

# Whose Citizenship to Empower in the Area of Freedom, Security and Justice?

## The Act of Mobility and Litigation in the Enactment of European Citizenship

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### Abstract

The Stockholm Programme and the European Commission's Action Plan implementing it have positioned the freedom, security and justice of 'European citizens' at the heart of the EU's political agenda for the next five years. Yet, who are the 'citizens' about whom the Council and the European Commission are so interested? At first sight it would appear as if only those individuals holding the nationality of a member state would fall within this category. This paper challenges this assumption, however, and argues that as a consequence of litigation by individuals before EU courts and of the growing importance given to the act of mobility in citizenship and immigration law, the personal scope of the freedoms accorded to European citizenship already covers certain categories of third-country nationals (TCNs). Through an examination of selected landmark rulings of the Court of Justice in Luxembourg, the paper demonstrates how the requirement of being a national of an EU member state is progressively becoming less important when defining the boundaries of the European citizenry. TCNs already enjoy and benefit from a number of European citizenship-related and citizenship-like freedoms, rights, benefits and general principles, which are subject to protection and scrutiny at the EU level. This development, we argue, is not only an indication of a continuing loss of discretionary power by the nation-state with respect to European citizenship, but may also constitute a clear signal that a new European citizenship of TCNs is in the making in the Union. This citizenship places the freedom to move and non-discrimination on the basis of nationality at the core of its identity.

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# WHOSE CITIZENSHIP TO EMPOWER IN THE AREA OF FREEDOM, SECURITY AND JUSTICE?

## THE ACT OF MOBILITY AND LITIGATION IN THE ENACTMENT OF EUROPEAN CITIZENSHIP

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### Introduction

The Stockholm Programme – the third multiannual programme outlining the EU's Area of Freedom, Security and Justice (AFSJ) for the next five years – was endorsed by the European Council on 10-11 December 2009<sup>1</sup> and given the title “An open and secure Europe serving and protecting citizens”. The Programme focuses predominantly on the interests and needs of citizens, calling for a ‘Citizens’ Europe’ to be at the centre of Europe’s political agenda. In April 2010, the Directorate-General of Justice, Freedom and Security (DG JLS) published a Communication on the Action Plan implementing the Stockholm Programme, entitled “Delivering an area of freedom, security and justice for Europe’s citizens”.<sup>2</sup> The Plan presents detailed timetables on the specific legislative and policy actions that are expected to be adopted during the next five years, in order to put into practice the vision enshrined in the Stockholm Programme. Similar to the Stockholm Programme, the Commission’s Action Plan pays special attention to “the expectations and concerns of our citizens” and the need for “empowering European citizens” in the AFSJ.

Concerns have been raised since the adoption of the Stockholm Programme alluding to the tensions inherent to an EU AFSJ, whose scope *ratione personae* would be restricted to a conception of ‘citizens’ that only includes individuals holding the nationality of an EU member state.<sup>3</sup> At first sight it appears that indeed only the nationals of EU member states are entitled to benefit from European citizenship-related and citizenship-like freedoms, benefits and rights in the EU’s AFSJ. This paper challenges these framings and aims at demonstrating that the answer to the question of who these ‘citizens’ are is not as straightforward as both the Stockholm

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<sup>1</sup> Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting citizens, 5731/10, Brussels, 3 March 2010.

<sup>2</sup> European Commission, Communication on Delivering an Area of Freedom, Security and Justice for Europe’s Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171, Brussels, 20 April 2010.

<sup>3</sup> E. Guild and S. Carrera, *Towards the Next Phase of the EU’s Area of Freedom, Security and Justice: The European Commission’s Proposal for the Stockholm Programme*, CEPS Policy Brief No. 196, CEPS, Brussels, August 2009.

Programme and the Action Plan contend. Limiting a ‘Europe of rights’ to EU nationals, and setting aside third-country nationals (TCNs), would be inadequate. This reasoning applies not only in relation to those freedoms falling within the category of fundamental rights as envisaged in the EU Charter of Fundamental Rights, some of which clearly apply to TCNs.<sup>4</sup> It also holds true in relation to other EU freedoms, benefits and general principles, which have been developed through secondary law and international agreements with third countries, as well as those emanating from a number of landmark rulings by the Court of Justice of the European Union (CJEU). The ‘freedoms’ of TCNs in Europe, and their entitlement to equality of treatment and non-discrimination, have been subject to increasing litigation before the CJEU in Luxembourg. Judgements such as those in *Metock* (C-127/08), *Soysal* (C-228/06), *Genc* (C-14/09), *Commission v. the Netherlands* (C-92/07), *El Youssfi* (C-276/06) and *Chakroun* (C-578/08) represent just a few examples challenging the traditional concept of citizenship in the EU and highlighting the non-sustainability of claims advocating the EU member states’ ‘untouched nationalistic garden’ on citizenship issues.

These rulings demonstrate the political relevance of the role of individuals’ litigation and the effects of a progressive judicialisation of citizenship and migration matters, and the way in which they are deeply transforming classical understandings of European citizenship-related and citizenship-like freedoms for TCNs beyond nationality-centred perspectives and member states’ (ministries of interior) competences. CJEU case law also evidences the extent to which some key concepts, benefits and rights (and the exceptions applicable to these) of non-EU nationals are often being interpreted in light of European citizenship and free movement law, EU general principles of law and the principle of non-discrimination on the basis of nationality. These judgements question traditionalist divisions and the relevance and legitimacy underlying differential treatment between EU nationals and TCNs in relation to certain characteristics of the status of European citizenship, as well as the exclusive competence (and margin of appreciation) that national administrations are said to hold in this domain.

When combined with the increasing importance given by the EU to the ‘freedom of movement’ or ‘cross-border situations’ of TCNs (intra-EU mobility and while exercising it benefiting from equality of treatment compared with nationals of the receiving member state) in the EU Directives on long-term residents’ status, the blue card, researchers and students, the answer to the question of who are the ‘citizens’ to be empowered by the Stockholm Programme and Action Plan takes us beyond the individual categorised as a ‘national’ (in accordance with nationality law) and towards unexpected venues and political subjectivities. Voices calling for the preservation of a personal scope of European citizenship freedoms and benefits limited to the nationals of the EU member states are losing ground, and are in tension with the de facto gradual promulgation and expansion of EU freedoms and non-discrimination to TCNs in the EU. Through the enactment of their EU freedoms, non-EU nationals are progressively brought into (and become legitimate members of) the European citizenry.

Such a challenging argument would be naïve without duly acknowledging the existence of limitations and (legal) conditions that still apply in the EU legal system to TCNs when having access to and enjoying these European citizenship-like and citizenship-related freedoms, benefits and rights. That notwithstanding, this paper argues that the role of strategic individual litigation and the effects of CJEU rulings, alongside the expansion to TCNs of the freedom of

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<sup>4</sup> See the Charter of Fundamental Rights of the European Union, OJ C 83, Vol. 53, 30.03.2010, 2010/C 83/02, p. 389. The Commission’s Action Plan stipulates that “[a] European area of freedom, security and justice must be an area where all people, including third-country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union” (p. 2).

movement (and quasi-equality of treatment while doing so) and non-discrimination on the basis of nationality in EU secondary law and international agreements, are central (and will continue being so) to the enactment and future of European citizenship. The role of *the individual* in initiating litigation before courts, in claiming the recognition and enforcement of EU freedoms and rights, and in exercising the act mobility, is becoming ever more critical.

As this paper shows, the so-called ‘Citizens’ Europe’ in the AFSJ and a ‘Europe of rights’ *already* include TCNs in their personal scope in relation to the protection of EU (both citizenship-related and citizenship-like) fundamental freedoms, benefits and non-discrimination principles. The political objective identified by the Commission’s Action Plan implementing the Stockholm Programme, stating that “the main thrust of [the] Union’s action in this field in the coming years will be ‘Advancing people’s Europe’”,<sup>5</sup> should therefore expressly place at its heart the freedoms and rights of vulnerable groups exercising their citizenship beyond nationality-based configurations and boundaries, and effectively address the barriers they face in exercising and enforcing them. This is where the added value of European citizenship will lie over and above national citizenship.<sup>6</sup>

## 1. The act of mobility and non-discrimination: Whose ‘European citizenship’ falls under the Stockholm Programme?

One of the successes of European integration has been the expansion of citizenship of the Union and the freedom of movement within an EU of 27 countries. As from 1993 (the entry into force of the Maastricht Treaty – Treaty on European Union, TEU), when European citizenship was officially instituted, the EU has played a decisive role in transforming foreigners into citizens and dismantling internal border controls among its member states.<sup>7</sup> The Union has also promoted a rather revolutionary understanding of citizenship, whose freedoms and benefits are no longer exclusively attached to a nationality status, but closely intertwined with the mobility of individuals beyond their state’s territory. A peculiar feature of European citizenship is thus the encouragement that it gives to the individual to move for benefiting from some of its most symbolic features and components. It is at the moment of moving, crossing an EU internal border, when the individual becomes a beneficiary of a full set of EU (citizenship-related) rights and freedoms. It is also at that non-static moment when they are entitled to claim and can demand the enforcement of equality of treatment and non-discrimination in comparison with nationals of the second (receiving) member state.

The academic literature looking at the transformative nature, features and foundations of the mobility dimension of European citizenship, the proactive role played by the CJEU and the extent to which it is becoming (or not) the fundamental status of EU nationals is rich and

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<sup>5</sup> European Commission, COM(2010) 171, op. cit.

<sup>6</sup> The Action Plan (ibid.) has confirmed the need for “empowering European citizens” by stating that European citizenship needs to further progress from a concept enshrined in the Treaties to become a tangible reality demonstrating in the daily lives of citizens, *its added value over and above national citizenship*. Citizens need to be able to benefit from their rights stemming from European integration. Facilitating citizens’ mobility is of crucial importance in the European project. Free movement is a core right of EU citizens and their family members. It needs to be vigorously enforced. (Emphasis added.)

<sup>7</sup> E. Guild, “Free Movement of Workers: From Third Country Nationals to Citizen of the Union”, in P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the Free Movement of Workers: The European Challenges Ahead*, Nijmegen: Wolf Legal Publishers, 2009, pp. 25-38.

extensive.<sup>8</sup> Attention has also been paid to the political implications underlying the promotion of mobility in the scope of European citizenship in the attempt to promote an EU identity among EU nationals.<sup>9</sup> The general axiom upon which citizenship of the Union has been built is that only those individuals holding the nationality of an EU member state will be European citizens, and that citizenship of the Union is of a derivative and complementary nature to nationality.<sup>10</sup> The new Art. 20.1 of the revised version of the Treaty on European Union now establishes that “[c]itizenship of the Union is hereby established. *Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*” (emphasis added).

The connectivity between citizenship of the Union and holding the nationality of an EU member state (along with the exclusive competence of EU member states over the conditions of acquisition and loss of nationality) constituted a condition for national governments to agree on its very establishment by the TEU. Yet the connecting factor according to which only those holding the nationality of an EU member state will be citizens of the Union has not prevented the expansion of citizenship-related rights and freedoms to TCNs. EU member states largely retain a monopoly over determining ‘who qualifies’ as a European citizen and the question of whether an individual possesses the nationality of a member state is still to be settled “solely by reference to the national law of the member state concerned”.<sup>11</sup> The degree of national discretion has been transformed, however (and to a certain extent reduced during the last 10 years), concerning who benefits from the set of supranational (*European citizenship-related*) civil, social, political and economic freedoms and benefits. TCNs have acquired certain EU freedoms that, while perhaps not formally falling within the legal landscape of European citizenship, are of a similar or related nature.

A primary constitutive element pertaining to the added value of the EU in the granting of an AFSJ to *individuals* in Europe has been the act of mobility, i.e. the facilitation of freedom of movement and the abolition of obstacles to the exercise of the latter, including the entitlement of equal treatment and non-discrimination in the receiving EU member state in comparison with its own nationals. The crossing of the traditional internal borders of the nation-state functions as a key determining factor for the allocation of EU freedoms beyond the national arenas. The relevance of the principle of free movement of persons (freedom of movement and residence) to the components of European citizenship status has been recognised and is a fundamental right in the Charter of Fundamental Rights of the EU. Art. 45 of the Charter states that “[e]very citizen of the Union has the right to move and reside freely within the territory of the Member States. *Freedom of movement and residence* may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State” (emphasis added).

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<sup>8</sup> Among many others, refer for example to M. Conduzzi, A. Lang and B. Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, Leiden: Martinus Nijhoff Publishers, 2008 and M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, The Hague: Kluwer International Law, 1998. For a ‘state of the art’ perspective on previous literature, refer to S. Carrera and M. Merlino, *State of the Art on the European Court of Justice and Enacting European Citizenship*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, April 2009.

<sup>9</sup> E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, 2004.

<sup>10</sup> G.R. De Groot, “Towards a European Nationality Law”, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe’s Future*, *Migration, Integration and Citizenship: A Challenge for Europe’s Future*, Vol. I, Maastricht: Forum Maastricht, 2005, pp. 13-53.

<sup>11</sup> See the Declaration on nationality of a member state attached to the final Act of the Treaty on European Union, OJ C 191, 29.07.1992.

The exercise of the freedom to move to and reside in a second member state not only constitutes the act by which an individual becomes a legitimate claimant of certain freedoms ascribed to citizenship of the Union in light of the Citizens Directive 2004/38/EC. Mobility also often implies the recognition of other European citizenship-related freedoms and benefits – and protection against discrimination on the grounds of nationality; this is the case in relation to nationals of EU member states as well as an increasing number of TCNs in Europe. Guild (2004) has argued that “the prohibition of discrimination on the basis of nationality has a particular importance in understanding identity. If foreigners must be treated the same way as nationals where is the difference between the two? The central point of differentiation falls away.”<sup>12</sup> Indeed, the greater the freedoms, protection and non-discrimination, the greater the individual’s citizenship claims. By approximating the treatment of TCNs to that of nationals of the EU, the Union is fundamentally altering traditional political and legal configurations of European citizenship. Indirectly, the Union is asserting its ‘added value’ in the citizenship and migration domains, while at the same moment intending to foster some sense of a European identity among TCNs.

There are four major dimensions in which TCNs are holders of European citizenship-related or citizenship-like freedoms in the EU legal system:

- First, the most obvious case is that of the TCN family members of Union citizens who have exercised their freedom to move to a second EU member state. They benefit from EU free movement and the legal framework of citizenship fully applies, which leaves national immigration laws without (almost) any role to play in practice.<sup>13</sup>
- Second, other European citizenship-related freedoms have been foreseen in the scope of international agreements between the EU and third countries. The EU has concluded Association Agreements or Euro-Mediterranean Agreements with countries such as Turkey, Morocco, Tunisia and Algeria, which grant freedom from discrimination on the basis of nationality to nationals from these countries in comparison with EU nationals in fields such as employment, freedom of establishment, service provision and social security.
- Third, certain interpretations and general principles pertaining to European citizenship law have also been used in rulings falling within the scope of EU immigration law (the conditions of entry and residence of TCNs in the EU), e.g. Directive 2003/86/EC on the right to family reunification.<sup>14</sup> Particular concepts, rights and exceptions used by EU immigration law have been interpreted in light of EU free movement and citizenship law. They have equally been subject to the protection offered to the individual by the general

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<sup>12</sup> See Guild (2004), op. cit., p. 161. Refer also to E. Bribosia, P. Magnette and A. Weyembergh, *Union européenne et nationalités: Le principe de non-discrimination et ses limites*, Brussels: Bruylant, 1999.

<sup>13</sup> To this we may also add the rights of entry and residence of TCN employees of a cross-border service provider on the basis of Art. 56 TFEU. The CJEU held in *Van der Elst* (Case C-43/93, *Van der Elst* [1994] ECR I-3803) that such workers have a right of entry and residence in the member state where the service is provided, but only to the extent necessary to provide those services and without any right to join the employment market of the host state. See J. Onslow-Cole, “The Right of Establishment and Provision of Services: Community Employers and Third-Country Nationals”, in E. Guild, *The Legal Framework and Social Consequences of Free Movement of Persons in the European Union*, The Hague: Kluwer, 1999, pp. 63-72.

<sup>14</sup> Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003.

principles of EU law (such as those of proportionality, non-discrimination and fundamental rights).

- Fourth, the legal and political relevance of the act of mobility (EU-intra mobility) to a second member state is also present in the context of EU immigration law. This is well illustrated when looking at Directives 2003/109/EC on the status of TCNs who are long-term residents,<sup>15</sup> 2009/50/EC on the EU blue card,<sup>16</sup> 2005/71/EC on researchers and 2004/114/EC on students.<sup>17</sup>

The next section engages in an analysis of the first three dimensions, where the role of individual litigation and the proactive interventions by the CJEU have been seminal in the expansion of *citizenship-related* freedoms and benefits to TCNs. The fourth dimension, which shows the progressive extrapolation of the mobility aspect (so typical of the status of European citizenship) to the set of EU freedoms, rights and benefits (*citizenship-like*) granted to TCNs in the EU, is analysed in section 3.

## 2. Individuals' litigation and the CJEU: European citizenship-related freedoms

### 2.1 Family members of Union citizens on the move: The right to move and reside

European citizenship and free movement law recognises citizenship-related freedoms for the TCN family members of European citizens on the move. Since the 1970s, the EU has been very active in relation to recognising the rights of the TCN family members of European citizens. While some may argue that formally these rights fall outside the status of European citizenship because of their 'derivative' nature, they have a similar scope to those enjoyed by EU nationals as long as the family relationship continues to exist and mobility to a second EU member state occurs. The element of mobility (which in this case is exercised by the national of an EU member state) represents the condition for TCN family members to benefit from the freedoms and protection granted by European citizenship law. The Citizens Directive (2004/38/EC) expressly recognises citizenship-related freedoms and non-discrimination, also with respect to the TCN family members of European citizens.<sup>18</sup> The principle of family unity has prevailed

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<sup>15</sup> Council of the European Union, Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23.1.2004.

<sup>16</sup> Council of the European Union, Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009.

<sup>17</sup> See Council of the European Union, Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004; see also Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289/15, 3.11.2005.

<sup>18</sup> See Directive 2004/38/EC of the European Parliament and 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 amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30 April 2004; see also S. Carrera, "What does free movement mean in theory and practice in an enlarged EU?", *European Law Journal*, Vol. 11, No. 6, November 2005(b), pp. 699-721; and T. Kostakopoulou, "European Citizenship: Writing the Future", *European Law Journal*, Special Issue on EU Citizenship, Vol. 13, No. 5, 2007, pp. 623-646.

over the predominant relevance granted to the nationality criteria when guaranteeing the rights of freedom of movement and residence, and the right to equality of treatment with nationals of the receiving state to TCN family members.

While the right of family members who are TCNs to enter and reside in an EU member state stems from the family relationship, the act of mobility still plays a fundamental role. When the EU national stays ‘at home’, they cannot rely on the rights contained in Directive 2004/38/EC, as the case is considered to be a wholly internal situation to the member state and therefore national law applies. As Guild (2004) has explained, EU law related to the right of family reunification can be only accessed when the citizen is a migrant in another member state, or has been a migrant and then returns to his/her home member state or is exercising a cross-border economic activity.<sup>19</sup> The relevance of mobility was confirmed by the CJEU in the *MRAX* case (C-459/99),<sup>20</sup> where it held that the exercise of the freedom of movement (or related activities) constitutes the premise for the individual to benefit from EU law. The element of mobility remains central to the recognition of the citizenship-related freedoms of TCNs under Directive 2004/38/EC. Not surprisingly, this part of the Directive has been among those for which national transposition by EU member states has been most unsatisfactory.<sup>21</sup>

Who is a ‘family member’ in the context of citizenship and free movement law? Art. 2.2 of the Citizens Directive establishes that the definition of a family member includes, *irrespective of their nationality*, the spouse, the registered partner (if the legislation of the host member state treats registered partnerships as equivalent to marriage), direct descendants under the age of 21 or who are dependents, as well as the dependent direct relatives in ascending line. Art. 3.2 of the Directive provides EU member states with the possibility to facilitate the entry and residence of “any other family members” not falling within any of these categories who are ‘dependent’ on the Union citizen or owing to “serious health grounds” requiring the personal care of the family member by the Union citizen, as well as “the partner with whom the Union citizen has a duly attested and durable relationship”.<sup>22</sup>

The Citizens Directive 2004/38/EC allows member states to keep the residence card requirement with respect to the family members of Union citizens who are TCNs for periods of residence longer than three months.<sup>23</sup> While the freedoms granted to family members are dependent upon their family relationship (in the absence of which, the right to stay will depend on ordinary immigration law provisions), the Directive grants protection to family members in the event of death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership by calling for the adoption of measures “to ensure that in such circumstances family members already residing within the territory of the host member state retain their right of residence exclusively on a personal basis”.<sup>24</sup> It also recognises a right of

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<sup>19</sup> See E. Guild (2004), op. cit.

<sup>20</sup> See Case C-459/99, *Mouvement contre le racisme, l'antisemitisme and la xenophobia ASBL (MRAX) v. Belgian state* [2002] ECR I-6591.

<sup>21</sup> Refer to S. Carrera and A. Faure-Atger, *Implementation of Directive 2004/38 in the Context of EU Enlargement: A Proliferation of Different Forms of Citizenship?*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, April 2009; see also K. Groenendijk, R. Fernhout, E. Guild, P. Boeles, R. Cholewinski and P. Minderhoud, *European Report on the Free Movement of Workers in Europe in 2007*, European Commission, Brussels, December 2008 (retrieved from <http://ec.europa.eu/social/main.jsp?catId=475&langId=en>).

<sup>22</sup> See Directive 2004/38/EC, op. cit.

<sup>23</sup> See Recital 13 of the Preamble.

<sup>24</sup> See Recital 15 of the Preamble and Arts. 12 and 13.

permanent residence not only for European citizens, but also for their family members after having resided for a continuous period of five years.<sup>25</sup>

The *European citizenship-related* rights of entry and residence of TCNs who are family members can be summarised as follows:

- First, deterring European citizens from being accompanied by family members, independent of their nationality, would jeopardise and constitute an unacceptable obstacle to the exercise of the general principle of freedom of movement, which is a fundamental component of European citizenship.<sup>26</sup>
- Second, the entry and residence of TCN family members is compatible with Art. 8 of the European Convention of Human Rights (ECHR) and Art. 7 of the EU Charter of Fundamental Rights.<sup>27</sup>
- Third, the right of residence derives directly from EU law and is not conditional on holding any administrative document issued by the receiving member state (e.g. a residence permit or visa).<sup>28</sup> Therefore, while the Citizens Directive 2004/38/EC stipulates that the leave to enter will be granted only if the individual has a valid passport and an entry visa, failure to provide these documents does not allow the receiving state to reject the TCN's right to enter and reside. Member states are also obliged to offer "every facility" to TCN family members to obtain the necessary administrative documents.<sup>29</sup>
- Fourth, TCN family members who have resided regularly for a continuous period of five years with a Union citizen in a second EU member state enjoy a right of permanent residence.<sup>30</sup> TCN family members who have the right of residence or the right of permanent residence in a member state are entitled to an independent right to take up employment or self-employment<sup>31</sup> and to enjoy equality of treatment in comparison with nationals.<sup>32</sup>
- Fifth, restrictions to the right of entry and residence of TCN family members must comply with the general principles of EU law, such as those of proportionality and non-discrimination. Derogations by EU member states of EU freedoms and rights falling

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<sup>25</sup> See Recital 17 of the Preamble.

<sup>26</sup> Refer to Case C-459/99, *Mouvement contre le racisme, l'antisemitisme and la xenophobia ASBL (MRAX) v. Belgian state*, op. cit.; Case C-318/05, *Commission v. Germany* [2007] ECR I-0000; Case C-60/00, *Carpenter* [2002] ECR-I-6279; and Case C-291/05, *Eind* [2007] I-10719.

<sup>27</sup> See Case C-413/99, *Baumbast und R v. Secretary of the State for the Home Department* [2002] ECR I-7091; Case C-109/01, *Akrich* [2003] ECR I-9607; Case C-157/03, *Commission v. Spain* [2005] ECR I-2911.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Art. 5.4 of Directive 2004/38/EC.

<sup>30</sup> See Art. 16 of Directive 2004/38/EC. In light of Art. 16.3,

[c]ontinuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

<sup>31</sup> See Art. 23 of Directive 2004/38/EC.

<sup>32</sup> See Art. 24 of Directive 2004/38/EC; see also J.Y. Carlier and E. Guild (eds), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L'Homme de l'Université Catholique de Louvain, Brussels: Bruylant, 2006.

under the scope of European citizenship on the basis of “public policy, public security and public health” must also be interpreted strictly. The person involved must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”.<sup>33</sup> The impact of expulsion on fundamental rights must also be taken into consideration.<sup>34</sup> Furthermore, as stated by Directive 2004/38/EC, “the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be”.<sup>35</sup>

What have been the implications of individuals’ litigation before the CJEU for the freedom to move and reside of TCN family members?

### **2.1.1 Freedom to move and reside: The Metock case**

The CJEU was called upon to address the right of entry of the TCN family members of Union citizens in the *Metock* ruling, where it “re-embraced the fundamentals of the free movement of persons”.<sup>36</sup> The case concerned four TCNs married to European citizens exercising their respective free movement rights in Ireland.<sup>37</sup> Mr Metock was a national of Cameroon who unsuccessfully applied for asylum in Ireland in June 2006. In October 2006, he married Ngo Ikeng, also originally from Cameroon, who had acquired UK nationality and resided and worked in Ireland since late 2006. The couple had met in Cameroon in 1994 and had two children. Mr Metock’s application for a residence card as the spouse of a Union citizen was refused by the Irish authorities on the grounds that he did not satisfy the condition of prior lawful residence in another member state. The factual situation of the other three applicants was essentially similar. All four applicants were denied a residence permit under the Citizens Directive 2004/38/EC on the basis that they had not previously been lawfully resident in another member state. This provision of the Irish implementing measure of Directive 2004/38/EC had been initiated on the basis of the previous CJEU *Akrich* ruling,<sup>38</sup> which had introduced the possibility for member states to require that, in order to benefit from the rights conferred by the Treaty, TCN spouses should have previously been lawfully resident in another member state (the so-called ‘first point of entry’ principle).<sup>39</sup> Yet in *Metock*, the CJEU overruled *Akrich*, stating, “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.”<sup>40</sup> The CJEU

<sup>33</sup> Refer to Case C-30/77, *Régina v. Pierre Bouchereau* [1977] ECR 01999; Joined Cases C-482/01 and C-493/01, *Orfanopoulos* [2004] ECR I-5257; Case C-157/03, *Commission v. Spain*, ECR [2005] I-2911.

<sup>34</sup> See Joined Cases C-482/01 and C-493/01, *Orfanopoulos*, op. cit.

<sup>35</sup> Refer to Recital 24 of the Preamble.

<sup>36</sup> See Case C-127/08, *Metock and Others* [2008] ECR I 6241; see also E. Fahey, “Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*”, *Legal Issues of Economic Integration*, Vol. 36, No. 1, 2009, pp. 83-89.

<sup>37</sup> See S. Peers, “Free Movement, Immigration Control and Constitutional Conflict”, *European Constitutional Law Review*, Vol. 5, No. 5, 2009(a), pp. 173-196; see also J. Handoll, “The *Metock* Case: Union Citizenship, Family Reunion and the Abuse of Rights”, in P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the Free Movement of Workers: The European Challenges Ahead*, Nijmegen: Wolf Legal Publishers, 2009, pp. 173-188.

<sup>38</sup> See Case C-109/01, *Akrich*, op. cit.

<sup>39</sup> For criticism on this ruling, see for instance, A. Arnul, *The European Union and its Court of Justice*, Oxford: Oxford University Press, 2006, p. 460; see also R. White, “Conflicting Competences: Free movement rules and immigration laws”, *European Law Review*, Vol. 29, No. 2, 2004, p. 385.

<sup>40</sup> Refer to para. 58 of the judgement. On the CJEU’s interpretation of the condition of previous lawful residence, refer also to Case C-1/05, *Jia* [2007] ECR I 1.

concluded that TCN spouses of European citizens exercising their freedom to move cannot be required to have been lawfully resident in a member state in order to rely on the provisions of Directive 2004/38/EC. In its view,

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.* (Emphasis added).<sup>41</sup>

It continued by saying that

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 an Member State whose nationality they do not possess would vary from one Member State to another,* according to the provision of national law concerning immigration. (Emphasis added).<sup>42</sup>

The CJEU considered that this ‘inequality of treatment’ among the EU member states would be contrary to the very objectives of the internal market and the abolition of obstacles to the free movement of persons. Furthermore, it was also established that it makes no difference *when or where* the marriage was concluded, or whether the TCN entered the host member state before or after the Union citizen.

## 2.2 Non-discrimination on the basis of nationality

With regard to the prohibition of discrimination on the grounds of nationality, the Court has stated in the *Vatsouras* case<sup>43</sup> that the personal scope of Art. 18 of the Treaty on the Functioning of the European Union (TFEU) (ex-Art. 12 EC Treaty) is restricted to cases of discriminatory treatment among nationals of the member states. The CJEU asserted that the provision “is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”.<sup>44</sup> Art. 18, however, is worded in a way that does not refer exclusively to ‘European citizens’. According to this provision, discrimination on the grounds of nationality shall be prohibited “within the scope of application of the Treaties”. Consequently, it could be argued that Art. 18 TFEU also applies to TCNs in situations falling “within the scope of application of the Treaties”.<sup>45</sup> Moreover, it could be inferred from the case law of the Court that TCNs may rely on the principle of non-discrimination on the grounds of nationality as a general principle of EU law. In the *ČEZ* case,<sup>46</sup> the CJEU clarified that even in a situation in which Art. 18 TFEU is not applicable the general principle of non-discrimination on grounds of nationality could be still invoked. The Court held that Art. 18 TFEU, which prohibits any discrimination on grounds of nationality, is merely a specific expression of the general principle of equality.<sup>47</sup> Hence, although the prohibition of nationality discrimination is laid

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<sup>41</sup> See para. 63.

<sup>42</sup> Refer to para. 67 of the judgement.

<sup>43</sup> See Joined Cases C-22/08 and C-23/08, *Vatsouras* [2009] ECR I-0000.

<sup>44</sup> Refer to para. 52 of the judgement.

<sup>45</sup> For this opinion, see C. Hublet, “The Scope of Article 12 of the Treaty of the European Communities Vis-à-Vis Third-Country Nationals: Evolution at Last?”, *European Law Journal*, Vol. 15, No. 6, 2009, p. 757.

<sup>46</sup> See Case C-115/08, *ČEZ* [2009] ECR I-0000.

<sup>47</sup> Refer to paras. 88-91 of the judgement.

down in Art. 18 TFEU, it constitutes a general principle that is also applicable in cases where this provision cannot be relied upon.

The legal position of non-EU national workers and their families from certain non-EU countries has been subject to international agreements granting them European citizenship-related freedoms, especially in the domain of employment and some social security aspects. While these agreements (and accompanying measures) do not confer a right of entry to the EU, they are seminal in the context of ensuring respect of the principle of non-discrimination on the basis of nationality in relation to working conditions (including dismissal and social security).<sup>48</sup> The agreements date back to the very origins of the European Economic Community (EEC) in the 1960s and 1970s. This has been the case for Turkey, Morocco, Algeria and Tunisia, with which the EU concluded an Association Agreement or Euro-Mediterranean Agreement Establishing an Association. These Agreements were mainly aimed at developing economic, trade and political relationships among the respective regions, but also cover ‘social aspects’, such as those in the scope of social security coordination and labour mobility rights. One of the most relevant principles of these agreements is that they aim at granting freedom from discrimination on the basis of nationality in the fields of employment and social security, and in the case of Turkey, to progressively ensure the free movement of workers and improve standards of living. Individuals’ litigation before EU courts has clarified and further developed the citizenship-related rights belonging to nationals from these countries.

### **2.2.1 Employment, provision of services and freedom of establishment**

In the case of Turkey, the EU concluded an Association Agreement on September 1963 (Council Decision No. 3685, December 1963) and an Additional Protocol of November 1970 (Council Regulation (EEC) No. 2760/72 of December 1972).<sup>49</sup> One of the underlying presumptions of the Association Agreement was the eventual membership of Turkey to the EU. Among its various provisions, Art. 36 of the Protocol must be underlined, as it envisages the gradual establishment of the free movement of workers between the EU and Turkey.<sup>50</sup> In Arts. 12-14 of the Agreement, the contracting parties agreed that they would be guided by the respective fundamental freedoms under EU law for the purpose of securing freedom of movement for workers between them and abolishing restrictions on freedom of establishment and services. Art. 9 provides for the need to ensure non-discrimination on the basis of nationality. The right of admission remains in the hands of member states, yet once a Turkish worker has entered the territory Council Decision No. 1/80 will apply, providing to the individual security of residence (which will no longer be dependent on national immigration law).<sup>51</sup>

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<sup>48</sup> See H. Verschueren, “Social Security Co-ordination in the Agreements between the EU and Mediterranean Countries, in particular Turkey and the Maghreb Countries”, in D. Pieters and P. Schoukens (eds), *The Social Security Co-ordination between the EU and Non-EU Countries*, Social Europe Series, Vol. 20, Antwerp: Intersentia, 2009, pp. 19-56; see also S. Peers, “EC Immigration Law and EC Association Agreements: Fragmentation or Integration?”, *European Law Review*, Vol. 34, No. 4, 2009(b), pp. 628-638.

<sup>49</sup> See N. Rogers, *A Practitioners’ Guide to the EC-Turkey Association Agreement*, The Hague: Kluwer Law International, 2000; see also E. Guild, *Immigration Law in the European Community*, The Hague: Kluwer Law International, 2001.

<sup>50</sup> Refer to Case C-12/86, *Demirel* [1987] ECR 3719.

<sup>51</sup> Art. 6 of this Decision states that

[a] Turkish worker duly registered as belonging to the labour force of a Member State: - shall be entitled in that Member State, after one year’s legal employment, to the renewal of his permit to

Regarding the freedom of establishment and the freedom to provide services, Art. 41 of the Additional Protocol contains a ‘standstill clause’, which precludes the introduction of any new restrictions in this respect. Moreover, beyond the rights and freedoms formally recognised in the Agreement, Protocol and Decision, the CJEU jurisprudence has not only recognised the direct effect of their provisions (as long as they are clear, precise and unconditional), but it has also interpreted certain key concepts and provisions from the prism of European citizenship and free movement law. This has been the case for instance in relation to the concept of ‘worker’.<sup>52</sup> Similarly, the concepts of ‘public policy’, ‘public security’ or ‘public health’, which may justify the expulsion of a Turkish worker and her/his family from the EU as stipulated in Art. 14 of the Decision, must be interpreted in the light of European citizenship and free movement law.<sup>53</sup>

Concerning the right to work, on several occasions the CJEU has interpreted the obligations arising from the EEC–Turkey Association Agreement and Decision No. 1/80 in a way that has generally enhanced the security of residence and employment status of Turkish migrants.<sup>54</sup> The Court has taken the most proactive stance concerning Turkish citizens who are self-employed or providing services<sup>55</sup> by relying on the standstill clause contained in Art. 41(1) of the Additional Protocol in order to establish that Turkish nationals exercising their freedom of establishment may not be subject to stricter conditions than those applicable at the time when the Additional Protocol entered into force.<sup>56</sup>

### 2.2.1.1 Who is a worker? The Payir and Genc cases

The CJEU has consolidated the rights of Turkish workers by interpreting the concept of worker under Art. 6(1) of Decision No. 1/80 in an analogy with the concept of worker under Art. 45 TFEU. In *Payir*,<sup>57</sup> the Court had to deal with the question of whether au pairs and students, conducting part-time work alongside their studies, could be considered to fulfil the criterion of being “duly registered as belonging to the labour force” of the host member state.<sup>58</sup> The British Home Office underlined that the first applicant had been granted leave to enter the UK as an au pair with the primary objective of learning English, whereas the second and third applicants had been admitted for the purpose of studies, even though they were allowed to work for up to 20

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work for the same employer, if a job is available; - shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation; - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

<sup>52</sup> See Case C-188/00, *Kurz* [2002] ECR I-10691 and Case C-340/97, *Nazli* [2000] ECR I-957.

<sup>53</sup> See Case C-188/00, *Kurz*, op. cit.

<sup>54</sup> See P. Shah, *Activism in the European Court of Justice and Changing Options for Turkish Citizen Migrants in the United Kingdom*, Research Paper No. 25/2009, Queen Mary School of Law Legal Studies, University of London, 2009.

<sup>55</sup> Arts. 13 and 14 of the Agreement Establishing an Association between the European Economic Community and Turkey (signed at Ankara, 1 September 1963), OJ 1973 C113.

<sup>56</sup> See Case C-37/98, *Savas* [2000] ECR I-2927, para. 70. For more details see also A. Ott, “The Savas Case – Analogies between Turkish Self-Employed and Workers?”, *European Journal of Migration Law*, Vol. 2, Nos. 3-4, 2000, pp. 445-458 and K. Groenendijk, “Noot bij: HvJ EG zaak C-37/98”, *Rechtspraak Vreemdelingenrecht*, 2000/91, 2000, p. 354.

<sup>57</sup> Refer to Case C-294/06, *Payir and Others* [2008] ECR I-203.

<sup>58</sup> See Art. 6(1) of Decision No. 1/80.

hours per week.<sup>59</sup> Consequently, the British authorities, supported by the German, Italian and Dutch governments, argued that Turkish nationals who have not entered the host member state as workers cannot rely on Art. 6(1) of Decision No. 1/80, even if they are performing genuine and effective economic activities. According to these member states, allowing students and au pairs to rely on Art. 6(1) would undermine national autonomy in determining the conditions for the entry of Turkish nationals and encourage the circumvention of national immigration legislation.<sup>60</sup> Yet, the CJEU provided a broad interpretation of the concept of ‘worker’ under Decision No. 1/80, referring to the criteria of non-marginal, genuine and effective economic activities<sup>61</sup> that are equally applied to Union citizens.<sup>62</sup> This means that students and au pairs can rely on the rights contained in Decision No. 1/80, provided they comply with the criteria contained in Art. 6(1) therein. The Court underlined that member states may not make the rights conferred upon Turkish workers by virtue of Decision No. 1/80 subject to any conditions connected with the reasons for which the right to enter, reside and work was initially granted.<sup>63</sup>

An even more explicit parallel between EU and Turkish workers was drawn in *Genc*,<sup>64</sup> where the Court underlined that to ascertain whether a Turkish migrant can be considered a ‘worker’, it is necessary to refer to the interpretation of the concept of worker in EU law. Ms Genc, a Turkish national, had entered Germany in July 2000 to join her equally Turkish spouse. She obtained a residence and work permit and took up employment as a cleaner for 5.5 hours per week. At the time that she applied for a residence permit, she received social security benefits in addition to the income from her employment. She could no longer derive a right of residence from her husband, who had become a self-employed person and ceased to be a worker in the sense of Decision No. 1/80 in May 2003. According to the German authorities, Ms Genc’s economic activity of 5.5 hours per week could not be regarded as legal employment in the sense of Decision No. 1/80.

The Court held that “in order to ascertain whether the first condition laid down in Article 6(1) of Decision No. 1/80 is fulfilled, it is...necessary to refer to the interpretation of the concept of ‘worker’ in European Union law”.<sup>65</sup> Just as in the case of EU workers, it is ultimately for the national court to decide whether the employment in question is real and genuine. Yet, the CJEU stressed that even if a person is working for a very limited number of hours, factors such as the right to a number of days of paid leave, the continued payment of wages in the event of sickness, a contract of employment and the contractual relationship with the same undertaking for almost four years indicate that the employment is real and genuine.<sup>66</sup> The Court relied

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<sup>59</sup> See the AG Opinion in Case C-294/06, *Payir and Others*, op. cit., delivered on 18 July 2007, paras. 7, 8 and 12.

<sup>60</sup> The German and Dutch governments also raised the concern of an inconsistent approach in interpreting Decision No. 1/80 and Directive 2004/114/EC, which clearly distinguishes between a student and a worker.

<sup>61</sup> See Case C-294/06, *Payir and Others*, op. cit., para. 31.

<sup>62</sup> For the definition of the concept of ‘worker’ under Art. 45 TFEU, see inter alia Case 66/85, *Lawrie-Blum* [1986] ECR 2121, paras. 16 and 17, and Case C-228/07, *Petersen* [2008] ECR I-6989, para. 45.

<sup>63</sup> It is notable that the Court deviated in this respect from the Opinion of Advocate General Kokott, who had argued that even though prima facie both students and au pairs satisfy the conditions of Art. 6(1) of Decision No. 1/80, students, as opposed to au pairs, should not be able to benefit from Art. 6(1) of Decision No. 1/80. See the AG Opinion in Case C-294/06, *Payir and Others*, op. cit., delivered on 18 July 2007, paras. 51 and 85.

<sup>64</sup> See Case C-14/09, *Hava Genc* [2010] ECR I-0000, para.18.

<sup>65</sup> Refer to para. 18 of the judgement.

<sup>66</sup> See paras. 27-33 of the judgement.

heavily on its case law regarding EU workers, emphasising that employment that yields an income lower than the minimum required for subsistence or normally does not exceed even 10 hours a week does not prevent the person concerned from being regarded as a worker. The overall assessment of Ms Genc's employment relationship made it necessary to take into account factors relating not only to the number of working hours and the level of remuneration, but also that she had a right to 28 days of paid leave, to the continued payment of wages in the event of sickness and that her contract of employment was subject to the relevant collective agreement. Also, the duration of her contract of almost four years had to be taken into account. All of these factors were seen by the Court as an indication that the professional activity was real and genuine.

In addition, the CJEU has consistently stressed that owing to the primacy of EU law and the direct effect of Art. 6 of Decision No. 1/80, member states are not permitted to modify unilaterally the scope of the system of gradually integrating Turkish workers into the labour force of the host member state. For this reason, they are prevented from applying any measure restricting the right of employment and residence of Turkish workers once the conditions laid down in Decision No. 1/80 have been fulfilled.<sup>67</sup> The right of access to the labour market of the host state and the right of residence are thus not dependent on the conditions under which the rights of entry and residence were initially granted under national law.<sup>68</sup> As a consequence, even though Ms Genc's initial purpose of residence as a family member of a migrant worker had ceased to exist, she could not be subject to any additional conditions for relying on Art. 6(1) of Decision No. 1/80. The reasoning of the national court that an extension of Ms Genc's residence permit could not be justified by any interest that merits protection was not accepted. According to the Court, the right of residence of a Turkish worker within the meaning of Art. 6(1) of Decision No. 1/80 "cannot be made subject to additional conditions as to the existence of interests capable of justifying residence or as to the nature of the employment".<sup>69</sup>

### 2.2.1.2 Residence permits: *The Sahin case*

In the *Sahin* case,<sup>70</sup> the Court held that the standstill clauses contained in Art. 41(1) of the Additional Protocol and Art. 13 of Decision No. 1/80 have identical objectives and must therefore be interpreted in the same way. The case concerned a Turkish citizen, Mr Sahin, who had been living in the Netherlands together with his Dutch wife on the basis of a residence permit since 2000. His application for an extension of the residence permit in February 2003 was refused on the basis of the fact that he had not paid an administrative charge of €169. Mr Sahin filed a complaint against the negative decision, and after proceedings before a district and appeal court, the case arrived before the Council of State, which referred a question to the CJEU. The Council of State wanted to know, first, whether a Turkish national such as Mr Sahin could rely on Art. 13 of Decision No. 1/80, and second, whether the standstill clause contained therein precludes legislation requiring a Turkish national to pay administrative charges to obtain

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<sup>67</sup> Refer to Case C-1/97, *Birden* [1998] ECR I-7747, para. 37; Case C-188/00, *Kurz*, op. cit., para. 66; and Case C-14/09, *Hava Genc*, op. cit., paras. 37-39.

<sup>68</sup> See Case C-14/09, *Hava Genc*, op. cit., para. 40. There are only two kinds of restrictions of an exhaustive nature that may be imposed on Turkish citizens fulfilling the conditions contained in Decision No. 1/80: persons constituting by reason of their own personal conduct a genuine and serious threat to public policy, public security or public health (Art. 14(1)); and the person has left the territory of that state for a significant length of time without legitimate reason. See Case C-373/03, *Aydinli* [2005] ECR I-6181, para. 27; Case C-502/04, *Torun* [2006] ECR I-1563, para. 21; Case C-349/06, *Polat* [2007] ECR I-8167, para. 21; and Case C-453/07 *Er* [2008] ECR I-7299, para. 30.

<sup>69</sup> See para. 44 of the judgement.

<sup>70</sup> See Case C-242/06, *Sahin* [2009] ECR I-0000.

a residence permit or an extension thereof, in particular when those charges are significantly higher than those required of Community nationals.

Mr Sahin, who had arrived as a family migrant, had been allowed to work and had held several jobs in the Netherlands between 2000 and 2002. Yet, none of these jobs had lasted for more than a year without interruption in the service of the same employer, with the result that he could not rely on Art. 6 of Decision No. 1/80. The Court reiterated that “Article 13 of Decision No. 1/80 is not subject to the condition that the Turkish national concerned satisfy the requirements of Article 6(1) of that decision and that the scope of that Article 13 is not restricted to Turkish migrants who are in paid employment”.<sup>71</sup> To the contrary, according to the Court Art. 13 is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and residence under Art. 6(1) (as long as their entry and residence in the territory of the member state is lawful).

Regarding the scope of the standstill clause in Art. 13 of Decision No. 1/80, it was undisputed that the introduction of fees for the extension of a residence permit was ‘new’ legislation within the meaning of that article. Nevertheless, the CJEU reiterated that the standstill clause does not prohibit the adoption of new rules that apply in the same way to both Turkish nationals and Community nationals. Thus, the standstill clause does not, as such, preclude the introduction of fees for the granting or extension of a residence permit.<sup>72</sup> But such legislation may not amount to creating a new restriction within the meaning of Art. 13 of Decision No. 1/80, and as such, the fee may not be disproportionate to the amount requested from European citizens. The Court stated in para. 71 of the judgement that “although a Turkish national to whom those provisions apply must certainly not be placed in a position more advantageous than that of Community nationals, he cannot on the other hand be subjected to *new obligations which are disproportionate as compared with those established for Community nationals*” (emphasis added).

In the case at hand this meant that the difference in treatment between Turkish nationals, who had to pay €169 for the extension of a residence permit, compared with European citizens who were required to pay €30 for a similar application, was not justified. The Court did not accept any of the arguments put forward by the Dutch government regarding the difference in fees. In particular, it ruled out the argument that the enquiries and checks required before a residence document can be issued to a Turkish national are more complex and costly.

A crucial consequence of the *Sahin* case and the analogy drawn between Art. 13 of Decision No. 1/80 and Art. 41(1) of the Additional Protocol is that the standstill clause extends to rules related to continued residence as well as first admission to the territory of the member states. The Court stated in para. 64 of the judgement that the standstill clause prohibits the introduction of any new restriction “including those relating to the substantive and/or procedural conditions governing the first admission”. Therefore, even though Mr. Sahin was applying for the renewal of a residence permit, it must be concluded that the standstill clause contained in Art. 13 of Decision No. 1/80 prohibits the introduction of any new measures restricting the exercise of the freedom of movement for workers, including those on first admission.<sup>73</sup> This prohibition also includes any additional requirement for the entry of Turkish workers introduced after the entry

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<sup>71</sup> Refer to paras. 50 and 51 of the judgement.

<sup>72</sup> According to para. 70 of the judgement, “[t]he standstill clause in Article 13 of Decision No. 1/80 therefore does not, as such, preclude the introduction of legislation of that type which makes the granting of a residence permit or an extension of the period of validity thereof conditional on the payment of administrative charges by foreign nationals residing in the territory of the Member State concerned”.

<sup>73</sup> See paras. 62-65 of the judgement.

into force of the Additional Protocol, covering fees for residence permits, integration and language requirements, resource requirements, etc.

### 2.2.1.3 *Conditions for admission: Commission v. the Netherlands*

The CJEU confirmed this line of reasoning in another case against the Netherlands decided on 29 April 2010.<sup>74</sup> The European Commission brought infringement proceedings against the Netherlands, claiming that the charges imposed on Turkish nationals from 1 February 1994 for obtaining and extending a residence permit were contrary to the standstill and non-discrimination rules contained in the EU legislation concerning the EEC–Turkey Association Agreement.

The Dutch government, supported by the German government, put forward several arguments as to why it considered its system of fees to be in line with EU law. First, the Dutch as well as the German government argued that the charges did not undermine the substance of the right of access to the labour market, as they are a mere administrative formality rather than a substantive condition for obtaining the right of residence. As such, they cannot be considered a restriction for the purpose of the standstill clause. Second, the Dutch government upheld that the charges were not discriminatory, since there are fundamental differences between the situation of Turkish nationals and that of Union citizens, which means that the benefits of Directive 2004/38/EC cannot be extended to Turkish citizens. Third, the Dutch government contended that the charges were proportionate as Turkish nationals wishing to immigrate to a member state normally have sufficient means to pay them, and were reasonable as they are based on the cost price of producing such documents. Lastly, it was argued that the charges did not undermine fundamental rights and that exemptions can be made in favour of foreign nationals who are able to rely on Art. 8 ECHR.

The Court did not accept any of these arguments. First, the CJEU clarified a point that was already apparent in *Sahin*: the possibility to apply the standstill clause contained in Art. 13 of Decision No. 1/80 to conditions concerning first admission. The Court held that

Article 13 of Decision No. 1/80 precludes the introduction into Netherlands legislation...of any new restrictions on the exercise of the free movement of workers, including those relating to the *substantive and/or procedural conditions governing the first admission* to the territory of that Member States of Turkish nationals intending to exercise that freedom.<sup>75</sup> (Emphasis added.)

Thus, Art. 41(1) of the Additional Protocol and Art. 13 of Decision No. 1/80 preclude the introduction of new requirements for the entry of Turkish citizens intending to take up employment, to provide services or to establish themselves in one of the member states. Even though the two cases concerned the introduction of charges for the issue of residence permits, the principle, covering substantive and procedural conditions governing first admission, must be extended to all other entry requirements.

Furthermore, the Court relied on Art. 2(1) of the Association Agreement, which establishes the objective of approximating the rights of Turkish nationals and Union citizens by progressively securing the free movement of workers and the abolition of restrictions on freedom of establishment and freedom to provide services. According to the Court, the principle of non-discrimination on grounds of nationality (Art. 9 of the Association Agreement and Art. 10 of Decision No. 1/80) contributes to facilitating the progressive integration of migrant Turkish

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<sup>74</sup> Refer to Case C-92/07, *Commission v. the Netherlands* [2010] ECR I-0000.

<sup>75</sup> Refer to para. 49 of the judgement.

workers and Turkish citizens moving for the purposes of establishment or service provision. Therefore, the Court concluded, the Netherlands

cannot justify the difference existing between the contested charges and those required from citizens of the Union by referring to the circumstances that free movement of workers, freedom of establishment or freedom to provide services in the Union do not benefit Turkish nationals as completely as they benefit citizens of the Union. The Commission correctly relied on the non-discrimination rules as well as on Article 59 of the Additional Protocol.<sup>76</sup>

The Court relied on the non-discrimination provisions in conjunction with the standstill clause to argue that the fees demanded from Turkish citizens must be proportionate in relation to those demanded from Union citizens. The argument that there are fundamental differences between Turkish nationals and European citizens owing to the fundamental objective of establishing an internal market and to ensuring the free movement of Union citizens was not accepted.<sup>77</sup> Finally, the CJEU clarified that charges applicable to Turkish nationals that are slightly higher than those claimed from citizens of the Union may in certain cases be considered proportionate. Yet, the enormous difference in fees as applied in the Netherlands was clearly seen as a violation of the principle of proportionality. Moreover, in the case of Turkish workers as well as Turkish nationals wishing to avail themselves of the freedom of establishment or freedom to provide services and their family members, the imposition of different fees infringes the right to non-discrimination.<sup>78</sup> It must be concluded from this paragraph that these categories of Turkish citizens must be treated in the same way as Union citizens as far as charges for residence permits are concerned, implying in our view that a difference in fees is not permissible.

#### 2.2.1.4 Visas: *The Soysal case*

In *Soysal*,<sup>79</sup> the CJEU was asked to rule on the compliance with Art. 41(1) of the Additional Protocol on the introduction of visa requirements for Turkish nationals entering the territory of a member state to provide a service on behalf of a Turkish company. The case concerned two Turkish lorry drivers who were working for a Turkish company and had to be in possession of a Schengen visa on the basis of Regulation (EC) No. 539/2001 to enter Germany. Such a visa was not required for Turkish citizens on the date of entry into force of the Additional Protocol. The Court held that Art. 41(1) of the Additional Protocol precludes the application of visa requirements to Turkish citizens who are providing services in a member state on behalf of an undertaking established in Turkey, if such requirements were not in force at the date of entry into force of the Additional Protocol. The introduction of visa requirements was considered to constitute a “new restriction” to the right of Turkish nationals to freely provide services in a

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<sup>76</sup> See para. 69 of the judgement.

<sup>77</sup> It must be underlined, however, that in the context of the establishment/services as well as employment, new conditions may be introduced, provided they apply in the same way to both Turkish nationals and Community nationals. That is because by virtue of Art. 59 of the Additional Protocol, Turkish nationals may not receive more favourable treatment than nationals of another member state. Yet, Turkish nationals who are intending to exercise their freedom of establishment, services or employment may not be subject to any conditional requirements that are disproportionate to those applied to EU nationals. See Case C-242/06, *Sahin*, op. cit., paras. 67-69.

<sup>78</sup> See para. 74 of the judgement.

<sup>79</sup> See Case C-228/06, *Soysal and Savatli* [2009] ECR I-0000. Refer also to E. Guild and K. Groenendijk, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal*, Economic Development Foundation Publications, No. 232, Istanbul, March 2010. For a previous analysis of the ruling refer to Peers (2009a), op. cit.

member state within the meaning of Art. 41(1) of the Additional Protocol.<sup>80</sup> In that context, the Court considered it irrelevant that the German legislation in question was implementing a provision of secondary EU law, as international agreements concluded by the EU have primacy over provisions of secondary EU law.<sup>81</sup> The national referring tribunal indicated that the application of the standstill clause at hand would obstruct the general legislative power of the member states, which may affect the position of Turkish nationals. Yet, the Court held that this objection could not be accepted.

### 2.2.2 Social security coordination: The El Youssfi case

The Euro-Mediterranean Association Agreements between the EU and the Maghreb states have also been subject to various CJEU rulings. In several cases, the Court has interpreted the right to equal treatment on social security for workers and their families as contained in the Euro-Mediterranean Agreements concluded with Morocco,<sup>82</sup> Algeria<sup>83</sup> and Tunisia.<sup>84</sup> On the basis of Art. 65(1) of the Association Agreements, Moroccan, Tunisian and Algerian workers and their family members living with them enjoy equal treatment with nationals with respect to social security benefits. The Court held in *Kziber*<sup>85</sup> that Art. 61 (now Art. 65) of the Agreement with Morocco has direct effect. The same applies to the Agreements concluded with Algeria and Tunisia.

The member states have tried to limit the access to social security benefits of workers and family members from the Maghreb states by interpreting the scope *ratione materiae* and *ratione personae* of Art. 65(1) of the Association Agreements restrictively. The CJEU has nonetheless confirmed the broad scope of the principle of non-discrimination laid down in these provisions, therewith strengthening the social security rights of workers from these countries in the EU. The CJEU underlined in cases such as *Echouik*<sup>86</sup> and *El Youssfi*<sup>87</sup> that the principle of non-discrimination implies a right to claim social security benefits “on the same basis as nationals of the host Member State”, barring member states from imposing additional or stricter conditions for migrant workers than those applicable to nationals of that state. As stated by the Court in para. 53 of *El Youssfi*,

[i]t is thus contrary to the abovementioned *principle of non-discrimination* to apply to persons referred to in the first subparagraph of Article 65(1) of the Association Agreement *not only the requirement that they have the nationality of the Member State concerned but also any other condition which nationals are not required to fulfil.* (Emphasis added.)

<sup>80</sup> Refer to para. 57 of the judgement.

<sup>81</sup> See paras. 58 and 59 of the judgement; see also Case C-61/94, *Commission v. Germany* [1996] ECR I-3989, para. 52

<sup>82</sup> Euro-Mediterranean Agreement establishing an association between the EC and Morocco (signed in Brussels on 26 February 1996 and approved on behalf of the Communities by Decision No. 2000/204/EC of 24 January 2000), OJ L 70/1, 18.3.2000.

<sup>83</sup> Euro-Mediterranean Agreement establishing an Association between the EC and Algeria (signed in Valencia on 22 April 2002 and approved on behalf of the Communities by Decision No. 2005/690/EC of 18 July 2005), OJ L 265/1, 10.10.2005.

<sup>84</sup> Euro-Mediterranean Agreement establishing an association between the EC and Tunisia (signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC of 26 January 1998), OJ L 97/1, 30.03.1998.

<sup>85</sup> Case C-18/90, *Onem v. Kziber* [1991] ECR I-199.

<sup>86</sup> Case C-336/05, *Echouikh* [2006] ECR I-5223, paras. 55-58.

<sup>87</sup> Case C-276/06, *El Youssfi* [2007] ECR I-2851, paras. 51-56.

In the case *Hallouzi-Choho*,<sup>88</sup> the Court made clear that for the purpose of granting access to social security benefits, EU member states are not allowed to apply residence requirements to Moroccan workers or their close family members that are not applied to nationals of the member state concerned. Consequently, the provision under Dutch law, according to which certain benefits could only be obtained by persons possessing either the nationality of the Netherlands or fulfilling a residence requirement, was ruled to be contrary to the principle of treating persons covered by Art. 65(1) in the same way as nationals.

The Court clarified the scope *ratione materiae* and *ratione personae* of Art. 65(1) of the Association Agreement in the *El Youssfi* case. The case was about Mrs El Youssfi, a Moroccan widow, who lived with her son in Belgium on the basis of family reunification. She applied for the Guaranteed Income for Elderly Persons, claiming that she had to be treated equal to Belgian nationals in relation to receiving such benefits. But she was not considered to be eligible to receive the Guaranteed Income for Elderly Persons by the Belgian authorities. The CJEU came to a different conclusion. Regarding the scope *ratione materiae* of Art. 65(1) of the Association Agreements, the Court reiterated that the term ‘social security’ must be interpreted by analogy with the same concept in Regulation (EC) No. 1408/71.<sup>89</sup> This means that all kinds of social security benefits covered by Regulation (EC) No. 1408/71 must also be guaranteed to migrant workers and their family members on the basis of Art. 65(1) of the Association Agreement. This includes inter alia a guaranteed income for elderly persons, which is aimed at ensuring their minimum means of subsistence.<sup>90</sup> The Court thus did not accept the argument made by member states that such benefits should be categorised as social assistance, falling outside the scope of Art. 65(1).

Concerning the personal scope of the non-discrimination provision, it applies first of all to workers of Moroccan, Algerian or Tunisian nationality. The Court has also held that not only active workers, but also those who have reached retirement age benefit from the provision.<sup>91</sup> The right to non-discrimination with regard to social security benefits likewise applies to family members residing with the worker in the member state of employment. The Court has interpreted the concept of family members under Art. 65(1) broadly, including the spouse and minor children as well as other close relatives, such as relatives in the ascending line.<sup>92</sup> Mrs El Youssfi could thus rely on the right to non-discrimination on basis of nationality with regard to old age benefits either by virtue of her own status as a former employee or on the basis of a family relationship with her son, as the family member of a Moroccan worker. In the case *Hallouzi-Choho*<sup>93</sup> mentioned above, the Court had to deal with the attempts of a member state to draw a distinction between personal rights and the derived rights of the family members of a Moroccan worker. The Court stressed that Art. 65(1) of the Association Agreement differs from Art. 2 of Regulation (EC) No. 1408/71 in that it does not distinguish between personal and

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<sup>88</sup> Case C-126/95, *Hallouzi-Choho* [1996] ECR I-4807.

<sup>89</sup> See Regulation (EC) No. 1408/71 of 14 June 1971, as amended by Regulation (EC) No. 1992/2006 of 18 December 2006, OJ L 392, 30.12.2006; see also Case C-103/93, *Yousfi* [1994] ECR I-1353 and Case C-103/94, *Krid* [1995] ECR I-719. For more details on the social security rights of Maghreb nationals, see A.P. Van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, Oxford: Hart Publishing, 2003, p. 169 ff.

<sup>90</sup> Refer to Case C-103/94, *Krid* [1995] ECR I-719, paras. 33-35; and Case C-276/06, *El Youssfi*, op. cit., para. 60.

<sup>91</sup> See Case C-18/90, *Onem v. Kziber*, op. cit., para. 27; see also Case C-58/93, *Yousfi v. Belgian State* [1994] ECR I-1353, para. 21.

<sup>92</sup> See Case C-179/98, *Mesbah* [1999] ECR I-7955, para. 46.

<sup>93</sup> See Case C-126/95, *Hallouzi-Choho*, op. cit.

derived rights. Consequently, a family member of a Moroccan worker can rely on Art. 65(1) of the Agreement, even if s/he has never been a worker him-/herself and irrespective of a distinction between personal rights and derived rights under national law. Hence, the Court has interpreted the personal and material scope of Art. 65(1) of the Association Agreements broadly, strengthening the right of migrant workers to non-discrimination and limiting the scope for national derogations from this right.

## 2.3 Family reunification

Directive 2003/86/EC on the right to family reunification provides common EU standards and conditions for TCNs residing lawfully in a EU member state to be reunited with their family members.<sup>94</sup> The academic literature has widely examined its nature, effects and critical aspects, along with its national transposition across the Union.<sup>95</sup> Has the litigation of individuals before EU courts had any impact on the foundations, limits and enactment of European citizenship in this regard?

### 2.3.1 The Chakroun case

In the *Chakroun* case,<sup>96</sup> the CJEU relied on its previous case law concerning Union citizens when interpreting the provisions of Directive 2003/86/EC on the right of family reunification. The CJEU had to provide an interpretation of two provisions of the Family Reunification Directive to determine whether the Dutch implementing measures were in compliance with EU law.<sup>97</sup> The case concerned a Moroccan national, Rhimou Chakroun, who wished to join her equally Moroccan husband Mohammed Chakroun in the Netherlands. Mohammed Chakroun has resided in the Netherlands since 1970 and holds a permanent residence permit. In 1972, two years after his moving to the Netherlands, the couple got married in Morocco, where Rhimou Chakroun continued to reside for the following years. In 2006, she decided to apply for a provisional residence permit (*machtiging tot voorlopig verblijf*) at the Dutch Embassy in Rabat in order to live with her husband in the Netherlands. At that point in time Mohammed Chakroun was receiving unemployment benefits. The Dutch authorities refused the application on the grounds that Mr Chakroun's income was below the minimum income applicable to family formation under the Dutch Aliens Order (*Vreemdelingenbesluit*).

After an unsuccessful objection and appeal against the decision, the case came before the Council of State, which posed the question to the CJEU. It enquired first whether member states are entitled by virtue of Art. 7(1)(c) of Directive 2003/86/EC to deny family reunification to a sponsor who has stable and regular resources to meet general subsistence costs, but who will be entitled to claim special assistance. Second, the Council of State asked whether the Directive,

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<sup>94</sup> Refer to Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *op. cit.*

<sup>95</sup> By way of illustration, refer to H. Schneider and A. Wiesbrock, "The Council Directive on Family Reunification: Establishing Proper Rights for Third Country Nationals?", in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe's Future*, Vol. II: The Position of Third Country Nationals in Europe, Maastricht: Forum Maastricht, 2005, pp. 35-70. See also H. Oosterom-Staples, "The Family Reunification Directive: A Tool Preserving Member State Interest or Conducive to Family Reunification Unity?", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007, pp. 451-488; and K. Groenendijk, R. Fernhout, D. Van Dam, R. Van Oers and T. Strik, *The Family Reunification Directive in EU Member States: The First Year of Implementation*, Nijmegen: Wolf Legal Publishers, 2007.

<sup>96</sup> See Case C-578/08, *Chakroun* [2010] ECR I-0000.

<sup>97</sup> See A. Wiesbrock, "Noot bij HvJ EU, zaak C-578/08", *European Human Rights Cases*, 5, 2010.

and in particular Art. 2(d) thereof, precludes national legislation that makes a distinction according to whether a family relationship arose before or after the entry of the resident into the member state. Under Dutch immigration law, a distinction is drawn between those cases where the family relationship already existed prior the sponsor's entry into the Netherlands (family reunification) and cases where the family relationship was created at a time when the sponsor was already living in the Netherlands (family formation). In the latter case, the sponsor must have an income of at least 120% of the statutory minimum wage of a worker above 23 years of age. In cases of family reunification, the net income must be equal to the statutory minimum wage.

What were the findings by the CJEU?

The Court held that Art. 7(1)(c) of the Directive, which contains the requirement of “stable and regular resources” of the sponsor as a precondition for family reunification, precludes the application of a minimum income requirement that amounts to 120% of the national minimum salary. Even though member states are allowed to take into account the level of minimum national wages when evaluating the sponsor's resources, they may not operate a minimum income level below which all family reunifications will be refused. This stems from the fact that by virtue of Art. 17 of the Directive, an “individual examination of applications for family reunification” is required. Moreover, the concept of ‘social assistance’ in the Directive refers to assistance granted in compensation for a lack of stable, regular and sufficient resources, and not to special assistance, which covers exceptional or unforeseen needs. When interpreting the requirement of having “sufficient resources” so as not to rely on “social assistance”, the CJEU referred to its previous judgement in *Eind*,<sup>98</sup> which concerned a TCN family member of a Union citizen. The question therefore arises as to whether *the analogy* with case law regarding a European citizen implies that the resource requirement under the Directive on Family Reunification (“stable and regular resources”) must be interpreted in the same way as the resource requirement in Directive 2004/38/EC (“sufficient resources”).

Furthermore, the Court underlined that Art. 2(d) of the Directive precludes member states from making a distinction between family relationships that arose before or after the sponsor entered the territory (with the specific exception of refugees as stipulated in Art. 9(2) of the Directive). According to the CJEU,

having regard to that lack of distinction, intended by the European legislature, based on the time at which the family is constituted, and taking account of the necessity of not interpreting the provisions of the Directive restrictively and not depriving them of their effectiveness, the Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive.<sup>99</sup>

In this respect, the CJEU referred to the right to family life under Art. 8 ECHR and Art. 7 of the Charter, but also to its judgement in *Metock*,<sup>100</sup> discussed above. This means that the prohibition of the ‘first point of entry’ principle as established in *Metock* also applies to TCNs relying on Directive 2003/86/EC. For the purpose of benefiting from the provisions of the Directive it is irrelevant *when or where* the marriage of two TCNs took place.

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<sup>98</sup> See Case C-291/05, *Eind*, op. cit.

<sup>99</sup> Refer to para. 64 of the judgement.

<sup>100</sup> See Case C-127/08, *Metock and Others*, op. cit., para. 93; see also S. Peers (2009a), op. cit., pp. 173-196; and S. Currie, “Accelerated justice or a step too far? Residence rights of non-EU family members and the Court's ruling in *Metock*”, *European Law Review*, Vol. 34, 2009, pp. 310-326.

### 3. The act of mobility and EU immigration law: European citizenship-like freedoms

During recent years we have witnessed a slow, yet gradual, Europeanisation of freedom of movement and migration laws in the Union, which has already attributed some ‘citizenship-like freedoms’ to non-EU nationals.<sup>101</sup> The EU is also progressively inserting the mobility element into common laws dealing with the conditions of entry and residence of TCNs in Europe. Several EU Directives include different versions of the freedom to move (intra-EU mobility) to a second EU member state and to enjoy, subject to a number of conditions and requirements, ‘near equality’ of treatment and non-discrimination with nationals of the receiving state. This has been the case so far in the Directives related to long-term resident status, the EU blue card and students and researchers, to which we now turn to analyse.

#### 3.1 The status of TCNs who are long-term residents

One of the components of Directive 2003/109/EC on the status of long-term residents who are TCNs<sup>102</sup> is recognition of the principle of equal treatment for long-term resident TCNs who move to a second member state different from the one that first granted such status in the first place.<sup>103</sup> The conditions under which this can take place are stipulated in Chapter III of the Directive, which is entitled “Residence in the other Member States”, and Arts. 14 to 16. According to Recital 22 of the Preamble, “[t]o avoid rendering the right of residence nugatory, long-term residents should enjoy in the second Member State the *same treatment*, under the conditions defined by this Directive, they enjoy in the Member State in which they acquired the status” (emphasis added).

Art. 14 establishes that a person being recognised by an EU member state as an EU long-term resident shall acquire the right to move and reside to a second member state for a period exceeding three months for reasons of employment or self-employment, to pursue studies or vocational training or “for other purposes”. The Directive therefore aims at promoting the mobility of long-term residents and while doing so grants them ‘quasi-equal’ treatment and protection against expulsion also in the second receiving member state,<sup>104</sup> subject to a number of conditions foreseen in Arts. 15 and 16. Among the various legal requirements, it is interesting to note how the act of mobility will exempt the TCN from complying with integration measures in the second EU member state when s/he is required to pass integration conditions for

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<sup>101</sup> A. Wiesbrock, *Legal Migration to the European Union*, Leiden: Martinus Nijhoff Publishers, 2010(a), (forthcoming).

<sup>102</sup> Refer to Directive 2003/109/EC of 25 November 2003, op. cit.

<sup>103</sup> According to Art. 2(d) of the proposal, “second Member State” means any member state other than the one that for the first time granted long-term resident status to a third-country national and in which that long-term resident exercises the right of residence. Refer for instance to K. Groenendijk, “The Long-Term Residents Directive, Denizenship and Integration”, in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007, pp. 429-450; and also to S. Carrera “Integration as a process of inclusion for migrants? The case of long-term residents in the EU”, in H. Schneider (ed.), *Migration, Integration and Citizenship: A Challenge for Europe’s Future*, Maastricht: Forum Maastricht, 2005(a), pp. 109-138; and to S. Boelaert-Suominen, “Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back”, *Common Market Law Review*, Vol. 42, No. 4, August 2005, pp. 1011-1052.

<sup>104</sup> Refer to Arts. 11 and 12 of the Directive.

acquiring the status in the first EU member state – something that means a mutual recognition of civic integration programmes.<sup>105</sup>

The original intention of the European Commission was to extend the element of mobility to those individuals recognised as refugees or beneficiaries of subsidiary protection. Refugees fell within the personal scope of the original European Commission’s proposal for a directive of 2001,<sup>106</sup> but during the course of negotiations within the Council it was decided to exclude them from the personal scope. The Commission presented a follow-up proposal<sup>107</sup> for a Council directive amending Directive 2003/109/EC, to extend its scope to beneficiaries of international protection, which would have also ensured that beneficiaries of international protection would enjoy the same EU freedoms and protection as long-term resident TCNs after five years of legal residence in an EU member state. The proposal would have recognised a right of residence of beneficiaries of international protection who are long-term residents in a second member state. Because of the failure of this proposal in the Council rooms, persons being granted refugee status or subsidiary protection remain outside the rights granted to long-term resident TCNs, including the right of freedom of movement within the EU.

### 3.2 The EU blue card

In a similar fashion, the EU Blue Card Directive<sup>108</sup> has presented intra-EU mobility as an important element to ensure the added value of the Union’s legal system. Indeed, the original proposal presented by the European Commission considered intra-EU mobility one of the strongest incentives for third-country ‘highly qualified workers’ to enter the EU labour market and called for facilitated conditions for intra-EU mobility as an asset for immigrants and the EU.<sup>109</sup> The role that the freedom for EU-intra mobility has in the promotion of Europe’s role (and added value) and to a certain extent identity in this process remains central.

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<sup>105</sup> See S. Carrera and A. Wiesbrock, *Civic Integration of Third Country Nationals: Nationalism versus Europeanisation in the Common EU Immigration Policy*, CEPS Liberty and Security Series, CEPS, Brussels, October 2009.

<sup>106</sup> European Commission, Proposal for a Council Directive concerning the Status of Third-Country Nationals who are Long-term Residents, COM(2001) 127 final, Brussels, 13 March 2001.

<sup>107</sup> European Commission, Proposal for a Council Directive amending Directive 2003/109 to extend its scope to beneficiaries of international protection, COM(2007) 298, Brussels, 6 June 2007.

<sup>108</sup> See Directive 2009/50/EC, *op. cit.*

<sup>109</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, Brussels, 23 October 2007; see also E. Guild, *EU Policy on Labour Migration: A First Look at the Commission’s Blue Card Initiative*, CEPS Policy Brief No. 145, CEPS, Brussels, November 2007. The impact assessment of the initiative expressly states that

[a]nother *important aspect influencing – if not limiting – the attractiveness* of [the] EU with respect to HSW is represented by the barriers existing for [an] HSW [highly qualified worker] who would like to move to [an]other [Member State]...while there is yet no evidence of these barriers being a substantial element of non-attractiveness for the EU, it can be assumed that facilitating this mobility – as for researchers – could raise the interest of the “best and the brightest” for the EU. *The high barriers to geographical mobility for third-country HSW therefore represent a specific weakness of the EU labour market* and, more generally, of EU policy on economic immigration towards HSW. (Emphasis added.)

See European Commission, Accompanying document to the proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment – Impact Assessment, Commission Staff Working Document, SEC(2007) 1403, Brussels, 23 October 2007, pp. 14-15.

The Directive, which was adopted in 2009, aims at establishing a common fast-track procedure for admission and residence of more than three months for highly skilled workers and their family members, including the facilitation to move (mobility and conditions of residence) to a second member state (intra-EU mobility) and granting them equal socio-economic rights while doing so. Chapter V deals with “Residence in other Member States” and provides the conditions under which this can happen in Art. 18, including for family members. In particular, this article states that an EU blue-card holder having resided legally for a period of 18 months in the first issuing member state (and his/her family members) may move to a second EU member state for the purposes of highly qualified employment, subject to a number of conditions. Art. 18.2 states that “[n]o later than one month after entering the territory of the second Member State, the EU Blue Card holder and/or his employer shall present an application for an EU Blue Card to the competent authorities of that Member States and present all the documents proving the fulfilment of the conditions set out in Art. 5 for the second Member State”.<sup>110</sup>

In contrast with the provisions of Directive 2003/109/EC, EU blue-card holders have been granted the privilege to take into account the periods of legal residence in other EU member states from the one that originally granted that status in order to qualify for the status of long-term residents. They will be granted a residence permit indicating “former EU blue card holder[s]” (Art. 17.2). This is the case as long as they have lived for the last two years in the country where the application for a long-term residence permit was lodged (Art. 16).<sup>111</sup> According to the original proposal presented by the Commission, this derogation from Directive 2003/109/EC allowing for the possibility to cumulate periods of residence in different member states in order to obtain EU long-term residence status aimed at fostering intra-EU mobility. The preferential access to the labour market of the second member state for former blue-card holders with a long-term residence permit was deleted during the Council negotiations.<sup>112</sup>

### 3.3 Students and researchers

The Directives on Students and Researchers<sup>113</sup> attribute a similar relevance to the freedom to move from the first EU member state, granting the status to a second one. Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research (the Researchers’ Directive) provides a special admission procedure and the adoption of conditions of entry and residence applicable to TCNs for stays of more than three months in the member states for the purposes of conducting a research project under a hosting agreement with a research organisation. A researcher means a TCN holding an appropriate higher education qualification, which gives access to doctoral programmes, and who is selected by a research organisation for carrying out a research project for which the above qualification is

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<sup>110</sup> It is necessary to note that during the period of time awaiting the decision of the second member state (which may take up to 90 days), the person may be prohibited from working in the second member state.

<sup>111</sup> Furthermore, according to Art. 16.3,

[f]or the purpose of calculating the period of legal and continuous residence in the Community and by way of derogation from the first subparagraph of Article 4(3) of Directive 2003/109/EC, periods of absence from the territory of the Community shall not interrupt the period referred to in paragraph 2(a) of this Article if they are shorter than 12 consecutive months and do not exceed in total 18 months within the period referred to in paragraph 2(a) of this Article. This paragraph shall apply also in cases where the EU Blue Card holder has not made use of the possibility provided for in Article 18.

<sup>112</sup> See European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final, op. cit.; see also Guild (2007), op. cit.

<sup>113</sup> Refer to Directive 2004/114/EC, op. cit., and Directive 2005/71/EC, op. cit.

normally required. Among the researchers' rights provided in Chapter V of the Directive is the mobility among EU member states stipulated in Art. 13. In light of this provision, the researcher shall be allowed to carry out part of his/her research in another member state subject to the following conditions depending on the duration of stay: less than three months (sufficient resources and not a threat to public security) or more than three months (a new hosting agreement might be required).

Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service provides the conditions and procedural rules for the admission of TCNs to a member state for a period exceeding three months. Art. 8 of the Directive establishes the conditions for mobility in another member state. A TCN who has been admitted as a student and applies to follow in another EU member state part of the studies already commenced, or to complement them with a related course of study in another member state, shall be admitted by the latter member state if s/he evidences that the course genuinely complements the studies, participates in an exchange programme or has been admitted as a student in a member state for no less than two years.

#### **4. Conclusions: TCNs enacting European citizenship**

What are the implications of individuals' litigation before the CJEU and the act of mobility for the foundations, configurations and legal boundaries of European citizenship and the personal scope of the EU's AFSJ advocated by the Stockholm Programme and the Action Plan implementing it? This paper has assessed the impact of the progressive judicialisation of citizenship and migration law, and the relevance of the act of mobility for the changing boundaries of European citizenship. Citizenship of the Union is evolving in unexpected ways, favouring the inclusion and membership of TCNs in citizenship-related and citizenship-like freedoms, benefits and general principles.

The status of TCNs in Europe, and their entitlement to 'European citizenship' freedoms and non-discrimination on the basis of nationality, has been subject to EU law and active litigation before EU courts. The enactment by TCNs of their EU freedoms and benefits, and the consequent judicialisation of European citizenship and free movement law, has often led to proactive and liberal interpretations. At times these interpretations have given rise to unexpected developments in the clarification of existing (or predetermined) rights as well as the emergence of new freedoms and benefits presenting citizenship features for TCNs. The act of individual litigation has the potential of leading to a mutation of the nature (and unravelling the limits) of European citizenship beyond expected legalities and rights as static statuses rooted in the nationality laws (and exclusive competences) of the EU member states. Litigation puts the relationship between the EU institutions, state and the individual under the lens of the rule of law and activates freedoms beyond national authorities' discretion and derogations. The position of the CJEU in this context has been remarkable, as it constitutes a scaling-up of the enactment of citizenship by the individual to another level situated above the state in the EU legal system. The Court has navigated successfully in the high seas of EU politics by ensuring that the rule of law and the general principles upon which the EU legal system has been built (and which are crucial to protecting and safeguarding the EU liberties and benefits enjoyed by the individual) are duly respected by national and EU authorities. By reinterpreting and sometimes challenging some national (restrictive) interpretations and exceptions to EU (citizenship) freedoms, the individual (independently of his/her nationality and immigrant administrative status) is questioning and expanding the limits of 'who' is to be considered a legitimate holder of EU freedoms and who forms part of the European citizenry.

Beyond solely addressing an individual interest or complaint in light of European citizenship law, litigation before the CJEU has led to the clarification, interpretation, widening and development of EU freedoms beyond the remit of nationality. The CJEU landmark rulings studied in this paper have shown that TCNs do enjoy and benefit from a number of European citizenship-related freedoms, rights, benefits and general principles, which are subject to protection and scrutiny at the EU level. This has been already the case in relation to

- the freedom to move and reside by the TCN family members of Union citizens who have exercised their freedom to move to a second EU member state;
- freedom from discrimination on the basis of nationality for nationals of countries such as Turkey, Morocco, Tunisia and Algeria, with whom the EU has concluded international agreements covering aspects related to employment, service provision and freedom of establishment and social security coordination; and
- certain concepts (such as those of worker, social security, social protection and sufficient resources) and principles (proportionality, non-discrimination and fundamental rights) falling formally within the scope of citizenship and free movement law, which have been used to interpret freedoms enjoyed by TCNs in the scope of EU immigration law and exceptions applied by EU member states to the latter.

The expansion of the CJEU's jurisdiction after the entry into force of the Lisbon Treaty (which can now receive preliminary rulings not solely from last-instance national tribunals) is expected to increase the possibilities of strategic litigation on the part of TCNs seeking to claim European citizenship-related entitlements.

Another point highlighted by this paper concerns not just the legal, but additionally the political relevance attributed to the freedom to move by the EU in the scope of both citizenship and immigration law and politics. Free movement functions as the mechanism unlocking European citizenship. The EU conceives this freedom to be at the heart of its identity and added value beyond nationalism. Exercising mobility, and while doing so benefiting from equality of treatment and non-discrimination in comparison with the nationals of the receiving member state, has become a feature of the ways in which European citizenship has been understood and developed. Citizenship at the EU level is one that encourages individuals to move and reside elsewhere within the Union and removes any obstacles exercised by the state on the basis of nationality-based framings. The freedom from discrimination owing to nationality is losing ground in favour of a citizenship that conceives mobility and equality of treatment at its core.

The relevance and operability of a freedom-of-movement dimension is moreover expanding beyond the realm of European citizenship law towards legal venues applying to non-EU nationals. Intra-mobility freedoms in the EU have likewise been granted to certain categories of TCNs in EU immigration law. European citizenship-like freedoms when moving to a second EU member state have been introduced as a benefit for those TCNs falling within the personal scope of the EU Directives on the status of TCNs who are long-term residents, the EU blue card and the ones on researchers and students. The exercise of cross-border mobility, and while doing so being subject to treatment comparable with nationals of the receiving EU member state, has been seen to play a role in promoting the EU's added value and attractiveness for TCNs to choose Europe as their destination.

The expansion of European citizenship-related and citizenship-like freedoms to TCNs is an indication of the loss of discretionary power by the nation-state as well as a clear signal that a new European citizenship of TCNs is already in the making. The requirement of being a national of an EU member state in order to benefit from citizenship-related rights is progressively becoming less central in the recognition and allocation of EU freedoms. The discretion and autonomy of national administrations over European citizenship-related matters

have been transformed as a result of EU integration and now fall within the scope of EU law. The classical distinction between those holding the nationality of an EU member state and others is steadily losing its predominant role. Cases such as those analysed in this paper give us clear signals concerning the way forward in terms of the shape and outer edges of European citizenship, which ascribes ever less importance to the nationality connection in the recognition and allocation of citizenship rights and freedoms to TCNs in the EU. This has gradually, and profoundly, transformed ‘who’ is to be understood as a ‘citizen’ in the EU. Individuals’ litigation and CJEU rulings have been and will continue to be a very dynamic force around the foundations of citizenship of the Union and its liberalisation with respect to the freedoms and status of TCNs.

The concept of ‘citizen’ used by the Stockholm Programme and the European Commission’s Action Plan implementing it is therefore one that cannot solely include nationals of EU member states. Such a personal scope would be incompatible with EU law and the jurisprudence of the CJEU. As has been shown in this paper, a wider number of beneficiaries already exist in the context of European citizenship freedoms. The EU’s AFSJ is thus already more than a ‘private garden’ with access limited to those individuals holding the nationality of an EU member state, and interpretations concluding otherwise would be in tension with the current stage of European integration. The answer to the question of who are the ‘citizens’ entitled to the empowerment and the protections of their liberty, security and justice needs also to include certain categories of TCNs. The ways in which individuals’ litigation before EU courts and the political role granted to the freedom to move in the scope of both European citizenship and migration law sheds light as to potential ways forward in rethinking and reshaping citizenship of the Union. Such a citizenship needs to move beyond nationality-based perceptions and legal configurations by placing at the heart of the EU’s added value the facilitation and promotion of the freedom to move, and (while doing so) the enjoyment of non-discrimination on the basis of nationality.

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