Citizenship, Residence and Social Security

Mel Cousins, Glasgow Caledonian University
Analysis and Reflections

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Mel Cousins*

[Keywords to follow]

In two recent cases the Court of Justice has considered the impact of Union citizenship on the long-standing issue of the exportability of social security payments. These decisions clarify: (i) the position of the Court in relation to the material scope of the protection provided by Art.18 EC, i.e. that the exercise of free movement is itself sufficient to bring an issue within the scope of the Treaty regardless of whether the issue actually in dispute involves a question of Community law; and (ii) that the Court will examine residence requirements as a restriction on the freedoms conferred by Art.18 EC and as obstacles to freedom of movement. However, the fact that the Court came to different conclusions of the facts of the cases highlights the growing importance of the concept of justification of restrictions on citizens’ rights free movement and the challenge of developing a clear and consistent approach to its interpretation.

States have traditionally imposed nationality or residence requirements on entitlement to their social security benefits. National solidarity was seen as confined to the state’s own national or residents. For Member States of the EU, discrimination on grounds of nationality is not allowed in relation to most social security benefits.1 Similarly residence requirements have been removed under EU law for a range of benefits. However, there remain some benefits which cannot be exported or which can be exported only to a limited extent. The developing concept of EU citizenship raises important implications for such benefits which have been considered by the Court of Justice in two recent cases.2

The facts

Mr De Cuyper was a Belgian national who had been employed in Belgium and subsequently was granted unemployment payments.3 Some months later, as he was over the age of 50, he was exempted from the various national control procedures (as allowed by Belgian law). In particular he was no longer required to be available for work, to

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1 In accordance with Regulation 1408/71, [1971] O.J. L149/5.
2 A number of Member States have introduced residence requirements in order to establish entitlement to benefits. These also raise important issues of compatibility with EU law (considered, for example, in Case C-138/02, Collins [2004] E.C.R. I-2703).
accept suitable employment, to present himself to the employment service or to register
as a jobseeker, nor to participate in a monitoring scheme. In 1999, Mr De Cuyper
moved to the south of France (although returning to Belgium approximately once every
three months). When the Belgian authorities became aware of this they terminated his
entitlement on the basis of the national requirement that he must be actually resident
in Belgium. The Belgian Labour Court referred questions to the Court of Justice as to
whether Arts 17 and 18 EC, under which EU citizens have the right to move reside freely
within the territory of the Member States, were inconsistent with a national law which
made entitlement to an allowance such as that payable to Mr De Cuyper conditional on
actual residence in the Member State concerned.

The second case—Tas-Hagen—involves two Dutch nationals both of whom had been
born in the Dutch East Indies and who held Netherlands nationality.4 Both had worked in
the Netherlands but had ceased employment in the 1980s due to incapacity for work and
had moved to Spain in 1987. The two people were recognised as “civilian war victims”
for the purposes of the Netherlands legislation of benefits for civilian war victims but
had been denied entitlement to benefit as they did not satisfy the requirement in the
national law that they be resident in the Netherlands at the time when the application
was submitted. The Netherlands social security court referred a question to the Court of
Justice asking whether Art.18 EC precluded national legislation which refused the grant
of a benefit solely on the ground that the person concerned was not in the territory of
the Member State where the application was submitted.

Judgment of the Court

In both cases the Court broadly followed the approach suggested by the Advocates
General.5 In both, the Court found that the national legislation, in so far as it placed
at a disadvantage certain of its nationals simply because they exercised their freedom
to move and to reside in another Member State, was a restriction on the freedoms
conferring by Art.18 EC.6 It held that making payment of benefits conditional on the fact
that applicants are resident in the territory of the Member State was liable to dissuade
Community nationals from exercising their freedom to move and to reside outside their
home state.7

Such a restriction could only be justified, according to the Court, only if it is based on
objective considerations of public interest independent of the nationality of the persons
concerned and proportionate to the legitimate objective of the national provisions.8

The Court examined in both cases whether such justification was possible. In the De
Cuyper case, the Court ultimately concluded that the restriction of the exportability on
employment benefit could be justified “by the need to monitor compliance with the
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Statutory conditions governing the compensation paid to unemployed persons”.

Thus, in this case, the Court’s interpretation did not alter the long-standing restrictions of the exportability of unemployment benefits which make this type of benefit an exception to the general rule set out in Regulation 1408/71.

However, in the Tas-Hagen case, the Court took a different approach on the facts of the case. It found that the condition of residence in Netherlands law arose from the legislature’s wish to limit the obligation of solidarity with civilian war victims to those who had links with the population of the Netherlands during and after the war. The Court accepted that this aim of solidarity might constitute an objective consideration of public interest. However, even allowing for the “wide margin of appreciation” allowed to Member States in deciding the criteria to be used when assessing the degree of connection to society with regard to benefits not covered by EU law, the Court held that the residence condition in this case could not be characterised as an appropriate means by which to attain the objectives sought as it was liable to lead to different results for persons whose degree of integration into the society of the Member State was in all respects comparable.

These cases, which are representative of a series of recent cases concerning Union citizenship, help to clarify two important points: first, the position of the Court in relation to the material scope of the protection provided by Art.18 EC and, secondly, the basis upon which the Court will examine restrictions on persons exercising their right to free movement. The two decisions also highlight the growing importance of the question as to when restrictions on citizens’ rights of free movement can be justified and the challenge of developing a clear and consistent approach to its interpretation.

Material scope

In the famous Martínez Sala case—the first in a series of cases in which the Court began to develop the concept of Union citizenship—the Court ruled that that a citizen of the European Union, lawfully resident in the territory of the host Member State, could rely on (what is now) Art.12 of the Treaty in all situations which fell within the scope ratiune materiae of Community law. The Court held that the benefit in dispute in that case fell within the scope ratiune materiae of EU law. In a number of subsequent decisions the Court also adopted this approach of examining the subject of the dispute to see if it fell within the scope ratiune materiae of EU law. This approach

9 De Cuyper, at [47].
11 Tas-Hagen, at [34].
12 Tas-Hagen, at [36]–[38].
15 ibid., at [28] and [57].
16 Case C-184/99, Grzeczyn [2001] E.C.R. I-6193, at [46]; Case C-224/98, D’Hoo [2002] E.C.R. I-6191, at [17] and [32]; Case C-456/02, Trojani [2004] E.C.R. I-7573, at [42]; Case C-209/03, Bidar [2005] E.C.R. I-2119, at [38]–[43]. The issue was, of course, particular relevant in Bidar in that the Court had previously held that the maintenance grants in issue in that case did not fall within the scope of Art.12 EC.
examined whether the benefit in question fell within the scope of some Community provision. However, it did not appear to have a particularly logical basis. For example, the child benefit payment at issue in Martínez Sala was primarily a national competence. While such a payment did fall within particular aspects of Community law, it was not clear that Ms Martínez Sala was within the personal scope of the EU legislation in question. It was also unclear whether any reference at all in EU law would be sufficient to bring an issue within the scope of EU law.17 Unsurprisingly, the Court’s approach in this area was heavily criticised in the literature.18

However, at the same time (and to a certain extent in parallel), the Court also developed a different approach to the scope of EU law. For example in the Grelczyk case, which also appeared to have considered whether the benefit in question fell within the scope of the Treaty, the Court also stated that the situations falling within the scope of EU law:

“include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move or reside freely in another member state”

guaranteed by Art.18 EC.19 Gradually, this broader—and more logical—approach appears to have become accepted by the Court. For example in the Pusa case, which involved attachment of earnings, the Court simply referred to the fact that the exercise of the freedom to move and reside brought the issue within the scope of EU law.20

Perhaps surprisingly this issue appears to have received relatively little attention either in the literature or the jurisprudence. However, it has now been considered in some detail in the Tas-Hagen case. As we have seen, the subject-matter of the dispute was clearly outside the scope of EU legislation and it appears that the UK Government in particular, intervening in the case, argued that reliance on Art.18 EC presupposed that the situation concerned related to a matter covered by Community law ratione materiae. Advocate General Kokott, in her Opinion, addressed this matter in some detail. While accepting that the Court had in the past considered whether the benefits in question fell within the scope of Community law, she argued that this could at most be “an additional factor in the appraisal of a particular case” and not “an imperative requirement for the application of Article 18 (1) EC”.21

The Advocate General provided a detailed rationale for a broader approach pointing out that a Union citizen’s right to free movement is a fundamental freedom and, therefore, directly applicable and to be interpreted broadly.22 In particular she argued that this provision, like the other fundamental freedoms, has a scope which is not restricted

17 For example, while taxation it is clearly a matter of national confidence, could it be argued that the existence of a Council Directive (77/799, [1977] O.J. L 336/15) on mutual assistance in the field of taxation was sufficient to bring an issue of cross-border taxation within the scope of the Treaty?
19 At [33]. This approach had first been developed in Case C-274/96, Bickel and Franz [1998] E.C.R. 1-7637.
21 Opinion, at [32]–[33]. Though why such an additional factor should be necessary was left unclear.
22 Opinion, at [34]–[41].
to specific matters nor only to matters in respect of which the Treaty grants specific powers. She pointed out that were matters not governed by Community law excluded from the scope of the fundamental freedoms, it would be impossible to implement an internal market. Accordingly, she pointed out that the Court has consistently held that the fundamental freedoms are to be observed even where a Community law has not (yet) laid down rules. By analogy, she argued that it would be equally inconsistent with the notion of Union citizenship as the fundamental status of all Union citizens, if Member States did not have to observe the right to free movement in all areas but only in relation to specific issues covered by Community law. Therefore, she concluded that Art.18 EC must be applied in a case involving a claim for civilian war victim benefits by a person who has transferred his or her place of residence within the EU. She did, however, concede that the fact that such benefits are not governed by Community law means that the Member States should have a broad margin of discretion in organising the system of such benefits.

The Court addressed the question much more briefly but appeared to agree with the Advocate General. The Court noted that the benefit at issue fell within the competence of the Member States but pointed out that they must exercise that competence in accordance with Community law, in particular with the Treaty provisions giving Union citizens the right to move and reside freely. While the Court accepted that citizenship did not extend the scope of the Treaty to internal situations which had no link with Community law, it held that the situation of the applicants was covered by the right of free movement and residents of citizens.

The same approach has been taken in a number of other recent decisions. Thus it would appear that the exercise of free movement is itself sufficient to bring the matter within the scope of the Treaty regardless of whether the issue actually in dispute involves a question of Community law. Indeed, it would appear that the person bringing the claim need not, necessarily, have exercised the right of free movement him or herself. In Schempp the Court held that the exercise by Mr Schempp’s former spouse of a right of free movement had an effect, on his right in relation to the deduction of maintenance payments for taxation purposes, sufficient to bring that case within the scope of the Treaty.

The basis of the Court’s review

These decisions also help to clarify the Court’s approach to restrictions on persons exercising their right of free movement. In their case note on the D’Hoop judgment in this journal, Iliopouli and Toner identified four possible approaches to the examination of the compatibility of discrimination against persons exercising their free movement rights. The first was to qualify it as “indirect or disguised discrimination on the grounds of nationality”. The second was to consider mobility or migration itself as the prohibited

23 Citing, in the area of social security, cases such as Case C-120/95, Decker [1998] E.C.R. I-1831.
24 Judgement, at [20]–[24].
25 See, for example, Case C-520/04, Turpeinen [2006] E.C.R. I-000.
ground of discrimination. The third was to see discrimination based on migration as an obstacle to free movement. Finally, a fourth option was one based on direct nationality discrimination. In that case, they argued that the Court wavered between the second and third approaches.

In the two cases considered here, the persons involved were nationals of the Member State involved in the case. This highlighted the difficulty of any approach based on indirect discrimination on grounds of nationality. However, the Court in both cases adopted a clear approach emphasising that it was the exercise by the individuals involved of the right to move and reside freely which gave rise to the disputes, i.e. the third approach outlined above. In contrast to its earlier jurisprudence, as in D’Hoop, the Court in both recent cases referred to residence requirements as “a restriction on the freedoms conferred by Article 18 EC” and as “obstacles” to freedom of movement. So rather than having to compare the persons concerned with non-nationals or non-migrating nationals, the Court saw a restriction on or obstacle to free movement as requiring justification if it was not to be in breach of EU law.

Thus the Court has clarified two fundamentally important issues in relation to the application of Art.18 EC and the concept of Union citizenship. First, Art.18 EC is applicable where an issue in the case involves the exercise of the right of free movement of residence. Secondly, establishing a possible breach of EU law does not require identification of possible indirect nationality discrimination or even discrimination between migrating and non-migrating Union citizens but simply requires the identification of a restriction on or obstacles to the right to free movement and residence. While these approaches are both coherent and logical, they do substantially broaden the potential scope of review by the Court of Justice under EU law. They bring to the forefront the question of possible justification for such obstacles and restrictions and the challenge in developing a coherent and consistent approach to this issue.

When can restrictions on citizens’ rights be justified in the public interest?

In both cases, having identified a restriction on the right of free movement, the Court stated that such a restriction could be justified:

“only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions.”

28 De Cuyper, at [39]; Tas-Hagen, at [28]. In De Cuyper, the Advocate General specifically ruled out discrimination as being a precondition for the application of Art.18 EC and argued that non-discriminatory barriers were also covered: De Cuyper Opinion, at [104]–[108]; while in Tas-Hagen the Advocate General pointed out that nationality discrimination was not involved in that case and so there was no issue of direct or indirect nationality discrimination. Thus Art.12 was not relevant but Art.18 protected persons exercising their right of free movement: Opinion, at [48]–[51].


30 De Cuyper, at [39]. The Court in Tas-Hagen also uses the term “restriction” at, for example, [32]–[33].

31 Tas-Hagen, at [30].

32 See Tas-Hagen, Opinión, at [50].

33 De Cuyper, at [40]; Tas-Hagen, at [33].
However, the Court’s application of this concept varied somewhat in both decisions. In De Cuyper, the question of the exportability of unemployment benefits was already regulated by Regulation 1408/71 which, in contrast to most other types of benefit, only allowed the export of unemployment benefits in very limited circumstances (which did not apply in the case). The Court held that the residence clause reflected “the need to monitor the employment and family situation of unemployed persons” and, accordingly, was based on objective considerations of public interest independent of the nationality of the person concerned. The Court then went on to consider whether or not the measure was proportionate which it defined as being appropriate for securing the attainment of the objective pursued and not going beyond what is necessary in order to attain it. The Belgian authorities argued that the residence clause was necessary for them to monitor compliance and to allow inspectors to check whether the situation of a person had undergone changes which might affect his entitlement to benefit. The Court accepted that the effectiveness of monitoring arrangements was dependent to a large extent of the fact that it was unexpected and carried out on the spot and, for that reason, accepted that less restrictive measures would mean that monitoring would be less effective. Accordingly it found that the obligation to reside in the Member State concerned satisfied the requirement of proportionality.

In the Tas-Hagen case, in contrast, the benefit for civilian war victims was not subject to Community co-ordination and was, in fact, specifically excluded from the scope of Regulation 1408/71. The Court found that the condition of residence in Netherlands law arose from the Netherlands legislature’s wish to limit the obligation of solidarity with civilian war victims to those who had links with the population of the Netherlands during and after the war and accepted that this aim of solidarity might constitute an objective consideration of public interest. However, even allowing for the “wide margin of appreciation” allowed to Member States in deciding the criteria to be used when assessing the degree of connection to society with regard to benefits not covered by EU law, the Court concluded that the specific residence criterion involved could not be a satisfactory indicator of the degree of attachment of the person to the society of the Member State where it was liable to lead to different results for persons living abroad whose degree of integration into the society was in all respects comparable.

Here the Court followed the analysis of the Advocate General. She had accepted that residence could, in principle, be used as the criterion for connection with the society of the Member State granting the benefit and that that person’s integration into the society could be regarded as established by residence there for a certain length of time. While accepting that a Member State had a broad margin of discretion in determining the degree of integration required, Advocate General Kokott had argued that Member States must at least formulate the residence requirement in such a way as to accurately reflect the desired degree of integration. She argued that the specific Netherlands requirement, which only required residence when the application for benefits was made, did not do

34 Regulation 1408/71, Arts 10 and 69.
35 At [41].
36 At [47].
37 At [38].
so. First she suggested that it could lead to differences amongst persons who had lived and worked in the Netherlands for a long time in the past and who now wished to retire to another Member State on the basis solely of whether they applied for the benefits before or after moving to that second Member State. Secondly she suggested that the criterion could open up entitlements to persons who transferred their residence to the Netherlands only shortly before submitting an application and whose integration into the society was less than those who had lived and worked for a long time in the Netherlands but who had retired abroad before submitting a claim for benefits. The Advocate General suggested that the specific residence requirement would be an appropriate means only if it also allowed persons to demonstrate their connection with the Netherlands society, if necessary, irrespective of their place of residence at the time when the application was submitted.

The outcome of these two cases is the—perhaps slightly surprising—result that the position of a core social security benefit which is subject to co-ordination and (albeit limited) export has been held to be unaffected by the concept of Union citizenship while, on the other hand, export of civilian war benefits which are specifically excluded from the co-ordination as being a particular national responsibility (and which the Court as recently as September 2004 had found not to be exportable under Art.39 EC) are now exportable in certain circumstances. One might suggest that the Court took the concept of proportionality somewhat too far in *Tas-Hagan* and perhaps not far enough in *De Cuyper*.

The fundamental issue in the *De Cuyper* case was arguably the fact that many of the normal components of the “unemployment” benefit payable in that case had been removed because of Mr De Cuyper’s age (or, more accurately, the Belgian legislature’s perception of that age). It would, perhaps, be surprising had the Court given serious consideration to a general relaxation on the export of unemployment benefits where, arguably, close contact with the employment services is normally essential as part of job search and monitoring requirements. However, the fact that Mr De Cuyper was not required to be available for work or to actually look for work meant that many of the arguments which might normally be made against the export of unemployment benefit were not applicable. The Advocate General was reduced to using general arguments against the exportation of the unemployment benefit even though some of these did not apply on the facts of the particular case. The Court was more careful and confined itself to the arguments that it was necessary to monitor the family circumstances and possible sources of undeclared income of the claimant. However, family circumstances have also to be monitored in the case of many benefits whose export is allowed (such as sickness benefits). Whether or not the need to monitor possible sources of undisclosed earnings

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39 Case C-386/02, *Baldinger* [2004] E.C.R. 1-8411 (by the same chamber of the Court).
40 In fact, recognising the extent to which the benefit had been modified the Commission argued that it should be categorised as an early retirement or *sui generis* benefit. However both the Advocate General and the Court rejected this argument. The Court identified the core components of unemployment benefits as being to cover of the risks linked to involuntary loss of employment where the worker retains capacity for work (at [24]). The Court was surely correct to adopt a broad brush approach to the categorisation of benefits and to avoid the development of new categories or *sui generis* benefits which would not be covered by the co-ordination rules.
41 Opinion, at [85].
42 Judgement, at [45].
was, in itself, sufficient to justify the non-export of benefits to Mr De Cuyper might be open to question (especially when one notes that the Court has recently rejected an argument for less favourable treatment of non-resident taxpayers suggesting that “alleged difficulties” as regards collection of tax from such non-resident taxpayers did not justify such treatment). The is particularly the case given that Mr De Cuyper argued that he would be prevented from exercising his right of free movement and residence because, without the benefit, he would lose his right of residence in France as he would not have “sufficient resources”. The Court might perhaps instead have upheld the general ban on the export of unemployment benefits but, following the Baumbast approach, have disapplied this rule in a case where its application was not proportionate.

In contrast, in Tas-Hagan the Advocate General and the Court applied the concept of proportionality very strictly. There is no doubt but that they were probably correct to point out that the Netherlands requirement of residence at the time of the application was made was a very rough test of connection with the society concerned and one which could lead to different outcomes in broadly similar cases. However, the same point might be made in relation to the Court’s linkage of residence for a period of time in a particular state and the employment market of that state (in Collins). In addition, it is far from clear that the outcome of the Tas-Hagan case will ultimately advance free movement. The Advocate General suggested that the Member States could, in principle, determine how long a person must have resided in the territory before he or she could claim a particular benefit and that, in the absence of contrary Community law provisions, a Member State could require the person concerned to be resident in the state when benefits begin to be paid and, where appropriate, throughout the entire period of receipt of benefits. While the Court did not comment on this aspect, this approach may well lead Member States to require more long-term (or indeed permanent) residence for such benefits which clearly would not advance free movement. Thus, in the absence of coordinating Community rules, it might have been more advisable for the Court to have respected the Member States’ margin of discretion rather than to have given rise to a situation which might see a reduction in exportability of benefits.

Conclusion

Overall, these recent judgments, and a number of other recent judgments of the Court in the area of Union citizenship, have clarified a number of important points including the material scope of the provisions and the fact that Member States will be required to justify obstacles to and restrictions on free movement. The approach in relation to material scope, while it does significantly broaden the range of the Courts review, is justified by the arguments put forward by Advocate General Kokott in relation to the need to give real effect to a fundamental freedom and is much more logical then the highly arbitrary approach to classification based on whether or not a particular measure has been referred to somewhere in the developing corpus of EU law. The approach of seeing restrictions on free movement in itself as the key (rather than comparisons

43 Case C-520/04, Turpeinin [2006] E.C.R. I-000, at [35]. The Court suggested that such difficulties could be addressed through the mechanism of Council Directive 77/799 on mutual assistance in direct taxation.
44 Opinion, at [94].
between nationals or non-nationals, or migrating and non-migrating nationals) is also to be welcomed. However, while it is easy to identify restrictions on free movement, this does move the difficult part of the analysis to the identification of justification for such restrictions on citizens’ rights. It will be important for the Court to develop a coherent and consistent jurisprudence in this regard. Arguably this will require the Court to be sensitive as to the extent to which particular policy areas are subject to co-ordination. In the past, the Court has perhaps applied a more rigorous standard to national provisions than to those of the Community legislature. Following its approach in _Baumbast_— and related cases—to the residence Directives, arguably the Court may need to apply such a more rigorous approach more broadly to areas which have been addressed by the Community legislature while adopting a lighter touch to those areas which are still primarily a national competence.

46 M. Dougan, “The Constitutional Dimension to the Case Law on Union Citizenship’ (2006) 31 E.L. Rev. 613. The Court appears to have adopted this approach in these two cases (although not explicitly). Advocate General Geelhoed in _De Cuyper_ referred heavily to the restrictions on the export of unemployment benefit in Regulation 1408/71, was concerned that the case would “undermine entirely” the rules on unemployment benefit in that Regulation (at [116]), and suggested that the right of free movement under Art.18 EC was limited by the general principle arising from Regulation 1408/71 that unemployment benefits may not be exported (at [113]). In contrast, Advocate General Kokott in _Tas-Hagan_ noted that unlike the _De Cuyper_ case there was nothing in EU law to justify the restriction on the export of the civilian war victim benefit (at [55]).
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