THE MEANING OF 'NATIONALITY' IN ARTICLE 12 EC

A PLEA FOR A MORE INCLUSIVE READING

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This is the First Sketch Only

Abstract

The change in the legal status of third country nationals who are long term EU residents in Community law coupled with the growing powers of the Community in the field of immigration beg for a fundamental reinterpretation of Article 12 EC. The narrow reading of the term 'nationality' in Article 12 EC limiting it to the nationalities of the Member States for the purposes of Community law seems to be impermissible given the growing number of third country nationals falling within the scope of Community law to whom the article should potentially apply. Given that Directive 2003/109/EC does not outlaw nationality discrimination the non-application of Article 12 EC to non community nationalities looks particularly unjust. It will take reason, determination and will of the European Court of Justice to solve this problem.

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I.

The non-discrimination right of Article 12 EC, although not expressly mentioned among citizenship rights in the EC Treaty,[1] has been interpreted by the ECJ as applying uniquely to the nationals of the Member States.[2]

Most regrettably, it does not protect third-country nationals residing in the Union[3] and is one of the most important rights enjoyed exclusively by the European citizens.[4] Taken into account the recent case law of the ECJ, non-discrimination seems to be working excellently in tandem with the European citizenship provisions, since according to the ECJ in *Martínez Sala* 'a citizen of the Union […] lawfully residing in the territory of the host Member State, can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law'.[5] Citizenship articles of the EC Treaty have thus successfully taken the place of the free movement of services provisions,[6] as the tool used by the ECJ to bring a particular situation within the scope of application of Community law, turning citizenship into

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[1] Upon the entry into force of the Treaty of Lisbon, Article 12(1) EC, renamed as Article 18(1) FEU (Treaty on the Functioning of the European Union) will be included in the section 'Non-Discrimination and Citizenship of the Union', altering the present situation. The text of the article will not change.

[2] *See generally* Davies (2003 'Nationality DIscrimination').

[3] The ECJ has been clear on the issue that third-country nationals are not covered by Art. 12 EC: Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi* [1998] ECR I-6781, para 29.

[4] However, similar non-discrimination provisions are included in the Agreements concluded by the Community and the Member States with certain third countries (esp. the EEA Agreement and the Swiss Agreement on free movement, *see* section IV(ii)(d) *infra*). The right, as applied to third-country nationals, is also protected by Art. 11 of Directive 2003/109/EC.

[5] Case C-85/96 *María Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691, para 63.

[6] *Esp.* Art. 49 EC. Case 186/87 *Ian William Cowan* v. *Tresor Public* [1989] ECR 195; Case 293/83 *Françoise Gravier* v. *City of Liège* [1985] ECR 593.

the key element of the functioning of the non-discrimination provisions in Community law.[7]

Article 12 EC as interpreted by the ECJ excludes those not in possession of the status of EU citizens from its scope.[8] The article reads as follows: 'within the scope of application of this Treaty […] any discrimination on grounds of nationality shall be prohibited'.[9] Although it obviously applies to European citizens in a number of situations, the wording seems to suggest that the scope of the non-discrimination right contained in this provision is much broader than that. To agree with de Witte, Article 12 EC 'could also be read as prohibiting discrimination against *third-country nationals*'.[10]

II.

In a way, the narrow interpretation of Article 12 EC by the ECJ is clearly related to the narrow interpretation of Article 39 EC by the Court.[11] If the meaning of 'the

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[7] Even after the introduction of the concept of European citizenship into the EC Treaty, the ECJ was still using Art. 49 EC to protect citizens' rights instead of the new Art. 18 EC: Case C-193/94 *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929; Joined Cases C-4 and 5/95 *Fritz Stöber and José Manuel Piosa Pereira* v. *Bundesanstalt für Arbeit* [1997] ECR I-511. *But see* Case C-60/00 *Mary Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I-6279, where the Court, again, put an accent on the free movement of services. *See also* Guild, Elspeth, 'Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgement of the European Court of Justice', 12 *The Good Society* 2, 2003, 22.

[8] For an overview analysis *see* Epiney, Astrid, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizneship', 13 *Eur. L.J.*, 2007, 611 (*esp.* fn 4 at page 612, listing the recent case law of the ECJ most relevant for the interpretation of Art. 12 EC).

[9] Art. 12 EC.

[10] de Witte, Bruno, 'The Past and Future of the European Court of Justice in the Protection of Human Rights', in Alston, Philip (ed.), *The EU and Human Rights*, Oxford: OUP, 1999, 859, 860 (emphasis added).

[11] On the interpretation of Art. 39 EC *see* section IV(i) *supra*. Just as the EC Treaty provisions on the free movement of workers do not apply to third-country nationals, the provisions of the EC Treaty on

workers of the Member States' were not confined to those workers in possession of the nationality of a Member State, the meaning of 'nationality' for the purposes of Article 12 EC would clearly be different. As interpreted at present, all non-Community nationalities are excluded from the scope of the article, which often leads to cases of differentiated treatment not logically explainable.[12] A number of arguments have been made in the literature for the reassessment of the scope of the article.[13]

An obvious problem in this respect is to make sure that the cases to which the article is to apply, when involving non-nationals of the Member States, really fall within the scope of Community law. Undoubtedly, 'if the Community legislator decides to concede rights to nationals of a non-member country, the concerned situations fall under the scope of application of the Treaty, since facts regulated by Community law are involved'.[14] In other words, as Boeles has also argued, the problem of bringing third-country nationals within the scope of the article is solvable: Article 12 EC can apply, for instance, to the cases where the Community is empowered to act to regulate the legal situation of third-country nationals.[15]

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the free movement of services equally do not cover them: Case C-147/91 *Criminal proceedings against Michele Ferrer Laderer* [1992] I-4097, para 7.

[12] *E.g.* Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi* [1998] ECR I-6781, para 29. Mr. Awoyemi, a third-country national having moved from one Member State to another, failed to exchange his Community-model driving licence and could not question the proportionality of the criminal penalty imposed on him by the Belgian state since provisions on free movement in the EC Treaty did not apply to him.

[13] *E.g.* Boeles, P., 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?', *Sociaal-economische wetgeving*, no. 12, 2005, 502; Hervey, Tamara, 'Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law', in Shaw, Jo and More, Gillian (eds.), *New Legal Dynamics of the European Union*, Oxford: OUP, 1995, 91, 97; Plender, Richard, 'Competence, European Community Law and Nationals of Non-member States', 39 *Int'l and Comp. L. Quarterly*, 1990, 599, 605.

[14] Epiney (2007), 614.

[15] Using especially Title IV EC, regulating immigration and asylum issues: Boeles (2005), 509–513. A very interesting example used by Boeles concerns the possible application of Art. 12 EC with a view to ensuring non-discrimination among third-country nationals benefiting from the right of family reunification under the Directive 2003/86/EC, *OJ* L251/12, 2003. While this Directive allows the Member States, in Art. 7(2) to establish conditions for integration of third-country nationals in the society of the Member State where they are going to reside, Art. 12 EC can be invoked by those third-

As long as a fundamental distinction between nationals and non-nationals of the Member States exists in the interpretation of Article 39 EC, however, it is difficult to speak of a serious extension of the scope of application of Article 12 EC. In this sense, the article is clearly different from Article XIV of the US Constitution. The equal protections clause applies to every individual under the US jurisdiction.[16] In other words, the citizen status, which is potentially irrelevant for the application of the non-discrimination provision of the US Constitution, is of extreme importance in the EC legal context. Keeping in mind the history of American Constitutional evolution, where this state of play is a result of a long line of developments, the reassessment of the scope of application of Article 12 EC is predictable.

III.

Bringing third-country nationals within the scope of Community law became infinitely easier with the entry into force of Directive 109/2003/EC, which allows for (albeit limited) free movement of third-country nationals in the Community.[17] At present, it is impossible to state, as the ECJ did in *Awoyemi*,[18] that free movement cannot apply to third-country nationals. Notwithstanding that the Directive contains its own non-discrimination provision (Art. 11),[19] it is difficult to see why those benefiting from the free movement rights under this instrument should not be entitled

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country nationals who are in possession of a nationality for which stricter integration rules apply (in practice the integration requirements for some nationalities, such as, *inter alia*, US, Japan, New Zeeland, Canada, are much milder than for other nationalities, *de facto* resulting in differentiated treatment solely on the basis of nationality: Boeles, 512, 513).

[16] *See e.g. Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); *Graham* v. *Richardson*, 403 U.S. 365 (1971). *For discussion see* Brozovich, Elise, 'Prospects for Democratic Change: Non-citizen Suffrage in America', 23 *Hamline J. Pub. L. and Pol'y*, 2002, 403, 416–419.

[17] *See* section IV(ii)(b) *infra*.

[18] Case C-230/97 *Awoyemi* [1998] ECR I-6781, para 29.

[19] However, this provision does not generally contain a requirement of non-discrimination on the basis of nationality.

to rely on a more general provision of primary Community law, namely Article 12 EC. The Directive thus largely removed the difficulty of bringing third-country nationals within the scope of Community law: all those in possession of a Community residence permit are potential beneficiaries of Article 12 EC.

Contrary to the present reading of Article 12 EC, which presents this instrument as containing an EU citizenship right, the future development of Community law is likely to result in the broadening of the scope of this article also to include those not in possession of the legal status of European citizens. Such development is both inescapable and most welcome.