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AUTHORS: Bahadır YAKUT

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THE ECJ CASE LAW CONCERNING ARTICLES 17 AND 18 OF THE EC TREATY AND THE SUBSEQUENT EFFECT ON THE RIGHT TO MOVE FREELY

Bahadır YAKUT

Abstract

The European Court of Justice (ECJ) has played a major role in the expansion of the boundaries of right to free movement by interpreting the EU citizenship provisions of the Treaty. The paper analyses the case law of the ECJ, highlighting the most important decisions in this field and their enormous effects on the way citizenship is construed. Although, the Court was initially reluctant, it has moved from market interpretation that is economic citizenship to political citizenship and then it extended right of citizenship to non nationals.

As of the new Citizenship Directive, it is more than a consolidation and summarise the innovation of jurisprudence of the Court whilst recasting the contents of the abolished directives in the wording of residence entitlements.

Key Words: *European Court of Justice, Right to Move Freely, Citizenship, European Union, Jurisprudence of the ECJ*

Özet

Avrupa Adalet Divanı (ATAD), AT Antlaşmasının vatandaşlığa ilişkin hükümlerini yorumlarken serbest dolaşım hakkının sınırlarının önemli ölçüde genişlemesinde çok önemli rol oynamıştır. Bu makalede ATAD'ın vatandaşlığa ilişkin hükümlerin yorumlanması konusundaki en önemli içtihatları analiz edilerek getirdiği yorumların altı çizilecektir. Başlangıçta ATAD isteksiz olmasına rağmen, daha sonraki içtihatlarında iç pazar anlamında yani ekonomik vatandaşlık yorumundan politik vatandaşlığa doğru evrilmiştir ve vatandaşlığa ilişkin hakları vatandaş olmayanlara da teşmil etmiştir.

Anahtar Kelimeler: *ATAD, Serbest Dolaşım Hakkı, Vatandaşlık, Avrupa Birliği, ATAD içtihatları.*

* Dr., Judge at Turkish Ministry of Justice

Introduction

The Treaty on European Union (TEU) established for the first time a coherent concept of Citizenship by virtue of the inclusion of Articles 17-22. As most writers have concurred, the European Court of Justice (ECJ) has played a major role in the expansion of the boundaries of right to free movement by interpreting the EU citizenship provisions of the Treaty. The essential question here is to what extent the ECJ has contributed to this growth through its interpretation of EU's these provisions.

This paper will consider whether the jurisprudence of the ECJ has developed an overall right of free movement of persons through its interpretation of the EU citizenship provisions. Special regard in this essay will be paid to the right of free movement and the residence of EU citizens within the borders of the Union.

The paper analyses the case law of the ECJ, highlighting the most important decisions in this field and their enormous effects on the way citizenship is construed. In the first section the following issues will be examined: the legal concept of citizenship, what contribution Article 18 makes to the already existing rights of European citizens, the derived rights of citizenship and whether these rights are constitutional or not, the relationship is between the EU citizenship and national citizenship, and the effects of the ECJ's judgements on the new Citizenship Directive. In the second section there will be critical analysis of how the Court has contributed to the revolution of free movement in the context of the citizenship provision of the TEU. It will also address where this revolution first appeared and how free movement fits into the revolution.

In the last section, the effects and meanings of article 18 of EC Treaty will be examined. Central to this inquiry is this question: does the concept of citizenship create a general right of non-discrimination on grounds of nationality?

Legal Concepts

Legal Basis of Citizenship

The concept of European citizenship has been present survived from earliest days of the European Communities. Before the Maastricht the rights of Union nationals turn around Community and rely on economic statues to a large extent.¹ However a new policy did not emerge from the Treaty of Maastricht. The Treaty's clauses, particularly regarding the free movement of workers, appeared to be a only a embryonic development in the initial structure of European Citizenship. The significance of the provisions of the Treaty of Maastricht might be seen as the first stage of inclusion in the official scope of Community legislation.²

The Preamble of the TEU bestows on Member States' nationals a 'common' citizenship. Article 2 of the Treaty includes provisions pertaining to the aims of the EU

¹ Penelope Kent, **Law of the European Union**, London, Pearson Longman Fourth Edition, 2008, at. 195

² David O' Keffe "Union Citizenship", in D. O' Keffe and P. Twomey (eds.) **Legal Issues of the Maastricht Treaty**, London, Chancery/Wiley, 1994, at. 87; Kent, n.1 above, s. 195.

and emphasises its objectives as being to ensure the 'protection of the rights and interests of nationals. In part two provisions of the TEU address the constitutional basis of the citizenship.³ The fact that citizenship is dealt with in a separate section rather than in the preface to the articles might be considered as evidence that citizenship is regarded as an indispensable part of the Treaty and this in turn indicates that these provisions are enforcement regulations and not solely declaratory in nature.⁴ However, one scholar has asserted that Article 17 implies that citizenship is merely a metaphor⁵

Article 18 in Relation to the Pre-Existing Rights of the European Citizens

One may reasonably ask to what extent does Article 18 contribute to the pre-existing rights of European citizens? Evidently, TEU does not seem to steer a novel course regarding the freedom of movement and residence of EU citizens, adding little to existing Community law, as it applies economically active and non-active individuals. The latter proceeds from the Commission's assertion that, as the Treaty encompasses economic actors, and Residence Directive 90/364-366 deals with economic non-actors, there is no need for a new arrangement. The TEU seems to pay attention to the present Treaty law in regard to economic actors and to secondary legislation covering non-economic actors. O'Keeffe maintains that 'it will only be if the legislator uses Article 18 as the basis for further legislation that anything new will be added'.⁶

The Legal Concept of EU Citizenship

The drafting process of Article 17 EC proves that EU citizenship is an outcome of nationality of Member States.⁷ This is consistent with the *Micheletti* decision of the Court which was buttressed by the provisions of the Maastricht Treaty. The Court ruled in *Micheletti* that Member States alone hold exclusive and sole competence for the conditions of granting or revoking citizenship. Nonetheless, they do not have the power to restrict derived rights where citizenship has been vested by a different member state.⁸ Hence, it was inferred that EU citizenship might be characterised as a 'derived condition of citizenship' which would lead to some important results as emphasised. Firstly, Community law does not have any ability to establish the conditions for acquiring or cancelling the nationality as well as citizenship. As d'Oliveira accurately stated, there is no 'Community nationality'.⁹ Secondly, the EU does not possess the

3 Jo Shaw, "The Interpretation of the European Union Citizenship", 61 **The Modern Law Review Limited**, 1998, at.297

4 Carlos Closa, "The concept of Citizenship in the Treaty on European Union", 29 **Common Market Law Review** 1137, 1992, at.1158.

5 Norbert Reich, "Union Citizenship – Metaphor or Source of Rights?", 7 **European Law Journal** 4, 2001, at.5

6 O' Keeffe, n.2 above, at. 94; Kent, at.195.

7 Norbert Reich, "The European Constitution and New Member Countries: The Constitutional Relevance of Free Movement and Citizenship", Annual Lecture at CECIL, University of Sheffield, 2004, at.3; Kent, P., n.1 above, at.196.

8 Case C-369/90, *Micheletti v Delegación del Gobierno en Cantabria*, [1992] ECR I-4239

9 Hans Ulrich Jessurun d'Oliviera, "Nationality and the EU after Amsterdam", **David O'Keeffe** and Patrick Twoney, **Legal Issues of the Amsterdam Treaty**, Oxford University Press, 1999, at.397; Kent, at.195-196.

ability to set up principles of its own concerning the right to citizenship as a consequence of nationality. Thirdly, as the ECJ upheld in *Micheletti* judgment, if a member state has granted citizenship, owing to one's nationality, even if the citizen has dual nationality, this citizenship must be recognized across the EU borders.¹⁰

The rights established by the Treaty of Amsterdam are attached to another decisive measure, specifically, residence rather than EU citizenship which might amount equivalent to nationality.

What Kind of Rights Derive From the Citizenship?

The typical concept of citizenship might consist of 'full membership of a Community'.¹¹ This membership grants to persons a catalogue of rights. Most important among these in the EU context are freedom of movement, right of residence, right to consular and diplomatic protection, voting and standing rights in EU parliament and local election, political rights to have access to EU institutions and the EU ombudsman.¹² The concept of citizenship has incorporated an active relation between the persons and society in which they live. Civic rights bestow on individuals the principle of equivalent treatment before the law. Political rights enable involvement in the enjoyment of national sovereignty. On the other hand, social rights indicate the pinnacle of progress for citizenship. The EU Community law is a long way from ensuring the mentioned framework of rights for its citizens.¹³

The majority of commentators feel that the concept of citizenship goes hand in hand with an expansion of citizens' rights. Reicht, concurring subsequently with Advocate General Leger, maintained that laws in every member state relied on its own citizenship. National citizenship is the basis to define the scope of the EU citizens' rights in the field of implementation of EC Treaty in accordance with meaning of Article 12. He argued further that citizenship must not be a decisive factor for differentiating the rights and responsibilities of Member States' nationals in the EU except where particular interstate disagreements mandate divergent principles.¹⁴

As to the question of whether citizenship is a constitutional right or not, Closa argued that TEU shaped or 'constitutionalised' definite rights within the sphere of the Community.¹⁵ On the other hand, White maintained that after the inclusion into the EU Treaty, EU citizenship, the right to move and reside in the Union freely gave rise to a constitutional right deriving from the status of citizenship in the Union.¹⁶ Some new rights have been included and further amendments have been made. These have ensured a fundamental legal ground for expansion of the bundle of rights associated with

¹⁰ Reicht, at.7-8; Kent, at.195-196.

¹¹ Shaw, at.298; Kent, at.195-196.

¹² Shaw, at.298; Kent, at.195-196.

¹³ Closa,(1995), at.490

¹⁴ Reich, at. 14

¹⁵ Closa,(1995), at.490

¹⁶ Robin White, "Free Movement, Equal Treatment, Citizenship of the Union", **International and Comparative Law Quarterly**, 2005, at. 885-906

citizenship.¹⁷ Shaw adapted advance view which modifies a structure of rights and in which the citizen was seen as an 'individual subject of law'. She has categorized this as the 'civic, political and social' rights of EU citizens. The concept of citizenship may therefore be regarded as a developing and dynamic one. Citizenship indeed has a constitutional dimension and necessitates more progress and expansion.¹⁸

Is there a transformation in conferred rights from the 'market' understanding of citizenship towards the 'Union' or actual not virtual citizens who does not occupy his position by virtue of economic pursuit? If Union citizenship is perceived as a 'market citizenship'¹⁹ in that case it does not, most likely, entail the some constitutional requirements.²⁰ However, EU citizenship is not a different concept that is separated from political ingredients.²¹

What is the Relationship Between the EU Citizenship and National Citizenship?

Article 39 of the Rome Treaty, encompasses workers' right to move freely within the Common Market. This right was depended upon on the nationality of member states. Likewise, the introduction of Article 17(1) EC at Maastricht ensured that all individuals who were citizen of a Member State shall hold EU citizenship.²²

Upon this legal base, EU citizenship seemed to constitute a prescribed structure that was attained simply by holding the citizenship of a Member State, (thus debarring from the bundle of rights those not holding nationality even though dwelling in the country). Closa has described this relation as equivalent to a derived condition of nationality.²³ Union citizenship and national citizenship complement each other rather than one replacing the other. Which is why it is not possible to compare them.²⁴

Before the inclusion of citizenship in Treaty, the Court in *Micheletti* case²⁵ in 1992 strengthened what it regarded as the exclusive power of the Member States. Nevertheless, the legal requirements of the Community should still be borne in mind.

17 Carlos Closa, "Concept of Citizenship in the TEU", 29 **Common Market Law Review**, 1992, at. 1168

18 Jo Shaw, 'Citizenship of the Union: Towards Post-National Membership?' in *Vi(1) Collected Courses Of The Academy Of European Law* 237, The Hague: Kluwer Law International, 1998, at. 346

19 Michelle Everson, "The Legacy of the Market Citizen" in Jo Shaw and Gillian More (eds), **New Legal Dynamics of European Union**, Oxford: Oxford University Press, 1995.

20 H.U. Jessurun d'Oliveira, "Union Citizenship: Pie in the Sky?" in A. Rosas and E. Antola (eds), **A Citizens' Europe: In Search of a New Order**, London: Sage, 1995.

21 Dora Kostakopolou, "Ideas, Norms and European Citizenship: Explaining Institutional Change", 68 **Modern Law Review**, 2005, at. 260-1.

22 James D., Mather, 'The Court of Justice and Union Citizen,' 11 **European Law Journal** 724, 2005, at. 726

23 Carlos Closa, "Citizenship of the Union and Nationality of Member States", 32 **Common Market Law Review** 487, 1995, at. 510

24 Shaw, at. 298

25 Case C-369/90, *Micheletti and Others v Delegación del Gobierno Cantabria* [1992] ECR I-4239.

The facts of the case were that an Italian national, who had dual Argentine nationality, was under a Spanish domestic provision, subjected to a *de facto* residence assessment. This was a *de facto* residence test to find out his nationality for the purposes of whether he could depend upon Article 43 EC. It was ruled a breach of law. The importance of the decision rests on the fact that the ECJ clearly maintained one key principles of international law: Member States have exclusive right to determine nationality. The decision laid the ground for the inclusion of EU citizenship. However there were various assumptions that the ECJ might accept an alteration to its position, perhaps shaping its own Community connotation to the concept.²⁶

The situation in *Micheletti* was explicitly confirmed in *Kaur*²⁷ and *Zhu and Chen Kaur*²⁸. In *Zhu and Chen*, the applicant claimed that she possessed the right to free movement, within the scope of Article 18(1) EC and Directive 90/364 EC, on the grounds that she held Irish citizenship, having been born in Ireland. The Court upheld the discretion of each Member State to arrange the requirements for the deprivation and acquisition of citizenship, as long as the Member State takes into account Community law. In regard to fundamental freedoms laid down in the Treaty, a Member State can not limit the derived rights of the nationality of another Member State by stipulating further conditions for recognizing of that nationality. Therefore an applicant's right to move freely could not be refused even if her Member State nationality had been obtained so as to protect a right of residence for her mother who was a third-country national. Briefly, in view of the definition of citizenship, the ECJ has made little effort so far, particularly since 1992 to narrow the exclusive competence of the Member States, thus maintaining the inequality across the EU in regard to acquiring citizenship.²⁹

Effects of the ECJ's Judgements on the New Citizenship Directive

The new Citizenship Directive, which must be implemented by the MS by 30 April 2004, represents a reshaping the existing EU citizenship law. It enshrines two major aspects of EU citizenship: firstly, liberty from any type of immigrant controls and secondly, right to equal treatment to those of citizens in the host member states. However, it must be admitted that there still exist definite requirements. Both refuse to allow entry and deportation are theoretically possible, although under very specific conditions. Nonetheless, the complete availability of social rights has not been attained. Concurrently the Court explicitly and the new Directive implicitly and concurrently agreed that obtaining benefits necessitates a certain integration on the part of the individual into the host member state. This may be achieved by acquiring permanent residence. However, the member state may refuse entitlement to social for the first three months (or more extensive time limit) for job seekers and for student. It might be said

²⁶ Izolda Bulvinaite, "Union Citizenship and its Role in the Free Movement Regimes", at. <http://webjcli.ncl.ac.uk/2003/issue5/bulvinaite5.html> (5.6.2006); Mather, n. 22 above, at. 724-725

²⁷ Case C-192/99 R v Secretary of State for the Home Department, ex parte Kaur [2001] ECR I-1169.

²⁸ Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department*, Judgment of 19 October 2004.

²⁹ Mather., at.726

that the case law represents more than a consolidation of rights and is instead a re-conceptualisation of the EU citizens' free movement rights. White shares the same view with Kostakopoulou on significance of the Citizenship Directive. They emphasize that in regard to move freely its significance lies in consolidation of the rights. Citizenship acquires improvements by way of recognizing as permanent residence rights without any limitation and establishes certain bundle of membership rights laid down either in the EC Treaty or in the secondary law.³⁰

The Revolution of Free Movement in the Context of ECJ Jurisprudence Concerning EU Citizenship Provisions

The Initial Hesitance of the Court

It might be argued that the Court followed a cautionary approach in 1993–1997.³¹ In *Sknavi*,³² its first case analysing the concept of citizenship, the Court declined to deliberate on the implementation of Article 17, which was regarded as being secondary in proportion to the more prioritised Treaty rights.³³

In *Boukhalfa*³⁴, an Algerian resident of Belgian national was working at the German Embassy in Algiers. Her contract of employment had been terminated there. She paid premiums to the German pension insurance fund and paid income tax under German law. She contended to be got treatment equal to the people in the status in Germany. She claimed that it was infringement of principle of the prohibition of discrimination based on nationality to enforceable to her condition. The ECJ – held that Article 39(2) EC and Article 7 of Regulation No 1612/68 bestow fundamental right of move freely. Article 39(2) EC is a more specific form of the general principle of the prohibition of discrimination on grounds of nationality laid down by Article 12 EC in that it grants migrant workers equality of treatment with nationals of the host country “as regards employment, remuneration and other conditions of work and employment”. Article 7 of Regulation 1612/68 for its part refers to the general principle. The Court held itself constrained to examining the clauses concerning free movement of workers, as the Bundesarbeitsgericht only cited provisions of Article 39 and Article 17 of the EC Treaty and Article 7 of Regulation 1612/68. The Court held that there had been an adequate relationship between the activity of Ms Boukhalfa and the Community for her to obtain safeguard from the Community's free movement provisions.³⁵ Advocate General Léger who concurred with the decision of the ECJ, expressed a clearer opinion pertaining to the rights bestowed by the concept of citizenship. He maintained that the Court had not really had a chance to interpret the new concept of European citizenship yet. It was for the ECJ the first time to review that its complete scope be attained. When

30 Robin White, 'The Citizenship Directive: Consolidation, Codification or Re-conceptualisation', (Leicester University Distance Learning Week Hand out 2006), at.8; Kostakopoulou, n.21 above, at. 260-1.

31 Kostakopoulou, at. 239

32 193/94 [1996] ECR I-929

33 Reich, at.10

34 Case-214/94 *Deutschland* [1996] ECR I-2253

35 Ibid., para., 63

the full potential of this concept is fulfilled, all EU citizens should, whatever their nationality, enjoy precisely the identical rights and be subject to identical responsibilities.³⁶ The ECJ adjudicated the case based on the conventional and generous understanding of the free movement provisions whereas, as Reich has remarked, the complementary role of Article 17 might have been employed.³⁷ Advocate General Ruiz-Jarabo Colomer maintains similar obiter dictum in his view in *Shingara* and *Radion*³⁸: ‘The creation of the citizenship of the Union with the corollary described above of freedom of movement of citizens throughout the territory of member states, represents of considerable qualitative step forward in that.....it separates this freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) raises it to the level of genuinely independent right inherent in the political statuses of the citizens of the Union’

Where Has the Revolution Appeared?

*Sala*³⁹ is the first case before the ECJ, in which the court uses the term ‘citizenship’ to broaden the rights of EU citizens. However, the member states’ courts had concentrated on Article³⁹ and Regulations 1612/68 and 1408/71. Nevertheless, this approach could not preclude the Court from interpreting the clauses in an inventive and innovative way and implement the provisions itself.⁴⁰

The case concerned a Spanish nationals residing in Germany. While she was unemployed, she claimed a child-benefit allowance. According to domestic law, her claim was not accepted since she did not hold a legally binding residence certificate. The ECJ did not allow this restrictive requirement in effect granting her the allowance. Fries and Shaw noted that the innovative approach of the Court in this case was based on the interpretation of Article 17(2), in connection with Article 12, and with broader interpretation of the content of Community law.⁴¹

How Does Free Movement Fit in this Revolution?

In the first instance, the ECJ held that if nationals of one Member State had permission to reside in a different Member State for nationals of different Member States that was considered to sufficient to give those individuals the *personal* protection of the Community law. This is the idea of EU citizenship with universal recognition of all citizens of the Member States, irrespective of economic condition. In the second instance, the Court adjusted the claim with the provisions, (specifically Regulation 1612/68 and Regulation 1408/71) which were perceived primarily as distributing rights

36 Kostakopolou, n.21 above, at. 239

37 Reich, at. 10

38 Case- 65 and 111/95, *The Queen v. Secretary of State for the Home Department ex parte Shingara and Radion* [1997] ECR I-3341, at. para 34

39 [1998] ECR I-2691

40 Siofra O’ Leary, “Putting Flesh on the Bones of European Union Citizenship”, 24 **European Law Review** 68, 1999, at.77

41 Sybilla Fries and Jo Shaw “Citizenship of the Union: First steps in the European Court of Justice”, 4 **European Public Law** 533, 1998, at. 550

on the basis of the principle of non-discrimination to immigrants involved in economic activity, (and also to their family members). This provided the *material* context of Community law. Hence, *personal* and *material* scope of Community law results in the right to equal treatment which ensured basis in principle in this case.⁴²

Whilst the Court sustained its conventional interpretation which was established in *Cowan Case*,⁴³ in *Sala Case* it applied Articles 17-18 to broaden the scope of protection from unequal treatment for non-host state nationals to all EU citizens. The earlier relation with free movement rights was given up, thereby expanding the content of safeguard. Nevertheless, the ECJ did not clarify whether holding residence permit was rely on domestic legislation or on Article 18 provisions.⁴⁴

The similar view was adopted in the *Bickel and U. Franz Case*⁴⁵. Advocate General Jacobs and Court were eager to broaden the application of principle of non-discrimination in Article 12 to whole nationals in the context of the free movement arrangements covered by Article 18. Advocate General Jacobs attributed to *Cowan* and expanded it to the defendant's rights as an EU citizen on criminal charges.⁴⁶ The ECJ agreed with Advocate General and maintained that to deny German-speaking citizens from Austria or Germany use of their own language in proceedings in the Bolzano District, (when this right existed for German speaker Italians), constituted infringement of right to equal treatment on the grounds of nationality.⁴⁷ The ECJ repeated its *Martinez Sala* judgment in which a Member State's national residing in a different Member State with legal permission is covered by the provisions of Article 18 of the Treaty and hence could claim on the bases of Article 12. The prohibition of discrimination laid down in Article 49 was not addressed. In the same way as asserted by Arnall, in the scope of the freedom of movement, Article 12 appears to have encompassed entirely different concrete phrases of the principle.⁴⁸

Nevertheless, the *Donatella Calfa Case*⁴⁹ to a certain extent limited the terms of the interpretation of the notion of citizenship. The case concerned with criminal charges and in it the ECJ dealt with the issue of the deportation of one member state national from the boundary of another Member State. Although, the Greek High Court clearly considered Articles 17-18 in associated with the free movement principles, neither Advocate General La Pergola nor the ECJ relied on their view or decision on EU citizenship.⁵⁰

42 See, O' Leary, n.40 above.

43 Reich, at.11

44 O' Leary, n.40 above, at.78

45 See. Reich, at. 11 concerning the Case- 274/96 *Criminal Proceedings against H.O. Bickel and U. Franz* [1998] ECR I-7637

46 Reich, at. 11

47 Ibid.

48 Antony Arnall, *The European Union and its Court of Justice*, New York: Oxford University Press, 1999, at. 386

49 Case 348/96 *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11

50 Reich, at.12

What was the reason behind the ECJ's approach in this judgment? It did not vest the basis of freedom of movement to the Article 18. Indeed, in *Bickel Case* interpreting things differently, it ruled that where EU citizen enjoyed freedom of movement in the same way as embodied in Article 18, she would right to equal treatment exactly enshrined in Article 12. Doppelhammer maintained correctly that the issue of deportation is preferable to assess the scope of Article 18, since it is more fragile in terms of politic rather than far less sensitive rights related language.⁵¹

In *Wijsenbeek Case*,⁵² the ECJ appeared to enthusiastic about the potency of Article 18(1) notwithstanding taking into account of different Treaty rights. ECJ refined the conditions of freedom of movement to its clearest framework: where a EU national crosses an EU border, he/she should be subject to the, the principle of non-discrimination. Economic activity or degree of relation between the person and the other Member State should not be relevant. Basically, an EU national abroad in a different Member State, should have, at the minimum rights to non-discrimination equal to that state's own nationals. However, the presence of citizen in his/her own member state itself is not adequate to impose EC obligation on that state.⁵³

In *Wijsenbeek* judgment, the ECJ said that Article 18(1) bestowed a freedom of movement and maintained that restrictions might be associated lawfully on the basic right to move freely to another Member State.⁵⁴

In a recent Case, *Louvain-la-Neuve*⁵⁵ the Court's justification is analogous with that of *Martínez Sala* case.⁵⁶ The case concerned unequal treatment resulting from nationality. The Court therefore made use of citizenship to cope with the *ratione personae* scope of Article 12 and maintained by reference *Martínez Sala* that an EU citizen who resides legally in the boundary of a new member State should be able to base his claim on Article 12 in all circumstances covered by the *ratione materiae* context of Community law. The Court holding that such circumstances contain those surrounding the use of the basic freedoms assured by the Treaty and those comprising the utilisation of the freedom of movement and right to reside in a new Member State, in the same way entrusted by Article 18.⁵⁷

How Did the Court Interpret?

Analysis of the Court's jurisprudence reflects to certain reluctance moving towards the absolute implementation of the notion of citizenship in enlarging the privileges of citizenship in the field of freedom of movement. In their references to the ECJ several

51 Martina Doppelhammer, "Expulsion: a Test Case for European Union Citizenship?", 24 *European Law Review* 621, 1999, at.626

52 Case 378/97 *Criminal Proceedings against Florus Ariel Wijsenbeek* [1999] ECR I-6207

53 Ibid., Para. 22-41

54 Ibid., para. 41-45

55 C-184/99, *Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies- (CPAS)* [2001] ECR I-6193

56 Paul Craig, and de Burca Grainne, *EU Law Text, Cases and Materials*, 3rd ed., Oxford, New York: Oxford University Press, 2003, at. 759

57 Ibid., n.47 above, para.29-33

Member States have objected that Article 18(1) was not designed to bestow a new right on freedom of movement or residence. The views of the Advocates Generals appear far-reaching, at least in expression and possibly, in essence.⁵⁸

Pushing Boundary of Citizenship

It is necessary to remark that *Martínez Sala* and *Grzelczyk* cases might be regarded as exceptional incidents to the ECJ's interpretation of citizenship. Both judgments are attributed to the second sentence of Article 18(1) and, in particular, to the requirements of legal residence in new Member State as set out in the residence directives. But a current issue for the ECJ deliberation is the coverage to which a country is obliged to undertake liability for the nationals of another Member States living within their boundaries. That is say not owing to a person's employment position such as a worker or self-employed person, but due to their status as citizenship.⁵⁹

In *Martínez Sala*, the right of a Spanish national resident in Germany to a child-care payment emerged from her position as an EU citizen, irrespective of the fact that she was benefiting from German social security system. In *Grzelczyk*, a French national who was a student in Belgium, was ruled to be entitled to a social aid benefit as an EU citizen equal to Belgian nationals. Thus the increasing significance of the conceptualisation of citizenship for the employment of Community legal order and its basis as a primary status for nationals of the Member States was affirmed.⁶⁰

The Court in a recent judgment has concurred with this. In *Marie-Nathalie Case*⁶¹ it ruled that discrimination is the breach of the rules, which comprise the foundation of EU citizenship, namely, the assurance of the non-discrimination towards a citizen who practises the right to free movement.⁶²

In *Trojani*⁶³ and *Bidar*⁶⁴ which are recent cases, the Court confirmed its view point adopted in *Baumbast* and *Grzelczyk* cases. Trojani had not right to reside as he did not afford himself. However, he was lawful resident under Belgian law. Thus the Court found it sufficient to bestow his right to equal treatment arising from Article 18 in terms of entitlement to the minimex. In the Bidar case, the Court accepted the right to reside of a French student who attended secondary school in the UK and his right to entitlement to student grant. The Court affirming the direct applicability of Article 18 reached such a broad view.⁶⁵

⁵⁸ Reich, at.13

⁵⁹ Niamh Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?", 39 **Common Market Law Review** 731, 2002, at. 750

⁶⁰ Ibid.

⁶¹ Case C-224/98 *Marie-Nathalie D'Hoop v. Office national de l'emploi* [2002] ECR I-6191

⁶² Ibid., para.35

⁶³ Case C-456/02 *Trojani*, judgment of 7 Sept 2004

⁶⁴ Case C-209/03 *Bidar*, judgment of 15 Mar 2005

⁶⁵ Hüseyin Göçmen, "Does the Concept of European Citizenship Lack Content?", 2(4) **GAU J. Social Sciences**, 2008, at.56-66.

Effects and Meanings of Article 18 of EC? What Brings Article 18?

Throughout prolonged consideration of EU citizenship the bases of EU citizenship have been the right of free movement and the right of residence. Article 18 EC establishes the rights to free movement and residence inside the geographical borders of the Member States. These rights are guaranteed and only limited by the requirements set out by the 'Treaty' as necessary precautions. These restrictions and conditions in relation to free movement refer to the exemptions and limits in case the public policy, public security and health issues as envisaged by the Articles 39-55.⁶⁶

Although, the EC Treaty curve out the right of the free movement of economically active persons, (specifically those arrangements regarding the free movement of workers), from the very outset this was connected with the notion of EU citizenship.⁶⁷

What Limitations Exist on Free Movement of EU Citizens?

Treaty bestows the rights of free movement to economically active persons and secondary legislation grants same right to their family members. However, Article 2 of the Directives 90/364-366 has stipulated freedom of movement for persons who are not economically active. As mentioned before, reservations may be made by the Member States on public policy, public security and public health grounds. The rights rest on precondition that the person has to be economically capable so as not to impose additional burden on the new member states' social security and health system. Some derived rights such as freedom of movement and residence of family members of EU citizens are not encompassed by the Article 18.⁶⁸ On the other hand, O'Keeffe perceives the right to free movement as somewhat economic in nature rather than overtly political and he considers that understanding of free movement as a basis of citizenship rights is not consistent with actual situation⁶⁹

Direct Effects of Article 18

The most important issue to be raised in this section will try to find to answer is whether it is able to be thought that the right to free movement enshrined by Article 18(1) EC is proficient of being based on directly by all EU citizens in their national courts.⁷⁰ Nevertheless, the Court judgments of Court did not address this controversy either in the *Martínez Sala*⁷¹ or *Bickel* or *Grzelczyk* Cases. According to the Commission, it was intended as exclusively declaratory and not to bestow any additional rights.⁷² This controversy has also been brought to Court in the UK, in *ex parte Do Amaral Case*⁷³ UK Court judged that the EU citizens had not have an

⁶⁶ Mather, at.728

⁶⁷ Ibid.

⁶⁸ Craig and De Burca, at.759

⁶⁹ O' Keeffe, at. 94

⁷⁰ Mather, at.7

⁷¹ O'Leary, at.78

⁷² Bulvianate, at. 7

⁷³ Case, *R. v. Secretary of State for the Home Department, ex parte Vitale, R. v. Secretary of State for the Home Department, ex parte Do Amaral* [1995] All ER (EC) 946

unqualified right to reside in another Member State depending on Article 18, as Article 39 of the Treaty restricts this right. Nevertheless, the majority of the commentators asserted that Article 18 ought to be understood to have direct effect so as to confer functional sense to that clause.⁷⁴

The Court set out that three essential conditions are required for a clause to be found directly effective in *Belastingen Case*⁷⁵: It should be clear, precise and unconditional, (there must not be any implementation measures relying on discretion of member states or Community institutions). The phrase ‘the right to move and reside freely within the territory of the Member States’ appears sufficiently clear and brief. Even though Article 18(1) does not seem to specifically point out Member States, it might be inferred that in bestowing a right on persons, Article 18(1) inherently obliges Member States to guarantee move and reside freely.⁷⁶

It may be understood from the wording of Article 18(1) that the rights covered are not unconditional; they are attached to the restrictions and requisites embodied in the Treaty. The precedent judgments of Court indicate this. The free movement of persons introduced by Article 39, (*Van Duyn v. Home Office Case*), Article 43, (*Reyners v. Belgium*) and Article 49, (*Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*) has been understood directly effective irrespective of the public policy, public security and public health restrictions endorsed by the Treaty. Specifically, in the *Van Duyn Case* the Court ruled that even though Article 39 conferred restrictions on the rights of move freely, this did not indicate that it was used in a sense being qualified directly effective. The ECJ pointed out to the accessibility of legal review over: Since restrictions and conditions of Article 18 may possibly be available to legal review, the restrictions as such do not restrain the direct effect of this clause.⁷⁷

As far as the criterion of implementation concerned, this is somehow complex to ascertain definitely. Application of a Community provision which has direct effect must not be taken according to the discretion of Community institutions or by Member States. The first issue might be raised is whether Article 18(2), by virtue of providing implementing measures, derive from the directly effective provision of Article 18(1). Going through the Court’s case law it ought to be borne in mind that even so Articles 39 and 43 explicitly foresee extra application requirements, this would not be seen as a hindrance to the acknowledgment of direct effect. Similarly, Article 18(2) contemplates the likelihood of extra requirements but does not of itself preclude Article 18(1) holding direct effect.⁷⁸

74 Stephen Hall, **Nationality, Migration Rights and Citizenship of the Union**, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995, at.182; David O’ Keffe, “Reflections on European Union Citizenship”, 49 **Current Legal Problems** 347, 1996, at.372

75 Case 26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

76 Bulvianate, at.7

77 Hall, at. 187-188

78 Bulvianate, at.7

Second issue has to be dealt with is whether the phrasing of Article 18(1), on restrictions and requirements, set out both by the Treaty, as well by the measures acknowledged to produce its effect leaves room for discretion in execution. On the face of it, the response is not straightaway apparent.⁷⁹

O'Keeffe argues that as the Directives related to right of residence entrust the right of residence solely to individuals who possess adequate resources of survive and these exclusions actually restrict the right of movement and residence. He maintains that this might involve some discretion on the part of Community law maker suggesting that the clauses ought not to be directly effective.⁸⁰ It might be said however that Article 18(1) merely circumscribes present rules and does not contain limits and requisites for future enactment. Nevertheless, to a greater extent convincing claims is that Article 39(3) (d) EC ensures an illustration of a directly effective provision, albeit that it definitely delegates for the acceptance of conditions. Limits on the right covered in Article 39(3) (d) were forced by Article 2 of Regulation 1251/70. This exempts from exercise of the right a number of classes of individuals who would otherwise encompassed by the Treaty clauses. However, the Court regarded the Regulation 1251/70 as valid. Therefore, this suggests that a treaty provision having direct effect might be attached to restrictions and conditions to be laid down in secondary legislation delegated by the Treaty is not invalid.⁸¹

To sum up, the central idea behind the capable of having direct effect of Article 18 derives from the related jurisprudences of the Court. The Court has revealed the direct effect of various clauses albeit the restrictions or prerequisites may be attributed to court review. Hence, on the occasion of public policy, public security and public health or on neutrally reasonable basis, (for example, to safeguard member states' social aid resources), the Court's jurisprudence allows member states to restrict rights; nevertheless, this does not hinder the possession of direct effects of Article 18.⁸²

The Court reached the similar conclusion in *Baumbast and R Case*⁸³ in which vested direct effect on the Article 18 EC. The argument of right of residence would not be stemmed straightforwardly from Article 18(1) was claimed by the UK and German Governments. Since, the restrictions and conditions attributed to in that indent; the Commission as well concurred with this opinion whereas pointing out the political and legal significance of Article 18.⁸⁴

However, the Court held that: An EU citizen who any further does not avail a right of residence like an immigrant employee in another Member State is able to avail a right of residence in there via the direct effect of Article 18(1). The benefiting from this right is attached to the restrictions and conditions ascribed to in that clause, nevertheless the

79 Ibid., at.189

80 O' Keeffe, at.372

81 Hall, at. 207

82 Ibid.

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

84 Bulvianate, at.7

legal authorities and, if the national courts be obliged to guarantee that those limits and conditions are put into practice in conjunction with the common rules of Community legislation and, specifically, the principle of proportionality.⁸⁵

The Court of Justice ruled that the right of residence inside the Member States contained in Article 18(1) is entrusted on all EU citizens by clear-cut clauses of the EC Treaty. The ECJ accepted that this right is based on the restrictions and requirements. However, alluding to *Van Duyn*, the Court maintained that these restrictions and requirements, whilst being depend on court reconsideration do not deprive of Article 18(1) of its effect. EC vests rights which are accessible and which the domestic courts be required to safeguard. The justification given by Court of Justice is that the restrictions and conditions, which are attributed to in Article 18 EC and set out by Directive 90/364, are rooted on the view that the enjoying EU citizens of the right of residence might be regarded secondary to the lawful stake of the Member States. Nevertheless, restrictions and conditions must be envisaged in compliance with the Community legislation and specifically in compliance with the proportionality principle.⁸⁶

In conclusion, the *Grzelczyk* and the *Baumbast* cases bestow direct effect on Article 18 EC. Thus growing importance of EU citizenship namely, the primary position of citizens of the Member States has been established. Nevertheless, after the *Baumbast Case*, a new common right for every EU citizens has not emerged. The Court of Justice held that a directly applicable Article 18(1) right of residence conferred can be exercised by EU citizen 'who no longer enjoys a right of residence as a migrant worker in the host Member State.' This gives the impression of Article 18 being regarded the last resort by former immigrant workers, rather than be able to apparent benefit of 'non-migrant' workers, who are not engaged in economic activity or who do not posses adequate resources.⁸⁷

Citizens' Right to Equal Treatment

As has already been appeared, rather concrete division exist in the Community law between the two status of group bearing in mind whether they are in gainful occupation or not. Former group such as employed, self employed and descendants of employed are safeguarded by Treaty's fundamental provisions. However non-active minority such as unemployed, disabled, tourist, pensioners by the long standing secondary law.⁸⁸

Since the Treaty provisions and three residence Directives do not cover to those who are wholly dependent upon social security system, these people could not benefit from the free movement rights such as the right of entry and residence. The secondary Community legislation delegated to the host Member State to restrict the rights of those relying upon public support so as not to impose a burden upon its social security system. Except for the family members of immigrant workers or self employed, or

85 Ibid.

86 Bulvianate, at.7, related decision para.84-91

87 Ibid.

88 White, at. 886-905

retired migrant workers or self employed people, those who do not have adequate resource for themselves, can not maintain to receive benefits in regard to the right of equal treatment based on the condition of nationality yet.⁸⁹

By interpretation of the TEU clauses and secondary legislation, one conclusion to be come out that as far as the principle of non-discrimination and freedom of movement concerned, above mentioned distinguishing features cause multi-faceted application.⁹⁰ However, contribution of the case law of ECJ in construing of the notion of citizenship has played a considerable vital role in establishing a general right to equal treatment. By virtue of the ECJ's judgment in *Sala*, a common non-discrimination right, which is very similar to universal concept and comprehending to acquire all sorts of social advantages, has been rooted in Community law. This has emerged from the setting up the notion of EU citizenship.⁹¹

Conclusion Remarks

The Court has indisputably revolutionised the scope of Union citizenship more than expected. Although, the court was initially reluctant, it has moved from market interpretation that is economic citizenship to political citizenship and then it extended right of citizenship to non nationals. Citizenship is being pushed through the boundaries.

The Court first remarked in *Grzelczyk* that Union citizenship 'is destined to be the fundamental status of nationals of the Member States'. It was then stated in *Baumbast* that Article 18 EC does undeniably generate a 'directly effective right to residency' for all Union citizens. Nevertheless, the Treaty itself explicitly attaches the certain limitations and conditions upon that right, which requires that Union citizens be obliged to hold adequate guarantees and complete health insurance.⁹²

The interpretation of the Court in *Martínez Sala* substantiates that Union citizenship explodes 'linkages' which EC law mandated up to that time so as to prohibit of discrimination, that is, carrying out or taking part in an economic pursuit as workers, established individuals or suppliers or receivers of services, preparation for prospect economic pursuit as a student or various connection with an economic actor as a family relations or dependant. As result of this judgment, the material scope of the EC law conferred right to equal treatment to shoulder of citizens of EU residing legally in a host Member State as regards the complete bundle of benefits.⁹³

As of the new Citizenship Directive, it is more than a consolidation and summarise the innovation of jurisprudence of the Court whilst recasting the contents of the abolished directives in the wording of residence entitlements.⁹⁴

⁸⁹ Ibid.

⁹⁰ Bulvianate, at.7; related decision para. 84-91

⁹¹ Fries and Shaw, at. 536

⁹² Michael Dougan, "Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education in EU", 42 **Common Market Law Review**, 2005, at. 958

⁹³ O' Leary, S., at.77-78

⁹⁴ White, at. 7

Bibliography

Books

- Antony ARNULL, **The European Union and its Court of Justice**, New York: Oxford University Press, 1999
- Paul CRAIG, and de Burca GRAINNE, **EU Law Text, Cases and Materials**, 3rd ed., Oxford, New York: Oxford University Press, 2003.
- Jo SHAW and Gilliam MORE (eds), **New Legal Dynamics of European Union**, Oxford: Oxford University Press, 1995.
- David O' KEEFFE and Patrick TWOMEY (eds.) **Legal Issues of the Maastricht Treaty** Chancery/Wiley, London, 1994.
- Penelope KENT, **Law of the European Union**, London, Pearson Longman Fourth Edition, 2008
- Stephen HALL, **Nationality, Migration Rights and Citizenship of the Union**, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995

Articles

- Carlos CLOSA, "The concept of Citizenship in the Treaty on European Union", 29 **Common Market Law Review** 1137, 1992
- Carlos CLOSA, "Citizenship of the Union and Nationality of Member States", 32 **Common Market Law Review** 487, 1995
- David O' KEEFFE "Union Citizenship", in David O' KEEFFE and Patrick Twomey (eds.) **Legal Issues of the Maastricht Treaty**, London, Chancery/Wiley, 1994
- David O' KEEFFE, "Reflections on European Union Citizenship", 49 **Current Legal Problems** 347, 1996
- Dora KOSTAKOPOLOU, "Ideas, Norms and European Citizenship: Explaining Institutional Change", 68 **Modern Law Review**, 2005.
- Hans Ulrich Jessurun D'OLIVEIRA, "Nationality and the EU after Amsterdam", **David O'Keeffe** and Patrick Twomey, **Legal Issues of the Amsterdam Treaty**, Oxford University Press, 1999
- Hans Ulrich Jessurun D'OLIVEIRA, "Union Citizenship: Pie in the Sky?" in A. Rosas and E. Antola (eds), **A Citizens' Europe: In Search of a New Order**, London: Sage, 1995.
- Hüseyin GÖÇMEN, "Does the Concept of European Citizenship Lack Content?", 2(4) **GAU J. Social Sciences**, 2008
- Izolda BULVINAITE, "Union Citizenship and its Role in the Free Movement Regimes", at. <http://webjcli.ncl.ac.uk/2003/issue5/bulvinaite5.html> (5.6.2006).
- James D. MATHER, "The Court of Justice and Union Citizen", 11 **European Law Journal** 724, 2005
- Jo SHAW, "The Interpretation of the European Union Citizenship", 61 **The Modern Law Review Limited**, 1998
- Jo SHAW, "Citizenship of the Union: Towards Post-National Membership?" in **Vi(1) Collected Courses Of The Academy Of European Law** 237, The Hague: Kluwer Law International, 1999.

- Martina DOPPELHAMMER, "Expulsion: a Test Case for European Union Citizenship?", 24 **European Law Review** 621, 1999
- Michael DOUGAN, "Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education in EU", 42 **Common Market Law Review**, 2005
- Michelle EVERSON, "The Legacy of the Market Citizen" in Jo Shaw and Gillian More (eds), **New Legal Dynamics of European Union**, Oxford: Oxford University Press, 1995.
- Norbert REICH, "Union Citizenship – Metaphor or Source of Rights?" 7 **European Law Journal** 4, 2001.
- Norbert REICH, "The European Constitution and New Member Countries: The Constitutional Relevance of Free Movement and Citizenship", Annual Lecture at CECIL, University of Sheffield, 2004
- Niamh Nic SHUIBHNE, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?", 39 **Common Market Law Review** 731, 2002
- Robin WHITE, "Free Movement, Equal Treatment, Citizenship of the Union", **International and Comparative Law Quarterly**, 2005
- Robin WHITE, "The Citizenship Directive: Consolidation, Codification or Re-conceptualisation", (Leicester University Distance Learning Week Hand out 2006)
- Síofra O' LEARY, "Putting Flesh on the Bones of European Union Citizenship", 24 **European Law Review** 68, 1999
- Sybilla FRIES and Jo SHAW, "Citizenship of the Union: First steps in the European Court of Justice", 4 **European Public Law** 533, 1998