The developing concept of European citizenship: residence and welfare rights in EU law

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Abstract

The developing case law on European Union citizenship has attracted much attention in recent years. One of the most important aspects of this case law has been the implications of citizenship for the right of residence and, in particular, the relationship between the right of residence and access to social security benefits. This issue is particularly sensitive because of the concerns of Member States in relation to the potential costs involved arising from greatly extended residence rights for non-nationals. This article looks at a number of interrelated issues concerning the relationship between access to social security and (rights of) residence. It examines, in particular, the interpretation of the law by the European Court of Justice in relation to (i) the need to have sufficient resources and sickness insurance in order to have a right of residence, and (ii) the need to have a right of residence (or to be habitually resident) in order to be entitled to social security. On the basis of this analysis, we examine a number of key issues concerning the interpretation of the new residence Directive 2004/38 and look at a number of recent important decisions of the Court of Justice.
The developing concept of European citizenship: residence and welfare rights in European Union law

I. Introduction

The developing case law on European Union citizenship has attracted much attention in recent years.\(^1\) One of the most important aspects of this case law has been the implications of citizenship for the right of residence and, in particular, the relationship between the right of residence and access to social security benefits.\(^2\) This issue is particularly sensitive because of the concerns of Member States in relation to the potential costs involved arising from greatly extended residence rights for non-nationals. This article looks at a number of interrelated issues concerning the relationship between access to social security and (rights of) residence. There has long been a right of residence for workers and members of the family under EU law and related social security rights. However, the establishment of EU citizenship and its interpretation by the European Court of Justice has had particular implications for non-active citizens and these implications form the focus of this article.

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In part 2 of this article we outline briefly the relevant provisions of EU law. In parts 3 and 4 we look at the interpretation of the law (as set out in the three residence Directives of the 1990s) to date by the European Court of Justice in relation to (i) the need to have sufficient resources and sickness insurance in order to have a right of residence, and (ii) the need to have a right of residence (or to be habitually resident) in order to be entitled to social security. In part 5 we examine a number of key issues concerning the interpretation of the new residence Directive 2004/38 which have recently been considered by the Court of Justice. Part 6 concludes by looking at some of the broader issues which arise from the case law.

2. Rights under EU law

The EC Treaty

Article 17 of the Treaty sets out the provisions in relation to citizenship. This provides that:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

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3 Directive 90/364 on the right of residence; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activities; Directive 90/366 on the right of residence for students (subsequently replaced by Directive 93/96).

4 On the issue of whether a Member State may impose a residence requirement in order to prevent the ‘export’ of a benefit, see M. Cousins “Citizenship, residence and social security” (2007) 32 (3), E.L. Rev. 386-395.
Article 18 provides that:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.

3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

Article 12 of the Treaty, which is in the section setting out the principles of the Treaty, provides for non-discrimination on grounds of nationality. This Article states that

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

Specific provisions in relation to the right of residence are set out in Council Directive 2004/38 which replaces the earlier residence Directives.

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5 Articles 19-22 set out related provisions concerning the right to vote, diplomatic representation, etc.
Directive 2004/38/EC

Director 2004/38/EC (which had to be implemented by Member States by 30 April 2006) states that “Union citizenship should be the fundamental status of nationals of the Member States where they exercise their right of free movement and residence”.\(^6\) Article 6 of the Directive provides that Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions (other than having a valid identity card or passport). However this is qualified by Article 14 which states that Union citizens and their family members have this right “as long as they do not become an unreasonable burden on the social assistance system of the host Member State”.

Article 7 provides for a longer-term right of residence. It provides that all Union citizens have the right of residence for a period longer than three months if they

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have a comprehensive sickness insurance cover in the host Member State; or

(c) in the case of students have a comprehensive sickness insurance cover in the host Member State and assure the relevant national authority that they have sufficient resources for themselves and their family members not to become a burden of the social assistance system of the state during their period of residence.

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\(^6\) Preamble, para three.
Family members (whether nationals of a Member State or not) accompanying or joining a citizen who satisfies the above conditions are also entitled to this extended right of residence.

Article 14.2 provides that such persons will have the right of residence provided for in Article 7 as long as they satisfy the conditions set out therein. Member States are entitled to verify whether such a person continues to satisfy the conditions where there is a “reasonable doubt” but may not do so systematically. Reflecting the case law of the Court of Justice, Article 14.3 provides that an expulsion measure should not be the automatic consequence of a person’s recourse to the social assistance system of the Member State.

Article 16 of the Directive provides that citizens who have resided legally for a continuous period of five years in the host Member State are entitled to permanent residence there. Articles 27 to 33 of the Directive set out restrictions on the right of residence of the grounds of public policy, public security or public health. These, of course, reflect the long-standing restrictions in Community law and have received extensive interpretation by the Court of Justice.

Article 24 of the Directive provides that, subject to specific exceptions in the Treaty and secondary law, all Union citizens (and their family members) residing on the basis of the Directive in the territory of another Member State are entitled to equal treatment with the nationals of that Member State within the scope of the Treaty. However, Article 24.2 provides that by way of derogation from the principle of equal treatment Member States are not obliged “to confer entitlement to social assistance during the first three months of residence” or during the period in which a person seeking employment is entitled to residence in the Member State.

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7 Article 14.2
under Article 14.4.b (i.e. as long as that person can provide evidence that she is continuing to seek employment and has a genuine chance of being engaged). Article 24.2 also provides that Member States are not obliged, prior to the acquisition of a right to permanent residence, to grant maintenance aid for studies, including vocational training, such as student grants or student loans to persons other than workers, a self-employed persons and members of the family.

Thus the Directive provides that person is entitled to a right of residence for up to three months as long as she does not become an unreasonable burden on the social assistance system of the host Member State. A person (who is not a worker or self-employed) is entitled to longer term residence where she has sufficient resources for herself and her family not to become a burden on the social assistance system of the Member State and has comprehensive sickness insurance cover. Students are entitled to the longer residence period where they have comprehensive sickness insurance cover and assure the national authorities that they have sufficient resources not to become a burden on the social assistance system of the state. In this regard the provisions of the Directive largely follow those of the earlier residence Directives. These provisions have, however, been significantly affected by the manner in which the European Court of Justice has interpreted the concept of European citizenship and the right to nondiscrimination.

3. The need for ‘sufficient resources’ and for sickness insurance coverage to be entitled to a right of residence

In this section we look at the case law concerning the need to have ‘sufficient resources’ and sickness insurance in order to be entitled to a

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8 These are repealed by Directive 2004/38.
right of residence under EU law. It is important to note that this case law relates to the pre-2004 residence Directives. How Directive 2004/38 has been interpreted will be discussed in more detail below (section 5).

Sickness insurance - in order to be entitled to a longer-term right of residence under Article 7, a person must have firstly “comprehensive sickness insurance cover in the host Member State”. The interpretation of this provision was considered by the Court in the Baumbast case. In that case, Mr Baumbast, a German national, had lived in the United Kingdom since 1990. He carried out economic activity there between 1990 and 1993 and subsequently worked outside the EU while retaining his residence in the United Kingdom where his family continued to live and his children went to school. He and his family did not claim any social benefits in the United Kingdom and, as they had comprehensive medical insurance in Germany, they travelled there as necessary for medical treatment. However, in 1996 the United Kingdom authorities refused to renew Mr Baumbast’s residence documents. The Court of Justice was asked, inter alia, whether Mr Baumbast, as an EU citizen, enjoyed a directly effective right of residence under Article 18 EC. In that landmark decision, the Court held that EU citizens did enjoy a direct right of residence under Article 18 EC subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it effect. However, the limitations and conditions must be applied in accordance with Community law, in particular the principle of proportionality. Accordingly

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10 Baumbast, para 91
these restrictions must be necessary and appropriate to attain the objective pursued. It was clear that Mr Baumbast had sufficient resources, he had worked and been legally resident in the Member State for several years, during that period his family also resided in the United Kingdom and remained there after his activities as a worker in that country came to an end; neither he nor the members of his family had become burdens on the public finances of the United Kingdom and, finally, both he and his family had comprehensive sickness insurance in another Member State. Under these circumstances, the Court ruled that to refuse Mr. Baumbast a right of residence would amount to a disproportionate interference with the exercise of his rights under Article 18EC.

The procedural requirements in proving that a person has sickness insurance were considered by the Court in *Commission v. Italy*. In that case the Commission had objected to the fact that the Italian authorities required a person to submit a declaration by the consular authority certifying that the applicant was registered with the health service of a Member State, a sickness insurance policy covering medical care and hospitalisation valid for Italian territory, or a certified copy of the document of registration with the Italian national health service. The Court ruled that, in implementing the Directive, Member States must ensure the basic freedoms guaranteed by the Treaty and the effectiveness of Directives containing measures to abolish obstacles to free movement. In particular, Member States must make use of the various possibilities offered by other rules of Community law in relation to

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11 The referring court had taken the view that this medical insurance did not cover emergency treatment in the United Kingdom. The Court, at paragraph 89, appears to have had some doubt as to whether this was correct but confined itself to pointing out that it was for the national tribunal to determine whether this was indeed the case having regard to regulation 1408/71/EC.

12 At para 93.

the production of evidence by means of certificates issued by national social security bodies. The Court ruled that Italy had exceeded Community law by limiting the means of proof which may be relied on and by requiring that certain documents must be issued or certified by the authorities of the Member State.

Sufficient resources—in order to be entitled to a longer-term right of residence under Article 7, a person must also have “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State”. Such resources may of course include social security payments from another Member State. Unlike the earlier Directives concerning the right of residence of workers who had ceased occupational activity and of the non-employed persons (Directive 90/364 and 90/365), Directive 2004/38 simply refers to “sufficient” resources and does not specify any particular level of resources.\textsuperscript{14}

This issue was considered by the Court of Justice in \textit{Trojani}.\textsuperscript{15} Mr. Trojani was a French national who moved to Belgium and lived, variously, in a campsite, a youth hostel and then in a Salvation Army hostel where in return for board and lodging and pocket money, he did various jobs for about 30 hours a week as part of a reintegration program. He claimed the Belgian minimum income payment which was refused as he did not have Belgian nationality. The Court of Justice was asked, inter alia,

\textsuperscript{14} The earlier Directives have specified that the resources were to be deemed sufficient “where they were higher than the level of resources below which the host Member State may grant a social assistance to its nationals, taking into account the personal circumstances” or where they were higher “than the level of the minimum social security pension paid by the host Member State”.

whether a person in Mr Trojani’s situation might, simply by being a citizen of the European Union, enjoy a right of residence in Belgium by the direct application of Article 18 EC. The Court, in reply, pointed out that the rights set out in Article 18 EC was not unconditional and were conferred subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it affect. It follows from Article 1 of Directive 90/364 (now replaced by Directive 2004/38/EEC) that Member States were entitled to require a person to have sufficient resources to avoid becoming a burden on the social assistance system. While the Court had held in Baumbast that such limitations and conditions must be applied in accordance with the principle of proportionality, in this particular case Mr Trojani claimed the Belgian benefit precisely due to a lack of resources and in these circumstances the Court ruled that he did not derive a right of residence from Article 18 EC. Contrary to the situation in Baumbast the Court held that there was no indication that “the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that Directive”.

In a number of cases the Court of Justice has considered issues as to who must have the resources and as to the level and type of proof that a Member State is entitled to seek in terms of the resources available to a person. In Zhu the Court of Justice considered the entitlements of a child of Irish nationality residing in the United Kingdom whose parents were Chinese. The child had both sickness insurance and sufficient resources provided by her mother for her not to become a burden on the United Kingdom’s social assistance system. However the Irish and United Kingdom governments argued that the condition concerning sufficient

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16 Trojani at para 36

resources meant that the person concerned must possess those resources *personally* and could not rely on the resources of a family member. The Court of Justice rejected these arguments as unfounded pointing out that the Directive (in that case Directive 90/364) required the person to “have” the necessary resources and did not lay down any requirements as to their origin.\(^{18}\) To interpret this requirement in the manner suggested by the Irish and United Kingdom governments would, the Court argued, “constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC”.\(^ {19}\)

In *Commission v. Belgium*, the Court considered infringement proceedings taken by the Commission against Belgium in relation to its implementation of Directive 90/364.\(^ {20}\) The Commission had received a number of complaints concerning Belgian legislation or practice on the granting of residence permits. In one particular case, the Belgian authorities had taken the view that a Portuguese national did not satisfy the condition of sufficient resources and had ruled that an undertaking to support her provided by her partner did not constitute evidence of such resources. The Belgian authorities argued that the Directive required a person to have sufficient personal resources and would only take into account the income of a third party where it belonged to the spouse or children of the person relying on Directive 90/364, i.e. where such person was bound by a legal obligation. The Belgian authorities subsequently expanded this position accepting that a partner’s resources could be taken into account but only where that partner had undertaken by legal contract to make them available to the person concerned. Following its decision in

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\(^ {19}\) *Zhu* at Para 33.

\(^ {20}\) Case C-408/03 *Commission v Belgium* (2006) ECR I-2647.
Zhu, the Court pointed out that the Directive laid down no requirement as to the origin of the resources. The Court accepted that the national authorities were entitled to carry out necessary checks as to the existence and availability of resources. However, it refused to accept the Belgian authorities’ requirement of a legal link between the person concerned and the person providing the resources as it would be disproportionate and go beyond what was necessary to achieve the purpose of the Directive, i.e. the protection of the public finances.\(^2^1\) The Court pointed out that the loss of sufficient resources was always an underlying risk whether those resources were personal or came from a third party even where that third party had undertaken to support the person concerned. Accordingly the Court ruled that by excluding the income of partner residing in the host Member State in the absence of a legal agreement, Belgium had failed to fulfill its obligations under EU law.\(^2^2\)

As discussed above in relation to sickness insurance, the procedural requirements in proving the person has sufficient resources were considered by the Court in *Commission v. Italy*.\(^2^3\) In that case the Commission had objected to the fact that the Italian authorities required a person to submit a declaration by the consular authority certifying that the applicant was in receipt of a pension or allowance and the amount thereof. As in relation to the requirements involving sickness insurance, the

\(^{21}\) At para. 46.

\(^{22}\) The issue of the appropriate level of resources which a Member State might require was considered by the Court in Case C-424/98 *Commission v. Italy* (2000) ECR I-4001 in which the Court rejected a complaint by the Commission against the fact that Italy had a more favourable regime for the families of persons who had been employees or self-employed than for the family members of nonworkers. However, the basis of the decision appears to rest is much in the Court’s exasperation with the manner in which the Commission presented its complaint as with the actual circumstances involved.

Court ruled that by limiting the means of proof which may be relied on Italy was in breach of EU law.

*Students* – The requirements in relation to students\(^{24}\) are slightly different to those applying to other groups covered by the Directive. The obligation in relation to sickness insurance is the same as that for other categories that have been discussed above. However in contrast to other groups who must *satisfy* the national authorities that they have “sufficient resources”, students are simply required to

assure the relevant national authority, by means of the declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during the period of residence.\(^{25}\)

This distinction reflects the treatment of students in the original residence Directives (Directive 90/366 as replaced by Directive 93/96). The rationale for this distinction was discussed by the Court in *Commission v. Italy*.\(^ {26}\) Here it was suggested that the rationale was that a student’s residence

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\(^{24}\) “Students” are persons who are in “enrolled at a private or public establishment, accredited or financed by the host Member State ... for the principal purpose of following a course of study, including vocational training” (Article 7.1.c of Directive 2004/38/EEC).

\(^{25}\) Article 7.1.c. Although the Court in *Grzelczyk* (para. 42) made it clear that a Member State might take the view that a student who has recourse to social assistance no longer fulfilled the conditions of her right of residence or from taking measures, within the limits imposed by Community law, either to withdraw the residence permit or not to renew it: see Martin ““A Big Step Forward” (2002) European Journal of Migration and Law 4, 136–144, at 142.

\(^{26}\) At that time, there was also a distinction in that the student Directive did not specify any particular level of resources as being “sufficient” unlike the other residence Directives. This distinction has now been dropped from Directive 2004/38.
could be temporary since it was limited to the duration of her studies and the risk of becoming a burden on social assistance was, therefore, less than in the case of other persons. In that case, the Court considered a complaint against Italy’s requirement that students have resources of a specific amount not lower than the minimum amount laid down in the Italian general insurance scheme. The Commission argued that the Member State was not entitled to set any specific minimum nor to require means of proof beyond those specified in the Directive (i.e. a declaration or such equivalent means chosen by the student). The Court upheld the complaint and ruled that by requiring students to guarantee that they have resources of a specific amount, and by imposing requirements in relation to proof beyond those specified in the Directive, Italy was in breach of EU law.

Conclusion – Most importantly the Court has held that the provisions concerning a right of residence must be applied in a proportionate manner and has been prepared to review the actions of Member States notwithstanding their compliance with the strict wording of the Directives. Secondly, the Court has held that the Directive requires a certain degree of inter-state solidarity and that, in certain circumstances, persons cannot be denied a right of residence simply because they become, to a limited extent, a burden on the Member State concerned. In addition, the Court has clarified that the important issue is that resources exist and be available to the person and not that the person herself must possess the resources. It has also ruled that Member States must apply a reasonable approach as to requiring evidence of resources.

27 At paragraph 40.
28 On the (albeit limited) concept of inter-state solidarity see, in particular, Case C-209/03, Bidar, (2005) ECR I-2119 and see section 6 below.
4. The right of residence and the implications for access to social security.

The second aspect of this issue concerns situations in which access to social security is subject to a right of residence under either EU or national law or to habitual residence in the Member State concerned.

a) where a person has a right of residence under EU law

We look first at the situation where a person has a right of residence under Article 18 EC (and Directive 2004/38/EEC). The question arises as to whether such a person is entitled to a social security payment in the host Member State notwithstanding the restrictions set out in Directive 2004/38 in relation to not becoming an (unreasonable) burden on the social assistance system of that state. This issue arose in the Grzelczyk case.29 Mr. Grzelczyk was a French student who undertook studies in Belgium. For the first three years of his studies, he met his own costs of maintenance, accommodation and study by taking on various minor jobs and by borrowing. However, at the beginning of his fourth and final year of study, he applied for the Belgian minimum income payment. Although this was originally granted, it was subsequently terminated because of his lack of Belgian nationality. Assuming that Mr Grzelczyk was not a worker, on the basis of his “minor jobs” (an issue left for the national court to determine), it appeared that his residence in Belgium was on the basis of Directive 93/96. The Court pointed out that Article 1 of that Directive allowed Member States to require students to satisfy the national authority that

they have sufficient resources. However, it also pointed out that while the Directive made clear that it did not establish any right of payment of maintenance grants, there was no provision which precluded students from receiving social security benefits. This did not, however, prevent a Member State from taking the view that a student who had recourse to social assistance no longer fulfilled the conditions of his right of residence or from taking measures, within the limits imposed by the Community law, to withdraw his residence permit. Nonetheless, the Court pointed out that such measures could not become the automatic consequence of a student having recourse to social assistance. While Article 4 of the Directive did provide that the right of residence was to exist for as long as beneficiaries fulfill the conditions laid down in Article 1, the preamble of the Directive envisaged that the beneficiaries of the right of residence would not become an unreasonable burden on the public finances of the Member State. The Court imaginatively interpreted this provision as accepting “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”.  

The Court stated that Union citizenship was destined to be the fundamental status of nationals of Member States enabling them to enjoy the same treatment in law irrespective of nationality (subject to specific exemptions). Accordingly the Court ruled, following its judgment in Martínez Sala, that a citizen of the EU, legally resident in the territory of a host Member State, could rely on Article 12 of the Treaty in all situations which fell within the scope ratione materiae of EU law. The situations

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30 Paragraph 44

include those involving the exercise of the fundamental freedom guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State conferred by Article 18 EC. Accordingly, the Court ruled that Mr Grzelczyk was entitled to claim the Belgian minimum income payment and that the Member States nationality rules could not be applied against him.

Thus it would appear that a person entitled to reside in another Member State under EU law is entitled to access to national social security benefits without the application of any discriminatory national provisions such as a requirement that the person be a national of the Member State concerned.\(^{32}\) It is clear from the Court’s decision that such an application for national benefits may allow the Member State concerned to reconsider whether the person remains entitled to a right of residence. However, the national authorities must consider all the circumstances of the case and cannot automatically withdraw the right of residence simply on the bases of a temporary reliance on social assistance. The national authorities must consider the case in accordance with the rule of proportionality. Thus it would appear that a person in Mr Grzelczyk’s case who has resided in the Member State for a number of years without reliance on social benefits and who requires benefits for a specified temporary period may be entitled to those benefits without this affecting his right of residence. The situation might clearly be different had Mr Grzelczyk applied for benefits in his first year of study but the precise implications of this approach remain unclear.

\(^{32}\) However, as we will see below, the apparently broad language of that case has subsequently been confined to situations where the person has been legally resident in the host Member State for a certain time or possesses a residence permit (which is, of course, consistent with the facts of both Grzelczyk and Martínez Sala).
b) Where a person has a right of residence under national law

What about the situation where a person is entitled to reside in the country under national but not EU law? This issue has been considered by the Court of Justice in a number of cases including Martínez Sala and Trojani.\(^{33}\) In Martínez Sala a Spanish national had lived in Germany since 1968. She had worked there on various occasions and until 1984 had been issued with a residence permits.\(^{34}\) Since that date or she had only received documents certifying that an extension of a residence permit had been applied for. After the birth of a child in 1993, she applied for a child raising allowance but this was rejected on the basis that she did not have German nationality, a residence entitlement or a residence permit.\(^{35}\) However a residence permit was subsequently issued to her. The Court stated that Community law aims to prevent a Member State or from requiring nationals of other states to carry a residence document if an identical obligation was also imposed on its own nationals. However in this case possession of a residence permit was a condition of entitlement for the right to benefit. The Court ruled that for a Member State to require a national of another state to produce such a document when its own nationals did not have to do so amounted to unequal treatment. The Court ruled that this constituted discrimination prohibited by Article 12 EC within the sphere of application of the Treaty and in the absence of any justification. As the case involved discrimination based on the claimant’s nationality and, as in any event, nothing to justify unequal treatment had


\(^{34}\) The Court explicitly did not consider whether Ms. Martínez Sala could rely on the provisions of the Treaty to establish a right of residence is considering that this was not necessary in the circumstances.

\(^{35}\) See the decision of the European Court of Human Rights in relation to a similar issue under the Convention on Human Rights: Niedzwiecki v Germany 58453/00, 25 October 2005.
been argued by the German authorities, the Court held that the
discrimination was in breach of EU law and that the claimant was entitled
to the child benefit.

The facts of the \textit{Trojani} case have been set out above where we saw that
Mr Trojani did not have a right of residence under EU law as he did not
satisfy the condition of having sufficient resources. However, the Court
went on to point out that he was legally resident in Belgium and had been
issued with a residence permit. The Court ruled that while the Member
States may make residence of a Union citizen who was not economically
active conditional on his having sufficient resources, this did not mean
that such a person could not, during his lawful residence in the Member
State, be entitled to benefit from the fundamental principle of equal
treatment laid down in Article 12 EC. The Court pointed out that a social
assistance benefit, such as the Belgian minimum income, fell within the
scope of the Treaty.\textsuperscript{36} Secondly, a citizen of the Union who was not
economically active may rely on Article 12 EC where he has been legally
resident in the host Member State for a certain time or possesses a
residence permit. The Court ruled that a national legislation which did not
grant social assistance to citizens of the EU who were not its own nationals
(where such persons resided there lawfully and satisfy the conditions
required of nationals) constituted discrimination prohibited by Article 12
EC. The Court did, however, point out that it remained open to the
Member State to take the view that such a national no longer fulfilled the
conditions of his right of residence but that recourse to the social
assistance system by the citizen of the Union might not automatically lead
to expulsion.

\textsuperscript{36} Paras 42-45.
Thus it appears that in EU citizens legally resident in another Member State (for a certain period or being in possession of a residence permit) are entitled to social security on the same basis as nationals. The discrimination encountered in the two cases discussed here involved direct discrimination on grounds of nationality. However, the Court’s approach would also appear to apply to indirect discrimination. This is particularly relevant in that a number of Member States have a habitual residence clause for entitlement to social assistance while the United Kingdom has recently introduced the requirement of a legal ‘right to reside’. In addition, in more recent cases, the Court has altered its approach by treating a barrier to free movement as per se potentially in breach of EU law and as requiring justification.

c) Habitual residence and related requirements

Since 1994 United Kingdom social security law has required that a person be habitually resident in the United Kingdom in order to qualify for a range of social security benefits. On the accession of 10 new Member States to the EU in May 2004, the United Kingdom was one of the few countries not to impose any restriction on free movement of workers from the new Member States (although it did introduce registration requirements). However, reflecting its concern about the potential impact of such free movement on the social security system, the government strengthened

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the habitual residence test by adding a requirement that the person have a ‘right to reside’ within the United Kingdom.\(^{39}\)

In Collins the European Court of Justice was asked whether the habitual residence provisions in the United Kingdom social security law concerning jobseeker’s allowance were compatible with the EU law. Mr. Collins was not considered to be habitually resident. The Court was asked whether any provisions or principles of European Community law required the payment of a social security benefit with conditions of entitlement such as those for jobseeker’s allowance to a person in the circumstances of Mr. Collins.\(^{40}\)

Mr. Collins was a national of a Member State (Ireland) and was lawfully in the United Kingdom. He argued, on the basis of the Court’s decision in Grzelczyk,\(^{41}\) that payment of a non-contributory means tested benefit to a national of a Member State other than the host Member State cannot be made conditional on the satisfaction of a condition when such a condition is not applied to nationals of the host Member State. Mr. Collins acknowledged that the habitual residence test was applied to United Kingdom nationals but argued that it was well established that a provision of national law is to be regarded as discriminatory under Community law if it is more likely to be satisfied by the nationals of the Member State concerned. The United Kingdom government, in contrast, argued that there were relevant objective justifications for not making jobseeker’s allowance available to persons who are not habitually resident. It argued that the habitual residence test did not go beyond what was necessary to

\(^{39}\) Ireland has also recently introduced a similar requirement.

\(^{40}\) Questions were also referred in relation to Mr. Collins’ status as a worker under EU law and the legal basis for his residence in the U.K. However, as these are not directly relevant to the question of habitual residence, they will not be discussed here.

attain the objective pursued; and that it represented a proportionate and hence permissible method of ensuring that there was a real link between the claimant and the geographical employment market. It argued that in the absence of such a test, persons who had little or no link with the United Kingdom employment market would be able to claim jobseeker’s allowance.

The Court recalled that nationals of Member States seeking employment in another Member State fell within the scope of Article 39 of the Treaty and, therefore, enjoyed the right in Article 39.2 to equal treatment. It reiterated its previous rulings that Member State nationals in search of employment qualify for equal treatment only as regards access to employment in accordance with Article 39 of the Treaty and Articles 2 and 5 of Regulation 1612/68 but not with regard to social and tax advantages within the meaning of Article 7.2 of that Regulation. Neither Article 2 nor Article 5 of the Regulation expressly referred to benefits of a financial nature. However, the Court decided that in determining the scope of the right to equal treatment for persons seeking employment, this should be interpreted in the light of other provisions of Community law, in particular, Article 12 of the Treaty which prohibits any discrimination on grounds of nationality. The Court ruled that

In view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article (39.2) of the Treaty - which expresses the fundamental principle of equal treatment, guaranteed by Article

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42 The Court considered that Mr. Collins was not a “worker” for the purposes of Article 7.2 and thus could only rely on rights as a person seeking employment.

(12) of the Treaty - a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.\textsuperscript{44}

This was a significant development in the Court’s approach to this area and brought benefits to jobseekers of a financial nature within the scope of Regulation 1612/68. This means that any apparent discrimination must be justified.

The Court went on to consider the implications of this for the habitual residence test. It pointed out that as the habitual residence requirement was capable of being met more easily by the State’s own nationals, it placed at a disadvantage Member State nationals who exercise the right of movement in order to seek employment in the territory of another Member State. It ruled that such a requirement could only be justified “if it is based on objective considerations that are independent of the nationality of the persons concerned and proportional to the legitimate aims of the national provisions”.\textsuperscript{45} However the Court held that it was legitimate for the national legislature to wish to ensure that there was a genuine link between an applicant for an allowance in the nature of social advantage within the meaning of Article 7.2 of Regulation 1612/68 and the geographic employment market in question.\textsuperscript{46} It ruled that it may be regarded as legitimate for a Member State to grant a jobseeker’s allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of

\textsuperscript{44} At para 63.

\textsuperscript{45} Para 66.

that state. The existence of such a link might be determined, in particular, by establishing that the person concerned had, for a reasonable period, genuinely sought work in the Member State in question.

In a critical passage, the Court went on to say that

while a residence requirement is, in principle, appropriate for the purpose of ensuring such connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. In any event, if compliance with the requirement demands a period of residence, the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.47

Accordingly, the Court ruled that Community law did not preclude national legislation which made entitlement to an allowance conditional on a residence requirement insofar as that requirement could be justified on the basis of objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions. Subsequently the national courts have ruled that the residence requirement is justified.48 However, one would expect that the more recent “right to reside” test would have a particularly disadvantageous impact on non-United Kingdom nationals and, therefore, be more difficult to justify under EU law.

47 Para 72.

This requirement has been considered by the national courts in a number of recent decisions.\textsuperscript{49} While upheld by the English court of appeal, this was clearly on the basis of an inappropriate understanding of the scope of EU law and of the concept of objective justification.\textsuperscript{50} Interestingly, a Commissioner has subsequently suggested that

\begin{quote}
It is one thing to apply a “right to reside” test to put pressure on people to leave the United Kingdom when they have never been economically active here and have not been here for very long but it may be less clear that the blanket application of the test represents a proportionate response to the problem that concerns the Government if it results in pressure to leave the United Kingdom being placed on people who have been economically active in the past or have been established here for many years but for some reason or other have not acquired a permanent right of residence.\textsuperscript{51}
\end{quote}

\section*{5. The interpretation of Directive 2004/38}

A number of key issues arise as to the interpretation of Directive 2004/38 in the light of the Court’s developing case law on European citizenship. The Directive, in many ways, reflects the Court’s case law (discussed above)\textsuperscript{52} and, in participle, represents a major step forward from the earlier residence directives. However, as it was drafted at a time when the case law was developing rapidly, it is not always, intentionally or otherwise, 

\begin{itemize}
\item \textsuperscript{51} Commissioner Rowland in CIS/3182/2005 at para. 15.
\item \textsuperscript{52} See, for example, Preamble para. three, Articles 14.2-4, 24.1.
\end{itemize}
entirely consistent with the interpretation adopted by the Court in its jurisprudence. There has been considerable debate in the literature about whether these inconsistencies reflect fundamentally different positions (and if so whether the Court rulings modify the Directive’s position or vice versa) or whether differences are more apparent than real. Insofar as our topic is concerned there are three main areas where there appeared to be a potential conflict between the position set out in the Directive and that adopted by the Court (all arising from Article 24.2 of the Directive).

Article 24.1, reflecting the Court’s case law, provides that

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.

However, reflecting the financial concerns of Member States, as set out above, Article 24.2 goes on to provide three specific derogations from this principle.

Short-term residence

Firstly, the Directive provides that the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence.

\[53\] See, for example, Brand (2005) 12 Colum. J. Eur. L. 293 at p. 303;

\[54\] See, for example, Dougan “Constitutional dimension” at p. 630; Barnard (2005) 42, C. M. L. Rev. 1465-1489 at p. 1482.

\[55\] For example, Dougan at p. 628-9, Golynker “Student loans” (2006) 31 (3) E.L. Rev., 390-401 at p. 397.
months of residence’. This might appear to be inconsistent with the Court’s statement in *Martinez Sala* that a national of a Member State lawfully residing in the territory of another Member State comes within the scope ratione personae of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty attaching to the status of citizen of the Union, including the right not to suffer discrimination on grounds of nationality.\(^{56}\) However, Ms. Martinez Sala was, in fact, resident for a long period in Germany and in subsequent cases the Court was careful to modify its somewhat sweeping wording. In *Trojani* the Court instead stated that a Union citizen (who is not economically active) may rely on Article 12 ‘where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit’.\(^{57}\) There is no particular legal reason why short-term residents without a residence permit should not be able to rely on Article 12 in relation to access to social security. However, there are clearly political and practical reasons why the Court might not wish to dispute this particular exclusion. Even if one accepted that a person resident for less than 3 months could rely on Article 12, one might well find that the restriction set out in the Directive was objectively justified.\(^{58}\) This issue has not yet been considered by the Court.

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\(^{56}\) See also Grzelczyk para 30.

\(^{57}\) *Trojani* para 43 and followed in *Bidar* para 33. Although *Bidar* also repeats the earlier broader statement from *Martinez Sala* (at para 33).

\(^{58}\) See Dougan ‘Constitutional dimension’ who comes to the same conclusion (at p. 628-9). After all the right of residence set out in Article 6 of the Directive is expressly on the basis that a person does not become an unreasonable burden on the Member state concerned.
Secondly, Article 24.2 provides that the host Member State ‘shall not be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families’. Article 16(1) provides that Union citizens who have resided legally for a continuous period of five years (with allowance for certain specified periods of absence) in the host Member State shall have the right of permanent residence there. This provision appeared to be potentially inconsistent with the Court’s ruling in Bidar where it held that a French student who had lived in the United Kingdom for three years and had established a ‘genuine link with the society’ of the United Kingdom could not be excluded from entitlement to a student loan on the basis that he was not ‘settled’ in the United Kingdom.\(^\text{59}\) However, it must be recalled that the Bidar case was not about the period of residence which a Member State could require before granting entitlement to a student loan but rather about a clearly discriminatory provision which, in effect, could not be satisfied by a student from another Member State. In an earlier version of this note, I speculated that now that the Directive lays down clear rules as to entitlement to such grants\(^\text{60}\) the Court might take the view that five years residence (or such shorter period as a Member State might chose to adopt) was a reasonable expression of Union


\(^{60}\) Albeit by implication.
citizenship insofar as it was applied in a proportionate manner (following the Baumbast approach). However, Advocate General Kokott (writing extra-judicially) appeared to suggest that the Court might go further in reviewing the five year period pointing out that ‘it is not possible to restrict entitlements flowing from primary Community law by means of a restrictive Member State’s practice induced by secondary Community law’.  

The ECJ has now addressed this issue in the Förster case which is of fundamental importance to the development of EU law on citizenship and represents, in effect, the first judgment of the Court of Justice on the relationship between EU citizenship, the residence directive (2004/38/EC) and rights to social assistance. The importance of the case is illustrated by the fact that seven Member States (in addition to the Netherlands) intervened in the case.

Ms. Förster a German national who lived 49 kilometers from the Dutch border went to live and study in the Netherlands in March 2002. She also worked (including paid training relating to her studies) and qualified for a student maintenance grant as a worker on the basis of Regulation 1612/68. However, she gave up work from June 2003 to July 2004 to concentrate on finishing her studies. The Netherlands authorities subsequently reviewed the award of a maintenance grant for the period July-December 2003 and sought repayment of the grant. Ms. Förster argued that she was entitled to a grant on two grounds: (i) she should be regarded as having been a Community worker throughout 2003 and,


therefore, remained entitled to a grant under Regulation 1612/68; and/or (ii) at the material time, she was already so integrated into Dutch society that she was entitled under Community law to study finance for the second half of 2003.63

The major issue64 before the Court was whether Ms. Förster, who had been living and working in the Netherlands for over 3 years, could, following Bidar, be considered to be sufficiently integrated into Dutch society to be entitled to qualify for a maintenance grant. The Advocate General followed the Court’s approach in Bidar. A number of Member States had argued that Ms. Förster could not rely on Article 12 EC but the Advocate General shortly rejected that argument.65 The real issue was whether or not she could claim to be integrated into Dutch society on the basis of her residence and work there or whether the Netherlands was entitled to rely on the five year residence requirement. He pointed out that the Bidar case indicated that

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

63 The referring court also referred a question as to whether Ms. Förster derived rights under Regulation 1251/70 but she clearly did not fall within the personal scope of that Directive.

64 The Advocate General but not the Court considered whether she might be considered to be a worker for the purposes of EU law but that is not directly relevant to our discussions.

65 At paras. 104-12.
could have consequences for the overall level of assistance which may be granted by that State.\textsuperscript{66}

It was, therefore, 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. He pointed out that the Court in \textit{Bidar} had ruled that the condition of a sufficient degree of integration into society may be established by a finding that the student in question has resided in the host Member State for a certain length of time and had accepted that the requirement of three years’ residence (provided for by the national legislation at issue in that case) was an appropriate length of time. He took the view that Member States were obviously allowed to apply general conditions such as a three years’ residence requirement in \textit{Bidar}. However, he interpreted the case-law of the Court to indicate that

the condition imposed may not be so general in scope that it systematically excludes students, regardless of their actual degree of integration into society, from being able to pursue their studies under the same conditions as nationals of the host Member State.\textsuperscript{67}

In other words, the Advocate General took the view that ‘the criterion used must still be indicative of the degree of integration into society.’ This was not the case with a five year residence requirement as he believed that it could reasonably be assumed that a number of students would have established a substantial degree of integration into society well before the expiry of five years. Advocate General Mazák pointed out that Directive 2004/38 was not applicable to the facts of the case, and that in any case it could not detract from the requirements flowing from Article

\textsuperscript{66} At para 124.

\textsuperscript{67} At para 129.
12 EC and the general principle of proportionality. Accordingly he proposed that the Netherlands was precluded by Article 12 EC, read in conjunction with the principle of proportionality, from denying study finance to an economically inactive student from another Member State who has already been lawfully resident for three years in the Netherlands solely on the ground that that student was not resident for five years in the Netherlands prior to the study period concerned, if other factors indicate a substantial degree of integration into the society of the Netherlands. The Court did not follow this approach. The Court did agree that Ms. Förster could rely on Article 12 EC. However, it distinguished the Bidar case on the basis that it involved national legislation which, in addition to imposing a residence requirement, required students from other Member States to be ‘established’ in the UK – a condition which it was ‘impossible’ for foreign nationals to satisfy. The Court reiterated its Bidar position that 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 and that the existence of the requisite degree of integration could be established by a length of residence requirement. It therefore examined whether the five year residence rule could be justified by the objective of ensuring that students who are nationals of other Member States have a certain degree of integration into the society of the relevant State. It held that the requirement was both appropriate and proportionate. The judgment is notable for a lack of any real reasons as to why this was the case although the Court pointedly did refer to Directive 2004/38. It should be noted that the Court’s position is that legally a five year residence rule is

68 At para 131.
69 At paras. 35-44.
70 At paras 52-54.
appropriate to establish integration. However, while retaining the reference to ‘integration’, there is obviously no necessary factual relationship between the two concepts and, as the Advocate General pointed out, a person may in fact (but not, now, in law) be integrated into society in a much shorter period of time.\footnote{This echoes the Court’s legal acceptance of the habitual residence test as an indicator of a person’s link to the geographic employment market in question (in \textit{Collins}) although there is no necessary factual relationship between the two concepts.}

Thus the \textit{Förster} case has clearly shown that, at least on this point, the Court has resiled from its previous case law and is prepared to follow the approach agreed by the Council of Ministers (and the European Parliament) in the residence directive. In many ways, the approach adopted by the Court was not surprising and it should be recalled that the \textit{Bidar} case was not primarily about the length of the period of residence which a Member State could require before granting entitlement to a student loan but rather about a clearly discriminatory provision which, in effect, could not be satisfied by a student from another Member State. In addition, it is one thing for the Court to strike down such a clearly discriminatory national provision and quite another for it to overturn a position arrived at though the EU legislative process. If anything, one might criticise the \textit{Bidar} judgment which, if correct in its outcome, was perhaps insufficiently modulated to take account of future developments.

It is noticeable that the Court did not specifically reply to a question as to whether a shorter period of residence should be required in individual cases if factors other than the duration of residence indicate a substantial degree of integration into the society of the host Member State. It is implicit in its reference to five year’s ‘uninterrupted’ or ‘continuous’ residence\footnote{At paras 51, 52, 54 and 55 though the operative part of the judgement refers only to ‘five year’s prior residence’.} that the answer is no. However, the Court perhaps wished to
keep some scope to apply a *Baumbast* approach in a case where residence is close to five years and a refusal of a grant would not be proportionate given other indications of integration.\(^7\)

If one may accept the outcome in *Förster* as a necessary recognition by the Court of the Community legislature’s approach, there are a number of worrying aspects to the judgment. First, the five year residence requirement applies only to non-Netherlands nationals. It is perfectly reasonable in the context of rights to residence to set a length of residence requirement for non-nationals only given that nationals will automatically have a right to reside in their own country. However, the rationale becomes much less clear once you use the length of residence requirement for other purposes. The Advocate General did not consider this issue in any depth (perhaps because he was finding in favour of Ms. Förster) accepting the Commission’s argument that it was ‘legitimate to assume that the nationals of a Member State have a genuine link with the society of that State’. The Court does not appear to have made specific reference to the fact that the requirement was confined to non-nationals. However, to allow straightforward nationality discrimination in relation to access to social benefits would appear to be highly dubious and contrary to all principles of EU law. There is no reason to assume that a national who has not lived in a country for five years is somehow ‘integrated’ into that society. If the Court is to allow such nationality discrimination, will it allow Member States to apply a ‘residence’ test (such as the UK habitual residence test) only to non-nationals or uphold the UK ‘right to reside’ test on the basis that it is non-discriminatory?

More generally, the position taken in this case – if understandable – raises questions concerning the contrast with the approach which the Court is


taking as regard export of benefits – both in terms of outcome and in terms of legal basis. First, in terms of outcome, it is perfectly understandable that the Court wishes to establish some balance between ‘a certain degree of financial solidarity’ and ‘unlimited’ solidarity. It is equally understandable that the Court should decide that the EU legislature is best placed to decide where this balance lies in relation to student supports. However, the Court has come to a rather different decision as to the export of pensions for war victims where it has consistently overruled national rules preventing export of such benefits.74 Similarly the Court has recently allowed the export of education grants (although the scope and implications of this ruling are rather unclear).75 One might argue that the Court is more prepared to fill a legislative gap than to overrule Community legislation. However, at least in the case of the war-victim benefits, this ‘gap’ is one deliberately created by the Community legislature which specifically excluded such benefits from the scope of the co-ordination regulation (1408/71).76 So why exactly are war pensioners who want to move to sunnier climes or to their ‘home’ state more deserving of support than students who wish to move to another country to study? Secondly, the Court has now (very sensibly) analysed issues concerning the export of benefits under Article 18 EC (concerning the right to move and reside freely within the territory of the Member States) while, as we have seen, its focus in this case (and in Bidar) was primarily on Article 12 EC (on nationality discrimination). But why should the right to benefit of persons leaving their ‘paying’ State be analysed

74 See above re Case C-221/07, Zablocka-Weyhermüller (2008) ECR I-000.
under Article 18 EC while the right to benefit of persons entering the ‘paying’ State is analysed under Article 12 EC?  

Unemployed persons

Finally, and perhaps most controversially, Article 24.2 provides that the host Member State shall not be obliged to confer entitlement to social assistance during the period after the initial 3 months provided for in Article 14.4.b. This Article, in turn, provides that a Union citizen or a family member cannot be expelled from a Member State where she ‘entered the territory of the host Member State in order to seek employment’ for as long as she can provide evidence that she is continuing to seek employment and that she has a genuine chance of being engaged.  

Thus, the Directive states that there is no obligation on a Member State to provide equal treatment in relation to social assistance during the entire period of job search. This part of the Directive appeared to be in potential conflict with the Court’s ruling in Collins where it held that, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, the scope of Article 39.2 EC – which requires the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment - included a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. 

In addition, unlike the case of student supports, there did not appear to

77 Article 24(2) of Directive 2004/38 derogates from the right to equal treatment set out in Article 24(1) of that Directive in relation to, inter alia, student supports. It does not, in terms, rule out payment of social assistance and student supports in other cases such as, for example, where this is required under Article 18 EC.

78 Reflecting the Court’s approach in Case C-292/89 Antonissen (1991) ECR I-745.
be much room for temporal compromise between the Court’s view in *Collins* that jobseekers are entitled to access to unemployment benefits without discrimination on grounds of nationality once they have a genuine link with the labour market of the Member State involved and the Directive’s attempt to exclude entitlement for the entire period of job search.\(^7\) Thus in an earlier version of this note I speculated that the Court might well be faced with the necessity not to apply this aspect of Directive 2004/38.\(^8\)

Again this issue has recently been addressed by the Court in *Vatsouras*, where the Court, while upholding the validity of the directive, refused to apply the Council’s clear intention to prohibit payment of social assistance to migrant jobseekers.\(^8\) Unlike the *Förster* case where the question was primarily whether the Council could impose a five year residence requirement for entitlement to student supports or whether (as in *Bidar*) students should be able to show integration into the host member state in some shorter period, the *Vatsouras* case raised a more direct conflict between the Court’s view that jobseekers are entitled to jobseekers benefits (where they can show a real link with the labour market of the host state) and the Council’s opposition to payment of any benefit to jobseekers (not classified as workers under Article 39 EC).

\(^{7}\) Although it should be recalled that Mr. Collins did not, in fact, benefit from this ruling as the national courts, following the approach of the Court of Justice, ruled that the United Kingdom habitual residence requirements were objectively justified.

\(^{8}\) Golyenker “Jobseekers’ rights in the European Union” (2005), 30 (1) E.L. Rev. 111-122 appears also to take the view that applying this exclusion would be incompatible with the Court’s case law. Oosterom-Staples (2005) 42, C.M.L. Rev. 205-223, in contrast, simply assumes that the Directive overturns *Collins* on this point (at p. 223).

The case concerned 2 Greek jobseekers (and/or possibly workers) who had been refused German social assistance payments under national law which excluded jobseekers from other countries a right to assistance.\textsuperscript{82} The referring court has put forward two possible interpretations of Article 24(2) of Directive 2004/38. First, this might be interpreted as permitting a restriction for an unlimited period of time, so long as the citizen is trying to find work. The Advocate General noted that such an interpretation would constitute a move away from \textit{Collins}, as it would support a prohibition on access to social assistance irrespective of any link with the host Member State. Alternatively, it might be argued that Article 24(2) makes an implied reference to the period necessary to obtain permanent residence, as in the case of students (i.e. 5 years). Advocate General Ruiz-Jarabo Colomer found neither interpretation convincing.\textsuperscript{83} The first, he argued, contradicted \textit{Collins}, as an indefinite period would offer no legal certainty and would be inconsistent with the objectives of Directive 2004/38, which seeks to bring stability to a field of regulation which is very closely linked to the fundamental rights of the European citizen. He also rejected the second possible interpretation because it would not make sense for the directive to make a distinction between the status of students and the status of persons seeking employment and then to provide that they engender identical legal effects.

He argued that Directive 2004/38 was ‘silent’ on the question of the duration of any bar to assistance ‘precisely because it takes the approach that persons wishing to work are subject to a special regime which, after the first three months of residence, is not conditional on proving five years’ residence, as in the case of students, and which does

\textsuperscript{82} The law provided that ‘Foreign nationals who have the right of residence only because they are seeking employment, their family members and persons entitled to benefits under Paragraph 1 of the Law on benefits for asylum-seekers are excluded’.

\textsuperscript{83} Opinion, para 54.
not place them in a legislative limbo whilst they attempt to find work’. 84 The Advocate General argued that Article 24(2) did not provide a rigid criterion for determining the existence of the link required by Collins but rather left each national legislature free to find the appropriate balance. Thus it was ultimately for the Court of Justice to decide whether the national approaches comply with the Treaties and with Directive 2004/38. Such an approach not only confirmed the validity of Article 24(2) but enabled its provisions to be interpreted in line with the case-law of the Court. As to the substance of the dispute, the order for reference indicated that Germany prohibited the granting of assistance to persons entering its territory in order to seek work (i.e. the more restrictive view of Article 24(2) of the directive, which the Advocate General had rejected). He took the view that the national provisions did not allow for an evaluation of the claimants’ links with Germany and, in consequence, submitted that the German legislation should be held incompatible with the EC Treaty, as interpreted by the Court in Collins.

Although the outcome was broadly the same, the Court took a rather different path to that of the Advocate General. The Court did not find any ambiguity in Article 24(2) of Directive 2004/38 which, it stated, establishes a derogation from the principle of equal treatment enjoyed by Union citizens (other than workers, etc.) whereby ‘the host Member State is not obliged to confer entitlement to social assistance on, among others, job-seekers for the longer period during which they have the right to reside there’. 85 However, it stated that ‘the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 39(2) EC’. 86 In order to accomplish this, the Court ruled that

84 Opinion, para 55.
85 Judgement, paras 34 and 35.
86 Judgement, para 44.
benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2).\(^{87}\)

From the point of view of European citizenship, the outcome of this case is to be welcomed and largely restores the position established by Collins.\(^{88}\) Of course, as emphasised in Collins and subsequent cases, the Court will only find an entitlement to support where the person can show a close link with the labour market of the host state so the obligations imposed on Member States are by no means unlimited.

In terms of the precise approach taken to disapply Article 24(2) to jobseekers, it might have been more intellectual logical to have found that the Article was inconsistent with Article 12 EC insofar as it related to jobseekers who has established sufficient links with the host state. In effect, that it was the Court did\(^{89}\) but it (and the Advocate General) clearly wanted to avoid a formal finding of invalidity and so it (again) adopted an approach of interpreting the wording of legislation to mean what it wants it to mean. The Advocate General, in contrast, has argued that the wording of Article 24(2) was unclear and that this meant that it was for national legislation to establish whether a sufficient link to the host state existed. Although an elegant solution, the problem with this is that it is a

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\(^{87}\) Judgement, para 45. The Court agreed with the Advocate General that the objective of the benefit must be analysed according to its results and not according to its formal structure (Opinion, para. 57; Judgment, para 42).

\(^{88}\) There may, indeed, be some further debate as to what is ‘social assistance’ as opposed to ‘benefits of a financial nature which are intended to facilitate access to the labour market’. How, for example, would housing benefits for jobseekers be classified?

\(^{89}\) And thus para. 1 of the operative part of the judgement is illogical.
less plausible reading of the wording of Article 24(2) than those he rejected as unconvincing.\textsuperscript{90}

6. Conclusion

Thus we can see the importance which the developing concept of European citizenship has had in the interrelated areas of residence and social security entitlements. The Court of Justice has played a critical role through its interpretation of the residence Directives and the Treaty. Of course, this is not the first area in which the Court has embarked upon an expansive reading of Community laws. However, this instance does go well beyond a simple purposive interpretation by the Court and gives rise to a fundamental shift away from the ‘market’ concept of free movement for workers towards a logic of entitlement based on citizenship.\textsuperscript{91}

The development of entitlements based on citizenship forms one part of the broader Europeanisation of social security.\textsuperscript{92} However, it is important not to overemphasise the extent to which the Court’s case law - or indeed Europeanisation of welfare\textsuperscript{93} - has gone to date. On the one hand, in Bidar, the Court stated that

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\textsuperscript{90} And the Advocate General does not explain why the ‘literal’ reading of Article 24(2) should be ‘unconvincing’ because it contradicted Collins when that seems to have been the clear intention of the drafters.

\textsuperscript{91} This development has, of course, been underway for some time but the introduction of European citizenship has given it a significant new impetus.


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 ...^{94}

However, the Court immediately went on to say that it was “permissible for a Member State to ensure that the grant of assistance” (in that case to cover the maintenance costs of students from other Member States) did “not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State”. Therefore it was “legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State”.^{95} More recently, in *Tas-Hagen*, the Court referred to 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 by way of a condition of residence (as an expression of the extent to which such persons are connected to Netherlands society). The Court ruled that “this aim of solidarity may constitute an objective consideration of public interest” (albeit that it held that the particular residence test applied was not proportionate). Thus, while the Court has assumed that European citizenship involves “a certain degree of financial solidarity with nationals of other Member States”, it would appear that the precise scope of this solidarity may be limited by Member States to a certain extent on the

^{94} Para 56 citing *Grzelczyk* para 44. It should be noted that, as early as 1953, the signatories to the European Convention on Social and Medical Assistance agreed that “each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance provided by the legislation in force from time to time in that part of its territory.” In addition Article 6(a) of that Convention provides that “a Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance.”

^{95} Para 57.
basis of criteria including residence. As Ferrera has pointed out, classic citizenship involves spatial boundaries which separate insiders (the community of citizens) from outsiders (foreigners or aliens). 96 However, the new concept of (complementary) European citizenship creates overlapping boundaries whereby persons both are members of the (C)ommunity and entitled to (a certain degree of) solidarity and are not (sufficiently) members of the national community to be so entitled.

However, the jurisprudential basis of the recent decisions in both Förster and Vatsouras leaves something to be desired. In practical terms one might surmise that the Court is prepared to accept an existing, 97 time-limited restriction on entitlements but is not prepared to allow the Council to impose a subsequent and unlimited restriction on what it has found to be the law. But, in terms of the constitutional relationship between the EU institutions, this is rather unsatisfactory. If there are relevant legal differences between the position in Bidar-Förster and that in Collins-Vatsouras, the Court did not attempt to make them. 98 On balance, while one may welcome the outcomes of both Förster and Vatsouras from the point of view of European citizenship and while one may have some sympathy with the Court’s reluctance to be too explicit about its relationship with the other EU institutions, nonetheless one might regret the ‘outcome’ focussed nature of the Court’s judgements and the Court’s apparent unwillingness to motivate its decisions in any convincing manner.


97 The adoption of directive 2004/38 preceded the Court’s decision in Bidar.

98 The Court’s judgement does not even refer to Förster. The Advocate General makes one brief reference.
This conceptual lack of clarity is one of the reasons why, although rights to residence and rights to social security are of fundamental importance, the current legal position and, in particular, the relationship between the two concepts and that of citizenship is rather unclear. As Martin has pointed out, the steps forward in terms of the rights of Union citizens have, to a certain extent, been at a cost to legal certainty.\textsuperscript{99} The cause of legal clarity is not assisted by the fact that there appears to have been no effort at all to ensure any coherence between the residence Directive and the ‘new’ Regulation on the co-ordination of social security schemes.\textsuperscript{100} Inevitably the lack of co-ordination will give rise to further issues before the Court and will mean that the Court will continue to have a key role in how the concept of European citizenship develops. The only alternative is a more co-ordinated approach from the Community legislator. However, as Giubboni has pointed out, the EU currently lacks “the objective preconditions” which allowed the development of an unconditional right of free movement in the United States of America.\textsuperscript{101} In addition, it is perhaps the case that few observers of EU governance would have much confidence in the institutions’ ability to adopt and implement such an approach.\textsuperscript{102}

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\textsuperscript{100} Regulation 883/2004 which is intended to replace the existing Regulation 1408/71. Although ‘in force’ Regulation 883 is not yet ‘applicable’.


\textsuperscript{102} To give just one example, of the EU’s ability to adopt legislation in a complicated but not fundamentally controversial area: the proposal which ultimately became Regulation 883/2004 was originally agreed in 1998 and will only come into force in May 2010. It is also striking that, despite the lengthy legislation process, there is almost no evidence at all as to whether and to what extent social security entitlements have an effect on migration in Europe and what (if any) effect the elaborate EU legislation in this area has had on free movement and the position of migrants. See G. De Giorgi and M. Pellizzari Welfare migration in Europe and the cost of a harmonised social assistance, (2006) IZA Discussion Paper No. 2094 for an initial study.
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The Court’s role in removing barriers to free movement is often seen as an example of ‘negative integration’ (in that it simply removes barriers) and as a threat to traditional national solidarity. However, one could argue that the Court’s role in the development of European citizenship involves a more ‘positive’ integration in that it is developing a corpus of rights adhering to a Union citizen, it is establishing basic entitlements which can be enforced by the citizen as against national governments; and it is forcing Member States and the Council to develop a concept of (albeit limited) European social solidarity. Inevitably, this institutional process, whereby the Court has taken on the role of giving meaning to the concept of European citizenship, is likely to lead to a further period of interesting case law.