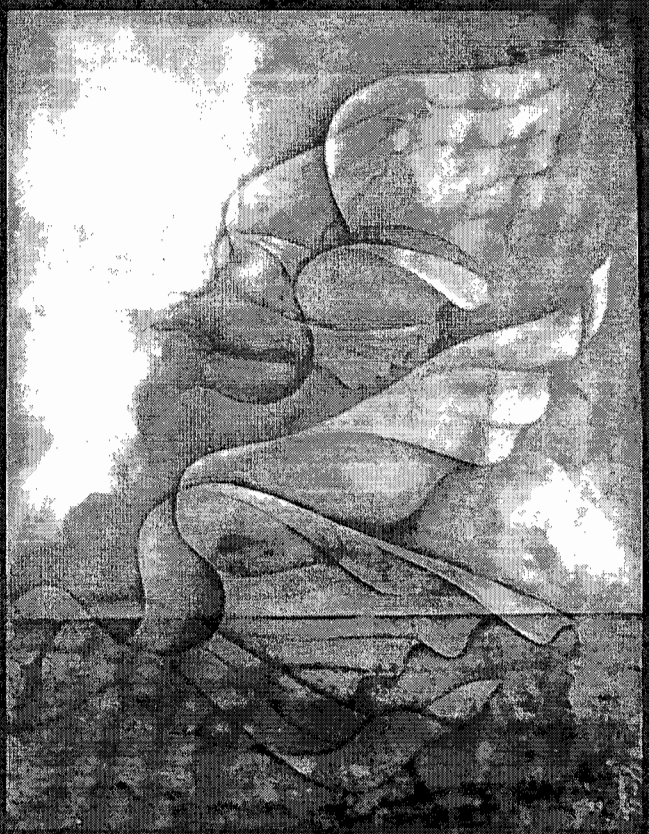
Rethinking the free movement of workers:
the European challenges ahead



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Reverse Discrimination: An Unsolvable Problem?

Herwig Verschueren

1. Introduction

Reverse discrimination occurs when an EU citizen finds himself or herself in a purely internal situation of a Member State and as a result of this cannot rely on European Community law to obtain a certain right but only on the national law of the Member State in question. EU citizens who find themselves in a cross-border situation can, for instance, invoke Community law regarding free movement of persons. By contrast, citizens of a Member State who have no ties whatsoever with another Member State can, as Community law with regard to free movement of persons now stands, only invoke that Member State's law. In the same circumstances the latter may turn out to be less favourable than Community law. As a result, these citizens feel discriminated against in their own Member States, a phenomenon which is sometimes called a situation of 'reverse discrimination'. The unacceptable nature of the continuing existence reverse discrimination in Community law has already been addressed extensively in the literature.[1]

In my contribution I will first analyse the reasons why reverse discrimination in the context of the EU is a problem, in particular with regard to the right of residence for family members of EU nationals. Indeed, EU nationals who have not made use of the right of free movement within the Union and find themselves in a so-called 'purely internal situation', cannot rely on EU law to obtain a right of residence for the members of their family in the Member State of which these EU nationals hold the nationality.[2] The contribution will then continue by exploring the legal origins of this phenomenon, including the relevant case law of the European Court of Justice, particularly its most recent rulings in 2008, such as *Government of the French Community*[3] and *Metock*.[4] It further examines tentative solutions to this problem by analysing the possibilities which may be offered by the EC Treaty provisions, the national non-discrimination clauses, the European Convention on Human Rights or even secondary EU legislation instruments. I will demonstrate that the problem of reverse discrimination may be tackled by initiatives

1 See recently: E. Spaventa, Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects, 45 *CMLRev* (2008), p. 13-45; A. Tryfonidou, Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizen's Europe, 35(1) *Legal Issues on Economic Integration* (2008), p. 43-67 and A. Walter, *Reverse Discrimination and Family Reunification*, Nijmegen: Wolff Legal Publishers 2008.

2 This became clear for the first time in Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR I-6947 and in Cases 297/88 and C-197/89, *Dzodzi*, [1990] ECR I-3763.

3 Case C-212/06, *Government of the French Community and the Walloon Government v. The Flemish Government*, [2008] nyr (hereafter referred to as '*Flemish care insurance* case').

4 Case C-127/08, *Metock e.a.*, [2008] nyr.

taken at the level of the European and national judiciary as well as at the level of the European legislature, which means that it is not unsolvable.

2. Why is Reverse Discrimination a Problem?

In *Metock* the Court of Justice refers to the observation by the Member States that Directive 2004/38[5] would lead to unjustified reverse discrimination, in so far as nationals of the host Member State who have never exercised their right of freedom of movement would not derive rights of entry and residence from Community law for their family members who are nationals of non-member countries.[6] Apparently, these Member States are aware that a problem of reverse discrimination could arise if the application of Community law, and in this case in particular the provisions with regard to the right of family reunification in Directive 2004/38 as interpreted by the Court of Justice in this ruling, would be more favourable than the application of the national provisions in this respect. On the basis of the provisions of this directive the spouses, registered partners, the direct descendants and the direct dependent relatives in the ascending line are the family members who can obtain a right to reside with an EU citizen. As far as employed or self-employed persons are concerned, the existence of a family tie to them suffices to grant a family member, including a third-country relative, a right of residence in the host country. For members of the family of economically non-active persons however, there is the condition that the EU citizen must have sufficient resources and a comprehensive sickness insurance for himself or herself and his or her family members. As for the condition of sufficient resources, these are considered to be sufficient if they prevent those persons from becoming a burden on the social assistance system of the host Member State during their period of residence.[7] In addition, Article 14 of Directive 2004/38 determines that an expulsion measure shall not be the automatic consequence of a Union citizen's his or her family member's recourse to the social assistance system of the host Member State.

But these rather favourable provisions with regard to the right of family reunification cannot be invoked by all citizens of a Member State and certainly not by all its inhabitants, as will be illustrated by the following example.

Take a number of citizens living in an ordinary street in a city like Rotterdam. House No 1 is inhabited by a German national. He works in Holland and would like to marry a Turkish national who is still living in Turkey. The right of family reunification applicable to this couple is that of Directive 2004/38 as implemented in Dutch law. There are only two conditions which this couple has to meet according to this directive. There must be a bond of marriage and the German national must be employed. Even if the Turkish bride had already resided in Holland

5 Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* L 158, 30.4.2004, 77; 1st corrigendum in *OJ* L 228, 29.6.2004, 35; 2nd corrigendum (only for the English version) in *OJ* L 197, 28.7.2005, 34.

6 *Metock*, *supra* note 4, para 76.

7 See Articles 2 and 7 of Directive 2004/38.

or to the marriage without having a right of residence there, she would, as soon the marriage has taken place, obtain a right of residence in The Netherlands.[8]

House No 3 is inhabited by a Dutch national who worked in Belgium for six nths last year. There he married a Turkish national who had lived in Turkey til the marriage took place. The bride's right of residence in Belgium was also verned by the provisions of Directive 2004/38, in the same way as in the case of e German-Turkish couple in house No 1. When the Dutch national returned to otterdam with his Turkish wife, the latter obtained a right of residence under ropean Community law, pursuant to the case law of the Court of Justice. In the *gh* case, for instance, the Court ruled that when an EU-citizen makes use of the ght of free movement as an employed or self-employed person, marries a third-untry national in the host country and then returns to the Member State of hich he holds the nationality to work there, his third-country spouse enjoys a ght of residence there on the basis of Community law.[9]

House No 5 is inhabited by a Turkish employee who has been legally working The Netherlands for several years. He would like to marry a Turkish woman ho resides in Turkey. This woman's right of residence falls under Community w, more specifically under Directive 2003/86 regarding the right of family reuni-cation.[10] This directive is applicable to third-country nationals who reside lawfully n the territory of a Member State (Art. 1). However, on the grounds of Article 7 f this directive Member States are allowed to lay down some conditions. This rticle states that

> 'the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has: (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned; (b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family; (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members. Member States may also require third-country nationals to comply with integration measures, in accordance with national law.'

So this provision leaves the Member States some scope for policy-making, but this scope is defined by Community law and must be applied within this framework, also taking into account the protection of fundamental rights, such as the right to

8 *Metock*, *supra* note 4.

9 Case C-370/90, *Singh*, [1992] ECR I-4265. See also Case C-291/05, *Eind*, [2007] ECR I-10719.

10 Directive 2003/86 of the Council of 22 September 2003 on the right to family reunification, *OJ* L 251, 3.10.2003, 12.

family life.[11] Consequently, the right of residence of the Turkish bride of the inhabitant of House No 5 does not fall under national law exclusively.

House No 7 is inhabited by a Dutch national who has never made use of the right of free movement within the EU and who would also like to marry a Turkish woman who is still living in Turkey. Because Community law does not apply in purely internal situations the right of residence of this bride solely depends on Dutch law. The conditions for family reunification laid down in this national law remain unimpaired, and in principle European Community law does not intervene. Taking into account the conditions for family reunification after marriage under Dutch law, this means in actual practice that in order to obtain a right of residence for his Turkish bride this Dutch national has to comply with the hardest conditions of all the neighbours. The result is that in his own Member State he has fewer rights than his neighbours with identical marriage plans, but who, one way or another, are able to invoke European Community law. And yet, this Dutch national is an EU citizen too but as far as his third-country wife's right of residence is concerned he feels like a second-class citizen in his own country. It is quite possible that he and his new wife do not meet the conditions for family reunification as laid down in Dutch law, so that it will be refused by the Dutch authorities. This could possibly be avoided if he went to work in another Member State for a few months, for instance in Belgium, married during his stay there and sent for his Turkish bride to come over to this other Member State on the grounds of Directive 2004/38. After some time, together with his Turkish wife, he could then return to live in House No 7 in the same street in Rotterdam.[12] But even in this case the person concerned could still feel a second-class citizen because he has in fact been forced to set up a somewhat dubious U-turn construction which will no doubt cost him money and may leave him with an uneasy feeling.

3. Legal Origin of the Problem of Reverse Discrimination and the Most Recent Case Law of the Court of Justice

The situation of the four Rotterdam neighbours makes one wonder where this reverse discrimination in Community law stems from. First of all it has something to do with the principle of conferral in Community law. Article 5 EC provides that 'the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'. Before Community law can intervene in a situation, the question must be asked first as to whether the problem concerned falls at all within the scope of Community law. If this is not the case, neither the provisions of Community law nor its principles can offer a solution for the problem. This is how the Court of Justice put it in *Uecker and Jacquet*:

> 'It must be noted that citizenship of the Union, established by Article 8 of the EC Treaty (now Article 17 EC Treaty), is not intended to extend *the scope ra-*

11 See Case C-540/03, *European Parliament v. Council*, [2006] ECR I-5769.

12 Such a construction is sometimes called the 'Belgium route'.

> *tione materiae* of the Treaty also to internal situations which have no link with Community law. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State'.[13]

The court obviously considers this first and foremost as a 'matter of scope'. As soon as it has been determined that the problem concerned is not part of the scope of Community law this problem cannot be solved by Community law but instead needs to be solved by each Member State's own national law. Meanwhile, this principle has become settled case law of the Court of Justice.[14]

Most recently this principle was once again and most explicitly brought up for discussion in the *Flemish care insurance* case. This concerned a special kind of sickness insurance for disabled persons, care insurance, which was established by one of the regional authorities in Belgium, in this case the Flemish Community. On the ground of European Community law, more specifically Regulation 1408/71 with regard to social security coordination[15] this insurance must also be open to employed and self-employed persons who have made use of the free movement of persons within the EU and are now working in this Belgian region but live in another Member State (for instance frontier workers). The question put to the Court of Justice by the Belgian Constitutional Court was whether migrant employed and self-employed persons who have made use of Community law regarding free movement and who work in Flanders but reside in another part of Belgium (more specifically Wallonia) should also be allowed access to this care insurance on the basis of Community law. The Court held the view that this was indeed the case.[16]

Nonetheless, another question which also came up in this case, and quite notably so, was if Community law could force the regional authorities concerned to grant the persons working on their territory but residing in another part of Belgium without ever having made use of the Community right to freedom of movement the same rights as the employed and self-employed persons who had made use of their right to freedom of movement. In her opinion of 28 June 2007 Advocate General Sharpston explicitly suggested to the Court to answer this question positively and to make short of the reverse discrimination. The AG stated that

> 'if the traditional 'purely internal situation' argument is accepted, Belgian nationals who have not exercised classic economic rights of freedom of move-

13 Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet*, [1997] ECR I-3171, paragraph 23.

14 See for instance Case C-148/02, *Garcia Avello*, [2003] ECR I-11613, paragraph 26; Case C-192/05, *Tas-Hagen and Tas*, [2006] ECR I-1045, paragraph 23 And Case C-403/03, *Schempp*, [2005] ECR I-6421, paragraph 20.

15 Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, *OJ* L 28, 30.1.1997, 1. See the consolidated version on: http://europa.eu.int/eur-lex/en/consleg/main/1971/en_1971R1408_index.html).

16 *Flemish care insurance*, *supra* note 3, paragraph 60.

> ment are, by the very operation of EC law (in combination with national law), the only class of persons residing or moving within the Union against whom the conditions for entitlement to the Flemish care insurance may discriminate with impunity. In such circumstances, a prima facie case can, it seems to the AG, be made for saying that the group of Belgian nationals who have not exercised classic economic rights of freedom of movement nevertheless falls in principle within the scope of EC law and/or is sufficiently affected by its application that they ought also to be able to invoke EC law'.[17]

Because of this the AG called on the Court to consider revising its settled case law with regard to the non-applicability of Community law in purely internal situations although she was well aware that this would amount to an overruling of previous case law. She added:

> 'There does nevertheless appear to me to be a possible argument – and one that is prima facie attractive because it would help to eradicate arbitrary discrimination – that citizens of the Union may rely upon that citizenship, in combination with the principle of non-discrimination, even in purely internal situations.'[18]

Despite this explicit appeal of the AG the Court stuck to its settled case law in its ruling of 1 April 2008. The Court recognized that application of the legislation at issue leads, inter alia, to the exclusion from the care insurance scheme of Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region and have never exercised their freedom to move within the European Community.[19] The Court hastened to add that Community law clearly cannot be applied to such purely internal situations. For the Court it is not possible to raise against that conclusion the principle of citizenship of the Union set out in Article 17 EC, which includes, in particular, according to Article 18 EC, the right of every citizen of the Union to move and reside freely within the territory of the Member States. Thereupon the Court called to mind that it has on several occasions held that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law.[20] The only possibility the Court sees fit is that the interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular, if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court.[21] So the Court leaves the assessment of the reverse discrimination resulting from

17 Paragraphs 153-154 of her Opinion.
18 Paragraph 157 of her Opinion.
19 *Flemish care insurance*, *supra* note 3, paragraph 38.
20 *Flemish care insurance*, *supra* note 3, paragraph 39.
21 *Flemish care insurance*, *supra* note 3, paragraph 40.

Community law to the national legal order, which in this respect may draw some inspiration from Community law without however this having to lead to a legal obligation. Anyway, in the meantime the Belgian Constitutional Court decided in its ruling of 21 January 2009 that the Belgian nationals in a purely internal situation who work in the Dutch-speaking region or in that of the bilingual region of Brussels-Capital but who live in the French- or German-speaking region are not unfairly discriminated because this is a consequence of the internal conferral of power between the various regions in Belgium.[22]

The case law stating that Community law is not applicable in purely internal situations with regard to family reunification was once again explicitly confirmed by the Court of Justice in *Metock* of 25 July 2008. In this judgement the Court repeated, after hearing the argument of a number of Member States that this could be a problem of reverse discrimination, that it is settled case law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant aspects within a single Member State and that any difference in treatment between those Union citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community law.[23]

For that matter, we do want to point out that from the case law of the Court of Justice it follows that in quite a lot of cases a rather tenuous link with the free movement of persons is considered to be sufficient to bring the specific case within the scope of Community law.[24] The existence of this kind of tenuous link is often looked upon as a rather arbitrary criterion for making a distinction between a situation which does and a situation which does not fall within the scope of Community law.[25]

4. Possible Solutions

Does this case law from 2008 mean the definitive end of the discussion with regard to reverse discrimination? Is the problem legally unsolvable? Further on in this contribution I will try and offer a number of paths towards possible solutions for the problem of reverse discrimination in Community law, international law and national law. Within the scope of this article these courses of action will not be entered into in depth. My main intention is to propose a number of creative solutions in the discussion about the issue of reverse discrimination.

22 Belgian Constitutional Court 21 January 2009, judgment No 11/2009; to be consulted on: http://www.grondwettelijkhof.be/nl/common/home.html.

23 *Metock*, *supra* note 4, paragraphs 77-78.

24 See for instance: Case C 60/00, *Carpenter*, [2002] ECR I-6279; *Garcia Avello*, *supra* note 14 and Case 224/98, *D'Hoop*, [2002] ECR I-6191.

25 See the literature *supra* note 1.

4.1 *European Citizenship as an Extension of the Personal Scope of the Prohibition of Discrimination on the Grounds of Nationality*

On the basis of Article 12 EC any discrimination based on nationality within the scope of the Treaty is prohibited. Article 17 EC establishes the citizenship of the Union saying that every person holding the nationality of a Member State shall be a citizen of the Union. Since *Grzelczyck* the Court has kept repeating with regard to the ban on discrimination on the ground of nationality combined with European citizenship that

> 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality'.[26]

Nonetheless, as far as the meaning of Article 17 EC with regard to purely internal situations is concerned, the Court in its recent case law always stated that citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law.[27] It is striking that the Court refers to the material scope of Community law which was not extended through the introduction of citizenship. However, the judgement that the introduction of European citizenship has not resulted in an extension of the material scope must be put into perspective. Indeed, in the same citizenship case law the Court also stated that if the right of free movement between the Member States (as granted by Article 18 EC to all EU citizens) has been used, the Member States have to exert their competence with regard to matters which do not fall within the material scope of the Community in such a way that this exertion can be reconciled with the right of free movement. The Member States' exertion of competence in those matters which do not fall within the competence of the Community may not lead to unjustified discrimination of persons who have made use of the right of free movement or to an unjustified obstruction thereof (including the nationals of the Member State concerned). For instance, in *Tas-Hagen and Tas* the Court of Justice recognized that as Community law now stands, a benefit such as that in issue, which is intended to compensate civilian war victims for physical or mental damage which they have suffered, falls within the competence of the Member States. However, Member States must exercise that competence in accordance with Community law, in particular with the Treaty provisions giving every citizen of the Union

26 See for instance in particular, Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, paragraph 31; *Garcia Avello*, *supra* note 14, paragraphs 22 and 23; Case C-224/02, *Pusa*, [2004] ECR I-5763, paragraph 16; Case C-209/03, *Bidar*, [2005] ECR I-2119, paragraph 31; Case C-520/04, *Turpeinen*, [2006], paragraph 18 and most recently on 16 December 2008 in Case C-524/06, Huber, [2008] nyr, paragraph 69.

27 *Uecker and Jacquet*, *supra* note 13, paragraph 23; *Garcia Avello*, *supra* note 14, paragraph 26; Case C-403/03, *Schempp*, [2005] ECR I-6421, paragraph 20; *Tas-Hagen and Tas*, *supra* note 14, paragraph 23 and *Flemish care insurance*, *supra* note 3, paragraph 39.

the right to move and reside freely within the territory of the Member States.[28] The matter dealt with in *Garcia Avello* and in *Grunkin and Paul* was the right with regard to a child's surname about which the Court also acknowledged that this does not fall within the scope of Community law, but that instead this competence must be exercised by the Member States.[29]

So, even if a matter does not fall within the competence of the Community, the Member States must respect the general principles of EC law, in this case the right of free movement of persons within the Union, in the exertion of their competence. Therefore the proposition that the introduction of European citizenship as citizenship as such has not extended the material scope of Community law should be put in perspective in the light of this case law.

Striking as well is that the Court of Justice only judged about the question as to whether Article 17 EC would mean an extension of the material scope of Community law. The Court did not take a position about the question as to whether Article 17 EC means an extension of the personal scope of Community law. Apparently this did occur as a result of this provision. Before its introduction by the Maastricht Treaty the personal scope of the provisions of the EC Treaty, in particular with regard to those concerning the free movement of persons, was limited to Member States' nationals who are (or were) active as employed or self-employed persons.[30] Article 17 EC appears to have extended the personal scope of the EC Treaty to all persons who are nationals of a Member State, irrespective of them having made use of the right of free movement as economically active persons. The Court in its case law has never explicitly confirmed this extension of the personal scope but neither has it explicitly denied it. The latter would be very difficult indeed. This may be the reason why the Court in its above-mentioned case law only speaks of the extension or non-extension of the *material* scope of Community law by means of Article 17 EC.

Now, if all citizens of the Union were to fall within the personal scope of the EC Treaty they, as persons, also would have to fall within the personal scope of Article 12 EC which forbids all discrimination on the ground of nationality. Obviously, the issue would also have to fall within the material scope of Community law, but judging by the provisions in this respect in Directive 2004/38,[31] the right of family reunification and the right of residence of EU citizens' family members clearly do so.

According to this line of reasoning the principle of the prohibition of discrimination on the grounds of nationality in Article 12 EC would be applicable to the right of family reunification with all EU citizens, also with those who find themselves in a purely internal situation. Through Article 17 they are part of the per-

28 *Tas-Hagen and Tas*, *supra* note 14, paragraphs 21 and 22. See for a comparable benefit also Case C-499/06, *Nerkowska*, [2008] nyr and Case C-221/07, *Zablocka-Weyhermüller*, [2008] nyr.

29 Case C-148/02, *Garcia Avello*, [2003] ECR I-11613 and Case C-353/06, *Grunkin and Paul*, [2008] nyr.

30 Articles 39, 43 and 49 EC Treaty.

31 See for analogy Case C-85/96, *Martinez Sala*, [1998] ECR I-2691, in particular paragraph 57.

sonal scope of the EC Treaty, and since the right of reunification with nationals of Member States is part of the material scope of Community law, the principle of Article 12 EC applies.[32] After that one would have to examine whether the non-application of Community law with regard to family reunification, in particular the relevant provisions in Directive 2004/38, does not amount to discrimination on the grounds of nationality. Actually there is no denying that this is a matter of *direct* discrimination on the ground of nationality. The scope of Directive 2004/38 is defined in Article 3 as 'all citizens who move to or reside in a Member State other than that of which they are a national and to their family members'. Here a direct distinction is made on the basis of nationality. Indeed, citizens of a Member State residing on the territory of another Member State, without ever having migrated within the Union, for instance because they were born in the host country and have always lived there, do fall within the scope of this directive, as do their family members for that matter.[33] If one assumes that every citizen of the Union falls within the scope of Article 12 EC the distinction on the basis of nationality in Article 3 Directive 2004/38 becomes rather problematic.

Given the above arguments it would be a good move for national courts to submit a request for a preliminary ruling to the Court of Justice when a case concerning a Member State national's right of family reunification in this Member State with a third-country national comes up. The question could then be put to the Court of Justice if Articles 12 and 17 EC do not that for the family reunification of an EU citizen with a third-country national in the Member State of which this EU citizen holds the nationality, the conditions to comply with are harder than those that apply to an EU citizen who holds the nationality of another Member State.

4.2 The Right Not to Use Freedom of Movement

Article 18 EC reaffirms the right of every citizen of the Union as laid down in Article 17 EC to move and reside freely on the territory of the Member States. The Court of Justice acknowledged the direct effect of this provision,[34] although not without taking into account the proportional and justified restrictions which Community law or national law of the Member States can impose in this regard.

Some have suggested that the right of free movement of persons within the European Union as laid down in Article 18 EC also includes the right not to be obliged to migrate in order to obtain rights which are granted to migrant citizens.[35] Indeed, the right of free movement is designated as a fundamental right in the case

32 Other authors too argue in favour of using Article 12 EC as a possibility to rectify reverse discrimination: see *Spaventa*, *supra* note 1, p. 32-39 and Walter, *supra* note 1, p. 40-41.

33 See *Garcia Avello*, *supra* note 14, for an example of the application of Community law to a national of a Member State who was born in another Member State.

34 For the first time explicitly in Case C-413/99, *Baumbast*, [2002] ECR I-7091, paragraph 84: 'As regards, in particular, the right to reside within the territory of the Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty.'

35 Walter, *supra* note 1, p. 38-40.

law of the Court of Justice.[36] This fundamental character could also be interpreted as saying that an EU citizen has the right not to migrate between the Member States. In the above examples we demonstrated that reverse discrimination could be solved practically if a Member State national who wants to rely on Community law, sets up a U-turn construction by means of a temporary migration to another Member State. There he could marry a third country-national and invoke the right of family reunification as laid down in Community law to obtain his spouse's right of residence. After that he could then return to his country of origin. Such a construction would indeed make it possible to escape reverse discrimination. But it also implies that in order to undo this reverse discrimination a person is more or less forced to make use of the right free movement and to go to expenses.

So one would be right in asking if Community law, and more specifically Article 18 EC, could not be interpreted in such a way that it cannot coerce EU citizens, directly or indirectly, to make use of the freedom of movement so as to undo the reverse discrimination. In a number of rulings the Court of Justice stated:

> 'In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy *if he had not availed* himself of the opportunities offered by the Treaty in relation to freedom of movement.'[37]

If one were to acknowledge the right of the same treatment in the same situation even if the person concerned has not made use of the right of free movement within the Union, the afore-mentioned quotation should be as follows: 'In that a citizen of the Union must be granted in all Member States the same treatment in law, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable that he would enjoy *if he had availed* himself of the opportunities offered by the Treaty in relation to freedom of movement.'

This is a challenging proposition which definitely deserves to be put to the Court of Justice through a request for a preliminary ruling about the correct interpretation of Article 18 EC.

4.3 Invoking the Principle of Non-discrimination in the National Law of the Member State Concerned

In its case law the Court of Justice has always pointed out, after it had refused to apply Community law in a purely internal situation in a given Member State, that any discrimination which nationals of a Member State may suffer under the law of

36 See *supra* note 26.

37 *D'Hoop*, *supra* note 24, paragraph 30 and Case C-224/05, *Pusa*, [2004] ECR I-5763, paragraph 18.

that State falls within the scope of that law and must therefore be dealt within the framework of the internal legal system of that State.[38]

In the *Flemish care insurance* case of 1 April 2008 the Court added that interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court.[39] It is clear that the responsibility in this regard is passed on to the national legal system and the national courts.

Nonetheless, it is not very clear if the problem of reverse discrimination can be solved through national anti-discrimination provisions whether or not of a constitutional nature. In the *Flemish care insurance* case the Belgian Constitutional Court did not proceed to do so. In its judgement of 21 January 2009 the Constitutional Court chooses not to apply Community law nor the legal position of EU citizens who have exerted their right of free movement to Belgian nationals who have not exerted their right of free movement.[40]

However, this judgement must be looked at in the light of the special institutional context of Belgium. The fact that it did not use the solution which on the basis of Community law applies to persons who have made use of free movement as employed or self-employed persons was justified by the Belgian Constitutional Court on the ground of the territorial conferral of power within the Belgian Constitution. In principle this does not allow the Flemish Community to extend the scope of its legal system to persons residing in another language community. The Flemish care insurance scheme is restricted to the inhabitants of Flanders and cannot be extended to the inhabitants of another Belgian region, for instance Wallonia, even if they work in Flanders. The Belgian Constitutional Court holds the view that the hardship this causes for the latter is the result of the fact that the Walloon authorities have not introduced a similar care insurance scheme for their own inhabitants. The Flemish government cannot be blamed for this, so that, according to the Belgian Constitutional Court, the Flemish legislation cannot be labelled discriminatory.

However, one cannot deduce from this judgement that the national anti-discrimination provisions do not offer opportunities. Indeed, this case did not only deal with aspects of discrimination but also with the internal conferral of power between the institutions of the various regions. Apparently, the latter was of greater relevance to the Belgian Constitutional Court. If reverse discrimination were to be judged purely on the basis of the national discrimination law without involving other aspects of national law, then the national court must assess whether or not the distinction on the grounds of nationality in national law does have an objective and reasonable justification and that it pursues a legitimate aim and uses means proportionate to this aim. The justification should not relate so much to the necessity of

38 *Uecker and Jacquet*, *supra* note 13, paragraph 23.
39 *Flemish care insurance*, *supra* note 3, paragraph 40.
40 Judgment of 21 January 2009, *supra* note 22.

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exerting a restrictive migration policy and preventing too easy recourse to the right of family reunification to obtain a right of residence in the Member State concerned. The justification must relate to the distinction made between EU citizens and, more specifically, to the difference in treatment of a Member State's own nationals resulting from this. The fact that this distinction is the outcome of the parallel application of the European and national legal order seems to me insufficient justification. After all, the European legal order is not alien to the national legal order but an integral part of it. The national authorities must explain why a restricted right of family reunification is not necessary for EU citizens who have made use of the right of free movement but is necessary for those nationals of the Member State concerned who have not made use of this right. After that, it is up to the national judge to decide whether or not this justification suffices.

4.4 Invoking the European Convention on Human Rights (ECHR)

As mentioned above, in *Metock* the Court of Justice repeated that Community law cannot be applied in a purely internal situation. But the Court also hastened to add that all the Member States are parties to the ECHR, which enshrines in Article 8 the right to respect for private and family life.[41] Therefore it can hardly be contested that the right of family reunification with a Member State national in a purely internal situation falls within the scope of this provision. This is not the place to enter at length into the meaning of Article 8 ECHR for family reunification. When family reunification is withheld or when certain conditions have to be fulfilled it, does not automatically mean a breach of this provision.[42] However, the fact that the right of family reunification with an EU citizen in a purely internal situation falls within the scope of Article 8 ECHR does mean that this matter also falls within the scope of the prohibition of discrimination in Article 14 ECHR. It is indeed settled case law of the European Court for Human Rights (ECtHR) that this anti-discrimination provision does not lead an independent existence but only applies if the matter at issue falls within the scope of another provision of the ECHR. But for that purpose it is not necessary that an infringement of this other provision has been established first.[43] From this it follows that the prohibition of discrimination in Article 14 ECHR applies to the right of family reunification, also in situations which are purely internal to a Member State.

Article 14 ECHR also applies to discrimination on the grounds of nationality.[44] This means that any distinction on the ground of nationality between persons who find themselves in the same situation must be tested against the ECtHR's case law

41 *Metock*, *supra* note 4, paragraphs 78-79. In *Akrich* too the Court already referred to this provision of the ECHR and the obligations of the Member States in the event of family reunification with their own nationals: Case C-109/01, *Akrich*, [2003] ECR I-9607.

42 See for the meaning of Article 8 ECHR for Community law also: Case C-540/03, *European Parliament v. Council*, [2006] ECR I-5769.

43 See for instance: ECtHR 28 May 1985, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, paragraph 71 and ECtHR 20 September 2003, *Koua Poirrez v. France*, paragraph 36.

44 See for instance ECtHR 16 September 1996, *Gaygusuz v. Austria*, paragraph 42 and ECtHR 16 September 1996, *Koua Poirrez v. France*, paragraph 46.

with regard to the prohibition of discrimination. According to the Court's case law, a distinction is discriminatory, for the purposes of Article 14, if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Yet, the ECtHR has always stated that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, the ECtHR expressly added that with regard to a difference of treatment based exclusively on the ground of nationality, very weighty reasons would have to be put forward before the Court would regard this as compatible with the ECHR. [45]

As regards the problem of reverse discrimination we are clearly dealing with a different treatment which is solely based on the nationality of the persons concerned. As for the European legislation, as Community law and the Court of Justice's case law now stand, this different treatment is the consequence of the principle of conferral with regard to competence, as a result of which the Community institutions are not qualified to assess this different treatment in the light of the principle of discrimination. But at the national level there is no problem of competence. Consequently, the different treatment on the ground of the nationality of those concerned must be tested, in the context of the national legal order, against the obligations to which this legal order is bound, i.e. those following from Article 14 ECHR.

It is doubtful that reverse discrimination to the prejudice of a Member State's own citizens could withstand this test. Perhaps a justification could be found in the fact that the difference in treatment is the result of the application of European Community law which obliges the Member States to grant other Member States' citizens certain rights with regard to family reunification with third-country nationals and that this obligation derives from the preferential status of EU citizens in European law.

In the *Moustaquim* case for instance, about the expulsion measure which Belgium had taken against a third-country national, the argument was invoked that Mr Moustaquim would be the victim of discrimination on the ground of nationality, contrary to Article 14 taken together with Article 8 ECHR, *vis-à-vis* juvenile delinquents of two categories: those who possessed Belgian nationality, since they could not be deported; and those who were citizens of another Member State of the European Communities, as a criminal conviction was not sufficient to render them liable for deportation. To this the ECtHR replied that Article 14 ECHR safeguards individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of the rights and freedoms recognized in the Convention and its Protocols. As for the preferential treatment given to nationals of the other Member States of the Communities, there is for the ECtHR an objective and reasonable justification for it as Belgium belongs, together with those States, to a special legal order. For the ECtHR the mere existence of a European

45 See, inter alia, *Gaygusuz*, *supra* note 44, paragraph 42 and *Koua Poirrez*, *supra* note 44, paragraph 46.

legal order on the basis of which the Member States' nationals can claim a preferential treatment entails that a third-country national who cannot invoke this preferential treatment does not find himself/herself in a similar situation as a national of a Member State. Therefore this is not a matter of discrimination or an infringement of Article 14 ECHR. According to the ECtHR persons who are part of the legal order of the EU are not comparable with persons who do not belong to the EU's legal order, in particular with regard to the free movement of persons. Indeed, the European integration process aims at granting a special status to nationals of a Member State who find themselves within the territory of another Member State. This special status differs from that of third-country nationals. According to the ECtHR the distinction on the ground of nationality, more specifically on the ground of whether or not a person holds the nationality of a Member State, is justified with regard to taking expulsion measures.

However, the legitimacy in this context of the distinction between EU citizens and third country nationals with regard to the right of residence and of family reunification does not mean that the distinction which is made between EU citizens can be justified by the existence of the special European legal order. In principle, all EU citizens are part of the European legal order and can effectively make use of the opportunities this legal order offers. The fact that only national institutions are qualified to settle the status of EU citizens who reside in their own State, does not mean that those EU citizens are not part of the integration process between states which this legal order aims at. Neither is it appropriate for these citizens to be equated, just like that, to third country nationals. In this regard the EU citizens concerned find themselves in 'similar situations'. There is only a difference with regard to the level qualified to regulate their position, more specifically the European level on the one hand and the national level on the other. Nonetheless, this does not release these levels of competence from the obligation to respect, within their own legal order, the principle of non-discrimination, including the obligation following from Article 14 ECHR. In this respect we must consider that the national level has to transpose the relevant EC legal instruments into its own legislation, making both legal orders strongly interrelated.

So, the non-application of the rules with regard to family reunification which apply to EU citizens who do fall within the scope of secondary Community law, must be justified by the Member States in the light of the ECtHR's case law on Article 14 ECHR. They must demonstrate on the merits why a restrictive policy with regard to family reunification has to be applied to their own nationals in a purely internal situation whereas a less restrictive policy can be exerted if an EU citizen finds himself/herself in a cross-border situation. Such an obligation of justification seems to me to be a very difficult task. In my opinion the Member States cannot hide behind the argument of the conferral of power within the European legal order. Anyway, it would be advisable to submit these arguments to the national judge and, if need be, to bring this case before the ECtHR.

In this context we would like to mention that the Austrian Constitutional Court has already judged that if the rules governing family reunification of EU citizens in a cross-border situation, are not applied to Austrian nationals who cannot invoke Community law because of the purely internal situation, this is a breach

of Articles 8 and 14 ECHR.[46] For the Austrian Constitutional Court there is no objective justification for this difference in treatment.

4.5 Amending Secondary Community Law

A last line of action I would like to explore in this contribution is the possibility of amending secondary Community law. The fact that Community law with regard to the right of family reunification for EU citizens is not applicable to nationals of a Member State who find themselves in a purely internal situation in their own Member State is laid down in Article 3 Directive 2004/38. The article states that the scope of this directive is restricted to 'all citizens who move to or reside in a Member State other than that of which they are a national and to their family members'. Removing the words 'other than that of which they are a national' would be sufficient to end the reverse discrimination.

It goes without saying that in order to remove these words and to make this directive applicable in purely internal situations one of the legal bases of this directive, more specifically Articles 12, 18, 40, 44 and 52 EC must be appropriate. As explained above, according to the present case law of the Court of Justice the provisions with regard to the free movement of persons (Articles 18, 40, 44 and 52 EC), both economically active and economically inactive persons, can only be applied in cross-border situations. We are indeed dealing with provisions in the EC Treaty that refer to the free movement between Member States in which, in principle, a cross-border element is required.

As such, this is not the case with Article 12 EC which refers to the prohibition of discrimination on the ground of nationality. If the Court of Justice, as suggested above in point 4.1, should allow the distinction on the ground of nationality with regard to the right of family reunification depending on whether the person concerned is an EU citizen or a Member State's own national, to fall within the scope of this Treaty provision then there is nothing preventing the Community legislator to remove the words in question from Article 3 Directive 2004/38 by invoking this legal basis. Actually, if Article 12 EC would be applicable to EU citizens in purely internal situations, excluding these citizens from the scope of Article 3 Directive 2004/38 because of their nationality would be in contravention of this Treaty provision.

If it should not be accepted that Article 12 EC is applicable to these purely internal situations, then there is still another possibility to make an end to reverse discrimination with regard to the right of family reunification by way of secondary legislation.

Directive 2003/86 on the right to family reunification of 22 September 2003 determines the rights with regard to family reunification with third-country nationals. The purpose of this Directive is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States (Article 1). The scope of this directive is restricted

46 Verfassungsgerichtshof 17 June 1997, No B592/96, to be consulted on http://www.ris.bka.gv.at/Vfgh/.

to the right to family reunification with third-country nationals, meaning that the Member States' own nationals cannot rely on this for obtaining a right of residence for their third-country relatives.

Furthermore, it is quite striking that contrary to Directive 2004/38 there is no requirement of a cross-border element in the sense of Community law to make Directive 2003/86 applicable. If the situation of the third-country national at issue is restricted to one Member State and therefore a matter of a purely internal situation in that Member State, this directive remains applicable. There is no problem with regard to the legal basis here. The legal basis of Directive 2003/86 is to be found in Title IV EC Treaty, more specifically in Article 63 (3) a. On the basis of this provision the Council

> 'shall adopt measures on immigration policy within the [...] area of conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion'.

So this concerns policy instruments with regard to the immigration from third countries for which as such no cross-border element within the EU is required. Contrary to the final text of Directive 2003/86, the European Commission in its original proposal had suggested to include the family reunion of third-country nationals with nationals of the Member States in the Directive. Article 1, as proposed at the time, was worded as follows:

> 'The purpose of this Directive is to establish a right to family reunification for the benefit of third-country nationals residing lawfully in the territory of the Member States *and citizens of the Union who do not exercise their right to free movement.*'[47]

In the text approved by the Council of Ministers the reference to the nationals of the Union was left out. This is said to have happened at the request of a few Member States which were not prepared to give up their freedom of policy regarding family reunification with their own nationals. However, there was no problem with the legal basis as such. Indeed, the terms of Article 63 (3)a EC speak of immigration measures with a view to family reunification, meaning the immigration of third-country nationals from outside the EU. In this provision the third-country relatives of the Member States' own nationals are not excluded and neither is there a reference to the necessity of an internal EU cross-border element.

The European legislator, more specifically the Council on a proposal from the Commission, can, on the basis of this Treaty provision adopt secondary Community law with regard to the family reunification with EU citizens who have not made use of the right to free movement within the EU. If the political will exists among the Commission to submit a proposal hereto and among the members of the Council to accept this proposal unanimously (see procedure Article 67 EC), the

47 See COM (1999) 638 final of 20.12.1999.

legislator could still extend the directive to 'citizens of the Union who do not exercise their right to free movement'. The problem is that this way the reverse discrimination vis-à-vis EU citizens who have made use of the right to free movement is not lifted at all. The latter category can continue to make use of the rights offered by Directive 2004/38 with regard to family reunification and which go a lot further than what would be guaranteed to them by Directive 2003/86. Indeed, this directive leaves the Member States more policy scope with regard to, for instance, imposing conditions in matters like accommodation, health insurance and stable and regular resources.[48] Moreover, the definition of family members in Directive 2004/38 is broader than that in Directive 2003/86, for instance with regard to the registered non-married partners.[49] Without wanting to analyse in detail the differences between these two directives, I think it is quite clear that the extension of the personal scope of Directive 2003/86 to EU citizens who have not made use of the right to free movement within the Union, is not such that it would end reverse discrimination with regard to the right of family reunification.

However, there is another possibility of doing this. Should it turn out not to be possible to extend Directive 2004/38 to family reunification with EU citizens who have not made use of the right to free movement within the Union on the ground of the legal bases of this directive itself (in particular Articles 12, 18, 40, 44 and 52 EC Treaty) then this could be done by way of Article 63(3)(a) EC. More specifically this could be done by way of a separate directive, which only contains one provision and could be adopted on this legal basis. This provision would have to state that the provisions in Directive 2004/38 with regard to the family members of EU citizens also apply to family members of EU citizens who have not exercised their right of free movement and who reside on the territory of the Member State of which they hold the nationality. Such a bridging construction to extend the scope of a secondary instrument of Community law with regard to the free movement of EU citizens within the Union through a legal basis from Title IV EC Treaty has already been used in the recent past. In this way Regulation 859/2003 of 14 May 2003[50] extended the scope of the Community's social security coordination for migrant workers and self-employed persons in Regulation 1408/71 to third-country nationals. Regulation 1408/71, based on Article 42 EC as such only applies to nationals of the Member States and their family members. To extend the personal scope of Regulation 1408/71 to third-country nationals, Regulation 859/2003 only needed one substantial provision, which states that

> 'the provisions of Regulation (EEC) No 1408/71 [...] shall apply to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided they are legally resident in the territory of a Member

48 Compare Article 7 Directive 2003/86 and Articles 7 and 14 Directive 2004/38.

49 Compare Article 2 Directive 2003/86 and Article 2 Directive 2004/38.

50 Regulation 859/2003 of the Council of 14 May 2003 extending the provisions of Regulation 1408/71 and Regulation 574/72 to third country nationals who are not already covered by those provisions solely on the ground of their nationality, *OJ* L 124, 20.5.2003, 1.

State and are in a situation which is not confined in all respects within a single Member State'.

So we are clearly dealing with a bridging regulation whose only purpose is to allow all provisions of another regulation which because of its legal basis is limited to the nationals of Member States, to be extended to third-country nationals and this by way of a legal basis from Title IV EC Treaty, more specifically Article 63(4) EC.

The condition that the third-country national concerned is not allowed to be in a situation which is not confined in all respects within a single Member State is a consequence of the legal basis itself of this bridging regulation. Article 63 (4) EC speaks of the competence of the Council to take measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States. To take measures on the ground of this legal basis a cross-border element within the EU is required. However, the latter condition does not follow from Article 63 (3) (a) which only mentions immigration from a third country without the necessity of a cross-border element within the EU. Because of this the extension of Directive 2004/38 to family members of EU citizens in a purely internal situation on the basis of Article 63 (3) (a) is possible by means of this kind of bridging directive. Through secondary legislation such a directive would end the reverse discrimination with regard to family reunification. It goes without saying that the approval of such a directive depends on the political willingness of the European Commission to submit a relevant proposal in accordance with Article 67 EC and of the willingness of the Council to approve this proposal unanimously. It is unclear whether or not that political willingness exists, but in my view there are no legal objections against such a solution. Furthermore, the legal basis of Article 63 (3) (a) EC has been taken over in Article 79 of the new Treaty on the Functioning of the European Union.[51] This Treaty will enter into force after the ratification of the Lisbon Treaty. On the basis of this provision such secondary legislation can be adopted by the European Parliament and the Council under the ordinary legislative procedure, including the rule of qualified majority voting in the Council

5. Conclusion

Excluding EU citizens in a purely internal situation from the right of family reunification which is accorded to EU citizens in a cross-border situation, leads to incomprehension and to the feeling among the former that in their own Member States they are treated worse than the nationals of other Member States. Reverse discrimination, this is called. Recently the Court of Justice has explicitly acknowledged the problem of reverse discrimination in a number of cases, but so far the Court has failed to give an adequate response to this.

In this contribution I have presented a number of lines of reasoning to find a legal solution for this problem, more specifically the possibility of reinterpreting the

51 For a consolidated version of this Treaty: *OJ* C 119, 9.5.2008.

application of Articles 12, 17 and 18 EC Treaty with regard to the prohibition of discrimination based on nationality, European citizenship and the right to move and reside freely within the Union. All EU citizens, including those who find themselves in a purely internal situation, should be able to rely on the prohibition of discrimination based on nationality and they should also be able to invoke the right not to be obliged to migrate if they want to claim the status which applies to those EU citizens who have made use of the right to free movement.

Apart from that, the non-discrimination provisions in the national legal order of the Member States themselves and in particular the constitutional provisions herein may offer a way out. In addition, the application of Articles 8 and 14 ECHR and more specifically the ban on discrimination on the basis of nationality, offers the national judges and, if need be, the ECtHR the possibility to undo the reverse discrimination with regard to family reunification.

And finally, reverse discrimination could also be ended by amending the Community's secondary legislation, more specifically by using Article 63 (3) (a) EC Treaty as a legal basis.

Reverse discrimination is not an unsolvable problem.