
FOCUS

CITIZENSHIP WITHIN THE SCOPE OF *RATIONE MATERIAE* OF COMMUNITY LAW: THE CURRENT APPROACH OF THE COURT OF JUSTICE

Theodore Konstadinides¹
Lecturer in Law, School of Law, University of Surrey

Introduction

According to Eurostat estimates "as of 1 January 2006, there were approximately 8.2 million EU citizens who were exercising their right to reside in another Member State."² As a result, the rights to move and reside freely within the European Union's territory as generated by art.18 EC and Directive 2004/38³ have often provided the basis for an assortment of claims before the European Court of Justice. The pedigree of the Court's case law, especially since Directive 2004/38 was put into force in 2006, demonstrates that the Court possesses competence to adjudicate upon the lawfulness of national residence requirements each time Member States create hindrances to the free movement of EU citizens. This article focuses on two streams of cases: (1) those where a Member State restricts the receipt of a social benefit to its own nationals so as to be conditional upon their residence in the territory of that Member State and (2) those where a Member State makes the right of a third country national family member to join and reside with an EU citizen in its territory conditional on the former having previously resided in another Member State. The Court's jurisprudential development in finding in these conditions clear obstacles to the free movement of EU citizens and their enjoyment of family life is of major salience, given that Member States have traditionally imposed nationality or residence requirements to determine the entitlement of migrants to their social security benefits or the right of third country nationals, who are family members of EU citizens, to accompany and reside with them in their territory.

Obstacles against a Member State's own nationals: residence conditions for the right of access to social benefits

Whilst the Court established relatively early in its case law that discrimination on grounds of nationality constitutes an infringement of the Member States' obligations under the Treaty (art.18 EC read in the light of art.12 EC),⁴ bars to welfare benefits have been gradually removed by virtue of a methodical judicial assessment of national obstacles to a person's exercise of his/her freedom of cross-border movement and residence within the Community. There is no doubt that Community law precludes discriminatory national legislation, which excludes nationals of other Member States who live and work in its territory from the grant of social benefits on the sole basis that they do not possess the nationality of that State.⁵ Such discriminatory treatment may be justified only on the

¹ I am grateful to Ms Amanda Cleary for insisting on clarification and helpful advice.

² European Commission, "Fifth Report on Citizenship of the Union" (May 1, 2004 - June 30, 2007) (2008) SEC 197.

³ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

⁴ *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve* (C-184/99) [2001] E.C.R. I-6193; [2002] 1 C.M.L.R. 19, para.31.

⁵ See more recently *Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* (C-164/07) (not yet reported).

grounds of objective considerations independent of the nationality of the persons concerned and if it is proportionate to the objective being legitimately pursued.⁶

On the other hand, Community law is not explicit with reference to events where a Member State raises obstacles to its own nationals as regards access to social benefits by reason of their residence in the territory of another Member State. In this context, the Court has not employed either its direct or indirect discrimination vocabulary. Since in such cases there is no obvious discrimination on the grounds of the migrant's nationality, the Court has rather settled on the general equality principle.⁷ In *D'Hoop*, a case concerning differential treatment of Belgian legislation regarding Belgian nationals educated in Belgium as compared to those who - having availed their freedom to move - have obtained their education in another Member State, the Court established:

"...it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement."⁸

Hence, the status quo arising from the Court's novel jurisprudential approach entails that national legislation which places at a disadvantage certain of its nationals on the sole ground that they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by art.18 EC on EU citizens.⁹ By implication, the Court has used the same reasoning to confer on a Member State's own nationals social benefits that in principle cannot be detached from its geographical boundaries and thus cannot be exported. This is especially where the award is dependent on the connection between the society of the Member State and the recipient.

In *Tas-Hagen*,¹⁰ where the benefit in question was aimed to limit the obligation of solidarity with civilian war victims who had links with the Dutch population during and after the war, the Court recognised a wide margin of national discretion in setting the criteria determining the degree of a person's connection to society. In spite of this, such discretion, according to the Court, could not involve the imposition of residence conditions as a measuring indicator of the applicant's connection to the society of the Member State granting the benefit. Hence, the residence conditions in question neither constituted an objective justification of public interest, capable of justifying a restriction to the rights conferred by art.18 EC, nor complied with the principle of proportionality.

Correspondingly, in *Nerkowska*¹¹ the Court ruled that Poland was precluded from maintaining the disputed national legislation that refused to award its nationals a benefit granted to war victims on the basis of their absence from Polish territory throughout the period of payment of the benefit and due to their residence at another Member State (Germany). Whilst confirming that the rules relating to social assistance intended to compensate civilian victims of war or repression for physical or mental harm fell within national competence, the Court emphasised that its exercise should not deviate from the Treaty's provisions concerning the free movement of persons. Thus, unless the contended

⁶ *R. (on the application of Bidar) v Ealing LBC* (C-209/03) [2005] E.C.R. I-2119; [2005] 2 C.M.L.R. 3; *Förster v Hoofddirectie van de Informatie Beheer Groep* (C-158/07) judgment of November 18, 2008 at para.49: "...it is legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State." See also *Morgan v Bezirksregierung Köln* (C-11/06 and C-12/06) [2007] E.C.R. I-09161; [2009] 1 C.M.L.R. 1 where the Court held at para.46: "...the first-stage studies condition, in accordance with which higher education studies of at least one year must have been undertaken beforehand in the Member State of origin, is too general and exclusive in this respect. It unduly favours an element which is not necessarily representative of the degree of integration into the society of that Member State at the time the application for assistance is made. It thus goes beyond what is necessary to attain the objective pursued and cannot therefore be regarded as proportionate" (see, by analogy, *D'Hoop v Office national de l'emploi* (C-224/98) [2002] E.C.R. I-6191; [2002] 3 C.M.L.R. 12, para.39).

⁷ C. Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law* (Intersentia nv, 2005), pp.364-370.

⁸ *D'Hoop* at para.30; *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtio* (C-224/02) [2004] E.C.R. I-5763; [2004] 2 C.M.L.R. 23, para.18.

⁹ *D'Hoop* at para.31; *Pusa* at para.19; *Tas Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* (C-192/05) [2006] E.C.R. I-10451; [2007] 1 C.M.L.R. 23, para.31; *Staatsanwaltschaft Mannheim v Schwarz* (C-321/07) (not yet reported), para.89.

¹⁰ *Tas Hagen* at paras 36-37.

¹¹ *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* (C-499/06) [2008] 3 C.M.L.R. 8.

rules are based on objective considerations of public interest and are proportionate in the light of the objective pursued, they are in violation of Community law.¹²

Drawing inspiration from its earlier jurisprudence, the Court has legitimately asserted its degree of intervention in areas dominated by national competence not via competence creep but through a hint at the principle of loyal co-operation enshrined in art.10 EC and the pre-emptive effect of primary Community law.¹³ In *Turpeinen*,¹⁴ for instance, it was recalled from the outset that although direct taxation falls within national competence, Member States ought to exercise that competence in accordance with Community law, in particular the Treaty provisions on the free movement of persons.¹⁵ This fidelity rationale was most recently affirmed in *Grunkin* where the Court submitted that despite the rules governing a person's surname falling within national competence, "the latter must none the less, when exercising that competence, comply with Community law unless the case in question constitutes an internal situation which has no link with Community law".¹⁶ The abovementioned cases confirm the boundaries of national competence: i.e. that supranational intervention is triggered the moment a Member State's national activates a freedom enshrined in the Treaty.¹⁷ Not only does he/she fall automatically within the scope of Community law but also as a consequence, national measures liable to hamper the exercise of his/her rights enshrined in art.18 EC, to move and reside freely within the territory of one of the Member States, constitute restrictions to these freedoms and are thus in conflict with Community law.

Obstacles against EU citizens and their family members: conditions requiring residence in another Member State

The rights enshrined in art.18 EC have recently been supplemented by Directive 2004/38, which has codified the legal status of economically active and inactive migrant EU citizens and their families. Directive 2004/38 creates two tiers of family members: those specified at art.2(2) EC (*Definitions*), to whom art.3(1) EC - entitled *Beneficiaries* - applies, including spouses, children and parents of EU citizens and those defined at art.3(2) EC as wider family members.

Certain Member States' legislation transposing the Directive, including Ireland, provided that a third country national family member of an EU citizen, may reside with or join the latter in the Member State concerned under the condition that he/she is already lawfully resident in another Member State. A short time ago, in *Metock*,¹⁸ the Court decided on the compatibility of the relevant 2006 Irish legislation with Directive 2004/38 and the legality of the Minister of Justice's decision to impose a blanket refusal in four cases pending before the High Court of Ireland concerning requests to grant residence permits to third country nationals, married with EU citizens (other than Irish), where the marriages did not constitute marriages of convenience (i.e. an abuse of Community law rights).¹⁹ The Court established that the Irish legislation in question, making the right of residence contingent of third country nationals - spouses of EU citizens - having lived in another Member State before their arrival in Ireland, was in breach of Community law (Directive 2004/38).²⁰ Following this ruling, the Department of Justice, Equality and Law Reform revoked the requirement in question.

The Court overturned its previous ruling in *Akrich*,²¹ decided prior to the adoption of Directive 2004/38, stressing that the Directive's application is not intended to be

¹² *De Cuyper v Office National de l'Emploi (ONEM)* (C-406/04) [2006] E.C.R. I-6947; [2006] 3 C.M.L.R. 44, para.40.

¹³ *Di Leo v Land Berlin* (C-308/89) [1990] E.C.R. I-4185, paras 14-15; *Meeusen v Hoofddirectie van de Informatie Beheer Groep* (C-337/97) [1999] E.C.R. I-3289; [2008] 2 C.M.L.R. 659, para.25; *Commission of the European Communities v Austria* (C-147/03) [2005] E.C.R. I-5969; [2006] 3 C.M.L.R. 39, paras. 31-35; *Schwarz v Finanzamt Bergisch Gladbach* (C-76/05) [2007] 3 C.M.L.R. 47, para.70.

¹⁴ *Turpeinen, Re* (C-520/04) [2006] E.C.R. I-10685; [2007] 1 C.M.L.R. 28.

¹⁵ See also *Schempp v Finanzamt München* (C-403/03) [2005] E.C.R. I-6421; [2005] 3 C.M.L.R. 37, para.19.

¹⁶ *Grunkin v Grunkin-Paul* (C-353/06) [2009] 1 C.M.L.R. 10, para.16.

¹⁷ *Cowan v Trésor Public* (186/87) [1989] E.C.R. 195; [1990] 2 C.M.L.R. 613.

¹⁸ *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) (not yet reported).

¹⁹ See Directive 2004/38, art.35 "Abuse of Rights": "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31".

²⁰ *Metock* at paras 58-59.

²¹ *Secretary of State for the Home Department v Akhric* (C-109/01) [2003] E.C.R. I-9607; [2003] 3 C.M.L.R. 26. The Court held in this case that a third country national spouse of an EU citizen may reside in the latter's State of origin when he/she, after making use of their right to freedom of movement - and having thus triggered his/her rights under Community law - returns to his/her home Member State with his/her spouse in order to work, provided that the spouse has lawfully resided in another Member State. The latter conclusion was reconsidered in *Metock*. See also *R v Secretary of State for the Home Department Ex p. Shingara* (C-65/95) [1997] E.C.R. I-3343; [1997] 3 C.M.L.R. 703.

conditional upon prior lawful residence of non-Community spouses of EU citizens in another Member State and does not require an EU citizen to have already founded a family at the time when he/she moves, in order for his/her third country national family member to be able to enjoy the rights granted by the Directive. Accordingly, the Court ruled that illegal entry or residence of a third country national family member of an EU citizen, does not constitute a bar to claiming rights of establishment under Community law.²² The protection under Community law is guaranteed to a non-Community spouse of an EU citizen even in cases where, prior to his/her marriage with the EU citizen, the third country national (then asylum seeker) was awaiting a deportation order from the Member State concerned. Furthermore, it is irrelevant where and when the marriage took place and how the third country national had access in the host Member State.²³

In *Akrich*, despite the fact that the third country national in question was an illegal immigrant when he had married an EU citizen, the Court emphasised the need for the British immigration authorities to consider the admittance of a third country national in the territory of the United Kingdom in the light of art.8 of the European Convention of Human Rights 1950 (ECHR) on respect for family life.²⁴ The right to family life, which belongs as much to the third country national as to the EU citizen with whom the former is married, is now enshrined in Directive 2004/38, which has been interpreted consistently with the division of competences between the Member States and the Community.²⁵ The requirement of prior lawful residence in another Member State constituted, according to Ireland, a means of controlling immigration at its external frontiers. As such, it did not fall within the remit of Community competence. By contrast, the Court found that since the exercise of the rights inherent in art.18 EC is interconnected with an EU citizen's ability to lead a normal family life in the host Member State, any obstruction by a Member State to the right of a third country national family member of an EU citizen, to accompany or join that EU citizen would discourage the latter from exercising his/her rights of entry and residence in that Member State under the Treaty.²⁶ Hence, in consistency with other areas of Community law, when Member States apply their national immigration laws to a case, which has an element of Community law, they are obliged to do so having regard to the general principles of Community law, such as the fundamental freedoms guaranteed by the Treaty and the principle of proportionality.

It is important that the protection and respect to family life has not been considered by the Court as a determining factor in assessing the degree of proportionality of a deportation order against a third country national family member of an EU citizen, but as a means of sustaining the free movement rights of EU citizens themselves as guaranteed by Community law, whenever Member States act within its scope. This appears to be the case even when, contrary to the provisions of Directive 2004/38, the spouse does not possess an entry visa or residence card issued by a Member State.²⁷ By upholding the derivative rights of non-EU spouses, the Court seems to have opened Pandora's box, which implications are yet to be determined by a number of tribunal and Court of Appeal decisions.²⁸ Thus, not only the Court's judgment in *Metock* has resulted to a review, under Directive 2004/38, of all relevant residence applications in Ireland prior to April 28, 2006 (approximately 1,500) but its aftermath has undeniably shaken the sovereign

²² See M. Dougan, "The Constitutional Dimension to the Case Law on Union Citizenship" (2006) 31(5) E.L. Rev. 613, at p.634 especially the discussion on *Mouvement contre le Racisme, l'Antisemitisme et la Xenophobie ASBL (MRAX) v Belgium* (C-459/99) [2002] E.C.R. I-6591; [2002] 3 C.M.L.R. 25 regarding the formalities under which third country national spouses of a migrant Community worker or self-employed person, may seek access to the territory of a Member State. See also *Jia v Migrationsverket* (C-1/05) [2007] 1 C.M.L.R. 41.

²³ See *Metock* at paras 87-93. However, Directive 2004/38 does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizens. Under art.27(1) of Directive 2004/38: "Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends".

²⁴ See *Berrehab v Netherlands* (A/138) (1988) 11 E.H.H.R. 322.

²⁵ *Metock* at paras 60 and 67.

²⁶ The Court has established a general principle of protection for the family life of EU citizens in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty in *Baumbast v Secretary of State for the Home Department* (C-413/99) [2002] E.C.R. I-7091; [2002] 3 C.M.L.R. 23 and *Carpenter v Secretary of State for the Home Department* (C-60/00) [2002] E.C.R. I 6279; [2002] 2 C.M.L.R. 64.

²⁷ See *MRAX*, cited above.

²⁸ See the cases of *HB (Algeria) v Secretary of State for the Home Department* [2008] UKAIT 69, para.60 and *SM (Sri Lanka) v Secretary of State for the Home Department* [2008] UKAIT 75, where the UK Asylum and Immigration Appeal Tribunal accepted the full implications of the Court's decision in *Metock*.

foundations of national immigration systems, in particular, national competence to tackle illegal immigration, false marriages and immigration control abuses.²⁹

Unquestionably, Member States can still refuse entry and residence on grounds of public policy, security and health or abuse of rights. They also remain competent to impose penalties, in compliance with Directive 2004/38, for entry into and residence in their territory in breach of national immigration rules. Yet, the feeling generated in the Member States after the Court's decision in *Metock* is that Community law almost encourages third country nationals who wish to establish themselves in one of the Member States to use any means available to arrive and evade the immigration authorities long enough before they marry an EU citizen and therefore gain an absolute right of permanent residence in the host Member State. Moreover, given that Community law freedoms can only be triggered when a Member State national exercises his/her rights under the Treaty, it appears that a third country national spouse of an EU citizen, can only benefit from Community law if either the EU citizen has exercised his/her free movement rights under the Treaty³⁰ or both have resided in another Member State prior to their arrival in the Member State of settlement.³¹ Hence, contrary to what was decided in *Metock*, a third country illegal immigrant in Ireland marrying an Irish national would have found himself/herself positioned outside the umbrella protection of Community law, since national immigration rules operate intact where all activities in question are confined within the territory of a Member State.³² Although, given that all Member States are parties to the ECHR, the degree of respect to family life is assessed by looking at art.8 ECHR, Member States have a legitimate claim in contending that the current position creates a case of reverse discrimination against their own nationals, since the importance of the protection of family life acquires relevance, under Community law, only with reference to the elimination of obstacles to free movement.

Conclusion

The Court's recent incremental judgments, categorised in this article, for the sake of clarity, to social assistance and protection of family life cases, demonstrate that the provisions on EU citizenship now impose upon the Member States a more invasive level of judicial review, extending beyond the rights of equal treatment and residence of migrant EU citizens. The Court has established that the exercise of the fundamental freedom of cross-border movement by a Member State national is sufficient in itself to raise an issue within the scope of the Treaty.³³ Hence, although EU citizenship is not intended to extend the scope *ratione materiae* of the Treaty to internal situations,³⁴ once the right of free movement and residence of EU citizens is triggered it almost becomes irrelevant under the material scope of the protection provided by art.18 EC and Directive 2004/38 whether a case involves a Community law question per se. There, as Dougan notes, "the fundamental freedoms proclaimed in the name of all Union citizens figure more prominently in the balance of interests inherent in the principle of proportionality".³⁵ What lies behind this development: a constitutional justification in asserting the separation of the freedom of movement from its functional and instrumental elements at the expense of national welfare systems or a mere aversion of injustice targeting national legislation, which places EU citizens and their families at a disadvantage simply because they have exercised their freedom to move and reside within the Union? The answer lies within the Court.

²⁹ A. Thorp, "Immigration: The *Metock* Case and its Implications for UK Rules on Family Members of EEA Citizens", House of Commons Library, (November 25, 2008) SN/HA/4900.

³⁰ In *Carpenter* the Court held that art.49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding a refusal by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

³¹ In *Eind v Minister voor Vreemdelingenzaken en Integratie* (C-291/05) [2008] 2 C.M.L.R. 1 the Court held that: "when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68...to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State."

³² *Metock* at paras 76-79. See also the UK Court of Appeal cases in *GC (China) v Secretary of State for the Home Department* [2008] EWCA Civ 623 and *R (on the application of H) v Secretary of State for the Home Department* [2008] EWCA Civ 245.

³³ *Criminal Proceedings Against Bickel* (C-274/96) [1998] E.C.R. I-7637; [1999] 1 C.M.L.R. 348, paras 15 and 16.

³⁴ *Land Nordrhein-Westfalen v Uecker* (C-64/96 and C-65/96) [1997] E.C.R. I-3171; [1997] 3 C.M.L.R. 963, para.23; *Garcia Avello v Belgium* (C-148/02) [2003] E.C.R. I-11613; [2004] 1 C.M.L.R. 1, para.26 and *Government of the French Community v Flemish Government* (C-212/06) [2008] 2 C.M.L.R. 31, para.33.

³⁵ M. Dougan, cited above, at p.641.