THE ECJ

30. It should be noted at the outset that the principle of non-discrimination set out in Article 48 is drafted in general terms and is not specifically addressed to the Member States.

31. Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (see ... *Walrave* ...).

32. The Court has held that the abolition, as between Member States, of obstacles to freedom of movement would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law (see *Walrave*, paragraph 18 ... and ... *Bosman* ... paragraph 83).

33. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, limiting application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application (see *Walrave*, paragraph 19, and *Bosman*, paragraph 84).

34. The Court has also ruled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see ... *Defrenne* ...). The Court accordingly held ... that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals. ...

35. Such considerations must, *a fortiori*, be applicable to Article 48 ..., which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 (now ... Article 12 EC). In that respect, like Article 119 ... it is designed to ensure that there is no discrimination on the labour market.

36. Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48 ... must be regarded as applying to private persons as well.

3 ARTICLE 45: WORKER AND THE SCOPE OF PROTECTION

Article 46 TFEU provides for the EP and Council to adopt secondary legislation to bring about the freedoms set out in Article 45. A range of directives and regulations were adopted under this provision to govern the conditions of entry, residence, and treatment of EU workers and their families. Many of these were consolidated by Directive 2004/38 on the free movement and residence of EU citizens and their families.[9]

The 2004 Directive has replaced Directive 64/221, which governed the main derogations from the rules on free movement, and has further tightened the extent to which Member States may derogate from free movement requirements. It also replaced Directive 68/360, which regulated the formalities and conditions of entry and residence of workers and self-employed persons, and sought to reduce and simplify further the bureaucratic hurdles which migrant workers and 'mobile' EU citizens face. The 2004 Directive amended Regulation 1612/68, which fleshed out the equal-treatment principle and

[9] Directive 2004/38/EC 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 [2004] OJ L158/77.

specified many of the substantive rights and entitlements of workers and their families. The Directive also replaced Regulation 1251/70 governing the conditions under which the worker and family may remain in the territory of a Member State following the worker's retirement, permanent incapacity to work, or death.

Apart from these changes, a major innovation of the 2004 Directive was to introduce the right of permanent residence for EU nationals and their families after five years of continuous legal residence in another Member State. This was significant because a fundamental issue which was not immediately apparent hitherto was whether 'workers of the Member States' in Article 45(2) covered only nationals of the Member States, or whether it included non-EU nationals resident and working within the EU.[10] The secondary legislation to implement Article 45, in particular Regulation 1612/68, specifically restricted its application to workers who were nationals of the Member States, and that was the interpretation adopted by the ECJ.

(A) DEFINITION OF 'WORKER': AN EU CONCEPT

Despite the array of secondary legislation which existed, many of the basic terms were not defined either in the Treaty or in the legislation itself, but have been shaped by the ECJ, including the meaning of the core term 'worker'. The Court insisted from the outset that the definition of a 'worker' was a matter for EU law, not national law.[11] The issue arose early in the case of *Hoekstra*, in the context of the interpretation of a Council social security regulation, where the ECJ declared that:

> If the definition of this term were a matter for the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person . . . Articles 48 to 51 [now 39–42] would therefore be deprived of all effect and the above-mentioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law.

In requiring the term worker to be a Union concept, the Court was also claiming ultimate authority to define its meaning and scope. In the words of the late Federico Mancini, formerly Advocate General and Judge of the Court, the ECJ conferred on itself a 'hermeneutic monopoly' to counteract possible unilateral restrictions of the application of the rules on freedom of movement by the different Member States.[12] Thus the Court has held that a spouse can be employed by the other spouse as a worker,[13] and that Article 45 can be relied on by the employer,[14] or by a relevant third party,[15] rather than only by the employee. The Court has, as we shall see, consistently construed the term broadly, and has presented this freedom as part of the foundations of the EU.

To summarize the position: any person who pursues employment activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is treated as a worker.[16] For an economic activity to qualify as employment under Article 45,

[10] F Burrows, *Free Movement in European Community Law* (Clarendon Press, 1987) 124; R Plender, 'Competence, European Community Law and Nationals of Non-Member States' (1990) 39 ICLQ 599.

[11] Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, 184.

[12] G Mancini, 'The Free Movement of Workers in the Case-Law of the European Court of Justice' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths, 1992) 67.

[13] Case C-337/97 *CPM Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289.

[14] Case C-350/96 *Clean Car Autoservice GmbH v Landeshauptmann von Wien* [1998] ECR I-2521.

[15] Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181.

[16] Case C-337/97 *Meeusen* (n 13).

rather than self-employment under Article 49 TFEU, there must be a relationship of subordination.[17] However, we shall also see that there is no single EU concept of worker, and that it varies according to the EU law context in which it arises.[18]

(8) DEFINITION OF 'WORKER': MINIMUM INCOME AND WORKING-TIME REQUIREMENTS

A number of cases have been concerned with the interplay between the economic aspect of free movement, as determined by the level of remuneration, and the social aspect underlying free-movement policy. This issue arose in *Levin*, in the context of part-time workers.[19]

Case 53/81 Levin v Staatssecretaris van Justitie [1982] ECR 1035

The appellant was a British citizen married to a non-EC national and living in the Netherlands, but whose application for a residence permit had been refused. She argued that she had sufficient income for her own and her husband's maintenance, and that she had taken up part-time employment as a chambermaid. The Staatssecretaris van Justitie argued that she was not an EC worker because her employment did not provide sufficient means for her support, not being equal at least to the minimum legal wage prevailing in the Netherlands. When the case was referred to the ECJ, the Court alluded to its argument in *Hoekstra* that Member States could not unilaterally restrict the scope and meaning of the term worker.

THE ECJ

12. Such would, in particular, be the case if the enjoyment of the rights conferred by the principle of freedom of movement for workers could be made subject to the criterion of what the legislation of the host State declares to be a minimum wage, so that the field of application *ratione personae* of the Community rules on this subject might vary from one Member State to another. The meaning and the scope of the terms 'worker' and 'activity as an employed person' should thus be clarified in the light of the principles of the legal order of the Community.

13. In this respect it must be stressed that these concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively.

14. In conformity with this view the recitals to Regulation No 1612/68 contain a general affirmation of the right of all workers in the Member States to pursue the activity of their choice within the Community, irrespective of whether they are permanent, seasonal or frontier workers or workers who pursue their activities for the purpose of providing services. Furthermore, although Article 4 of Directive 68/360 grants the right of residence to workers upon the mere production of the document on the basis of which they entered the territory and of a confirmation of engagement from the employer or a certificate of employment, it does not subject this right to any condition relating to the kind of employment or to the amount of income derived from it.

[17] Case C-268/99 *Jany v Staatssecretaris van Justitie* [2001] ECR I-8615, [34]; Cases C-151-152/04 *Nadin and Durre* [2005] ECR I-11203.

[18] Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ECR I-873, [63]; Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

[19] See also Cases C-22-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-4585, [28]-[29].

This was seen in the earlier case of *Commission v Belgium*,[34] and also in *Lebon*, where the ECJ ruled that the social and tax advantages guaranteed to workers under EU law, in particular by Article 7(2) of Regulation 1612/68, were not available to those moving in search of work.[35] In the more recent *Collins* case, the ECJ confirmed the distinction between fully-fledged workers who can benefit from all provisions of Regulation 1612/68 concerning social advantages and equality of treatment with national workers, and job-seekers who, although covered by Article 45, can benefit only from the provisions of Regulation 1612/68 governing access to employment.[36] Nonetheless, the ECJ also departed from the strict implications of its earlier judgment in *Lebon* by ruling that when interpreted in the light of EU citizenship equal treatment in access to employment under Article 45(2) should include the right to apply for a job-seeker's allowance under the same conditions as nationals of the host state, if they are genuinely linked to the employment market of that state.[37]

The *Collins* ruling was confirmed in *Ioannidis*, in which the ECJ ruled that a Greek national seeking his first employment in Belgium was entitled in principle to a tideover allowance intended specifically to facilitate the transition from education to the employment market, and that a national eligibility condition requiring applicants to have completed their secondary education in Belgium was contrary to Article 45.[38]

(E) SCOPE OF PROTECTION: NEW MEMBER STATES

Workers as defined in the previous pages have a right to move in accordance with Article 45. This right was qualified in relation to the 2004 enlargement when ten Central and East European states joined. The EU took the unprecedented step of admitting new Members while denying them the immediate right to benefit from one of the four fundamental freedoms. A transitional regime for the free movement of workers from the new states was introduced, delaying the full implementation of their rights of free movement for up to seven years.[39] While this arrangement was made in order to allay the fears of existing Member States that their labour markets would be flooded with new migrant workers, the effective creation of a 'second-class' membership, however temporary, gave rise to an understandably critical reaction from the new Member States and from other commentators.[40] This transitional regime for the states involved in the 2004 enlargement ended on 30 April 2011. The transitional regime for Bulgaria and Romania, which joined the EU in 2007 will end on 31 December 2013.

4 ARTICLE 45: DISCRIMINATION, MARKET ACCESS, AND JUSTIFICATION

It is clear that rules which directly discriminate on the grounds of nationality will be caught by Article 45.[41] It is equally clear that indirect discrimination, and even impediments to market access

[34] Case C-278/94 *Commission v Belgium* [1996] ECR I-4307.

[35] Case 316/85 *Lebon* [1987] ECR 281. Compare Case C-57/96 *Meints v Minister van Landbouw* [1997] ECR I-6689.

[36] Case C-138/02 *Collins* (n 18) [30]-[33]. We shall see in Ch 23, however, that by interpreting the rights of the job-seeker in the light of the Treaty provisions on citizenship, the ECJ decided that a job-seeker under Art 45 should be entitled to apply for a job-seeker's allowance under the same conditions as nationals of the host Member State.

[37] Ibid [54]-[73]. The aspects of the judgment which deal with EU citizenship will be considered in Ch 23.

[38] Case C-258/04 *Office national de l'emploi v Ioannidis* [2005] ECR I-8275.

[39] http://ec.europa.eu/social/main.jsp?catId=466&langId=en.

[40] V Mitsilegas, 'Free Movement of Workers, Citizenship and Enlargment: The Situation in the UK' [2009] Journal of Immigation, Asylum and Nationality Law 223.

[41] See, eg, Case C-55/00 *Gottardo v INPS* [2002] ECR I-413.

which do not depend on a showing of unequal impact,[42] can also lead to infringement of Article 45.[43] Discrimination, whether direct or indirect, will, however, be found only where two groups which are comparable in relevant ways are treated differently, or where groups which are not comparable are treated in the same way.[44]

(A) DIRECT DISCRIMINATION

In proceedings brought by the Commission against France for failing to repeal provisions of the French Maritime Code, which had required a certain proportion of the crew of a ship to be of French nationality, the Court ruled that Article 45 was 'directly applicable in the legal system of every Member State' and would render inapplicable all contrary national law.[45] Further, a state can be held in breach of Article 45 where the discrimination is practised by any public body, including public universities. Thus Italy was responsible for the discriminatory practice of certain public universities, which did not recognize the acquired rights of former foreign-language assistants.[46] While cases involving direct discrimination on grounds of nationality are much less common, such cases do still arise but they raise a strong burden of justification.[47]

(B) INDIRECT DISCRIMINATION

Indirect discrimination is also prohibited by Article 45, so that a condition of eligibility for a benefit which is more easily satisfied by national than by non-national workers is likely to fall foul of the Treaty. The ECJ has relaxed the requirements for proof of indirect discrimination, ruling in *O'Flynn* that in order for indirect discrimination to be established, it was not necessary to prove that a national measure in practice affected a higher proportion of foreign workers, but merely that the measure was 'intrinsically liable' to affect migrant workers more than nationals.[48]

A common species of indirect discrimination is where benefits are made conditional, in law or fact, on residence, place-of-origin requirements, or place-of-education requirements that can more easily be satisfied by nationals than non-nationals.[49] In *Ugliola*, an Italian worker in Germany challenged a German law under which a worker's security of employment was protected by having periods of military service taken into account in calculating the length of employment.[50] The law in question applied only to those who had done their military service in the Bundeswehr, although the nationality of the worker was irrelevant. The Court stressed that Article 45 allowed for no restrictions on the principle

[42] Case C-415/93 *Bosman* (n 5).

[43] A Castro Oliveira, 'Workers and Other Persons: Step-by-Step from Movement to Citizenship' (2002) 39 CMLRev 77.

[44] Case C-391/97 *Frans Gschwind v Finanzamt Aachen-Aussenstadt* [1999] ECR I-5451, [21]; Case C-356/98 *Arben Kaba v Home Secretary* [2000] ECR I-2623; S Peers, 'Dazed and Confused: Family Members' Residence Rights and the Court of Justice' (2001) 26 ELRev 76.

[45] Case 167/73 *Commission v French Republic* [1974] ECR 359; Case C-185/96 *Commission v Hellenic Republic* [1998] ECR I-6601; Case C-94/08 *Commission v Spain* [2008] ECR I-160; Case C-318/05 *Commission v Germany* [2007] ECR I-6957; Case C-460/08 *Commission v Greece*, 10 Dec 2009.

[46] Case C-212/99 *Commission v Italy* [2001] ECR I-4923; Case C-119/04 *Commission v Italy* [2006] ECR I-6885.

[47] On nationality restrictions when fielding players in sport see Case C-415/93 *Bosman* (n 5); Case C-438/00 *Kolpak* (n 23); Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura* [2005] ECR I-2579; Case 13/76 *Donà* (n 23); Case C-228/07 *Jörn Petersen* (n 27).

[48] Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617; Case C-278/94 *Commission v Belgium* [1996] ECR I-4307.

[49] Case C-355/98 *Commission v Belgium* [2000] ECR I-1221; Case C-350/96 *Clean Car* (n 14); Case C-276/07 *Nancy Delay v Università degli studi di Firenze, Istituto nazionale della previdenza sociale (INPS)* [2008] ECR I-3635.

[50] Case 15/69 *Württembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola* [1970] ECR 363.

of equal treatment other than in paragraph 3. It concluded that the German law had created an unjustifiable restriction by 'indirectly introducing discrimination in favour of their own nationals alone' since the requirement that the service be done in the Bundeswehr would clearly be satisfied by a far greater number of nationals than non-nationals.[51]

In *Sotgiu* the German Post Office increased the separation allowance paid to workers employed away from their place of residence within Germany, but did not pay the increase to workers (whatever their nationality) whose residence at the time of their initial employment was abroad, and this was held by the ECJ to be contrary to the Treaty.[52] In *Commission v Belgium*[53] the ECJ held that a system of retirement pension points that could be more easily satisfied by workers possessing the nationality of that Member State than by workers from other Member States was indirectly discriminatory, and hence caught by Article 45. In *Zurstrassen*,[54] the Court held that national rules under which the joint assessment to tax of spouses was conditional on their both being resident on the national territory were incompatible with Article 45.[55]

A further form of indirect discrimination is the imposition of a language requirement for certain posts, since it is likely that a far higher proportion of non-nationals than nationals will be affected by it.[56] However, since such a requirement may well be legitimate, Article 3(1) of Regulation 1612/68 allows for the imposition of 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'. The Court considered the scope of this exception in *Groener*, where a Dutch national working in Ireland as a part-time art teacher was rejected for the full-time art teaching post for which she was otherwise selected, because she did not pass an oral examination in the Irish language.[57] The ECJ ruled that even though the teaching was likely to be exclusively in English, the language requirement could, so long as it was not imposed in a disproportionate way, fall within Article 3(1) on account of the policy of the Irish government to promote the use of Irish as a means of expressing national identity and culture.

Another form of indirect discrimination frequently encountered in the law on free movement of goods and services, but which is equally relevant to the context of the free movement of workers, is the imposition of a 'double-burden' regulatory requirement, which does not recognize appropriate qualifications or certifications already received in the home state. Such a regulation was held to be contrary to Article 45 in *Commission v Portugal*.[58]

(3) OBSTACLES TO ACCESS TO THE EMPLOYMENT MARKET

It was for some time unclear whether Article 45 applied to national measures which restricted the freedom of movement of EU workers, but which were neither directly nor indirectly discriminatory on grounds of nationality. This central issue has arisen in relation to all the 'freedoms', but with greatest frequency in relation to free movement of goods. In the context of each of the freedoms, the ECJ has ruled that even non-discriminatory restrictions may breach the Treaty if they constitute an

[51] Case C-419/92 *Scholz v Universitaria di Cagliari* [1994] ECR I-505; Case C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47; Case C-187/96 *Commission v Hellenic Republic* [1998] ECR I-1095; Case C-278/03 *Commission v Italy* [2005] ECR I-3747; Case C-369/07 *Commission v Germany* [2009] ECR I-7811.

[52] Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153.

[53] Case 35/97 [1998] ECR I-5325.

[54] Case C-87/99 *Zurstrassen v Administration des Contributions Directes* [2000] ECR I-3337.

[55] See also Case C-169/03 *Wallentin v Riksskatteverket* [2004] ECR I-6443; Case C-400/02 *Merida v Bundesrepublik Deutschland* [2004] ECR I-8471; Case C-152/03 *Ritter-Coulais v Finanzamt Germersheim* [2006] ECR I-1711, Case C-329/05 *Finanzamt Dinslaken v Gerold Meindl* [2007] ECR I-1107; Case C-155/09 *Commission v Greece*, 20 Jan 2011.

[56] Cases C-259, 331 332/91 *Allué and Coonan* [1993] ECR I-4309; Case C-124/94 *Commission v Greece* [1995] ECR I-1457; Case C-90/96 *Petrie v Università degli studi di Verona and Camilla Bettoni* [1997] ECR I-6527.

[57] Case 379/87 *Groener v Minister for Education* [1989] ECR 3967.

[58] Case C-171/02 *Commission v Portugal* [2004] ECR I-5645.

excessive obstacle to freedom of movement. It is sometimes difficult to distinguish between cases of indirect discrimination and those where the ECJ intervenes to protect access to the employment market, but there are nonetheless cases that fall clearly within the latter category.

The issue was first addressed directly in the context of free movement of workers in the famous *Bosman* ruling, in which the transfer system developed by national and transnational football associations was found to be in breach of Article 45.[59] The system required a football club, which sought to engage a player whose contract with another club had come to an end, to pay money (often substantial) to the latter club. Bosman, who had been employed by a Belgian football club, was effectively prevented from securing employment with a French club. The fact that the transfer system applied equally to players moving from one club to another within a Member State as to players moving between states, and that a player's nationality was entirely irrelevant, did not prevent the system from falling foul of Article 45. This was so notwithstanding the reliance placed by the football associations on the *Keck* ruling,[60] which had narrowed the scope of the Treaty provisions on free movement of goods. According to the Court in *Bosman*:

> 103. It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 30 of the Treaty (see also, with regard to the freedom to provide services, Case C-384/93 *Alpine Investments* v. *Minister van Financiën* [1995] ECR I-1141, paras. 36–38).

In the absence of any sufficiently convincing public-interest justification for the rule, it was found by the ECJ to be contrary to Article 45. The fact that there was no discrimination was irrelevant: the existence of an obstacle to the access of workers from one Member State to employment in another Member State was enough to attract the application of Article 45.[61]

The principle established in *Bosman* was that non-discriminatory rules which nonetheless impeded the access of workers to the employment market of another state, whether imposed by the state of origin or destination, were caught by Article 45. It has been repeatedly applied in a steady stream of subsequent cases.[62] In *Terhoeve*, the ECJ ruled that provisions, such as a national law concerning the payment of social contributions, which could preclude or deter a national of a Member State from leaving his country of origin in order to exercise his free-movement rights constituted an obstacle to that freedom even if they applied without regard to the nationality of the workers concerned.[63] In *Commission v Denmark*[64] and *Van Lent*,[65] the Court condemned national rules which prohibited

[59] Case C-415/93 (n 5) [98]–[103], although see the earlier suggestion in Case 321/87 *Commission v Belgium* [1989] ECR 997, [15]; Case C-176/96 *Lehtonen v FRBSB* [2000] ECR I-2681; Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, 16 Mar 2010, [27]–[37].

[60] Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, discussed in Ch 19.

[61] L Daniele, 'Non-Discriminatory Restrictions to the Free Movement of Persons' (1997) 22 ELRev 191.

[62] Case C-385/00 *De Groot v Staatssecretaris van Financiën* [2002] ECR I-11819; Case C-209/01 *Schilling and Fleck-Schilling v Finanzamt Nurnberg-Süd* [2003] ECR I-13389; Case C-137/04 *Rockler v Försäkringskassan* [2006] ECR I-1441; Case C-345/05 *Commission v Portugal* [2006] ECR I-10633; Case C-40/05 *Lyyski v Umeå Universitet* [2007] ECR I-99; Case C-212/06 *Government of Communauté française and Gouvernement wallon v Gouvernement flamand* [2008] ECR I-1683; Case C-325/08 *Olympique Lyonnais* (n 59).

[63] Case C-18/95 *FC Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345, [39].

[64] Case C-464/02 *Commission v Denmark* [2005] ECR I-7929.

[65] Case C-232/01 *Van Lent* [2003] ECR I-11525; Cases C-151–152/04 *Nadin and Durre* [2005] ECR I-11203.

workers domiciled in one particular state from using a vehicle registered in another Member State, on the basis that these rules might preclude workers from exercising their right to free movement or might impede access to employment between states.

The fact that non-discriminatory provisions which impede market access can be caught raises concerns about the outer boundaries of Article 45, just as we saw in the case law concerning free movement of goods under Article 34. The issue was thrown into sharp relief by *Graf*.[66] The applicant claimed that rules providing that compensation on termination of employment did not apply when the worker voluntarily ended the employment to take up employment elsewhere were in breach of Article 45. Advocate General Fennelly adverted to the dangers of regarding such rules as constituting a breach of Article 45. He argued that neutral national rules could be regarded as material barriers to market access only if it were established that they had actual effects on market actors akin to exclusion from the market.[67] The ECJ shared these concerns. It reiterated the principle from *Bosman* concerning market access. It held however on the facts that the impugned legislation did not offend this principle. The entitlement to compensation was not dependent on the worker's choosing whether or not to stay with his current employer. It was, rather, dependent on a future and hypothetical event, namely the subsequent termination of the contract without this being at his initiative. This was too uncertain and indirect a possibility for the legislation to be regarded as being in breach of Article 45.[68]

Similarly in *Weigel*, the ECJ ruled that the negative tax consequences for an individual who moves to work from one Member State to another will not necessarily be contrary to Article 45, even if it is likely to deter the worker from exercising rights of free movement, if it does not place that individual under any greater disadvantage than those already resident and subject to the same tax.[69]

(D) INTERNAL SITUATIONS

Article 45 does not prohibit discrimination in a so-called 'wholly internal' situation. This is sometimes referred to as a situation of 'reverse discrimination', since its effect is frequently that national workers cannot claim rights in their own Member State which workers who are nationals of other Member States could claim there. In *Saunders* the ECJ held that since there was 'no factor connecting' the defendant 'to any of the situations envisaged by Community law', she could not rely on Article 45 to challenge an order which effectively excluded her from part of her own national territory.[70]

There have been attempts to circumvent the 'internal situation' barrier by relying on the right to freedom of movement conferred by Article 21 TFEU on European citizens, as something over and above the rights of movement of EU workers, but these have not so far succeeded before the ECJ.[71] It will be seen below that this 'internal situation' approach by the Court has given rise to some invidious results in the context of the rights of workers and their families.[72]

[66] Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493.

[67] Ibid [32] AG Fennelly.

[68] Ibid [24]-[25] ECJ's judgment.

[69] Case C-387/01 *Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-4981, [50]-[55].

[70] Case 175/78 *R v Saunders* [1979] ECR 1129; Case 298/84 *Pavlo Iorio v Azienda Autonomo delle Ferrovie dello Stato* [1986] ECR 247; Cases C-225-227/95 *Kapasakalis, Skiathis and Kougiagkas v Greece* [1998] ECR I-4329; Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241; Case C-212/06 *Government of Communauté française* (n 62).

[71] Cases C-64 and 65/96 *Uecker* and *Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629; Case 180/83 *Moser v Land Baden-Württemberg* [1984] ECR 2539. Compare however, Case C-148/02 *Garcia Avello* [2003] ECR I-11613, discussed further in Ch 23; Case C-34/09 *Ruiz Zambrano*, 30 Sept 2010, AG Sharpston; Draft Recommendation of the European Ombudsman to the Commission in Complaint 3317/2004/GG.

[72] See, eg, Cases 35 and 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723.

It is nonetheless clear, as exemplified by cases such as *Terhoeve*[73] and *De Groot*,[74] that a worker will be able to use Article 45 against his or her own state where the worker has been employed and resided in another Member State. Such a worker may then claim that he or she has been discriminated against in relation to, for example, social security contributions or taxation, when returning to work in his or her own Member State.

(c) OBJECTIVE JUSTIFICATION

The possible grounds for justifying indirect discrimination are broad, and not confined to the exceptions set out in the Treaty or in secondary legislation.[75] Thus in *Schumacker*, the Court ruled that indirect discrimination based on the residence of a worker, whereby an EU national employed but not resident in a particular Member State could not benefit from personal tax allowances, could in certain circumstances be justified.[76] This was because of the likely difference in position between workers from other Member States and resident workers, but such indirect discrimination could not be justified where, for example, the non-resident worker could not benefit from personal allowances in the Member State of residence either. There have been a number of other cases where the ECJ has held that differential tax rules are justified,[77] but in other cases the ECJ has rejected justificatory arguments cast in terms of the cohesion of the tax system, the need to supervise taxation or prevent tax avoidance.[78]

The ECJ undertakes close scrutiny of claims that restrictions are justified.[79] Thus in *Terhoeve*[80] the ECJ considered whether heavier social security contributions levied on a worker who transferred his residence from one Member State to another to take up work during the course of a year could be justified. The ECJ rejected justifications based on the need to simplify and coordinate the levying of such contributions, and technical difficulties preventing other methods of collection. In *Rockler*, the ECJ rejected arguments based on the supposed financial burden on the national social security scheme, ruling that justifications based on purely economic grounds could not be accepted, and that the justification put forward was not proportionate.[81] The ECJ's approach is also evident in the following case.

Case C-325/08 Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC
16 March 2010

The case involved challenge to a rule whereby young footballers who were trained by a particular club would then have to pay damages if they signed a contract with a different club. The ECJ held that the rule was caught by Article 45, and then considered justification.

[73] Case C-18/95 *Terhoeve* (n 63).
[74] Case C-385/00 *De Groot* (n 62).
[75] Case 152/73 *Sotgiu* (n 52); Case C-237/94 *O'Flynn* (n 48); Case C-176/96 *Lehtonen* (n 59) [51]–[60]; Case C-222/07 *UTECA*, 5 Mar 2009.
[76] Case C-279/93 *Finanzamt Koln-Altstadt v Roland Schumacker* [1995] ECR I-225; F Vanistendael, 'The Consequences of Schumacker and Wielockx: Two Steps Forward in the Tax Procession of Echternach' (1996) 33 CMLRev 255.
[77] Case C-300/90 *Commission v Belgium* [1992] ECR I-305; Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249.
[78] Case C-385/00 *De Groot* (n 62); Case C-169/03 *Wallentin v Riksskatteverket* [2004] ECR I-6443; Case C-152/03 *Ritter-Coulais* (n 55); Case C-150/04 *Commission v Denmark* [2007] ECR I-1163.
[79] See, eg, Case C-73/08 *Bressol v Gouvernement de la Communauté française*, 13 Apr 2010.
[80] Case C-18/95 *Terhoeve* (n 63) [43]–[47].
[81] Case C-137/04 *Rockler* (n 62)

THE ECJ

39. In regard to professional sport, the Court has already had occasion to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate (see Bosman, paragraph 106).

41 In that regard, it must be accepted that, as the Court has already held, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see Bosman, paragraph 108).

42. The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, Bosman, paragraph 109).

...

44. Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club...

45. It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, Bosman, paragraph 109).

46. It is apparent from paragraphs 4 and 6 of the present judgment that a scheme such as the one at issue in the main proceedings was characterised by the payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.

47. ... the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club.

48. Under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.

...

50. A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

5 ARTICLE 45(4): THE PUBLIC-SERVICE EXCEPTION

The ECJ has taken an expansive approach to the definition of worker. Conversely, its approach to the limiting clause in Article 45(4), which provides that Article 45 shall not apply to 'employment in the public service', has been restrictive. The ECJ has endeavoured to ensure that the scope of the exception does not go further than is necessary to fulfil the purpose for which it was included in the Treaty. This requires an analysis of why the exception was created. The case law provides a good example of

6. DIRECTIVE 2004/38: RIGHT OF ENTRY AND RESIDENCE OF WORKERS AND THEIR FAMILIES

(a) FORMAL REQUIREMENTS FOR WORKERS

Directive 68/360 was adopted under Article 40 EC to facilitate freedom of movement and the abolition of restrictions on employed persons, in part by clarifying the formal requirements relating to the right of entry and residence of non-nationals.[104] This Directive has been repealed and replaced by the relevant provisions of Directive 2004/38[105] on the movement and residence of EU citizens and their families, with 'family members' defined in Articles 2 and 3 thereof.

It is important to be mindful of the ECJ's interpretive methodology in relation to Directive 2004/38. It held that the Directive aims to facilitate the exercise of the primary and individual right to move and reside freely within Member States that is conferred directly on Union citizens by the Treaty, and that it aims in particular to strengthen that right. The consequence is that EU citizens cannot derive lesser rights from Directive 2004/38 than from the instruments of secondary legislation which it amended or repealed, and that the Directive must not be interpreted restrictively.[106]

Article 6 of the 2004 Directive gives an initial right of entry and residence for up to three months to all EU citizens and their families without any conditions other than presentation of an ID card or passport. The interim status of job-seeker is also recognized in the preamble to the Directive, which implicitly confirms the ECJ case law on this subject.[107] Article 8 of the Directive provides that workers and their families may be required to register with the host state authorities, and upon presentation of a valid passport or ID card and confirmation of employment (and, in the case of family members, a document attesting to the existence of the relevant family relationship, dependency, etc), to receive a certification of registration as evidence of their underlying right of residence.[108] Thus the previous system of residence permits under Directive 68/360 has been replaced with a simpler registration procedure for workers and their families. However, family members who are not EU nationals are to be issued with a residence card under Articles 9 and 10.

Member States are required by Article 4 to grant citizens and their families the right to leave their territory to go and work in other Member States, simply on producing an identity card or passport of at least five years' validity, which their Member State must provide for them and which will be valid throughout the EU and any necessary transit countries between Member States. No exit visa requirement may be imposed. Article 5 sets out similar conditions for the right to enter another Member State: all that is required is a valid identity card or passport and a visa requirement is impermissible, except for certain third-country nationals. The conditions under which a visa can be imposed for family members who are third-country nationals have been tightened up by Article 5(2); they are to be issued free of charge and as soon as possible, and those holding a valid residence card issued by a Member State under Article 9 are exempt from the requirement.

It is made clear in the Directive, as it was under the previous legislation and as the ECJ repeatedly emphasized in its case law, that the rights to reside and to work are not conditional upon initial satisfaction of the formalities for which the Directive provides.[109] Various provisions of Directive 2004/38, including Articles 5(5), 8(2), and 9(3), follow this line of case law by referring to the right of

[104] Dir 68/360 [1968] II OJ Spec Ed 485; Dir 64/221 [1963–4] OJ Spec Ed 117.
[105] (N 9).
[106] Case C-127/08 *Metock* (n 70) [59], [82], [84]; Case C-162/09 *Secretary of State for Work and Pensions v Taous Lassal*, 7 Oct 2010, [30]–[31]; Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, 23 Nov 2010, [23].
[107] 726–728.
[108] This provision was apparently intended to respond to Case 48/75 *Royer* (n 33), which indicated that the residence permit did not grant any rights, but was merely evidence of a pre-existing right under the Treaty.
[109] Case 48/75 *Royer* (n 33).

states to impose proportionate and non-discriminatory penalties for non-satisfaction of the formal requirements.[110] It is clear that deportation, refusal of entry, or revocation of the right of residence constitutes a disproportionate penalty for failure to fulfil administrative formalities.[111] Even with respect to the right to enter, Article 5(4) of the Directive, following the ECJ ruling on the relevant provisions of the predecessor Directive 68/360 in *MRAX*,[112] provides that where the EU national or family member does not have the requisite documents or visas, the Member State shall give them every reasonable opportunity to obtain the documents, to have them brought to them, or to prove their right to movement and residence by other means.

Some confusion was introduced by the ECJ's ruling in *Akrich* that a non-EU national spouse who was not lawfully resident in a Member State, who had, for example, entered unlawfully, could not avail of rights of movement and residence under EU law.[113] The decision was difficult to reconcile with the judgment in *MRAX*,[114] and in *Jia*[115] the ECJ confined *Akrich* to its own facts. The ECJ has now departed from *Akrich*.

Case C-127/08 **Metock and Others v Minister for Justice, Equality and Law Reform** [2008] ECR I-6241

THE ECJ

48. By its first question the referring court asks whether Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

49. In the first place, it must be stated that, as regards family members of a Union citizen, no provision of Directive 2004/38 makes the application of the directive conditional on their having previously resided in a Member State.

50. As Article 3(1) of Directive 2004/38 states, the directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 of the directive who accompany them or join them in that Member State. The definition of family members in point 2 of Article 2 of Directive 2004/38 does not distinguish according to whether or not they have already resided lawfully in another Member State.

51. It must also be pointed out that Articles 5, 6(2) and 7(2) of Directive 2004/38 confer the rights of entry, of residence for up to three months, and of residence for more than three months in the host Member State on nationals of non-member countries who are family members of a Union citizen whom they accompany or join in that Member State, without any reference to the place or conditions of residence they had before arriving in that Member State.

...

54. In those circumstances, Directive 2004/38 must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of point 2 of

[110] Case 321/87 *Commission v Belgium* (n 59); Case C-24/97 *Commission v Germany* [1998] ECR I-2133; Case C-215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215.

[111] Case 118/75 *Watson and Belmann* [1976] ECR 1185; Case C-363/89 *Roux* [1991] ECR I-273; Case C-459/99 *MRAX v Belgium* [2002] ECR I-6591; Case C-215/03 *Oulane* (n 110).

[112] Case C-459/99 *MRAX* (n 111); Case C-157/03 *Commission v Spain* [2005] ECR I-2911.

[113] Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, [49]-[53].

[114] Case C-459/99 *MRAX* (n 111).

[115] Case C-1/05 *Jia v Migrationsverket*, 9 Jan 2007.

Article 2 of that directive and accompany or join the Union citizen in a Member State other than that of which he is a national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State.

55. That interpretation is supported by the Court's case-law on the instruments of secondary law concerning freedom of movement for persons adopted before Directive 2004/38.

56. Even before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty...

...

58. It is true that the Court held in paragraphs 50 and 51 of Akrich that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, MRAX, paragraph 59, and Case C–157/03 Commission v Spain, paragraph 28).

59. The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons.

60. [T]he above interpretation of Directive 2004/38 is consistent with the division of competences between the Member States and the Community.

61. It is common ground that the Community derives from Articles 18(2) EC, 40 EC, 44 EC and 52 EC—on the basis of which Directive 2004/38 inter alia was adopted—competence to enact the necessary measures to bring about freedom of movement for Union citizens.

...

63. Consequently, within the competence conferred on it by those articles of the Treaty, the Community legislature can regulate the conditions of entry and residence of the family members of a Union citizen in the territory of the Member States, where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights of entry into and residence in that Member State.

...

65. It follows that the Community legislature has competence to regulate, as it did by Directive 2004/38, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.

66. Consequently, the interpretation put forward by the Minister for Justice...that the Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of family members of a Union citizen who are nationals of non-member countries must be rejected.

67. Indeed, to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.

68. That would not be compatible with the objective set out in Article 3(1)(c) EC of an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of

persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States. Freedom of movement for Union citizens must therefore be interpreted as the right to leave any Member State, in particular the Member State whose nationality the Union citizen possesses, in order to become established under the same conditions in any Member State other than the Member State whose nationality the Union citizen possesses.

The case reveals the tensions between the imperatives of free movement and Member States' desire to exercise 'first access control' on the entry into their territory of non-nationals, even where they are family members of an EU national. This is attested to by the fact that ten Member States submitted observations in the case, the decision prompted debate in the Council,[116] and led to heated criticism in some Member States, such as Denmark.[117] Costello and Currie reveal some of the more foundational issues raised by the case.

C Costello, *Metock*: Free Movement and Normal Family Life in the Union[118]

In the absence of political voice, or EC protection for the static EU citizen, 'exit' to the transnational realm becomes the only option. *Metock* should thus prompt deeper reflection on agency, belonging and identity in the EU. National governments' reflex is to insist on discretionary control over TCN[119] entry to the EU. In contrast, the ECJ's rights-based approach supports a vision of residence rights in which origins and belonging in the EU are decoupled, and blended families benefit from secure rights and entry and residence along the model established for EU citizens themselves.

S Currie, Accelerated Justice or a Step too Far? Residence Rights for non-EU Family Members and the Court's Ruling in *Metock*[120]

This case illustrates especially clearly the tensions that can arise as a consequence of the extension of residence entitlement to family members of Union citizens. From a legal perspective, when the judgment is considered in light of the case law pre-dating *Akrich* on TCN family members, and subsequent developments which have placed an increasing emphasis on the protection of family life as a fundamental right, *Metock* is not unreasonable. If anything, *Akrich* can be classified as the erroneous judgment due to its apparent contradiction of the case law before it. *Metock* also represents recognition of the reality of family life in the context of mobility and accepts that family relationships which arise in the aftermath of migration are worthy of some protection. In essence, the ruling enshrines a more equitable approach to TCN family members of Union citizens in circumstances of genuine family union. Reasoning on the individual level, this is surely a fair result.

There is a clear disjuncture, though, between the view of *Metock* as a judgment which can be categorised as legally justified and the political reality (or perceived reality) which informs the application of national immigration law. *Metock* has brought to the fore Member State dissatisfaction with the ECJ's

[116] C Costello, '*Metock*: Free Movement and "Normal Family Life" in the Union' (2009) 46 CMLRev 587, 607–608.
[117] S Currie, 'Accelerated Justice or a Step too Far? Residence Rights for non-EU Family Members and the Court's Ruling in *Metock*' (2009) 34 ELRev 310, 324–325.
[118] Costello (n 116) 622.
[119] Third country national.
[120] Currie (n 117) 325–326.

claim of Community competence to regulate the residence entitlement of family members and there are clearly questions about compliance in its aftermath. Given the recent finding by the Commission that implementation of Directive 2004/38 is less than meticulous in a significant number of Member States, *Metock* may prove to be the straw that broke the camel's back.

[illegible] WORKERS AND THE UNEMPLOYED

Article 7(3) of Directive 2004/38 governs the position of former workers who, although they have ceased working, nevertheless retain some of the rights of workers for themselves and their families. This provision replaces the pertinent parts of Directive 68/380, and supplements them with the relevant case law of the ECJ on voluntary and involuntary unemployment.

It provides that EU citizens who are no longer workers shall retain the status of worker where they are temporarily unable to work as the result of an illness or accident; or where they are involuntarily unemployed after having been employed for more than one year and having registered with the employment office as jobseekers. Where involuntary unemployment follows employment of less than one year, the Directive provides that the status of worker is to be retained for at least six months, if the person registers as a job-seeker. Article 7 also provides, following ECJ case law,[121] that a worker who embarks on vocational training may retain the status of worker, but that in cases where the worker has voluntarily given up employment retention of this status is conditional upon the training being related to the previous employment.

The Directive does not otherwise deal with voluntary unemployment, and so the assumption may reasonably be made that a person will not retain the status of worker if they become voluntarily unemployed unless they are pursuing related vocational training.[122] However, as we have seen from the *Antonissen* and *Collins* cases,[123] a person who is seeking work enjoys certain rights under Article 45. By comparison with the category of persons in Article 7(3) who have become involuntarily employed in the host Member State, these job-seekers do not enjoy the status of 'worker' in the full sense of the term, although they enjoy a right of residence during the period they are seeking work, and access to certain benefits which are specifically intended to facilitate access to employment.[124]

As far as the length of this period is concerned, the ECJ in *Antonissen* left it somewhat flexible, ruling that while the period of six months allowed by the UK seemed reasonable, the right to remain in search of work must continue even after that period so long as the person concerned 'provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged'.[125] Although this is not explicitly governed by the provisions of the Directive, recital 9 concerning the three-month right of residence for all EU citizens declares that it is without prejudice to the 'more favourable treatment applicable to job-seekers as recognized by the case-law of the Court of Justice'.

It should also be noted that the ECJ indicated in *Collins* that although rights linked to the status of worker may be retained even when someone is no longer in an employment relationship, the relevant links with the status of worker will not continue for an excessively lengthy period of time.[126] In

[121] Case C-3/90 *Bernini* (n 27); Case C-357/89 *Raulin* (n 27).

[122] In Case C-413/01 *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187, the ECJ ruled that a worker would not necessarily be considered to be *voluntarily* unemployed upon expiry of a fixed-term contract, since the employee has little or no control over the duration of the contract he or she is offered.

[123] Case C-292/89 *R v Immigration Appeal Tribunal, ex p Antonissen* [1991] ECR I-745; Case C-138/02 *Collins* (n 18).

[124] Case C-138/02 *Collins* (n 18); Case C-258/04 *Ioannidis* (n 38).

[125] Case C-292/89 (n 123) [21].

[126] Case C-138/02 (n 18).

Collins itself, the applicant job-seeker could not rely on the fact that he had been employed as a worker seventeen years earlier to claim current entitlement to rights as a worker.

(c) THE RIGHT OF PERMANENT RESIDENCE

An important innovation in Directive 2004/38 was the introduction of the right of permanent residence for EU citizens and their families, including non-nationals, who have resided lawfully for a continuous period of five years in the host state. These provisions replace and build on the previous legislation allowing workers or their families under specific conditions to acquire a right of permanent residence in less than three years in the event of retirement, injury, or death.

Articles 16–18 indicate the conditions under which EU citizens may enjoy this right, which clearly covers EU workers and their families. Article 16(3) makes provision for temporary absences and Article 16(4) provides that the right of permanent residence may be lost only through absences of more than two consecutive years. Article 17 details the shorter qualifying period for workers and their families in the event of retirement, incapacity, or death, and Article 18 concerns the right of permanent residence of family members of EU nationals, including workers, who have satisfied the five-year legal residence requirement.

The administrative formalities are regulated by Articles 19–21. A document certifying permanent residence is to be issued as soon as possible to EU nationals who have verified their duration of residence. Non-EU national family members of workers who enjoy a derivative right of permanent residence are to be given a 'permanent residence card', which is to be automatically renewed every ten years, and the validity of the card will not be affected by absences of less than two consecutive years. Continuity of residence, for any person with the right of permanent residence, will be broken by an expulsion decision which has been enforced against the person.

(d) CONDITIONS FOR EXERCISE OF THE RIGHT TO RESIDENCE

Articles 22–26 regulate conditions under which the right of residence, including the right of permanent residence, is to be enjoyed. It is to cover the whole of the territory, and includes the right of equal treatment with nationals of the host state within the scope of the Treaty, subject to such exceptions as are provided for by the Treaty or in secondary law.[127] Article 23 guarantees the right to take up employment for EU and non-EU national family members alike, replacing the relevant provisions of Regulation 1612/68, which is discussed below.

7 REGULATION 1612/68: SUBSTANTIVE RIGHTS AND SOCIAL ADVANTAGES

(a) REGULATION 1612/68

The main focus thus far has been on the negative effects of Article 45 and associated legislation: the prohibition of discrimination and of barriers to freedom of movement, and the prohibition of entry visas or similar restrictions. The other side of the coin is that this Treaty Article confers positive, substantive rights of freedom of movement and equality of treatment on EU workers. These rights are,

[127] This would include exceptions such as 'employment in the public service', benefits such as rewards for war-time loyalty on which the ECJ has ruled, and the right to vote in national elections, which are discussed below.

to some extent, fleshed out by the secondary legislation, and in particular by Regulation 1612/68,[128] which has been amended by Directive 2004/38. The Commission has proposed a codification of Regulation 1612/68.[129]

The ECJ's approach to Regulation 1612/68 has been similar to that to other free movement legislation, in ruling that the legislation protects and facilitates the exercise of the primary rights conferred by the Treaty, rather than creating rights in itself. However, although the principle of equal treatment, which is now also expressly contained in Article 24 of Directive 2004/38, forms the backbone of the legislation, its degree of detail and specificity goes beyond what is expressed in the Treaty, and requires the Member States to ensure that Union workers enjoy a wide range of the substantive benefits available to nationals. In particular, the Regulation covers the families of EU workers, which are not mentioned in the Treaty chapter.

There are three titles within Part I of the Regulation: Title I (Articles 1–6) on eligibility for employment, Title II (Articles 7–9) on equality of treatment within employment, and Title III (formerly Articles 10–12, but Articles 10–11 have been repealed and replaced by Directive 2000/34) on workers' families. Part II of the Regulation contains detailed provisions which require cooperation amongst the relevant employment agencies of the Member States, and between the Member States' agencies, the Commission, and the European Coordination Office, on applications for employment and the clearance of vacancies. Part III of the Regulation established an Advisory Committee and a Technical Committee made up of Member States' representatives, to ensure close cooperation on matters concerning free movement of workers and employment. Parts II and III of the Regulation, which were amended several times over the years, have attracted comparatively little legal attention. Yet they may be very significant for a worker seeking to move to another Member State to find employment. The Member States' authorities are required to provide information on vacancies, working conditions, and the national labour market, and to cooperate with the Commission in conducting studies on various matters.

However, it is Part I of Regulation 1612/68 which has been the subject of most comment and litigation. Article 1 sets out the right of Member State nationals to take up employment in another Member State under the same conditions as its nationals, and Article 2 prohibits discrimination against such workers or employees in concluding and performing contracts of employment. Articles 3 and 4 prohibit certain directly or indirectly discriminatory administrative practices, such as reserving a quota of posts for national workers, restricting advertising or applications, or setting special recruitment or registration procedures for nationals of other Member States, but with an exception for genuine linguistic requirements. Article 5 guarantees the same assistance from employment offices to non-nationals as well as to nationals, and Article 6 prohibits discriminatory vocational or medical criteria for recruitment and appointment. Article 7 fleshes out Article 45(2) of the Treaty by providing for the same social and tax advantages for nationals and non-nationals, for equal access to vocational training, and declares void any discriminatory provisions of collective or individual employment agreements. Article 8 provides for equality of trade-union rights with nationals,[130] and Article 9 for the same access to all rights and benefits in matters of housing.

Prior to the adoption of Directive 2004/38, Article 10 of the Regulation set out the family members who had the right to install themselves with a worker who was employed in another Member State. These were the spouse and their descendants, who were either under 21 or dependent,[131] and

[128] [1968] OJ L257/2, [1968] OJ Spec Ed 475.

[129] Proposal for a Regulation of the European Parliament and of the Council on freedom of movement of workers within the Union, COM(2010)204 final.

[130] Case C-213/90 *ASTI* (n 94); Case C-118/92 *Commission v Luxembourg* [1994] ECR I-1891; Case C-465/01 *Commission v Austria* [2004] ECR I-8291.

[131] The notion of dependency in Art 10 includes a member of the family who is in fact supported by the worker, whatever the reason for the support: Case 316/85 *Lebon* (n 35).

dependent relatives in the ascending line of the worker and spouse.[132] This group has now been extended by Article 2(2) of Directive 2004/38 to include, along with spouses, a partner with whom an EU citizen has a registered partnership under the national legislation of a Member State, if the host Member State treats registered partnerships as equivalent to marriage. Similarly, the under-21 or dependent children of a registered partner and the dependent direct relatives in the ascending line of the registered partner are also now included by Article 2(2).

Article 3 of Directive 2004/38, extending the previous provision in Article 10(2) of Regulation 1612/68, requires Member States to 'facilitate entry and residence' for other family members whatever their nationality, who were, in the state of origin, dependants or members of the household of the EU citizen, in this case the worker. The two innovations introduced by Directive 2004/38 to this provision are that Member States must also facilitate the admission of (i) any family member where serious health issues strictly require personal care of that family member by the EU citizen, and (ii) the partner with whom the Union citizen has a durable relationship, duly attested. Article 3 provides that the obligation of the host state is to 'undertake an extensive examination of the personal circumstances' and to provide a justification for any denial of entry or residence to such persons. The provisions of Directive 2004/38 governing registered partners, and this second-tier category of partners in a 'durable relationship', represent the cautious outcome of a heated legislative debate concerning the definition of family and the need to move beyond traditional definitions by conferring rights also on same-sex and non-marital partners.

Article 11 of Regulation 1612/68, which provided that the spouse and children mentioned in Article 10 had the right to take up activity as employed persons in the host Member State, has been superseded by Article 23 of Directive 2004/38, discussed above, which grants this right to *all* family members covered by the Directive, whatever their nationality.[133] Moreover, Article 24 provides a new explicit equal treatment guarantee for all EU nationals and their family members who enjoy the right of residence, which clearly includes workers and their families. Article 12 of Regulation 1612/68, which has been updated by Directive 2004/38, in part to reflect ECJ case law on the subject, provides for equal access for the children of a resident worker to the state's educational courses.

Regulation 1612/68 provoked a good deal of litigation. Indeed, Article 7 has probably been the most fruitful provision for workers and their families, raising interesting questions about when, if at all, Member States are entitled to treat their own nationals more favourably than other EU nationals. Clearly, there are some advantages enjoyed by citizens of a state not available to others, for example the right to vote in national elections. The ECJ's evolving interpretation of this Article illustrates how the initial conferral of limited rights on economic actors has evolved into something more substantial, and this is reflected in the new Article 24 of Directive 2004/38, which extends the general equal treatment principle, subject to the exceptions provided for in the Treaty and secondary legislation, to all lawfully resident EU nationals and their families.

(3) ARTICLE 7(2) OF REGULATION 1612/68

Initially in *Michel S*, the Court read Article 7(2) in a limited way, ruling that it concerned only benefits connected with employment.[134] Shortly afterwards, however, the ECJ departed from this restrictive interpretation and ruled that Article 7(2) should be read so as to include all social and tax advantages,

[132] Case C-1/05 *Jia* (n 115).

[133] Art 11 of Reg 1612/68 was interpreted by the ECJ to mean that the non-EU national spouse of an EU national migrant worker in a Member State had the right to work only in the Member State in which the spouse was employed: Case C-10/05 *Mattern* (n 27).

[134] Case 76/72 *Michel S v Fonds National de Reclassement Handicapés* [1973] ECR 457.

whether or not attached to the contract of employment,[135] that it applied not just to workers but also to surviving family members of a deceased worker, and that although Article 7 refers only to advantages for workers, it covers any advantage to a family member which provides an indirect advantage to the worker.[136] The rationale for the ECJ's broad interpretation was, at its most fundamental, to ensure that nationals and workers from other Member States, including their families, were treated equally. The Court was not willing to tolerate an EU in which migrant workers were treated as second-class citizens in the Member States where they worked. This would not only act as a disincentive to free movement, but was also fundamentally at odds with the very *raison d'être* of the EU. Thus, for example, in *Reina*, an interest-free 'childbirth loan' granted under German law to German nationals in order to stimulate the birth rate of the population was held to be a social advantage within Article 7(2).[137] An Italian couple in Germany, one of whom was a worker, must be eligible for the loan, despite the argument made by the defendant bank that, being principally a matter of demographic policy, such a discretionary loan fell within the area of political rights linked to nationality. The Court however ruled that the loan was a social advantage since its main aim was to alleviate the financial burden on low-income families, even if was also a part of national demographic policy.

The limits to the rights which may be claimed by a worker under Article 7(2) were addressed in the case of *Even*, concerning preferential retirement-pension treatment given in Belgium to nationals who were in receipt of a Second World War service invalidity pension granted by an Allied nation.

Case 207/78 Ministère Public v Even and ONPTS
[1979] ECR 2019

THE ECJ

22. It follows from all its provisions and from the objective pursued that the advantages which this regulation extends to workers who are nationals of other Member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community.

23. ...The main reason for a benefit such as that granted by the Belgian national legislation in question to certain categories of national workers is the services which those in receipt of the benefit have rendered in wartime to their own country and its essential objective is to give those nationals an advantage by reason of the hardships suffered for that country.

24. Such a benefit, which is based on a scheme of national recognition, cannot therefore be considered as an advantage granted to a national worker by reason primarily of his status of worker or resident on the national territory and for that reason does not fulfil the essential characteristics of the 'social advantages' referred to in Article 7(2) of Regulation No 1612/68.

Similarly in *de Vos* the ECJ ruled that the statutory obligation on an employer to continue paying pension insurance contributions on behalf of workers who were absent on military service was not a 'social advantage' to the worker within Article 7(2), since it was an advantage provided by the state as

[135] Case 32/75 *Cristini v SNCF* [1975] ECR 1085, [13].

[136] Case 63/76 *Inzirillo* [1976] ECR 2057; Case 94/84 *Deak* [1985] ECR 1873; Case 152/82 *Forcheri v Belgium* [1983] ECR 2323.

[137] Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33; Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817; Case C-237/94 *O'Flynn* (n 48); Case C-212/05 *Hartmann v Freistaat Bayern* [2007] ECR I-6303; Case C-213/05 *Geven v Land Nordrhein-Westfalen* [2007] ECR I-6347.

partial compensation for the obligation to perform military service, rather than an advantage granted to workers by virtue of the fact of their residence in the Member State.[138]

By comparison, in *Ugliola*,[139] which concerned the taking into account of military service in calculating seniority at work, the Court found that there was impermissible discrimination under Article 7(2). The difference between the benefit which the employer was required to provide in *Ugliola* and that in *de Vos* is rather difficult to discern, since each was concerned with ensuring that workers who were away on military service would not be disadvantaged as a result. However, the ECJ seemed to treat the obligation to protect a worker's seniority and security of tenure as a condition of employment imposed by the state on employers in *Ugliola*, whereas the obligation on employers to continue paying pension contributions in *de Vos* was treated as part of the state's mechanism for compensating those undergoing military service rather than as being linked to the employment contract.

(c) ARTICLE 7(3) OF REGULATION 1612/68 AND EDUCATIONAL RIGHTS FOR WORKERS

Article 7(3) provides that EU workers shall 'by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres'. The Article has been held to confer equal rights of access for non-national workers to all the advantages, grants, and facilities available to nationals.

It was restrictively interpreted by the ECJ in *Lair*, ruling that universities were not 'vocational schools' since the concept of a vocational school referred 'exclusively to institutions which provide only instruction either alternating with or closely linked to an occupational activity, particularly during apprenticeship'.[140] The ECJ however went on to hold that workers could also invoke the 'social advantages' provision of Article 7(2) to claim entitlement to any advantage available to improve their professional qualifications and social advancement, such as a maintenance grant in an educational institution not covered by Article 7(3).[141] Nonetheless, the Court imposed other limits on the ability of workers to invoke Article 7(2) by ruling that, although they did not have to be in the employment relationship just before or during the course of study, and although a fixed minimum period of employment could not be required by a state,[142] there must be some continuity or link between the previous work and the studies in question.[143] The one exception permitted was where a worker involuntarily became unemployed and was 'obliged by conditions on the job market to undertake occupational retraining in another field of activity'.[144] This case law is confirmed by Article 7(3)(d) of Directive 2004/38.

The likely reason for the limitations imposed by the ECJ on Article 7(2) and (3) is that the status of worker carries with it a substantial range of social and other benefits, and Member States wish to restrict those claiming such benefits to 'genuine' workers. If someone gives up work to pursue education or training, ceasing to be economically active, the states clearly fear that this could enable migrants to gain generous educational benefits after a short and purely instrumental period of employment. The Court also made clear in *Brown* that not only must there be a link between the

[138] Case C-315/94 *De Vos v Bielefeld* [1996] ECR I-1417, [17]-[22]; Case C-386/02 *Baldinger v Pensionsversicherungsanstalt der Arbeiter* [2004] ECR I-8411. Contrast Case C-131/96 *Romero v Landesversicherungsanstalt* [1997] ECR I-3659.

[139] Case 15/69 (n 50).

[140] Case 39/86 *Lair* [1988] ECR 3161.

[141] Case 235/87 *Matteucci v Communauté Français de Belgique* [1988] ECR 5589; Case C-337/97 *Meeusen* (n 13).

[142] Case 157/84 *Frascogna v Caisse des Dépôts et Consignations* [1985] ECR 1739; Case C-3/90 *Bernini* (n 27); Case C-357/89 *Raulin* (n 27).

[143] Case 39/86 *Lair* (n 140) [37].

[144] Ibid.

previous employment and the subsequent studies, but the employment must not be 'ancillary' to the main purpose of pursuing a course of study.[145]

In *Ninni-Orasche*, however, the ECJ ruled that the conduct of a person who took up short-term employment as a waitress only several years after entering the host Member State, and who shortly after finishing that employment obtained a diploma entitling her to enrol at university in that state, was irrelevant to her status as worker or to the question whether the work was 'ancillary'.[146] The ECJ similarly, echoing its rulings in *Akrich*[147] and *Chen*[148] in which it dismissed the allegations of abuse of rights, ruled that there was no such thing as 'abusively creating' the situation where she became a worker for the purposes of EU law.[149] However, the Court also ruled that, while the fact that the fixed-term contract she had accepted had come to an end did not necessarily make her 'voluntarily unemployed', factors such as the short-term nature of the job and the fact that she obtained the diploma entitling her to enroll at university immediately afterwards might be relevant to the question whether she took up employment with the sole aim of benefiting from the system of student assistance in the host state.

Finally, there is now in Article 35 of Directive 2004/38 a novel exception permitting Member States to refuse or withdraw rights under the Directive 'in the case of abuse of rights or fraud'. The Court's case law so far has not however confirmed any example of abuse or fraud, other than the case of a sham marriage entered for the purpose of gaining EU rights.

(c) REGULATION 1612/68: EDUCATIONAL RIGHTS FOR CHILDREN

Article 12 provides that 'the children of a national of a Member State, who is or has been employed in the territory of another Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same conditions as the nationals of that State, if those children reside in its territory'. Member States are to encourage 'steps allowing such children to follow the above mentioned courses under the best conditions'.

We saw in *Michel S*[150] that the ECJ interpreted Article 7(2) narrowly, but in the same case it interpreted Article 12 broadly, so that a benefit for disabled nationals was included in Article 12 on access to education for the children of workers.[151] This expansive reading was continued in *Casagrande*,[152] where the ECJ ruled that Article 12 applied not just to admission to courses but also to any 'general measures intended to facilitate educational attendance', including an educational grant. Thus Article 12 places the children of EU workers residing in a Member State in the same position as the children of nationals of that state so far as education is concerned, which means that they have more generous educational rights than their EU worker-parents. It has been held to require that, where grants are available to the children of nationals to study abroad, these must also be made available to the children of migrant EU workers, even if the studies abroad are to be in the Member State of the child's nationality.[153]

In *Gaal*, the ECJ ruled that the term children in Article 12 was wider than that in Article 10, so that Article 12 conferred educational rights on children who were over 21 and non-dependent, even

[145] Case 197/86 (n 30).
[146] Case C-413/01 *Ninni-Orasche* (n 122).
[147] Case C-109/01 *Akrich* (n 113).
[148] Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.
[149] Case C-413/01 *Ninni-Orasche* (n 122).
[150] (N 134).
[151] Case C-7/94 *Landesamt für Ausbildungsförderung Nordrhein-Westfalen v Lubor Gaal* [1996] ECR I-1031.
[152] Case 9/74 *Casagrande v Landeshauptstadt München* [1974] ECR 773.
[153] Case C-308/89 *Di Leo v Land Berlin* [1990] ECR I-4185.

though they were not covered by Article 10.[154] The ECJ held that the principle in Article 12 required the children of a migrant worker to be able to continue studies in order to complete their education successfully, so long as the children had lived with a parent in the Member State at a time when that parent resided there as a worker and, presumably, although the ECJ does not actually say this, at a time when the child was either dependent or under 21.

In *Echternach and Moritz*, the ECJ ruled that Article 12 covers the child's right to educational assistance even where the working parents have returned to their state of nationality.[155] While the rationale given in *Echternach* was that the child in question was obliged by reason of the non-compatibility of educational systems to remain and to complete the education in the host state, the ECJ moved beyond this in *Baumbast and R*, ruling that it would offend against both the letter and the spirit of Article 12 to limit the rights of children to remain in the host state to complete their education only to situations where they could not complete it in their Member State of origin.[156] The Court continued its expansive ruling in *Baumbast* by declaring that the fact that the parents of the children concerned had meanwhile divorced, the fact that only one parent was a citizen of the Union and that parent had since ceased to be a migrant worker in the host Member State, and the fact that the children were not themselves citizens of the Union were all irrelevant to the enjoyment of the rights under Article 12.[157] It is moreover clear from *Teixeira*[158] that the right of the primary carer to look after the child is derived directly from Article 12 and is not dependent on satisfying the residence conditions in Directive 2004/38.

This case law is now confirmed by Article 12(3) of Directive 2004/38, which also confirms the right of the children, and the right of residence of the carer-parent, to remain and complete their education after the death of the worker-parent. However, in a situation where the worker has left the host state and returned to the Member State of origin in which her children also live, EU law does not confer any right to have her children's studies financed by the former host state under the same conditions as those applying to nationals.[159]

(3) RIGHTS OF FAMILIES AS PARASITES ON THE WORKER'S RIGHTS

Although the interpretation of 'social advantages' in Article 7 is broad, it is only workers and the family members covered by Directive 2004/38, formerly by Article 10 of Regulation 1612/68, who may avail themselves of them. In *Lebon*, the ECJ ruled that once the child of a worker reached 21 and was no longer dependent on the worker,[160] benefits to that child could not be construed as an advantage to the worker.[161] We have seen moreover how lawfully resident job-seekers are entitled under EU law only to those advantages which are specifically made available for job-seekers nationally.[162]

[154] Case C-7/94 *Gaal*, (n 151).
[155] Cases 389 and 390/87 *Echternach and Moritz* [1989] ECR 723.
[156] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.
[157] Ibid [56]-[63].
[158] Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department*, 23 Feb 2010; Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department*, 23 Feb 2010; P Starup and M Elsmor, Note (2010) 35 ELRev 571.
[159] Case C-33/99 *Fahmi and Cerdeiro-Pinedo Amado* [2001] ECR I-2415.
[160] Case C-1/05 *Jia* (n 115).
[161] Case 316/85 (n 35); Case C-243/91 *Belgium v Taghavi* [1992] ECR I-4401; Case C-33/99 *Fahmi* (n 159).
[162] Case C-138/02 *Collins* (n 18); Case C- 258/04 *Ioannidis* (n 38).

The creative interpretation given by the ECJ to Article 7(2) is evident also in *Reed*, where the ECJ ruled that the possibility for a migrant worker to have his unmarried companion reside with him could constitute a social advantage under Article 7(2), where the host Member State treated stable companions as akin to spouses.[163] This was so even though Reed's companion would not have been covered by Article 10 of the Regulation at the time, since it covered only marital spouses. Since the case was decided, as we have seen, Directive 2004/38 has included registered partners, in states which recognize the status of registered partnerships, within the protected family, and also requires Member States generally to facilitate the admission of companions in a 'durable relationship'.

The 2004 Directive also clarifies a question which arose in *Diatta*[164] and *Singh*[165] concerning the status of a spouse, and in particular a spouse who lacks EU nationality, under Regulation 1612/68. The ECJ in those cases had indicated that, even where the spouses were separated or where a decree *nisi* of divorce had been granted, the non-working spouse did not lose the right of residence while the marriage was still formally in existence and had not actually been dissolved. The Court in *Baumbast* also ruled that a non-EU national spouse could, even after divorce, continue residing in the host Member State under EU law where the children, whether or not they had EU nationality, were exercising their educational rights under Article 12 of the Regulation and the divorced spouse was their primary carer.[166] Moreover in *Eind*[167] the ECJ ruled that a citizen is less likely to travel if he believes that he will not be able to return later to his home country with his family. This is so even if the members of the EU citizen's family included a third country national who did not have a right to reside in his home country when he initially left, and it was not material in this respect that the EU national returning home did not intend to engage in economic activity.

Article 13(1) of Directive 2004/38 now provides that even after divorce, annulment of marriage, or termination of a registered partnership, the right of residence of the family members who are EU nationals will not be affected. In the case of non-EU national family members, Article 13(2) provides that the right of residence will not be lost where (i) the marriage or registered partnership has lasted at least three years including one year in the host Member State; or (ii) where the spouse who is not an EU national retains custody of the EU citizen's children; or (iii) where it is warranted by particularly difficult circumstances such as the applicant having been a victim of domestic violence during the marriage/partnership; or (iv) where the non-EU national spouse or partner has the right of access to a minor child and where the court has ruled that such access must be in the host Member State, for as long as required.

Article 13 provides that such family members will retain the right of residence on an exclusively personal basis, and that if they are to go on to qualify for the right of permanent residence they must show that they are themselves workers or self-employed, or have sufficient resources to avoid becoming a burden on the host state. Article 35 of Directive 2004/38 makes clear, however, that a spouse will not gain any rights of residence or social advantages if the marriage is merely a marriage of convenience or a 'sham'.[168]

[163] Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

[164] Case 267/83 *Diatta v Land Berlin* [1985] ECR 567.

[165] Case C-370/90 *R v Immigration Appeal Tribunal, ex p Secretary of State for the Home Department* [1992] ECR I-4265.

[166] Case C-413/99 *Baumbast* (n 156).

[167] Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v Eind* [2007] ECR I-10719.

[168] Case C-109/01 *Akrich* (n 113) [57]-[58].

FAMILY MEMBERS IN AN INTERNAL SITUATION

The ECJ's approach to the so-called 'wholly internal situation' has been the subject of considerable academic criticism.[169] In *Saunders*[170] the ECJ ruled that a national could not rely on Article 45 in his or her own Member State to challenge a restriction on freedom of movement, since there was no factor connecting the situation with Union law. The impact was harshly illustrated in *Morson and Jhanjan*, where it was held that two Dutch nationals working in the Netherlands had no right to bring their parents, of Surinamese nationality, into the country to reside with them.[171] Had they been nationals of any other Member State working in the Netherlands, they would have been so entitled under Article 10 of Regulation 1612/68, now Article 2 of Directive 2004/38. However, because they were nationals working in their own Member State 'who had never exercised the right to freedom of movement within the Community', they had no rights under Community law.[172]

This was confirmed in *Uecker and Jacquet*, despite the referring German court's invitation to the ECJ to depart from its previous position.[173] The case concerned two non-EC nationals who came to Germany to live with their spouses, both of whom were German nationals residing and working in Germany. They invoked Article 7 of Regulation 1612/68 to claim equal treatment with German nationals in their employment, but the ECJ reiterated its stance on wholly internal situations, despite the national court's suggestion that the sort of reverse discrimination brought about by that stance was in conflict with 'the fundamental principle of a Community moving towards European Union'.[174]

In *Singh*, however, the situation was somewhat different. An Indian national had married a British national, and had travelled with her to Germany where they had both worked for some years before returning to the UK. The UK argued that the British spouse's right to re-enter the UK derived from national law and not from EU law. However, the ECJ clearly considered that the period of working activity in another Member State made all the difference, and enabled Singh now to claim rights as the spouse of a Community worker.

Case C-370/90 R v Immigration Appeal Tribunal and Surinder Singh, ex p Secretary of State for the Home Department
[1992] ECR I-4265

19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.

[169] N Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 CMLRev 731; C Ritter, 'Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234' (2006) 31 ELRev 690; C Dautricourt and S Thomas, 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, nothing for Penelope?' (2009) 34 ELRev 443.

[170] Case 175/78 (n 70); Case C-212/06 *Government of Communauté française and Gouvernement wallon* (n 62) [33]; Case C-127/08 *Metock* (n 70) [76]-[78].

[171] Cases 35 and 36/82 (n 72).

[172] Ibid [17].

[173] Cases C-64 and 65/96 *Uecker* and *Jacquet* (n 71).

[174] Ibid [22].

20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.

The Court subsequently confirmed this stance in *Akrich*, in which it rejected the suggestion that there was any 'abuse of rights' involved where a couple moved on a temporary basis to work in another Member State in order to avoid the 'internal situation' problem and to acquire rights for a non-EU national in the spouse's Member State of origin.[175] It was moreover made clear in *Metock* that Articles 2 and 3 of Directive 2004/38 applied to a national of a non-member country who was the spouse of a Union citizen residing in a Member State the nationality of which he did not possess, and who accompanied or joined that Union citizen, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.[176]

PUBLIC POLICY, SECURITY AND HEALTH RESTRICTIONS

LEVELS OF PROTECTION

Articles 27–33 of Directive 2004/38 govern the restrictions on the right of entry and residence which Member States may impose on grounds of public policy, security, or health. These provisions repeal and replace the previous Directive 64/221, and incorporate much of the relevant jurisprudence of the Court of Justice.

An innovations of Directive 2004/38 was the introduction of three different levels of protection against expulsion on these grounds: (i) a general level of protection for all individuals covered by EU law; (ii) an enhanced level of protection for individuals who have already gained the right of permanent residence on the territory of a Member State; and (iii) a super-enhanced level of protection for minors or for those who have resided for ten years in a host state. The Directive also simplifies the previous requirements of Directive 64/221 by making access to judicial and administrative redress procedures compulsory, and by eliminating references to comparability with national procedures.

GENERAL PRINCIPLES

Article 27(2) begins by setting out the general principles governing the exercise of the exceptions, specifying that all measures adopted on grounds of public policy or security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. The Directive makes clear, as did its predecessor, that the public policy, security, and health exceptions cannot be invoked to serve economic ends, and that past criminal convictions are not in themselves grounds for taking such measures. This provision was earlier interpreted in *Santillo* to mean that such convictions may be relied on as a basis for expulsion only where the past conviction in some way provides evidence of a present threat,[177] and that the threat must be assessed by the Member State at the time of the decision ordering expulsion.[178]

[175] Case C-109/01 *Akrich* (n 113) [55]–[56].

[176] Case C-127/08 *Metock* (n 70) [81]–[89].

[177] The ECJ in Case 30/77 *Bouchereau* [1977] ECR 1999 also suggested that past conduct alone, rather than the likelihood of future conduct, might be sufficient to indicate that someone is a *present* threat to public policy, but it is not easy to imagine what this might be.

[178] Case 131/79 *Santillo* [1980] ECR 1585; Case C-441/02 *Commission v Germany* [2006] ECR I-3449.