficiency laid down Directive 2004/38. In addition, the referring national court asked whether the right of residence in the host Member State of the parent who is the primary career for a child of a migrant worker ends when the child, who is in education in the host Member State, reaches the age of majority. The ECJ first held that the right of access to education and the child's associated right of residence both continue until the child has completed his or her education and, therefore, the fact that the child reaches the age of majority has no direct effect on these rights. Second, the Court stated that the right of residence in the host Member State of the primary career for a child, in principle, ends when the child reaches the age of majority since the child is assumed to be capable of meeting his or her own needs, but this right may extend beyond that age if the child continues to need the presence and care of that parent in order to pursue and complete his or her education. The ECJ

[31] Case C-480/08, *Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department*, Judgment of 23 February 2010.

left the assessment of whether that was the case concerning the daughter of Ms Teixeira to the national court.

It therefore appears that the ECJ is willing to go further than in *Förster* if the education and integration of children is at stake. As already mentioned above, in *Förster* the Court held that with regard to social assistance benefits, a citizen of the Union who was not economically active may only rely on the principle of equal treatment with nationals if he or she had been lawfully resident in the host Member State for a certain time, and it ruled that a condition of five year's continuous residence was not excessive in order to ensure the degree of integration of non-nationals into the host Member State.

By contrast, in *Ibrahim* and *Teixeira*, the ECJ did not require a certain time of continuous residence for the non-self-sufficient parents who were the primary career for children of a migrant worker who was a citizen of the Union. The only requirement was that the children of a national of a Member State who had worked in the host Member State had at some point joined that migrant worker in the host Member State and were residing there in order to complete education. The length of the stay of the migrant worker in the host Member State is therefore irrelevant and, as for the children, their right to reside does not have to be of a certain length as long as they are enrolled at an educational establishment in that Member State for the purpose of studying there. As to the right of the parent who is the primary career for the children, she derives her right from the children's right to pursue and complete education regardless of the fact that she is neither self-sufficient nor has a comprehensive sickness insurance cover in the host Member State.

The children's right of education and the integration of the worker's family into the host Member State seem thus to prevail over Member States' concerns about the financial burden imposed on their social security systems. These judgments consequently highlight the importance of migrant workers' right to be joined by their families and the integration of these families into the host Member State in order to guarantee the free movement of workers.

5. Conclusions

Initially the development of the free movement of persons was slower than that of the other economic freedoms granted by the Treaty. This is probably explained by the fact that Member States wished to control migration to their countries and were supposedly not interested in assuming the obligations related to pensions and social security costs for other than their own nationals. Moreover, the character of the European integration was also predominantly economic. As a consequence, the free movement of persons was first limited to workers, *i.e.* economically active persons. However, the adoption of secondary legislation and the broad interpretation of the concept of "worker" by the ECJ allowed students and jobseekers and even economically inactive persons to benefit from the right of free movement. But it has been the introduction of a citizenship of the Union that has finally created a separate right for all EU citizens, satisfying certain minimum conditions on self-sufficiency, to move and reside

freely within the European Union regardless of whether or not there is a link to an economic activity.

Moreover, the right of residence has been extended to family members of the citizen of the Union, irrespective of their nationality. The ECJ has justified this by the need to ensure the integration of the worker's family into the host Member State in order to allow the worker to enjoy the right of free movement. In particular, the ECJ has paid special attention to the right to education of the children of migrant workers in the host State. The children's right to education and their integration into the host Member State must therefore be guaranteed even if they are (or their primary career is) dependent on social security benefits. But with regard to other persons who are not self-sufficient, Member States could still make the right of residence subject to certain requirements that demonstrate their integration into the host State.

Today, citizens of the Union have an extensive right of free movement. As long as they are self-sufficient or can derive their right of residence from being family members of a citizen of the Union who is lawfully resident in the host Member State, they do not need to be involved in any economic activity in order to enjoy this right. In its recent case law, the ECJ arguably has gone even a bit too far by interfering in the Member States' competence to decide on the acquisition and loss of their nationality if the consequence would be the loss of the citizenship of the Union. On the other hand, *Rottmann* confirms the significance that the ECJ attaches to the citizenship of the Union and the rights related to it, making the protection of those rights a priority.

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