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PROBLEMS AND PERSPECTIVES OF THE EUROPEAN CITIZENSHIP: THE FIFTH REPORT ON CITIZENSHIP OF THE UNION

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Summary:

The fifth report on European Union citizenship covers the period between 1 May 2004 and 30 June 2007. This is a period of deep institutional change owing to the entry into force of Directive 2004/38 and to the European Court of Justice's interventions. Having established that Union citizenship is destined to be a fundamental status of nationals of the Member States, the European Court of Justice proceeded to weaken the link between economic self-sufficiency and the exercise of citizenship rights. EU citizens who do not impose an unreasonable burden on the host Member States are granted welfare rights. In addition, the Court has taken an uncompromising stance on the mobility rights third country national family members of Union citizens and has moved beyond the discrimination model in an attempt to provide effective protection to Union citizens. But the European Union citizenship agenda remains unfinished. Rethinking the link between Union citizenship and state nationality, ensuring the correct implementation of Directive 2004/38, enhancing Union citizens' political participation in the Member State of residence and the possibility of extending their participation to national and regional elections and rethinking the EU framework on Integration are important policy priorities.

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Author: **Dora Kostakopolou (University of Manchester)**

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Copies can be obtained through

Mr Jean Louis Antoine-Grégoire
Tel: +32 2 284 2753
Fax: +32 2 283 2365
E-mail: jean-louis.antoine@europarl.europa.eu

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BRIEFING PAPER ON THE FIFTH REPORT ON CITIZENSHIP OF THE UNION

(1 MAY 2004–30 JUNE 2007) COM(2008) 85 FINAL

1. INTRODUCTION

The *Fifth Report on Citizenship of the European Union* (concerning Articles 17-22 of the EC Treaty) was published on 15 February 2008. Under Article 22 EC, the Commission is obliged to reflect on the application of the provisions on Union citizenship every three years and to communicate these reflections to the European Parliament, the Council and the European Economic and Social Committee (EESC). The reports outline the steps that have been taken towards making EU citizenship a reality, examine the obstacles that may hinder the full implementation of specific provisions and explore the possibilities for new paths of development. The fifth report covers the period between 1 May 2004 and 30 June 2007. This period has been one of deep institutional change owing to the interventions of the European Court of Justice (ECJ) and the entry into force of Directive 2004/38/EC (the so-called 'Citizenship Directive') on 1 May 2006.[1] In addition, one should not underestimate the importance of initiatives such as the designation of 2006 as the European Year of Workers' Mobility,[2] the conversion of the European Union Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency (1 March 2007),[3] the adoption of a Community action programme to promote active European citizenship[4] and the follow-up 'Europe for Citizens' programme that will run until 2013,[5] and finally the establishment of the Fundamental Rights and Citizenship Programme 2007–2013.[6] These programmes seek to promote the active involvement of citizens in the process of European integration,[7] thereby enhancing their identification with the EU. The discussion in this paper examines the personal scope and content of Union citizenship and considers the unfinished institutional agenda.

2. EU CITIZENSHIP AND STATE NATIONALITY

EU citizenship has been conditioned on the tenure or acquisition of national citizenship: every person holding the nationality of a member state is an EU citizen (Article 17(1) EC). Making European citizenship derivative of national citizenship not only gives prominence to the nationality principle, but also subjects membership to the European public to the definitions, terms and conditions of membership prevailing in national publics. As the Declaration on Nationality of a Member State, annexed to the Final Act of the Treaty on European Union has expressly stated, "the question [of] whether an individual possesses the nationality of a member state shall be settled solely by reference to the national law of the Member State

[1] European Parliament and Council Directive 2004/38/EC, OJ L 158/77, 30.4.2004.

[2] The European Year initiative was launched in Brussels on 20–21 February 2006.

[3] Council Regulation (EC) No. 168/2007 Establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1.

[4] Council Decision 2004/100/EC of 26 January 2004 establishing a Community action programme to promote active European citizenship, OJ L 30, 4.2.2004.

[5] Proposal for a Decision of the European Parliament and of the Council establishing for the period 2007–2013 the programme 'Citizens for Europe' to promote active European citizenship, COM(2005) 116 final.

[6] Council Decision 2007/252/EC, OJ L 110, 27.4.2007, p. 33, corrigendum OJ L 141, 2.6.2007, p. 83.

[7] The main aims of the 'Citizens for Europe' programme are to enhance interaction among European citizens and civic participation, with the aim of promoting intercultural dialogue and a sense of European identity.

concerned". Similar declarations were adopted by the European Council at Edinburgh and Birmingham. The Birmingham declaration confirmed that, in the eyes of national executives, Union citizenship constitutes an additional tier of rights and protection that is not intended to replace national citizenship – a position that found concrete expression in the amended Article 17(1) EC at Amsterdam.[8] The ECJ has largely upheld the international law maxim that determination of nationality falls within the exclusive jurisdiction of the member states, despite the anomalies that this creates for the application of EC law and its exclusionary implications with respect to the rights of long-term resident third-country nationals. In the case of *Micheletti*, the ECJ confirmed that determination of nationality falls within the exclusive competence of the member states, but it went on to add that this competence must be exercised with due regard to the requirements of Community law.[9] In *Kaur* it stated that "it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality".[10] Accordingly, nationals of a member state should be able to exercise their rights to free movement without impediments imposed by additional regulations adopted by other member states.

In *Chen*, the ECJ criticised the restrictive impact of such additional conditions for the recognition of nationality of a member state. It ruled that the UK had an obligation to recognise a minor's (Catherine Zhu) Union citizenship status even though her member state nationality had been acquired in order to secure a right of residence for her mother (Chen), a third-country national, in the UK. Since Catherine had legally acquired Irish nationality under the *ius soli* principle enshrined in the Irish Nationality and Citizenship Act 1956, and had both sickness insurance and sufficient resources provided by her mother, the limitations and conditions referred to in Article 18 EC and laid down by Directive 90/364/EEC had been met, thereby conferring on her an entitlement to reside for an indefinite period in the UK.[11]

Notwithstanding the 'due regard' to Community law requirement, the EU cannot legitimately intervene in the domain of nationality laws of the member states even when definitions of nationality have apparent exclusionary effects. Two such cases arising from restrictive conceptions of citizenship in the new member states are mentioned in the report. First is the designation of the Russian-speaking minority as non-nationals or non-citizens in Estonia and Latvia following these countries' independence and the subsequent exclusion of this minority from the scope of Union citizenship in 2004. In the second case, 18,000 permanent residents originating from other republics of the former Yugoslavia were 'erased' in Slovenia, that is, they were removed from the register of permanent residents, thereby becoming foreigners. In both cases, EC anti-discrimination legislation and Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents in the EU[12] have been used as platforms for furnishing partial, and in the opinion of certain scholars less than satisfactory, remedies. It is worth noting, for instance, that the latter Directive does not grant long-term residents local electoral rights – a right that is provided for non-citizens in Estonia but not in Latvia.

Another issue raised in the report concerns a member state's decision to extend citizenship to nationals of another country on the basis of their common ethnic membership. In such a case, ethnonational or cultural narratives of community are deployed to effect nation-building across borders. Accordingly, external minorities become parts of a cultural nation or expatriates become an integral part of the nation, notwithstanding the fact that they are not

[8] Bull. EC 10-1992 I 8.9. The Amsterdam Treaty added the statement that "Union citizenship shall complement national citizenship" to Article 8(1) EC (Article 17(1) on renumbering).

[9] Case C-369/90, *Micheletti and Others v. Delegacion del Gobierno en Catanbria* [1992] ECR I- 4329.

[10] Case C-192/99, *R v. Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237, para 19.

[11] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, Judgement of the Court of 19 October 2004.

[12] OJ L 16/44, 23.01.2004.

subject to the jurisdiction of the state owing to their residence abroad. For example, Hungary has considered the award of external or extra-territorial citizenship to persons of Hungarian origin living in non-EU states, such as in Serbia, Montenegro and Ukraine. Article 16 of the Hungarian constitution establishes the state's responsibility to support Hungarians living abroad, and in 2001 legislation was introduced that was designed to grant them limited access to the Hungarian labour market, but falling short of awarding state nationality. The award of dual nationality, which would have to be recognised by the state of residence, could destabilise notions of political community and violate the principle of solidarity or mutual loyalty (Article 10 EC), if it were materialised without prior consultation with the Commission.[13]

The debate on the position of long-term resident third-country nationals has also highlighted the exclusionary effects of Union citizenship. Following a set of unsuccessful proposals by the European Parliament and the EESC to disentangle EU citizenship from state nationality and to award it to all persons residing lawfully in the territories of the EU for a certain period of time,[14] at the Tampere special summit in October 1999, the heads of state and government agreed to promote the fair treatment of third-country nationals who are long-term residents and a common approach to integration matters. According to the Tampere Presidency Conclusions, a vigorous integration policy encompasses the grant of rights and obligations comparable to those of Union citizens and the provision of opportunities for naturalisation in the host member state.[15] Whereas after the Tampere meeting one would have expected the prevalence of a rights-based framework and discussions on the liberalisation of rules governing naturalisation – with the view to removing unacceptable variations in the length of residence and the conditions for naturalisation – a new conception and institutional manifestation of integration began to take root from 2003 onwards.

The new conception of integration is national in origin. A number of member states require migrants to prove their commitment to the host country by engaging in performative acts, such as citizenship ceremonies and public declarations of allegiance and to demonstrate their 'willingness to integrate' by studying for, and passing, civic integration tests. Civic integration tests, that is, language and civic orientation tests, are not confined to naturalisation; they condition migrants' entry, the acquisition of temporary and permanent residence, access to social benefits and family reunification. They are mandatory and are normally accompanied by sanctions: namely, non-renewal of residence permits, deportation, unsuccessful naturalisation and fines. The conditionality and the coercion that accompanies the 'two-way process' of integration has been grafted onto the EU framework on integration, which emerged with the formulation of the common basic principles (CBPs). Notably, the Hague Programme, the successor to the Tampere programme, which outlined the policy priorities for the development of the Area of Freedom, Security and Justice in the period between 2005 and 2010 and was agreed by the European Council on 4 and 5 of November 2004,[16] reiterated the need for greater coordination of national integration policies and EU

[13] G.-R. de Groot, "Towards a European Nationality Law", in H. Schneider (ed.), *Migration, Integration and Citizenship: Volume 1*, Maastricht: Forum Maastricht, 2006, p. 25.

[14] European Parliament (1989) Resolution on the Declaration of Fundamental Rights and Freedoms, A2-0003/89; (1989) Resolution on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the Council of Ministers, A2-261/88; (1990) Resolution on Freedom of Movement for Non-EEC Nationals, A3-175/90, OJ C175, 16.7.90; (1991) Resolution on the Free movement of Persons A3-0199/91, OJ C 159/12-15, 17.6.91; ECSC (1991) Opinion on the Status of Migrant Workers from Third Countries, 91/C 159/05, OJ C 159/12, 17 June 1991.

[15] European Council 15-16 October 1999, SN 200/99, Brussels, p. 5.

[16] On 4 November 2004, the European Council adopted the Hague Programme, which set the objectives to be implemented in the Area of Freedom, Security and Justice for the period 2005–10. This was followed by the Commission's Action Plan (May 2005), which outlined 10 priorities for action, a set of implementing measures and a timetable for their adoption; see *The Hague Programme:*

initiatives. The Hague Programme also called for the development of a clear framework on integration based a set of common principles (CBPs). These were adopted by the Justice and Home Affairs Council of 19 November 2004.[17]

The principles reflect national priorities and conceptions, such as the condemnation of multiculturalism and diversity, and the commendation of conformity to national values and social cohesion. The CBPs incorporate the shift of emphasis to migrants' responsibilities to integrate (CBP 1), respect the basic values of the EU (CBP 2), learn the language, history and institutions of the host society (CBP 4.1), be active societal participants (CBP 5) and the possibility of conflict of cultural and religious practices with European rights or national law (CBP 8.2). It is noteworthy that the CBPs incorporate no reference to access to citizenship as a condition for 'integration'. The Commission sought to put flesh on the CBPs by publishing a Communication on a Common Agenda for an Integration Framework for the Integration of TCNs in the EU in 2005.[18] The Communication contained more explicit ideas for the development of a framework on integration, based on a set of suggested actions at both the national and EU levels with the view to implementing the CBPs. It also highlighted the need for a more coherent approach to integration at the EU level and contained a visible external dimension. Little reflection, however, was given to the conceptual underpinnings of such a policy and the need for an external dimension to integration. The implementing measures relating to CBP 2 on respect for the basic values of the EU centred on newly arrived migrants. By contrast, the implementation of CBP 4 – that is, "basic knowledge of the host society's language, history and institution[s] is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration" – referred to the strengthening of "the integration component of admissions procedures, through pre-departure measures, such as information packages and language and civic orientation courses in the countries of origin". The Commission's *Second Annual Report* noted the "new emphasis on obligatory integration courses, containing both language instruction and civic orientation",[19] whereas the *Third Annual Report*[20] announced that greater emphasis would be placed on exploring various concepts of citizenship participation and "the added value of common European modules for migrant integration".[21] The absence of serious reflection on the conceptual coherence and justifiability of 'integration abroad' as well as its impact on integration processes and family reunification is puzzling.

In the Communication on a Common Immigration Policy in Europe: Principles, Actions and Tools,[22] integration is seen to be "the key to successful immigration".[23] It goes on to state that

> [t]he positive potential of immigration can only be realized if integration into host societies is successful. This requires an approach that does not only look at the benefit for the host society but takes also account of the interests of the immigrants: Europe is and shall continue to be welcoming environment for those who have been granted the right to stay, be they labour immigrants, family members, students or persons in need of international protection.[24]

Ten Priorities for the next five years – the Partnership for European Renewal in the filed of Freedom, Security and Justice, COM(2005) 184 final, Brussels 10.5.2005

[17] Justice and Home Affairs Council Meeting (2618th), 14615/04 of 19 November 2004.

[18] COM(2005) 389 final, Brussels, 1 September 2005.

[19] SEC(2006) 892, p. 5.

[20] COM(2007) 512, 11 September 2007.

[21] Ibid, p. 10; compare with the Commission's Communication, The Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy, COM(2006) 735 final, Brussels, 30.11.2006.

[22] See COM(2008) 359 final, SEC(2008) 2026, SEC(2008) 2027, 17.6.2008.

[23] Ibid, p. 8.

[24] Ibid, p. 4.

Interestingly, the notion of 'integration abroad' did not feature at all in the Communication, which, among other suggestions, included an assessment of "the implementation and the need for modification of the Council Directive 2003/86/EC on the right to family reunification". Yet, principle three, on "prosperity and integration", bestowed legitimacy on integration tests and programmes by stating that "immigrants should be provided with opportunities to participate and develop their full potential. European societies should enhance their capacity to manage immigration-related diversity and enhance social cohesion".[25] Significantly, diversity was depicted as an exogenous feature resulting from migration, and not as an intrinsic characteristic of European societies, and little consideration has been given to the fact that such national programmes might in effect impair the realisation of migrants' full potential and participation by denying them entry, permanent residence, family reunification and naturalisation. Evidently, the idea that migrants have to earn their legal status, rights and inclusion in the host member states by meeting integration conditions is taking root at the European level. The Commission has been unable to respond to the various brands of nationalism that are mushrooming in Europe and the EU framework on integration mirrors, and thus lends legitimacy to, national trends and legislation displaying a retreat from multiculturalism and a civic notion of citizenship.

3. DEVELOPMENTS IN EU CITIZENSHIP AND THE UNFINISHED AGENDA

3.1 Free movement and residence

3.1.1 Legislative developments

The most significant development has been the adoption of the Citizenship Directive, that is, the Directive on the right of citizens and their family members to move and reside freely within the territory of the member states.[26] The Directive remedied the sector-by-sector, piecemeal approach to free movement rights by incorporating and revising the existing Directives and amending Council Regulation No. (EEC) 1612/68.[27] Building on the rights-based approach characterising the rights of free movement and enhancing it further, the Directive gave further substance to Union citizenship by establishing an unconditional right of permanent residence for Union citizens and their families[28] who have resided in the host member state for a continuous period of five years. The right of permanent residence entails a right of equal treatment with nationals in areas covered by the Treaty. In light of the typology of residence rights established by the Directive, shorter periods of residence exceeding three months entail a right of residence for Union citizens and their family members if they fulfil the following criteria:

a) engage in economic activity;

b) have sufficient resources and comprehensive sickness insurance cover in the host member states as non-active economic actors; and

c) are enrolled at a private or public establishment, have comprehensive sickness insurance cover and are self-sufficient in order to avoid becoming a burden on the social assistance system of the host member state.

The rights of family members have been reinforced by extending family reunification to registered partners and by giving spouses and partners who are non-EU nationals independent

[25] Ibid, p. 7.

[26] Directive 2004/38/EC, OJ L 158/77, 30.4.2004.

[27] Articles 10 and 11 of Council Regulation (EEC) No. 1612/68 were repealed with effect from 30 April 2006.

[28] The definition of a "family member" includes a registered partner if the legislation of the host member state treats registered partnership as equivalent to marriage.

rights of residence in the event of divorce, annulment of marriage or termination of the registered partnership. In addition, greater protection is afforded to Union citizens and their family members on grounds of public policy, public security and public health. A novel provision of the Directive provides that as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host member state they should not be expelled, thereby incorporating the ECJ's ruling in the *Grzelczyk* case.[29] This provision attests to the capacity of Union citizenship to change our understanding of community membership and to create more inclusive forms of political association. Finally, for short periods of residence for up to three months, Union citizens shall have the right of residence without any conditions or any formalities other than the requirement to hold a valid identity card or passport. In the case of *Oulane*, the Court reiterated that a member state may not refuse to recognise a person's right of residence because she did not present one of these documents and that any document that could prove that the person concerned is a Community national would suffice.[30] The Directive also refers to the possibility to extend the time during which Union citizens and their family members may reside in the territory of the host member state without any conditions.[31] In sum, the new Directive creates the institutional preconditions for a notion of citizenship that is more inclusive than nationality-based models of citizenship.[32]

The correct implementation of the Directive has been the centre of the Commission's attention. In June 2007, fifteen infringement procedures were open, four of which have been referred to the ECJ.[33] The Commission launched a study examining the conformity of the transposition measures in 2007[34] and is aware of the fact that third-country nationals who are family members of Union citizens continued to encounter problems with respect to the authorisation of their entry and the issue of residence cards.

3.1.2 Judicial developments

Citizenship as a fundamental status. During the period 2004–07, the ECJ made decisive contributions to the development of Article 18(1) EC. Having established that citizenship of the Union is destined to be the fundamental status of nationals of the member state (*Boukhalfa*, *Grzelczyk*)[35] and that Article 18(1) EC creates a directly effective right (*Baumbast*),[36] the Court proceeded to weaken the link between economic self-sufficiency and the exercise of citizenship rights. The right to move and reside freely within the territory of the member states thus became a fundamental right that all Union citizens should enjoy irrespective of their economic status. This has been achieved by the combination of Article 18 EC with Article 12 EC (the non-discrimination clause), which together enable Union citizens lawfully resident in the territory of a member state to rely on Article 12 in all situations that fall within the scope (*rationae materiae*) of Community law. Accordingly, in *Bidar*[37] the Court departed from earlier case law that had excluded students from the grant of social assistance, by ruling that as Union citizens, students who have demonstrated "a certain degree of integration into the society of the host state" can claim maintenance grants.[38] But the

[29] Directive 2004/38/EC, note 26 above, Article 14.

[30] Case C-215/03, [2005] ECR I-1215.

[31] Ibid, Chapter VII, Article 39.

[32] Nevertheless, egalitarian processes co-exist with the practice of exclusion of long-term resident, third-country nationals from the personal scope of Union citizenship.

[33] See the Commission's Report, p. 5.

[34] Ibid, p. 5.

[35] Case C-1214/94, *Boukalfa v. Federal Republic of Germany* [1996] ECR I-2253; Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

[36] Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091.

[37] Case C-209/03, *Bidar v. London Borough of Ealing*, Judgement of 15 March 2005.

[38] In Bidar's case, this was a subsidised student loan.

member states are also entitled to ensure that "the grant of assistance does not become an unreasonable burden". Even though the requirement of demonstrating "a certain degree of integration" is not sufficiently clear, the Court has nevertheless indicated that a reasonable period of lawful residence[39] and the ensuing immersion in a web of interactions in the host state[40] generates an entitlement to non-discrimination and equal treatment in the social field. The Court thus ruled in *Trojani* that a lawfully resident, non-active economic actor is entitled to a social assistance benefit on the basis of Article 12 EC,[41] whereas in *Collins*, the absence of a genuine link between a jobseeker and the employment market of the host state invalidates an entitlement to a jobseeker's allowance.[42] In both cases, however, the principle of proportionality must be respected and the application of a residence requirement is open to judicial review. The Court's reasoning is both reasonable and consonant with the fundamental status of Union citizenship; "the requirement of exhibiting a certain degree of financial solidarity with national[s] of other member states" (*Grzelczyk*) does not extend to situations in which a person becomes an unreasonable burden on the welfare system of the host member state.

In *D'Hoop*, the Court highlighted that Union citizenship forms the basis of rights to equal treatment irrespective of nationality,[43] and noted that it would contravene EC law if a citizen received in her own member state treatment less favourable than that she would otherwise enjoy had she not availed herself of the right to free movement.[44] Still, in *De Cupyer* the Court upheld the proportionality of Dutch measures that conditioned an entitlement to unemployment allowance on actual residence in the Netherlands on the ground that the effective monitoring of the employment and family situation of unemployed persons could not have been achieved by less restrictive measures, such as the production of documents or certificates.[45]

Family reunification. The Court has taken an uncompromising stance on the mobility rights of third-country national family members of Union citizens. In the past, it has had an opportunity to take issue with strict interpretations of the visa requirement for third-country national spouses and to make it clear that the residence rights of such persons do not derive from states' authorisation of their entry.[46] Instead, they are based on their family ties with Union citizens. In *Akrich*, the Court reiterated the importance that Community law attributes to the right to respect for family life.[47] Nevertheless, the Court gave the impression that Article 10 of Council Regulation (EEC) No. 1612/68 could only be invoked if the third-country national spouse of a Community national seeking to move to a member state was lawfully resident in another member state.[48] This led the UK Home Office to distinguish

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[39] Ibid. See also Case C-456/02, *Trojani v. CPAS* [2004] ECR I-7573, para 43. The ECJ refers to "lawful residence in the host member state for a certain time or the possession of a residence permit".

[40] Bidar had completed his secondary education in the UK.

[41] See note 39 above.

[42] C-138/02, *Brian Francis Collins* [2004] ECR I-2703. Similarly, the taking up of residence abroad is not a satisfactory indicator of a loss of connection with one's home Member State which is demonstrating its solidarity with the applicant by granting a civilian war benefit to him/her; Case C-192/05, *K. Tas-Hagen and R.A. Tas*, Judgement of the Court of 26 October 2006.

[43] Case C-224/98 *Marie-Nathalie D'Hoop v. Office national de l'emploi* [2002] ECR I-6191.

[44] Compare also C-258/04 *Ioannidis*, Judgement of 15 September 2005. Ioannidis was denied a tideover allowance on the grounds that he had completed his secondary education in another Member State.

[45] Case C-406/04, G. *De Cuyper v. Office national de l-emploi*, Judgement of the Court of 18 July 2006. Compare also Case C-365/02 *Lindfors* [2004] ECR I-7183 and Case C-403/33, *Schempp v. Finanzamt Munchen V* [2005] ECR I-6421.

[46] Case C-459/99, *MRAX*, Judgement of the Court of 25 July 2002.

[47] Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich* [2003] ECR I-9607.

[48] See para 61.

between the intra-Community movement of lawfully resident family members of Community nationals, which allegedly falls within the ambit of Community law, and the entry of such persons from outside the Community, which is seen to fall within the sovereign prerogative of the UK and thus the ambit of national migration rules. Accordingly, third-country nationals "who are illegally in the UK and marry British citizens should not be able to abuse EC law to remain here".[49] In this respect, the UK Immigration (European Community Area) Regulations 2006 state that third-country national dependent relatives or members of a household of a Community national seeking to exercise rights of free movement in the UK must have previous lawful residence in another member state in order to be eligible for a resident permit.

While in *Commission v. Spain* the Court had an opportunity to reiterate that the rights of entry and residence of non-EU nationals who are members of the family of a UK national do not depend on national migration regulations imposing additional conditions, but on their family links,[50] in *Jia* the Court revisited and distinguished the factual underpinnings of *Akrich.* The Court ruled in *Jia* that Community law does not require prior lawful residence in a member state for the grant of a permanent residence permit to a family member of a Community national who has exercised her right to free movement.[51] Mrs Jia, a Chinese national and the dependent relative (mother-in-law) of a German national living in Sweden, entered Sweden on a 90-day visit visa, and before the visa's expiry, she applied for permanent residence there. Her application was refused by the Swedish authorities, and on a preliminary reference from the Swedish Aliens Board, the ECJ held that there was no requirement for Mrs Jia to have resided in another member state before making the application and that the switch of her status from visitor to resident did not pose any problems for Community law. In subsequent cases, the Court has strengthened the rights of third-country national family members of Community nationals[52] and has outlawed national legislation making the right of residence of family members subject to prior lawful residence in another member state.[53]

Non-discriminatory restrictions. In *Pusa*, Advocate General Jacobs stated that, far from being limited to a prohibition of direct or indirect discrimination, Article 18 EC applies to non-discriminatory restrictions, including unjustified burdens.[54] Non-discriminatory restrictions involve measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty and can only be justified if they are based on overriding considerations of public interest and are proportionate (*De Cupyer*).[55] In *Tas-Hagen*, the Court utilised the non-discrimination model by stating that Dutch legislation on benefits for civilian war victims of 1940–45, which required that beneficiaries were resident in the Netherlands at the time of the submission of their application, was "liable to dissuade Netherlands nationals" from exercising their rights under Article 18(1) EC and "constituted a restriction".[56] Indeed, "the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a member state can be deterred from availing himself of them by obstacles raised to his residence in the host member state by

[49] See the reply of Baroness Scotland of Asthal to the question by Lord Tebbit on 17 November 2003, HL Deb 17 November 2003, Vol. 654, cc 252-3WA.

[50] In this case, a Spanish national law, which made the grant of a residence permit to a non-EU national family member of a UK national conditional upon applying and obtaining a residence visa at the Spanish consulate in their last country of domicile, violated Directives 68/360, 90/365 and 73/147; C-157/03, [2005] ECR I-2911.

[51] Case C-1/05, *Jia v. Migrationsverket* [2007] ECR I-1.

[52] Case C-291/05, *Eind*, Judgement of 11 December 2007, para. 45.

[53] Case C-127/08, *Metock and Others*, Judgement of the Court of 25 July 2008.

[54] Case C-224/02, *Heikki Antero Pusa v. Osuuspankkien Keskinainen Vakuutusythio* [2004] ECR I-5763.

[55] See note 45 above.

[56] Case C-192/05, *K. Tas-Hagen, R.A. Tas v. Raadskamer WUBO van de Pensioen – en Uitkeringsraad*, Judgement of the Court of 26 October 2006, para. 32.

legislation of his State of origin penalising the fact that he has used them".[57] And although the restriction can be justified on the ground that the obligation of solidarity could only apply to civilian war victims who had links with the population of the Netherlands during and after the war, residence abroad was not a sufficient indicator of a person's disconnection from the member state granting the benefit. The requirement of residence in the Netherlands therefore did not meet the test of proportionality.

Similarly, in the joined cases of *Morgan* and *Bucher*, the Court ruled that national law stipulating that education and training grants for studies in another member state can only be awarded for studies that are a continuation of education or training pursued for at least one year in the member state awarding the grant is liable to deter citizens of the Union from exercising their fundamental rights under Article 18(1) EC. In this respect, it constitutes an unjustified restriction on the free movement of Union citizens.[58] By moving beyond the discrimination model, the Court has managed to provide effective protection to Union citizens who have taken advantage of the opportunities afforded by the Treaty but who have been placed at a disadvantage by the legislation of their state of origin.

Increased protection of Union citizens. Member states may restrict the free movement rights of Union citizens, and of their family members, on public security, public policy and public health grounds, but as the ECJ has consistently stated, the latter must be strictly interpreted and comply with the principle of proportionality.[59] These grounds cannot be invoked by a member state in order to serve economic ends. Instead, they have to be based exclusively on the personal conduct of the individual concerned and may never be imposed automatically.[60] Member states must verify that a Union citizen's personal conduct poses "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".[61] The same assessment must take place with respect to third-country national spouses of Community nationals who have been the subject of alerts entered in the Schengen Information System (SIS). The ECJ has stated that both the member state issuing an alert and the member state that consults the SIS must first establish that the presence of a person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[62] Clearly, a member state cannot order the expulsion of a Union citizen as a deterrent or a general preventive action. Although the strict interpretation of the public policy derogations has circumscribed the member states' discretionary power, they nevertheless continue to deport Union citizens by reason of an enforceable criminal conviction. But as Advocate General Stix-Hackl has stated, "the German practice of automatic deportation, without regard for personal circumstances, justified on the ground of its deterrent effect on other foreigners and in breach of the fundamental right to family life breaches Community law".[63] The new Citizenship Directive enhances security of residence for Union citizens[64] and stipulates that long-term resident Union citizens and minors

[57] Ibid, para 30.

[58] Joined Cases C-11/06 and C-12/06 *Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren*, Judgement of the Court of 23 October 2007. See also Case C-76/05, *Schwarzand Gootjes-Schwarz*, Judgement of the Court of September 2007.

[59] Case C-100/01, *Ministre de l'Interieur v. Aitor Oteiza Olazabal*, Judgement of the Court of 26 November 2002; Joined Cases C-482/01 and C-493/01, *Orfanopoulos v. Land Baden-Wurttemberg* [2004] ECR I-5257.

[60] See the Opinion of Advocate General Mazak in Case C-33/07, *Gheorghe Jipa*, delivered on 14 February 2008, para. 23.

[61] Case 30/77, *R v. Bouchereau* [1977] ECR 1999.

[62] Case C-503/03, *Commission v. Kingdom of Spain*, Judgement of the Court of 31 January 2006.

[63] See the Advocate General's Opinion in Case C-441/02, *Commission v. Federal Republic of Germany*, 2 June 2005.

[64] Article 28(1) of Directive 2004/38/EC, OJ L 158/77, 30.4.2004.

may not be ordered to leave the territory of a member state, except on imperative grounds of public security.[65] These developments attest to the increasing importance of EU citizenship.

3.1.3 Transitional arrangements and other issues

The Commission actively monitors the impact of the transitional arrangements in the field of free movement of workers. It is reported that "by May 2007, nine out of fifteen member states had opened their labour markets to the nationals from EU-8 member states, whereas ten out of twenty-five member states have opened their labour markets to Bulgarian and Romanian nationals".[66] Mobility has been limited, however. In addition, it is reported that the negotiations concerning the amendment of the European Economic Area Agreement with the view of making Directive 2004/38/EC applicable in Liechtenstein, Norway and Iceland continue.

3.2 Electoral rights

The ECJ has held that the definition of the persons entitled to vote and to stand as a candidate in the elections for European Parliament falls within the competence of the member states, but added that in exercising this competence, a member state must comply with Community law, particularly the principle of equality.[67] The Commission's report on the 2004 European parliamentary elections noted a decrease in political participation in these elections in the member state of origin, while there has been an increase in the political participation of Community nationals in the member state of their residence.[68] Yet, as there has been a fall in Community nationals standing as candidates for European parliamentary elections in the member state of residence, the Commission has proposed to review and amend Directive 93/109/EC.[69] The proposed directive suggests the introduction of less burdensome measures with respect to both the exchange of information among the member state on how to prevent double voting and double candidature and the requirement of an attestation that a candidate is not deprived of the right to stand as a candidate.[70]

Partisanship at the European level has been enhanced, too. In June 2007, the Commission adopted a proposal to allow the establishment of European political foundations based on Article 191 EC, thereby amending Regulation (EC) No. 2004/2003 on political parties at the European level and their funding. The budget was fixed at €10.4 million in 2007 and 10 political parties at the European level receive funding. The Commission is also keen to promote the electoral participation of Union citizens in the member state of residence, which is impeded by national legislation that does not allow Community nationals to become party members or to establish political parties (or both). The Commission will examine such national legislation and will take action either by diplomatic means or by activating Article 226 EC. In addition, Union citizens have registered concerns about their exclusion from political participation in national or regional elections in the member state of residence. The Commission intends to invite the member states to "examine this issue" in order to promote the political participation of Union citizens.[71]

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[65] Ibid., Article 28(3).

[66] See the Commission's Report, p. 5

[67] Cases C-145/04, *Spain v. UK* [2006] ECR I-7917 and C-300/04, *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.

[68] COM(2006) 790.

[69] Directive 93/109/EC, OJ L 329, 30.12.1993.

[70] Proposal for a Council Directive amending Directive 93/109/EC of 6 December 1993 as regards certain detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a member state of which they are not nationals, COM(2006) 791 final, Brussels, 12.12.2006.

[71] See the Commission's Report, p. 8.

3.3 Diplomatic and consular protection and rights to non-judicial means of redress

European citizens' right to diplomatic and consular protection when travelling abroad (Article 20 EC) remains underdeveloped, despite the fact that EU nationals are increasingly travelling outside the EU. With a view to strengthening consular and diplomatic protection, the Commission has presented an Action Plan for the Years 2007–2009[72] and a Recommendation to member states to include the text of Article 20 EC in passports.[73]

Under Article 21 EC, Union citizens, and any natural or legal person residing or having its registered office in a member state, has the right to petition the European Parliament on a matter that comes within the fields of activity of the Community and affects the petitioner directly. The number of petitions received by the European Parliament during the period 2004–07 remains relatively stable, although there has been a modest rise in the complaints received by the European Ombudsman, probably owing to the accession of the new member states: 3,736 in 2004, 3,920 in 2005 and 3,830 in 2006. Even so, two-thirds of the complaints fall outside the Ombudsman's mandate or are deemed inadmissible.[74]

4. CONCLUSIONS

EU citizenship has been subject to evolution. One cannot possibly ignore the effective transformation of migrant workers into Union citizens endowed with wide rights of equal treatment in the member state of their residence and the growing stature of Union citizenship. The ECJ's jurisprudence coupled with the adoption of the Citizenship Directive (2004/38/EC) has contributed decisively to this. But the EU citizenship agenda remains unfinished. Rethinking the link between EU citizenship and nationality, ensuring the correct implementation of the Citizenship Directive, enhancing Union citizens' political participation in the member state of residence and possibly extending their participation to national and regional elections, and enhancing their rights to diplomatic and consular protection are important policy priorities. There is also an urgent need to rethink the meaning and policies attached to civic integration at the national and EU levels with the view of sustaining the vision of a diverse and inclusive EU, which enhances rights protection and promotes a respectful symbiosis among its citizens and residents. European citizenship has been a unique experiment for stretching social and political bonds beyond national boundaries and for creating a pluralistic political community in which diverse peoples become associates in a collective experience, and this vision needs to be calcified and promoted.

5. POLICY RECOMMENDATIONS

Several policy recommendations flow from the foregoing discussion, as follows:

- In the long term, Union citizenship should be based on domicile in the territories of the Union for a certain period of time.
- In the medium term, the European Parliament should monitor reforms of naturalisation laws in the Member States and exert more pressure for legal reform to remove unacceptable variations and to facilitate third country nationals' access to nationality in line with the Tampere mandate.
- There is a need for rethinking of national concepts, and programmes, of civic integration and of the EU Framework on Integration and of the appropriateness of

[72] COM(2007) 767 final.

[73] COM(2007) 5841 final.

[74] See European Ombudsman's *Annual Report 2006*.

using test-based and sanctions-based approaches to language acquisition and the dissemination of information about states' history, national values and ways of life.

- The vision of the EU as a heterogeneous political community, which values diversity, intercultural dialogue, rights protection and respect for human rights, should be placed at the heart of all policies.
- The correct implementation of Directive 2004/38 is vital and the Commission is correct to make this an absolute priority.
- Union citizens, who are permanent residents, should be able to vote in national and regional elections in the Member State of their residence.
- The acquis in the area of diplomatic and consular protection should be strengthened and the Commission's recommendation to Member States to include the text of Article 20 EC in passports should be implemented.