CITIZENSHIP IN THE CONTEXT OF EU ENLARGEMENT: POST-ACCESSION CEE MIGRANTS AS UNION CITIZENS

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Introduction

Prior to the 2004 enlargement of the European Union the older Member States (the EU15) voiced concerns that labour market disruption and benefit tourism would occur upon extension of the right to free movement to nationals of the eight central and eastern European accession countries (the EU8). Consequently, the Treaty of Accession 2003 included transitional arrangements enabling the EU15 to derogate from the *acquis* on the free movement of workers for a maximum period of seven years.[1] Most recently, following the enlargement which took place in 2007, an analogous regime has been imposed on nationals of Bulgaria and Romania (the EU2).[2]

The concern of this paper is to take a closer look at the relationship between the nationals of the recently-acceded central and eastern European (CEE) Member States and the evolving status of Union citizenship.[3] As the free movement of persons provisions, which extend valuable mobility rights and contingent social entitlement to EU citizens, constitute a central, if not the central, facet of Union citizenship, one of the main objectives of the paper is to explore the impact of restricted mobility rights during the transitional period(s) on the citizenship status of nationals from the CEE Member States.

First, attention turns to the notion of Union citizenship itself and the significance of free movement to a meaningful interaction with the status is emphasised. In the second part of the paper the contention that EU8 and EU2 nationals have been granted a 'second-class' citizenship status is explored in further detail. Certainly, transitional restrictions impact on the traditionally privileged category of economic migrant workers who, undoubtedly, occupy a less-privileged status during

[1] Treaty of Accession 2003 [2003] O.J. L 236/17. Article 24, Act of Accession [2003] O.J. L236/33 refers to a series of Annexes that contain details of the transitional arrangements in respect of each accession Member State (Annexes V-XIV). For example in relation to Poland see Annex XII [2003] O.J. L236/875

[2] Treaty of Accession 2005 [2005] O.J. L157/11. In the case of the EU2 it is the EU25 (not EU15) that is entitled to derogate from the *acquis* on free movement of workers

[3] The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia (the 'EU8'); Bulgaria and Romania (the 'EU2')

the transitional period. The typical typology of free movement entitlement under Community law is examined (i.e. that applicable to EU15 nationals and to nationals of Cyprus and Malta), and then the newest CEE citizens are incorporated into the citizenship hierarchy. Part three then considers the opportunities for EU8 and EU2 nationals to rely on the broader, non-economic right to free movement as a *citizen* flowing from Article 18 EC as, despite the imposition of transitional arrangements on the free movement rights of *workers*, CEE citizens are entitled to migrate throughout the EU under the sponsorship of one of the other categories of citizenship status. In examining the links between EU8 and EU2 nationals and the different sites of free movement in the EC Treaty there is also scope to trace the development of Union citizenship from a predominantly market-based status (attaching only to those 'worthy' economic migrants connected to the functioning of the Internal Market) to an arguably more inclusive and social conception of citizenship. The latter understanding of citizenship provides scope for economically inactive migrants to gain a degree of access to the status of citizenship and the valuable rights that append to it. Although it must be recognised that the non-economic mobility rights are clearly of value to some CEE citizens, the paper argues that the denial of the (complete) right to move as a worker continues to be a significant loss to the overall citizenship package extended to EU8 and EU2 nationals.[4]

1. Union citizenship as a concept and its link to mobility

Citizenship in a broad sense, although it remains somewhat of a contested concept,[5] refers to membership and participation in a community;[6] additionally, it denotes both entitlements and responsibilities which attach to the citizens who belong to the said community (usually the nation-state).[7] Citizenship then, formally, is a legal status but 'in its fullest sense it is the culmination of incorporation into a society'.[8] Bellamy has identified rights, participation and solidarity as the key

[4] This paper aims to analyse the citizenship status of CEE migrants at the EU, as opposed to the national, level. Nevertheless, it is recognised that the national context also plays a prominent role in shaping the rights and experiences of post-accession migrants as a consequence of the degree of discretion Member States are able to exercise when implementing transitional arrangements. For discussion of the UK approach to EU8 migrants see Currie, S., ''Free' movers? The Post-Accession Experience of Accession-8 Migrant Workers in the UK', (2006) 31 *European Law Review*, 207; Currie, S., 'De-Skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement', (2007) 23 (1) *International Journal of Comparative Labour Law and Industrial Relations*, 83-116

[5] Faist, T., 'Social Citizenship in the European Union: Nested Membership', (2001) 39(1) *Journal of Common Market Studies*, 37, 40

[6] Marshall, T.H., *Citizenship and Social Class*, (Cambridge: Cambridge University Press, 1950)

[7] Kofman, E., 'Citizenship for Some but not for Others: Spaces of Citizenship in Contemporary Europe', (1995) 14(2) *Political Geography*, 121, 122

[8] *Ibid.*

components of contemporary citizenship.[9] More specifically it is civil rights, particularly those that protect individual autonomy and family life; the right to engage in the political process; and to access social rights, such as education and social assistance, that are most crucial to an understanding of modern citizenship in its broad sense. This understanding, of course, has been established predominantly in the context of national citizenship. The notion of Union citizenship,[10] which has its own distinctive features, complements (rather than replaces) national citizenship[11] and is formally articulated in Articles 17-22 EC after a chapter on citizenship was agreed and inserted into the Treaty of Maastricht in 1992.[12] The formal creation of the citizenship provisions was part of an aspiration to increase the legitimacy of the European project and to further the integration of EU nationals living in Member States other than their own.[13] Essentially, the policy concern, of the European Commission in particular, was to bring 'Europe closer to its citizens'.[14]

Article 17 EC clarifies who is able to access the status of citizenship of the Union. Perhaps it is more appropriate to say this provision makes clear that it is the individual *Member States* that determine which individuals gain access to the status as 'every person holding the nationality of a Member State shall be a citizen of the Union'. This demonstrates the exclusionary nature of Union citizenship as for the many third-country nationals resident in EU Member States it has been an unattainable status and a community within which they have not been able to attain full membership or participation. By its very nature citizenship lays down boundaries between those who are included and those who are excluded.[15] One issue this paper seeks to explore is whether EU8 and EU2 nationals, despite now being nationals of a Member State, remain excluded from full membership and participation within the EU community.

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[9] Bellamy, R., 'Introduction: The Making of Modern Citizenship' in Bellamy, R. *et al* (Eds.), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation States*, (Basingstoke: Palgrave Macmillan, 2004), 1, 6

[10] See Shaw, J., 'The Many Pasts and Futures of Citizenship in the European Union', (1997) *European Law Review*, 554; Shaw, J., 'The Interpretation of European Union Citizenship', (1998) 61(3) *Modern Law Review*, 293

[11] Article 17(2) EC

[12] For more detail on the background behind the inclusion of citizenship see O'Leary, S., *The Evolving Concept of Community Citizenship* (The Hague: Kluwer, 1996); also, the Tindermans Report on the European Union, produced at the request of the Paris summit in 1974, included a chapter entitled 'Towards a Europe for Citizens' (Bull.EC.(8) 1975 II no.12, 1)

[13] Chalmers, D., Hadjiemmanul, C., Monti, G. and Tomkins, A., *European Union Law Text and Materials* (Cambridge: Cambridge University Press, 2006), 566-568; Ackers, L. and Dwyer, P., *Senior Citizenship? Retirement, Migration and Welfare in the European Union*, (Bristol: The Policy Press, 2002), 16-18

[14] Ackers and Dwyer, *Ibid.*, 17. It is outside the scope of this paper to give a detailed overview of the history of Union citizenship but see O'Leary, *Op. Cit.* n.12; Wiener, A., *'European' Citizenship Practice: Building Institutions of a Non-state*, (Boulder: Westview, 1998)

[15] Kofman, *Op. Cit.* n.7, 121

The citizens' rights established in the 'citizenship chapter' agreed at Maastricht include, in Article 18 EC, the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it effect. There is also the right to vote in local and European elections in the host state (Article 19 EC);[16] the right to diplomatic and consular protection from the authorities of any Member State in third countries (Article 20 EC); and the right to petition the European Parliament and the right to apply to the ombudsman in any one of the official languages of the EU (Article 21 EC). This constitutionalisation of the notion of Union citizenship clearly resonates with the notion of free movement as the applicable rights, notwithstanding Article 18 EC itself, are exercisable only outside of the citizen's home state.[17] In addition, Shaw makes the point that the formalisation of Union citizenship at Maastricht:

'was essentially the beginning of a new stage in an on-going process of development of the status of the individual under Community law which had involved inputs from the Court of Justice, and especially its constitutionalisation of the free movement provisions and the right to non-discrimination on the grounds of nationality…'[18]

Citizenship, therefore, stretches further than the articulation in Articles 17-22 EC to incorporate also the traditional 'economic' free movement provisions,[19] read alongside the extensive interpretation provided by the ECJ of the social rights of economic migrants. It also finds expression via the equal treatment principle in Article 12 EC and various pieces of secondary legislation.[20]

Union citizenship thus bestows a series of political, civil and socio-economic rights, which in some respects resembles the national citizenship model, but there can be no doubt that free movement is the trigger for any meaningful relationship with Union citizenship. Ackers and Dwyer stress that not only is mobility a right that citizens can access in itself, it also constitutes the trigger to other

[16] It is not the intention here to discuss aspects of political citizenship. See Lardy, H., 'The Political Rights of Union Citizenship', (1997) *European Public Law*, 111; Shaw, J., 'Sovereignty at the Boundaries of the Polity' in Walker, N. (Ed.), *Sovereignty in Transition*, (Oxford Hart, 2003), 461; Shaw, J. and Smith, M., 'Changing Polities and Electoral Rights: Lithuania's accession to the EU' in Shah, P and Minski, W. (Eds), *Migration, Diasporas and Legal Systems in Europe*, (London: Routledge, 2006), 145

[17] The Court has confirmed that the citizenship provisions are not applicable in wholly internal situation, see Cases 64/96 and 65/96 *Uecker and Jacquet* [1997] E.C.R. I-3171

[18] Shaw, J., 'The Many Pasts and Futures of Citizenship in the European Union', (1997) 22(6) *European Law Review*, 554

[19] Articles 39, 43 and 49 EC

[20] Now most notably Directive 2004/38 [2004] O.J. L158/77, and Regulation 1612/68 [1968] O.J. L257/2

forms of social entitlement, a 'basket of goods', that come into play while that right is being exercised,[21] most notably welfare and family rights.[22] They go on to make the point that the development of citizenship has, essentially, taken place alongside the evolution of mobility rights:

'In the absence of mobility, citizenship of the Union contributes little to the social status and day-to-day experience of Community nationals'.[23]

It is this interrelationship between rights of mobility and citizenship that demands some discussion of the extent to which the transitional arrangements, by limiting the ability of EU8 and EU2 nationals to rely on Article 39 EC and move as workers, effectively excludes them from full access to the status of Union citizenship.

Union citizenship, with its reliance on free movement as a central trigger to entitlement, as opposed to a primary reliance on political rights,[24] appears to have quite different characteristics to the kind of national citizenship described above with reference to Bellamy's classification of rights, participation and solidarity.[25] However, the free movement provisions have provided a fertile site for the development and extension of social rights seen as necessary to facilitate the movement and establishment of migrant workers.[26] Similarly, the more recent caselaw interpreting Article 18 EC in conjunction with Article 12 EC has enabled welfare entitlement to be extended to non-worker migrants under certain conditions.[27] In this respect there is at least a modicum of 'solidarity' evident in the developing citizenship caselaw. Indeed, authors have drawn a link between the recent emphasis on a 'social Europe' and Marshall's seminal work on citizenship which highlighted the development of social rights as the maturity of a relationship between the state and the people.[28] There is then, it seems, a degree of social citizenship[29]

[21] Ackers and Dwyer, *Op. Cit.* n.13, 3

[22] For example workers' rights of family reunification under Directive 2004/38, or entitlement to social benefits pursuant to Article 7(2), Regulation 1612/68

[23] Ackers and Dwyer, *Op. Cit.* n.13, 3

[24] Everson, M., 'The Legacy of the Market Citizen' in Shaw, J. and More, G. (Eds.), *The New Legal Dynamics of European Union,* (Oxford: Clarendon Press, 1995), 73, 74

[25] Although Articles 19-21 EC do provide some 'civil' rights and rights of political participation for those citizens in a Member State other than their own

[26] Pursuant to the non-discrimination principle enshrined in Article 39 EC (and Article 12 EC) and expressed in specific provisions of the secondary legislation such as Article 7(2), Regulation 1612/68 (and ensuing caselaw), Case 207/78 *Even* [1979] E.C.R. 2019; Case 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085; Case 65/81 *Reina* [1982] E.C.R. I-33; Case 59/85 *Netherlands v Reed* [1986] E.C.R. 1283

[27] Discussed below. See, for example, Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193

[28] For example, Shaw, *Op. Cit.* n.18; Ackers and Dwyer, *Op. Cit.* n.13, 16

[29] On social citizenship see, Everson, *Op. Cit.* n.24

evident in the evolving or maturing arena of Union citizenship. This paper will touch upon the extent to which social solidarity under the auspices of free movement is, or may possibly be, extended to EU8 and EU2 migrants. Citizenship, therefore, in the context of this is measured in terms of the residence rights extended to migrants and the consequent ability to rely on the principle of non-discrimination in the host state in order to access various social rights and benefits.[30]

2. Second class citizenship for EU8 and EU2 nationals in light of transitional restrictions on free movement?

Many of the discussions, particularly those surrounding the 2004 enlargement, were couched in quite symbolic terms referring to the post-communist CEE countries' 'return' to their rightful place in Europe.[31] This literature portrays the extension of free movement rights as holding particular significance for the citizens of the CEE Member States on account of the specific historical and socio-political background of the respective countries; specifically, under communism citizens of the CEE countries were subject to mobility restrictions, even between regions within a single state.[32] For example, prior to enlargement, in 2002, Maas argued that:

'For individual citizens in the candidate accession countries, freedom of movement is without a doubt a key symbol of the 'return to Europe' that EU accession represents. Citizens of applicant Member States regard the freedom of movement that EU citizens enjoy as remarkable when contrasted with the limits to movement they experienced under communism'.[33]

Given the symbolic importance of free movement, and the significance of mobility to citizenship, it is not surprising that the consequent failure to extend the right of free movement in full has led some to comment that EU8 and EU2 nationals are, initially at least, relegated to a status of

[30] Enshrined in Article 12 EC. Note that here the terms 'non-discrimination' and 'equal treatment' are used interchangeably to refer to the principle in Article 12 EC. The author acknowledges the point that, in practice, the right of individuals not to be discriminated against may not necessarily result in them being treated on an equal footing with nationals but there is insufficient scope in this paper to consider this in any depth. See the literature on the 'substantive versus formal equality' debate including, *inter alia*, Barnard, C. and Hepple, B., 'Substantive Equality', (2000) 59 *Cambridge Law Journal*, 562; Fredman, S., 'Equality: A New Generation?', (2001) 30(2) *Industrial Law Journal*, 145. On the notions of equal treatment and non-discrimination in EU law see Numhauser-Henning, A. (Ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, (The Hague: Kluwer, 2001)

[31] Kengerlinsky, M., 'Restrictions in EU Immigration Policies towards New Member States', (2004) 2(4) *Journal of European Affairs*, 12; Maas, W., 'Free Movement and EU Enlargement', Paper prepared for the Fifth Biennial Conference of the European Community Studies Association, Toronto, Canada, 31 May-1 June 2002

[32] Petev, V., 'Citizenship and *Raison D'État.* The Quest for Identity in Central and Eastern Europe' in La Torre, M. (Ed.), *European Citizenship: An Institutional Challenge*, (The Hague: Kluwer, 1998), 83; Maas, *Ibid*

[33] Maas, *Op. Cit.* n.31, 2

second class Union citizenship.[34] Reich, for example, comments that a seven-year postponement of free movement rights does not conform to the 'spirit of creating a greater Europe after the fall of the Soviet regime'.[35]

The transitional arrangements on the free movement of persons allow EU15 Member States to derogate from Articles 1-6 of Regulation 1612/68[36] in respect of EU8 and EU2 nationals.[37] It is these provisions which enable nationals of the Member States to access the labour markets of the other Member States and, hence, these provisions are the main source of an EU migrant worker's mobility and employment rights. By permitting the old Member States to deny labour market access to EU8 and EU2 nationals the transitional restrictions have the effect of rendering the Community law status of 'worker' inapplicable to the vast majority of the new EU citizens. Those who qualify as a worker[38] enjoy extensive citizenship rights in the form of secure residence in the host society[39] and, furthermore, contingent social rights such as family and welfare entitlement.[40] The extensive nature of migrant workers' citizenship standing under Community law is illustrated further by the ability of the status to have continuing effects after the employment relationship has come to an end. The recently-adopted Directive on the free movement rights of citizens and their family members (Directive 2004/38),[41] for example, now makes clear that the status of worker, which includes the right to reside and the attached social rights, continues to apply in the aftermath of a worker being made (involuntarily) unemployed, not being able to work due to illness or an accident, or embarking on vocational training.[42] This contrasts with the less

[34] Maas, *Op. Cit.* n.31; Carrera, S., 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?', (2005) 11(6) *European Law Journal*, 699

[35] Reich, N., 'The European Constitution and New Member Countries: The Constitutional Relevance of Free Movement and Citizenship', Paper presented at the Centre for European, Comparative and International Law's Annual Lecture, University of Sheffield, 26 February 2004, 16

[36] [1968] O.J. L257/2

[37] Note that in the case of the EU2 it is the *EU25* which have the opportunity to apply mobility restrictions. As a result of the Treaty of Accession concerning Romania and Bulgaria some of the EU8 Member States will be in the position of applying transitional measures against the new(er) citizens while their own nationals' free movement rights remain curtailed.

[38] Pursuant to the test laid down in cases such as Case 66/85 *Lawrie Blum* [1986] E.C.R. 2121 of 'for a certain period of time performing services for and under the direction of another person in return for which remuneration is received'

[39] Pursuant to Article 39 EC. Previously Directive 68/360 [1968] O.J. L257/13 articulated the procedural requirements connected to the right to reside, now Directive 2004/38 contains the relevant rules.

[40] *Op. Cit.* n.30. Family members have also been extended rights of residence and equal treatment in the host Member State. Directive 2004/38 now articulates this, previously it was realised by Regulation 1612/68 and the caselaw of the ECJ, for example see Cases 32/75 *Fiorini v SNCF* [1975] E.C.R. 1085; C-278/94 *Commission v Belgium* [1996] E.C.R. I-4307; C-185/96 *Commission v Greece* [1998] I-6601

[41] [2004] O.J. L158/77

[42] Article 7(3), Directive 2004/38. The provision enshrines the decision in Case 39/86 *Lair* [1988] E.C.R. 3161 so that in cases of voluntarily unemployment, were the migrant has enrolled on a vocational course, the training should be related to the previous employment. Note that a provision in the Accession Treaties allows the older Member States to withdraw the rights of EU8 and EU2 nationals who become voluntarily unemployed during the transitional period:

secure situation of those migrants who move without any 'economic' link, discussed below, whose rights of residence are much more circumscribed.

Before the discussion examines the impact of the transitional arrangements on the citizenship status of EU8 and EU2 nationals, the following subsection details the 'usual' typology of free movement entitlement that applies to the different categories EU migrant citizen.

2.1 Differentiated rights for Union citizens

Community law bestows different citizenship 'packages' on different categories of migrant citizens and, given the Union's economic origins, this has conventionally been determined by the particular category's degree of connection to the functioning of the Internal Market. Thus, the traditional approach to citizenship attaches primacy to the relationship between the individual and the labour market.[43]

Workers usually stand at the summit of the citizenship hierarchy alongside those other citizens, the self-employed and those providing services, also exercising one of the Community's fundamental freedoms.[44] Also at the summit are those retired citizens exercising their right to remain in a Member State where they have worked.[45] Citizenship, as mentioned earlier, is usually thought of as conferring rights *and* duties. One way of interpreting the traditionally privileged status of market citizens is to view their economic activity as, essentially, a duty fulfilled. Under this analysis, it is their economic contribution to the host Member State that has granted them the right to claim the various social entitlements including access to the extensive non-discrimination principle.[46] However, the very 'absolute' nature of the worker status which emerges from the ECJ's caselaw undermines this understanding somewhat. The ECJ has adopted an extremely broad understanding of who will constitute a worker so that those who receive wages lower than the official subsistence level in a Member State,[47] or, those who require additional public funds to supplement their wages[48] still acquire the very privileged status despite

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Article 24 of the Act of Accession [2003] O.J. L236/33, para. 2, Annexes. It is not entirely clear how the provisions relate but, in the event of an EU8 or EU2 migrant worker leaving a job to take up a vocational course, the Member State may attempt to rely on the Accession Treaty during the transitional period to expel the migrant.

[43] Ackers and Dwyer, *Op. Cit.* n.13, 13

[44] It is not the intention here to consider the exercise of establishment or the provision of services in any detail

[45] Pursuant to Regulation 1251/70 [1970] O.J. Sp. Ed. L143/24

[46] Although, as will be demonstrated, more recent developments in the citizenship law has led to those without such economic 'value' gaining access to the principle of equal treatment

[47] Case 53/81 *Levin* [1982] E.C.R. 1035

[48] Case 139/85 *Kempf* [1986] E.C.R. 1741

the contribution they make, in economic terms, being limited in nature. If a worker is classified as undertaking effective and genuine work their residence and equal treatment entitlement is (almost) unconditional in nature.[49]

Arguably, the family members of the market citizens described above have occupied the next rung down the ladder. Despite the derivative nature of family members' status it has been a far-reaching one thanks often to the ECJ's interpretation of secondary legislation which extended the worker's package of entitlement also to the family under the facilitating mobility test.[50] Directive 2004/38 has also solidified somewhat the status of family members by explicitly extending the right of equal treatment to them.[51]

Under the economic paradigm the bottom rung has been reserved for those with little, or any, connection to the Internal Market. This includes retired persons who exercise mobility rights after ending their occupational life in their own Member State (and thus have no 'right to remain' in any host Member State), students and the financially independent. The rights of these economically inactive citizens are dealt with in more detail below in relation to the status of EU8 and EU2 non-workers; suffice it to say for now that the status is much less secure than that of the market-citizen worker. In particular, their rights of residence have been subject to the twin requirements of possessing sufficient resources so as not to become a burden on the public assistance of the host Member State and of having taken out a policy of sickness insurance in the host state for themselves and their family.[52] The equal treatment rights of such citizens have also been more heavily circumscribed. In relation to students, for example, in *Brown* it was decided that, at that stage in the development of Community law, there was no anti-discrimination protection available in the area of maintenance or training grants.[53] Article 3 of Directive 93/96 confirmed this position. However, as will be demonstrated later, the ECJ was able to interpret the provisions of Community law to enhance the equal treatment rights of students (and other non-economically

[49] Subject to the, strictly defined, derogations on the grounds of public policy, public security and public health now detailed in Article 27-33, Directive 2004/38; previously the position was dealt with under Directive 64/221 [1964] O.J. Sp. Ed. L850/64

[50] For example, Case 207/78 *Even* [1979] E.C.R. 2019

[51] Article 24, Directive 2004/38

[52] Retired persons: previously Directive 90/365 [1990] O.J. L180/28; Students: previously Directive 93/96 [1993] O.J. L317/59; Financially-independent persons: previously Directive 90/364 [1990] O.J. L180/26. Now the free movement rights of all citizens are set out in Directive 2004/38

[53] Case 197/86 *Brown* [1988] E.C.R. 3205

active citizens) following the introduction of Article 18 EC.[54] For our purposes here it is sufficient to note that such non-market citizens are accorded a less comprehensive status than workers.

One final group of migrants to be situated in the hierarchy are workseekers. Community law has traditionally regarded workseekers as semi-workers (or semi-market citizens). The Court has held that if Member State nationals could only move for purposes of accepting offers of employment, then the free movement of workers would be significantly hindered.[55] EU nationals have, therefore, been afforded the right to move freely to other Member States and reside there for the purpose of seeking employment. The Court in *Antonissen* further secured the position of workseekers by stating that they should be granted a reasonable period in which to find work[56] and that, as long as the workseeker could show he or she was continuing to seek employment and had genuine chances of being engaged, the right of residence could continue.[57] Thus the residence status of workseekers appears relatively secure and one could argue that they sit just beneath workers on the citizenship ladder, especially given that they enjoy a (future) connection to the labour market. The equal treatment rights of this group, however, seem to more mirror those sitting at the bottom of the ladder. In effect, as with students, the approach of the ECJ was initially restrictive, holding that workseekers' rights of equal treatment only applied to accessing employment and not to any 'social advantages'.[58] Again, the Court's jurisprudence on the cumulative impact of Articles 18 and 12 EC has enabled workseekers to enjoy greater access to the non-discrimination principle thus enhancing their citizenship status.[59] However, the current status of this group (along with that of students) is complicated by the provisions of Directive 2004/38 which attempts to deny equal treatment as regards social assistance to workseekers (and as regards maintenance grants for students).[60] In some respects, then, for the time being the position of workseekers is slightly unclear as it is difficult to predict how the Court will interpret the provisions of Directive 2004/38. For now we will place them tentatively at the midway point, just beneath the family members of the market citizens as, although their status as regards the right to non-discrimination is ambivalent, their right to reside whilst genuinely seeking work is secure and not subject to the resources requirement.

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[54] For example, Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Case C-209/03 *Bidar* [2005] E.C.R. I-2119

[55] Case C-292/89 *Antonissen* [1991] E.C.R. I-745

[56] 6 months was suggested as a reasonable period of grace, *Antonissen,* para 21

[57] Directive 2004/38, on the whole, confirms this position. Although the general right of residence applies for only 3 months (Article 6) it is made clear in Article 14(4)(b) that a Union citizen cannot be expelled so long as they are continuing to seek employment and have genuine chances of being engaged

[58] Case 316/85 *Lebon* [1987] E.C.R. 2811

[59] Case C-138/02 *Collins* [2004] E.C.R. I-2703

[60] Article 24(2), Directive 2004/38

2.2. Adding EU8 and EU2 nationals to the citizenship hierarchy

As a result of the transitional arrangements on free movement EU8 and EU2 migrants experience a different kind of citizenship status and an altered, somewhat more complex, hierarchy emerges.[61] What the transitional restrictions do, essentially, is hamper the capacity of nationals from the CEE Member States to migrate under the sponsorship of one of the traditional 'economic' Community provisions – Article 39 EC. Articles 43 and 49 EC continue to apply so that EU8 and EU2 nationals are free to move throughout the EU to establish a business or to provide (or receive) services[62] but there can be no doubt that the denial of worker status dents the citizenship status of EU8 and EU2 nationals; certainly, it reduces their potential to be *market* citizens.

The place of workers, as a category of free movers, is relegated on the citizenship scale during the transitional period. Furthermore, due to the particular design of the transitional arrangements workers do not have a uniform entitlement to residence across the EU Member States. As it is for individual EU15 Member States to determine whether or not they restrict labour market access, the citizenship status of EU8 and EU2 nationals differs between Member States (in actual fact, in the case of the EU2 the individual *EU25* Member States can decide whether to impose restrictions or not).

One consequence of the transitional arrangement's focus on workers as a category of migrant is to enhance the importance of the distinction between workers and the self-employed. There may be a 'grey zone'[63] in some instances as to whether the work being carried out is under the direction of another, and hence is in the capacity of an employee, or is carried out independently and is thus is carried out as a self-employed person.[64] In any event, those CEE nationals who do exercise a right to establishment (or provide services) are entitled to take their place at the top of the hierarchy.[65] Those EU8 or EU2 workers called upon by certain of the older Member States to

[61] See Stalford, H., 'The Impact of Enlargement on Free Movement: A Critique of Transitional Periods', Paper presented at the Third Meeting of the UACES Study Group on the Evolving EU Migration Law and Policy, University of Liverpool, 5 December 2003

[62] Although, Austria and Germany are entitled to apply national measures to address serious disturbances or the threat thereof, in specific sensitive sectors of their labour market, see para. 13, Annexes

[63] Adinolfi, A., 'Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures', (2005) 42 *Common Market Law Review*, 469, 490

[64] See, *inter alia,* Case C-268/99, *Aldona Malgorzata Jany* [2001] E.C.R. I-8615

[65] Although it does need to be acknowledged that the position of service providers (and recipients), as *non-residents*, is not completely analogous to that of *resident* workers and self-employed persons. See Van Der Mei, A.P., *Free Movement of Persons Within the European Community: Cross Border Access to Public Benefits*, (Oxford: Hart, 2003)

fill gaps in their labour markets - such as the UK, Ireland and Sweden – and those who gain access to other of the EU Member States on an individual basis do (for example by means of obtaining a work permit), in theory at least, sit at the top of the ladder as once access is secured the principle of non-discrimination as regards social advantages[66] applies in full under the transitional arrangements.[67] However, the reality of such workers' experience may be quite different, as the UK's stance under the transitional arrangements demonstrates. The UK attempts to limit the citizenship status of EU8 and EU2 workers by denying rights of residence and equal treatment should the employment relationship come to an end which, as was mentioned earlier, is a privilege extended to migrant workers under Community law.

EU8 and EU2 migrant students, retired persons and economically self-sufficient individuals enjoy access to a higher position in the hierarchy than do workers not required by the EU15 because the transitional mobility restrictions do not apply to these groups. This clearly demonstrates the reversal of citizenship fortune experienced by workers during the transitional periods who, essentially, are downgraded to the bottom of the hierarchy.[68] As a corollary of the worker's demotion the family members of such citizens also occupy a less-privileged status during the transitional periods. Indeed, the status of family members is downgraded to an even greater extent under the Accession Treaties as the transitional arrangements enable the implementing Member States to prevent family members from working for a period of 18 months or until three years after the date of accession (whichever date is earliest),[69] whereas the standard Community law position is for family members to enjoy immediate labour market access.[70]

CEE workseekers similarly occupy a lower citizenship status than their EU15 counterparts. Interestingly, however, residence rights of workseekers flow directly from Article 39 EC itself rather than from the secondary legislation.[71] Arguably then, workseekers' residence rights fall outside the scope of the permitted derogations in the Accession Treaties, the main focus of which

[66] Article 7(2), Regulation 1612/68 [1968] O.J. L257/2
[67] Note, however, the continuing application of the safeguard clause which enables the EU15 to resort to transitional measures at any point during the transitional period (Act of Accession [2003] O.J. L236/33; para. 7, Annexes). It is unlikely, however, that the invocation of this safeguard would sanction the expulsion of those that had already gained access to the status of worker in the territory
[68] Stalford, *Op. Cit.* n.61, 10
[69] Para. 8, Annexes
[70] Article 23, Directive 2004/38; previously Article 11, Regulation 1612/68
[71] Case C-292/89 *Antonissen* [1991] E.C.R. I-745, para. 13

is Articles 1-6 Regulation 1612/68 *not* Article 39 EC itself.[72] This interpretation seems to be shared by the Commission as its free movement guide, produced to provide information about the operation of the transitional arrangements, states:

'Discrimination is prevented at the job search stage… Indeed all job-seekers are entitled to search for work in other Member States'.[73]

On this reasoning it may be appropriate to suggest that EU8 and EU2 migrants do formally have a right to reside under Community law to seek work for a reasonable period. Admittedly, this argument may appear unconvincing when one considers that the majority of EU15 Member States appear to circumvent Article 39 EC in this manner by denying residence to workseekers. But presumably, in an EU15 Member State with transitional restrictions in place a CEE migrant would have no reasonable prospects of becoming engaged and the right to reside would expire.[74] Essentially, the very existence of such transitional restrictions renders it unlikely that an EU8 or EU2 workseeker would have genuine chances of finding employment;[75] hence, workseekers sit below workers in the citizenship hierarchy that emerges under the transitional arrangements.

Clearly EU8 and EU2 migrants' citizenship status is downgraded as a result of the transitional restrictions. Hence, they are denied full membership and participation in the community that they have, formally, joined and are, accordingly, not fully incorporated into the EU 'society' while restrictions are in place. Furthermore, Stalford argues:

'The transition arrangements challenge more general, prevailing theories of citizenship which traditionally denote a common political, geographical, social and civil identity, implying a share in individual and collective rights and responsibilities'.[76]

[72] This is discussed in more detail later on but for now it is sufficient to note that the Commission shares this view: European Commission (DG Enlargement), *Free Movement for persons – A Practical Guide for an Enlarged European Union*, (Brussels, 2002), 6

[73] European Commission (DG Enlargement), *Free Movement for persons – A Practical Guide for an Enlarged European Union*, (Brussels, 2002), 6

[74] Of course it also true that many EU8 migrants will purposely *not* seek work in a Member State that has transitional restrictions in place because they will not expect to be successful

[75] Note that the position of workseekers is likely to be different in those Member States that have opened their labour market

[76] Stalford, *Op. Cit.* n.61, 11

Of course, the transitional restrictions are temporal in nature and are not a new phenomenon. After all, they were imposed following the accessions of Greece, Spain and Portugal (although they were lifted early). One wonders, however, whether the spirit within which the nationals of the CEE countries have been introduced to the EU will have any longer-term effects for the newest citizens' experience and perception of Union citizenship. Citizenship as a concept was largely absent from the documents surrounding the enlargement process;[77] indeed, there is no mention of it in the transitional arrangements contained in either the 2003 or 2005 Accession Treaties.[78] This is unusual given the frequent contemporary emphasis placed on the concept of Union citizenship, particularly by the European Commission. Furthermore, the rather discriminate way in which the restrictions are focussed on the ten post-communist states, leaving aside Malta and Cyprus, may be fuelling a perception of inequity in the CEE Member States. It suggests a 'them and us' attitude on behalf of the EU15, with Malta and Cyprus perceived as being more like the old Member States, and thus being immediately entitled to full membership of the community, and the CEE Member States being viewed more suspiciously; accordingly, their nationals are excluded from membership and full participation in the Community. Moreover, the specific symbolic significance of mobility rights to those who have experienced stringent movement restrictions in the past adds weight to the argument that the initial exclusion from full citizenship will be felt particularly keenly by many of the nationals in the CEE Member States and may be interpreted as a form of second class membership.

One particular criticism levelled at the transitional arrangements is articulated by Maas:

'Usually, the concept of citizenship is seen as a status that is unitary; either one is a citizen or one is not. That is not the way to think of citizenship in this case; the current enlargement will feature a gradual process of extending rights to individuals'.[79]

Arguably, however, Maas' construction of citizenship is firmly based on a national model and displays a fundamental misunderstanding of the workings of Union citizenship. Despite the Court's, and now also the legislature's,[80] insistence that citizenship is destined to be the fundamental status of the nationals of the Member States,[81] the reality is that Union citizenship is

[77] Stalford, *Op. Cit.* n.61; Maas, *Op. Cit.* n.31
[78] Although the relevance of Article 18 EC is discussed below
[79] Maas, *Op. Cit.* n.31, 15
[80] Recital 3, Preamble to Directive 2004/38
[81] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 31

highly differentiated and has never offered a unitary status.[82] The hierarchy of citizenship status sketched above corroborates this viewpoint. Advocate-General Léger's vision that 'every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations'[83] has certainly not yet been realised. As has already been pointed out here, the traditional distinction has been between the economically active groups of migrants 'protected by the Treaty's core provisions and long-established secondary legislation and those who fall into more marginal categories such as the unemployed, the disabled, tourists, students, pensioners and the independently wealthy'.[84] Those either side of the distinction have varying degrees of access to the principles of free movement and equal treatment.[85] The entrenchment of differentiated citizenship rights for all Union citizens under Community law leads Dougan to the conclusion that the downgraded status of EU8 and EU2 migrant workers is simply part of this ongoing trend:

'Even as regards nationals of the existing Member States, free movement rights vary according to distinctions drawn by the Treaty itself, under secondary legislation passed by the Community institutions, and through the caselaw of the Court – distinctions based on nationality, economic worth and financial status – whereby… some of the least wealthy and most vulnerable members of society are excluded from rights to free movement and residency across the EU'.[86]

The restricted citizenship status of EU8 and EU2 nationals, then, simply adds to the norm of differentiation already inherent in Community law.[87] Presumably under this analysis the new citizens are not accorded second class membership or, if they are, it does not amount to any more of a disadvantageous position than that experienced by certain groups of EU15 nationals. Undoubtedly it is true that the citizenship provisions, and this is particularly evidenced by the caselaw on Article 18 EC, appear to privilege those migrants who have, on the whole, adequate financial resources but have fallen on *temporary* difficulties in fulfilling the terms of the secondary

[82] Fries, S. and Shaw, J., 'Citizenship of the Union: First Steps in the European Court of Justice', (1998) 4(4) *European Public Law,* 533; Dougan, M., 'A Spectre is Haunting Europe… Free Movement of Persons and the Eastern Enlargement' in Hillion, C. (Ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart, 2004), 111
[83] Case C-214/94 *Boukhalfa* [1996] E.C.R. I-2253
[84] Fries and Shaw, *Op. Cit.* n.82, 535
[85] Ackers, L., Shifting Spaces: Women, Citizenship and Migration within the European Union', (Bristol: Policy Press, 1998), 111
[86] Dougan, *Op. Cit.* n.82, 141
[87] Directive 2004/38 retains the distinction between market citizens on the one hand and students, the financially independent and retired persons on the other

legislation.[88] However, while the less wealthy have been largely excluded from the broader citizens' right to free movement the Court's wide construction of the worker under Article 39 EC has opened up the fundamental right of mobility to those wanting to move to another Member State in search of economic and/or personal fulfilment. Unlike the free movement enshrined in Article 18 EC, residence under Article 39 EC is not subject to any 'limitations and conditions' and is not, therefore, dependant on the possession of such requirements as adequate resources and sickness insurance. Consequently, this provision has been accessible to the less wealthy nationals of the Member States.[89] With this in mind, it is arguable that the particular downgraded citizenship status imposed on EU8 and EU2 nationals can be distinguished from the Community norm of differentiated free movement rights for all as the transitional restrictions deny access to one of the most valuable categories of market citizen: that of migrant worker. While it is open to less wealthy EU15 nationals to try to increase their economic status by exercising their right to mobility for the purposes of taking up work, EU8 and EU2 nationals' ability to accomplish the same is significantly more restricted during the transitional periods. Currently, the right to move as a *worker* is more of a central feature of Union citizenship, certainly it is more valuable to the new CEE citizens, than the broader right to move as a *citizen*; thus, it is difficult not to conclude that EU8 and EU2 nationals are subject to a second rate conception of citizenship during the transitional periods. Moreover, whereas the hierarchy involving EU15 nationals has been predicated on the basis of each group's perceived economic capacity and value, the post-enlargement hierarchy relies to a greater extent on nationality as a deciding factor. Therefore, the rationalisation behind the new typology of free movement is more difficult to rationalise.

The discussion in the following section turns to the broader impact of the citizenship provisions, access to which is not restricted by the Accession Treaties, on the mobility rights of EU8 and EU2 nationals outside the scope of the free movement of workers. Although, in some circumstances, the rights flowing from Article 18 EC can be valuable for certain migrants it is not an adequate replacement for access to the fundamental *market* right enshrined in Article 39 EC. There is no doubt that the ability to move to another Member State to work is an extremely valuable right which is often relied upon by those who wish to further their career, gain greater experience or perhaps provide a better standard of living for their family. Arguably, it is this capability that would

[88] On students see Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; on the independently wealthy see Case C-413/99 *Baumbast* [2002] E.C.R. I-7091. For further detail see Dougan, M. and Spaventa, E., 'Educating Rudy and the Non English Patient: A Double Bill on Residency Rights Under Article 18 EC', (2003) 28(5) *European Law Review*, 699

[89] See Cases 53/81 *Levin* [1982] E.C.R. 1035; 139/85 *Kempf* [1986] E.C.R. 1741; 196/87 *Steymann* [1988] E.C.R. 6159

be most cherished by many of the new citizens. Therefore, although the capacity of 'citizens' to move is left intact, and despite the fact that differentiated citizenship rights are the norm in Community law, it would seem that the absence of the right to move as a *worker* is significant for CEE nationals' citizenship status, and for the perception they have of their 'worth' in the eyes of the EU15.

3. The entitlement of CEE nationals as migrant *citizens* as opposed to migrant *workers*

The current transitional arrangements adopt an approach similar to the restrictions put in place following the accessions of Greece (1981) and Spain and Portugal (1986) in that they permit Member States to discriminate on grounds of nationality as regards access to employment. The focus on workers is an attempt by the EU15 to curb potential labour market flooding. In addition, the transitional restrictions represent a desire to avoid the situation whereby employees on low-wages gain automatic rights to social welfare in the host Member State.[90] What the recent Accession Treaties do not take into account is the existence of the formal citizenship provisions and the potential impact of the mobility rights enshrined in Article 18 EC (which extends a right to reside in other Member States to all citizens). The Court's requisite jurisprudence, which often applies the non-discrimination principle in Article 12 EC in conjunction with Article 18 EC, also has implications for the citizenship status of EU8 and EU2 migrants.[91] As a result of such developments, which are elaborated on below, citizenship is 'nested'[92] across various sites in the Treaty and is therefore, at least in some form, accessible to CEE nationals in spite of the transitional arrangements. Citizenship rights are no longer confined to the traditional 'Single Market' provisions, such as Article 39 EC.

At the time of the accessions of Greece, Spain and Portugal citizenship as a concept had not yet been constitutionalised by insertion into the Treaty. Hence, the enlargements of 2004 and 2007 provide the first time opportunity for the broader notion of citizenship to interact with the restricted status of market citizenship offered to accession migrants under the transitional arrangements. Despite the extension of more comprehensive free movement rights to *citizens* generally the

[90] See cases *Op. Cit.* n.89

[91] Including Case C-85/96 *Martinez Sala* [1998] E.C.R. I-2691 ; Case C-413/99 *Baumbast* [2002] E.C.R. I-7091; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193; Case C-138/02 *Collins* [2004] E.C.R. I-2703; Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613

[92] On the concepts of 'nested' and 'multiple' citizenships see Faist, *Op. Cit.* n.5; Kostakopoulou, T., *Citizenship, Identity and Immigration in the European Union,* (Manchester: Manchester University Press, 2001), 66-67; Kostakopoulou, T., 'Nested "Old" and "New" Citizenship in the European Union: Bringing Out the Complexity', (1999) 5 *Columbia Journal of European Law*, 389

transitional arrangements have persisted with the preoccupation, in line with previous enlargements, with *workers*. Consequently, the ability of the EU15 Member States to prevent the migration of nationals from the newest Member States is more constrained in the aftermath of this enlargement than in previous EU expansions.[93]

First in this section, attention turns to the possibility of EU8 and EU2 nationals relying upon the right to residency enshrined in Article 18 EC. Secondly, there is analysis of the access to the principle of non-discrimination in Article 12 EC which may be extended to those found to have a right to reside in an EU Member State. These entitlements constitute the two main components of Union citizenship extended to migrant citizens. Although they are closely related it is helpful to examine them individually in order that the potential application of both citizenship components to the situation EU8 and EU2 nationals can be appreciated. This approach also mirrors the logic of the relationship between the entitlements: once it is established that a migrant citizen is resident in a Member State the right to rely on the equal treatment principle in Article 12 EC becomes active.

3.1 Rights of residence across the enlarged EU

EU8 and EU2 nationals are entitled from the outset to access the mobility rights attached to the economically-inactive categories of migrant citizen, such as students and financially independent persons,[94] described above in relation to the hierarchy of citizenship status.[95] In order to present a complete picture of the residence rights available to EU8 and EU2 nationals under these groupings (and the requisite rights of equal treatment examined below) it is necessary to discuss both the old regime in the form of the residence Directives and their relationship with Article 18 EC as determined in the caselaw of the Court, and, the new regime established by Directive 2004/38.

Article 18 EC confers on all citizens of the Union the right to move and reside freely within the Member States, subject to the limitations and conditions laid down in the Treaty and the

[93] Farkas, O. and Rymkevitch, O., 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices', (2004) *International Journal of Comparative Labour Law and Industrial Relations,* 369, 373

[94] The status of retired persons is not discussed specifically here, although the rights (and obligations) of this group is analogous to those of financially independent persons in that the resources requirement is central to the grating of residence in an effort to ensure the host welfare state is not unreasonably burdened. Note also that Directive 2004/38 creates a category of permanent residents who, after lawful residence in a Member State for 5 years, are no longer subject to the resources requirement and enjoy fully the right to equal treatment: Articles 16-21

[95] In addition to the market citizen categories of self-employed person and service provider

measures adopted to give it effect. It was just prior to the insertion of the citizenship provisions in the Treaty that the Community legislature had adopted the residency Directives which addressed economically-inactive migrants: Directive 90/365 (retired persons),[96] Directive 93/96 (students)[97] and Directive 90/364 (those persons able to support themselves).[98] Although this cluster of secondary legislation was intended to 'liberate the Community from its economic preoccupation and to prepare the way for a community of citizens',[99] all three Directives made clear that the right of residence was dependant on: the possession of adequate resources not to become a burden on the social assistance scheme of the host Member State; and, being covered by sickness insurance. Hence, the Member States were clearly concerned about the possibility of welfare tourism and sought to exclude from the right to reside those who would be unable to support themselves and their families in the host state. In the initial period following the insertion of the citizenship provisions by the Treaty of Maastricht it was not entirely clear what sort of relationship existed between the Directives' requirement of self-sufficiency and the 'limitations and conditions' on the right of free movement referred to in Article 18 EC. On the one hand, there was the argument that Article 18 EC simply codified the existing position under Community law to the effect that only economically-active and economically self-sufficient citizens could access mobility rights. On the other hand, there was also a sentiment expressed by some that Article 18 EC may have disentangled the links between the right to move freely and the need to be economically-active/self-sufficient to the effect that a separate right to mobility for all Union citizens had been created.[100]

Although there was a period of speculation,[101] the Court began to make important pronouncements on the effect of Article 18 EC and, in relation to the extent of the right of residence, *Baumbast*[102] and *Grzelczyk*[103] warrant particular attention and are discussed in detail below.[104] It was in the case of *Baumbast* that the Court first declared the right to reside in Article

[96] [1990] O.J. L180/28
[97] [1993] O.J. L317/59
[98] [1990] O.J. L180/26
[99] Hailbronner, K., 'Union Citizenship and Access to Social Benefits', (2005) 42 *Common Market Law Review,* 1245
[100] For more detail on the uncertainty surrounding the effect of the citizenship provisions see Fries and Shaw, *Op. Cit.* n.82
[101] See Fries and Shaw, *Op. Cit.* n.82, 534
[102] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091
[103] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193
[104] Note that these decisions came after the important judgment in Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691 which is discussed later in relation to the equal treatment rights of EU8 citizens. The focus here is on residence entitlement

18 EC to be directly effective.[105] This was despite the argument, put forward by the German and UK governments, that the 'limitations and conditions' referred to in Article 18 EC prevented the right from being free-standing.[106] The Court confirmed that the right of residence in Article 18 EC was sufficiently clear, precise and unconditional and, thus, conferred a right upon individuals.[107] In *Grzelczyk* the ECJ made the, now quite celebrated, statement that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.[108] This statement has now been codified in Directive 2004/38[109] which would suggest the formulation has been embraced also by the Community's political institutions. Additionally, however, in both of the aforementioned cases the Court confirmed that the 'limitations and conditions' referred to in Article 18 EC did include the requirements of sufficient resources and sickness insurance found in the residence Directives. Thus, the Court confirmed here that Article 18 EC had not completely detached the right to free movement from the economic elements; indeed, in *Baumbast* the ECJ stated that the limitations and conditions set out in the residence Directives recognise:

'…that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'.[110]

Before taking a closer look at the details and impact of these judgments on the residence rights of EU8 and EU2 nationals the position of the law following the adoption of Directive 2004/38 needs to be acknowledged. With regards to residence, the Directive retains the twin requirements of sufficient resources and sickness insurance in respect of economically inactive migrants. Hence, the distinction between the economically active and economically viable, on the one hand, and the non-economically active, on the other, remains. The Directive does, though, provide that all Union citizens have a right of residence for up to three months *without any conditions or any formalities* other than the requirement to hold a valid identity card or passport.[111] Therefore, it is

[105] *Baumbast*, para. 84
[106] *Ibid.,* para. 78
[107] *Ibid.,* para. 86
[108] *Grzelczyk*, para. 31. This has been restated in numerous other decisions of the ECJ including, *inter alia*, Case C-138/02 *Collins* [2004] E.C.R. I-2703 and Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613.
[109] Recital 3, Preamble, Directive 2004/38 [2004] O.J. L158/77
[110] *Baumbast*, para. 90
[111] Article 6, Directive 2004/38

only after this three-month period that the above distinction and the 'limitations and conditions' on the right of residence come into play.[112]

The existence of this three-month period in the new piece of secondary legislation is interesting when held up against the transitional arrangements in the Accession Treaties. Under the terms of the Directive EU8 and EU2 nationals, as Union citizens, are entitled to make use of this right that allows them to enter and reside in an EU15 Member State without the necessity of fulfilling the resources requirement. Arguably, this was not envisaged by the EU15 at the time the transitional arrangements were drawn up but it would appear that there are no grounds to challenge this reading of the law. First, the Directive contains no statement of derogation to the effect that EU8 and EU2 nationals are subject to any different rules as a result of the transitional periods. Secondly, the very precise language adopted in the annexes to the Acts of Accession,[113] which contain the details of the transitional restrictions, focuses solely on Articles 1-6 of Regulation 1612/68[114] and leaves very little scope for a wider interpretation of the transitional arrangements that includes other provisions of Community law. The restrictions only centre on allowing the EU15 to derogate from the provisions that usually require them to provide EU nationals with the opportunity to access their labour markets without experiencing discrimination. This ability to enter and reside for a period of three months may prove to be extremely useful for EU8 and EU2 nationals who wish to seek work in an EU15 state, despite the imposition of transitional restrictions, as it essentially provides a short period of grace within which they can seek employment. Once this initial three-month period comes to a close the right of residence for more than three months, in Article 7 of the Directive, becomes the operable provision and it is here that the various conditions relating to the different categories of migrant can be found.[115]

It is clear that those EU8 and EU2 nationals fulfilling the conditions of residence attached to the categories of economically inactive migrant are able to rely on the right to free movement in

[112] But note the principle of equal treatment does not apply in full during the first three months as Article 24(2) provides that Member States are not obliged to confer entitlement to social assistance during this period. It is slightly confusing, then, that Article 14(1) specifies that the right to reside for 3 months is dependant on the individual (and family members) not becoming an unreasonable burden on the social assistance system of the host Member State

[113] Article 24 of the Act of Accession [2003] O.J. L236/33, para 2, Annexes; Article 23, Act concerning the accession of Bulgaria and Romania [2005] O.J. L157/203 and the respective annexes: Annex VI, transitional measures, Bulgaria [2005] O.J. L157/278; Annex VII, transitional measures, Romania [2005] O.J. L157/311

[114] [1968] O.J. L257/2

[115] Workers and the self-employed have an automatic right to reside (Article 7(1)(a)) that cannot be withdrawn on the basis that they are an unreasonable burden on the social assistance system of the host Member State (Article 14(4)(a)). Member States can restrict the residence rights of these groups on grounds of public policy, public security or public health subject to the details in Articles 27-33

Article 18 EC during the transitional periods. This is a valuable right in itself and, in particular, it seems that many young EU8 nationals have taken advantage of their post-accession ability to move to the EU15 as students.[116] To gain a right of residence under Article 7 of the Directive students are required to have comprehensive sickness insurance and must assure the host Member State, by means of declaration,[117] that they have sufficient resources to avoid becoming a burden on the social assistance system. They must also be enrolled at a public or private establishment, accredited or financed by the host Member State, for the principal purpose of following a course of study (this includes vocational training).[118] Article 7 also confirms the twin requirements of sufficient resources and comprehensive sickness insurance continue to apply as regards those who aspire to reside on the basis of being financially independent.[119] By analogy with the conditions of the three residence Directives under the old regime, the requirements now enshrined in Directive 2004/38 will be included in the 'limitations and conditions' that the Article 18 EC right is subject to.

In addition to those situations in which an individual complies fully with the requirements in the secondary legislation, however, the manner in which the ECJ has interpreted the caveat of 'limitations and conditions' (albeit under the old regime) indicates there may be occasions when an EU8 or an EU2 national does not comply with the letter of the law, in respect of having sufficient resources and comprehensive sickness insurance, yet is (theoretically at least) entitled to rely on a right to reside flowing from Article 18 EC. To explore this assertion further it is necessary to take a further look at the cases of *Baumbast* and *Grzelczyk.*

In *Baumbast*[120] the British immigration authorities refused Mr Baumbast's application for an extension of his residence permit on the grounds that he and his family were not insured for emergency medical treatment in the UK and so failed to comply with the requirement of sickness insurance in Directive 90/364. Mr Baumbast, a German national, had originally moved to the UK as a worker but later was employed by a German company that required him to work in Asia and

[116] For example: in 2004/2005 8,390 Polish students took part in the Erasmus exchange program and 2,200 Polish nationals enrolled in British universities (compared to just 965 in 2003/2004). Further, in 2004/2005 Polish nationals constituted the second largest group of non-German students in Germany (after Chinese). Figures cited in Iglicka, K., *Free Movement of Workers Two Years After Enlargement: Myths and Reality*, (Warsaw: Centre for International Relations, 2006), 2

[117] This was also the position under Directive 93/96

[118] Article 7(1)(c), Directive 2004/38

[119] Article 7(1)(c)

[120] See Dougan and Spaventa, *Op. Cit.* n.88; Van Der Mei, A.P., 'Comments on *Baumbast*', (2003) 5 *European Journal of Migration and Law*, 419

Africa. His family, however, continued to reside in the UK where they owned a house and the children attended school. Although the Baumbasts did not satisfy the requirement of having health insurance in the UK they did have comprehensive medical insurance in Germany, where they returned to when they required treatment, and they had never sought to rely on the British welfare system. The UK court sought guidance from the ECJ as to whether Mr Baumbast could derive a right of residence from Article 18 EC.

After making the pronouncements, described above, that Article 18 EC was directly effective but the Member States were legitimately able to ensure nationals of other Member States did not become an unreasonable burden the Court went on discuss further the notion of 'limitations and conditions'. Most crucially, the Court went on to note that the:

'limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular with the principle of proportionality'.[121]

Given that the Baumbasts had not been a burden on the UK's public finances (indeed Mr Baumbast had made a positive economic contribution in the past), that the family were well integrated after residing in the UK for a number of years, and that insurance was in place in another Member State, the Court concluded that:

'to refuse to allow Mr Baumbast to exercise his right of residence… on the ground that his sickness insurance does not cover the emergency treatment given in the host Member State would amount to a disproportionate interference with the exercise of that right'.[122]

Thus by virtue of the application of the principle of proportionality Mr Baumbast's right of residence remained intact despite not complying with the formal requirements of the secondary legislation.[123]

[121] *Baumbast*, para. 91
[122] *Baumbast*, para. 93
[123] Dougan and Spaventa, *Op. Cit.* n.88, 703; Dougan, *Op. Cit.* n.82, 114

The decision in *Grzelczyk,*[124] while preceding the decision in *Baumbast*, displays a similar line of reasoning in relation to the requirement of sufficient resources for students in Directive 93/96. Rudy Grzelczyk, a French national, studied in Belgium and in the fourth year of his course he applied for the Belgian minimex (a non-contributory minimum subsistence allowance). By applying for such a benefit, of course, he indicated that he did not in fact have sufficient resources as stipulated by the Directive. In his previous years of residence Grzelczyk had worked part time; however, as he was in his last year he wished to be able to concentrate just on his academic studies. This case is important also for the discussion of the equal treatment principle but with regards to residence the Court stressed that refusal of a residence permit cannot be the automatic consequence of recourse to the host Member State's social assistance system.[125] The Court placed significance on the fact that Grzelczyk was merely experiencing 'temporary difficulties' and, as a result, he was entitled to expect to benefit from a degree of financial solidarity between nationals of the host Member State and nationals of other Member States.[126] On the basis of these cases, Dougan and Spaventa stress that:

'Baumbast… illustrates the application of proportionality to the "health insurance" requirement imposed by the three Residency Directives. The earlier case of Grzelcyk illustrates (though more in hindsight than in the explicit reasoning of the judgment itself) the application of the principle of proportionality to the requirement of "sufficient resources" set out in the Residency Directives'.[127]

Therefore, this application of the proportionality principle to the exercise of the Member States' discretion may allow the enforcement of a right to reside by an individual who does not actually meet the legislative requirements. Arguably, this remains so following the adoption of Directive 2004/38. The proportionality principle is not expressly codified; rather, Article 14(2) states that economically inactive migrants retain the right of residence so long as they continue to fulfil the conditions attached to that residence (i.e. sufficient resources and sickness insurance). However, the preamble does refer to the importance of migrants not becoming an unreasonable burden on the social assistance system of the host Member State[128] and this is essentially what the

[124] See Dougan and Spaventa, *Op. Cit.* n.88; Jacqueson, C., 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship', (2002) 27(3) *European Law Review*, 260; Iliopouou, A. and Toner, H., 'Casenote on Grzelczyk', (2002) 39 *Common Market Law Review,* 609
[125] *Grzelczyk*, para. 43. This has since been codified in Directive 2004/38, Article 14(3)
[126] *Grzelczyk*, para. 44
[127] Dougan and Spaventa, *Op. Cit.* n.88, 703
[128] Recital 10, Preamble, Directive 2004/38

application of the principle of proportionality to the twin requirements in the legislation sought to achieve. On the basis of this analysis the stage seems set for the Court to continue to apply proportionality to the Member States' efforts to enforce their limitations and conditions on a right of residence, the determining factor remaining whether the individual has become an 'unreasonable burden'.[129]

Of course, by no means is the right of residence for the economically-inactive unlimited but the Court's use of proportionality has injected a greater degree of flexibility into the black-letter provisions and allowed it to extend residence (and equal treatment) rights to some individuals that fell outside of the formal legislative regime. Applying this caselaw then to nationals of the CEE Member States, during the transitional periods EU8 and EU2 nationals with adequate resources can reside a Member State applying restrictions; furthermore, the right is flexible and may not automatically be rescinded should they fail to fulfil one of the conditions in the secondary legislation.

The application of proportionality, though, clearly cannot assist all those economically inactive migrants who experience hardship and fail to fulfil the requirements of residency. A case which demonstrates this is that of *Trojani*[130] where the Member State's application of limitations and conditions was held to be proportionate. Trojani, a French national, was residing in Belgium in a Salvation Army hostel and had made an application to receive the Belgium *minimex* which had been refused by the national authorities.[131] In relation to the issue of whether or not Trojani could enjoy a right of residence by virtue of the right to free movement in Article 18 EC the ECJ confirmed that the requirement of sufficient resources was subject to the principle of proportionality.[132] However, the Court went on to note that, in Trojani's case, a lack of resources

[129] This concept is not quantified but whether or not an individual constitutes an 'unreasonable burden' is often related to the application of the equal treatment principle (described below) which extends the right to access various welfare benefits to resident Union citizens. This may result in lawful residence activating the right to equal treatment which, in turn, enables the migrant to access social assistance; at this point, the Member State may lawfully conclude the claimant is an unreasonable burden and withdraw the right of residence. See Dougan and Spaventa, *Op. Cit.* n.88, 708

[130] Case C-456/02 *Trojani* [2004] E.C.R. I-7573, see further Van Der Mei, A.P., 'Union Citizenship and the 'De-Nationalisation' of the Territorial Welfare State', (2005) 7 *European Journal of Migration and Law,* 203

[131] Note that part of the judgment discusses whether Trojani can be classed as a worker for the purposes of Community law, in which case he would have the right to equal treatment as regards social advantages (Article 7(2), Regulation 1612/68), as he carried out 'odd jobs' for the Salvation Army. The ECJ, after reiterating the definition of worker, ruled it was for the national court to assess whether Trojani fulfilled the criteria (paras. 13-29)

[132] *Trojani*, para. 34

was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.[133] In contrast to the situation in *Baumbast*, then, Trojani could not derive a right to reside from Article 18 EC because 'there was no indication that… the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by… Directive [90/364]'.[134] It seems then that the application of proportionality would only be useful to those CEE migrants who had previously fulfilled the conditions of the Directive, of having sufficient resources and sickness insurance, but later fell on hard times that were temporary in nature.[135] *Baumbast* and *Grzelzcyk* illustrate that the Court values those with a greater sense of 'belonging' to the host state.[136] Article 18 EC is unlikely to be of great benefit to those wishing to establish in the first instance residence in another Member State.[137] Further, despite not fulfilling the requirements in the secondary legislation, it is clear that the Baumbasts, in particular, were portrayed as 'worthy' beneficiaries of the right to reside given their clear financial autonomy and the unlikeliness of the family ever requiring social assistance.[138] Grzelzcyk, too, is described in terms of having worked hard in the past to finance his studies.[139] By contrast, those such as Trojani who, as Dougan and Spaventa claim, are the more 'vulnerable members of society' remain 'alienated' from the same right.[140]

Less-wealthy EU8 and EU2 nationals will find it difficult to establish a right to reside in the EU15 longer than the initial three-month period of grace granted to all citizens under Directive 2004/38. Taking Poland as an example, considering the high rates of unemployment and the low rates of pay available in the country,[141] alongside the assertion that many wish to move in order to *increase* their wealth, it would appear that certainly many Polish nationals would fall into the 'vulnerable' group unable to enforce a right of residence in an EU15 state on the basis of Article 18 EC.

Clearly, the fundamental test remains that a economically inactive migrant should not become an unreasonable burden. If this threshold is reached the Member State is entitled to expel the

[133] *Trojani*, para. 35
[134] *Trojani*, para. 36
[135] As Grzelczyk did
[136] Dougan and Spaventa, *Op. Cit.* n.88, 712
[137] Van Der Mei, *Op. Cit.* n.120, 432
[138] *Baumbast*, paras. 88-89
[139] *Grzelczyk*, paras. 10-11
[140] Dougan and Spaventa, *Op. Cit.* n.88, 712
[141] Keune, M., *Youth Unemployment in Hungary and Poland: Action Programme on Youth Unemployment*, International Labour Organisation, Employment and Training Paper 20, Switzerland, 1998

individual. On this note, Dougan raises the example of a further interesting scenario.[142] The right of a Member State to expel an individual who no longer fulfils the residency requirements is, as we know, subject to the application of proportionality *and other general principles of Community law.*[143] Dougan suggests there is scope for a CEE accession national, who does not satisfy the conditions of residence as either a self-employed person or self-sufficient citizen, to argue that expulsion would infringe the right to family and private life under Article 8 of the ECHR.[144] The Court has certainly demonstrated an increasing tendency to draw inspiration from this particular provision. For example, in *Akrich*[145] the UK's authorities had taken the decision to expel the third-country national spouse of a Community national.[146] The ECJ stressed that the UK must not violate the Akrichs' right to respect for family life:

'Even though the Convention does not as such guarantee the right of an alien to enter or reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8(1) of the Convention'.[147]

Dougan argues that this line of argument may prove particularly accessible to those EU8 and EU2 migrants who have demonstrated a desire for themselves and their family to integrate into the host society:

'If the claimant has lived in the host state for a significant period of time, perhaps with his/her family and children, such that the claimant has few remaining personal ties to the country of origin, and the host state has become his/her home for all purposes save nationality, expulsion might be held to strike an unfair balance between the legitimate interests of the Member State and the private rights of the individual'.[148]

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142 Dougan, *Op. Cit.* n.82, 118-119
143 Case C-413/99 *Baumbast* [2002] E.C.R. I-7091
144 Dougan, *Op. Cit.* n.82, 118
145 Case C-109/01 *Akrich* [2003] E.C.R. I-9607
146 See also Case C-60/00 *Carpenter* [2002] E.C.R. I-6279 which involved the third-country national spouse of a British national providing services, pursuant to Article 49 EC, in other Member States. The ECJ stated that the UK decision to expel Mrs Carpenter ran contrary to *Mr Carpenter's* right to respect for family life in Article 8 of the ECHR which was to be protected in his capacity as service provider (paras. 41-42)
147 *Akrich*, para. 59
148 Dougan, *Op. Cit.* n.82, 118

This analysis is engaging and details another possible way, in addition to the application of proportionality, whereby an EU8 or EU2 national could enforce a right to reside in an EU15 Member State despite the imposition of transitional restrictions. It is doubtful, however, that this will be applied in practice to any great extent. Research suggests that CEE migrants, certainly the majority of EU8 nationals who have moved to the UK after 2004, frequently move alone; hence, their family members remain in the home state and, furthermore, the migrants themselves retain active transnational links with their home society.[149] On this understanding it seems unlikely that, at this stage, many CEE nationals and their families will display sufficient degrees of integration in a host state to justify the protection of a right to reside by Article 8 of the ECHR. Furthermore if an EU8 or EU2 family, despite having moved to an EU15 Member State, could integrate back into the home society relatively easily then arguably their expulsion would pass the threshold in Article 8(2) of the ECHR of being in 'accordance with the law and necessary in a democratic society'.

This discussion has demonstrated that the right to reside in another Member State is no longer based solely on the carrying out of 'worthwhile' economic activity by virtue of Article 18 EC. All Union citizens enjoy a directly effective right to reside throughout the Union and, although this is subject to the conditions set out in the secondary legislation, the Court has injected some flexibility into the operation of these requirements through the application of the principle of proportionality (and other general principles of Community law). Consequently, there may be occasions where a claimant fails to fulfil the requirements yet still retains the right to reside. Despite the transitional restrictions on their movement rights as workers, then, Article 18 EC may well prove valuable for financially-independent EU8 and EU2 nationals seeking to enforce a right to reside in the EU15; or, thanks to proportionality, the almost financially-independent. Article 18 EC still cannot assist the less wealthy in enforcing a right to reside and, in this respect, will not help those who wish to exercise mobility rights in order to better their living standards (and that of their families) by working. Thus, although it is interesting to speculate on the interplay between the right to reside as a *citizen* and the transitional restrictions on *workers'* residence entitlement,

[149] Currie, S., Free Movement and European Union Enlargement: A Socio-Legal Analysis of the Citizenship Status and Experiences of Polish Migrant Workers in the UK, University of Liverpool, 2007 (PhD Thesis); Silver, A., Families Across Borders: The Effects of Migration on Family Members Remaining at Home, Paper prepared for the Population Association Meeting of America Annual Meeting, March 30-April 1 2006. Available for download at <http://paa2006.princeton.edu/abstractViewer.aspx?submissionId=61355> (last accessed 24 November 2006); Iglicka, K., Free Movement of Workers Two Years After Enlargement: Myths and Reality, (Warsaw: Centre for International Relations, 2006), 2

the practical impact of Article 18 EC on the experience of EU8 and EU2 nationals is unlikely to be far-reaching.[150]

In any event, the right to reside under Article 18 EC remains significantly more constrained than that which is extended to workers. Despite the inclusion in Directive 2004/38 of the *Grzelczyk* statement that expulsion should not be the automatic consequence of a citizen's recourse to the social assistance system the host Member State is entitled to conclude, provided the principle of proportionality is respected, that the citizen no longer satisfies the conditions of having sufficient resources and sickness insurance. Furthermore, as will be discussed in the following section, citizens' rights to equal treatment are not as extensive or secure as those extended to market citizens.

3.2. The interplay between Articles 12 and 18 EC: CEE migrants' access to the principle of non-discrimination on the grounds of nationality

We know that economically-active market citizens have an extensive right to residency which,[151] in turn, provides an all-encompassing right to equal treatment in the host Member State[152] that includes within its remit the ability to access a plethora of social welfare benefits.[153] Economically inactive migrant citizens have not traditionally, under the residency Directives, had such extensive rights to equal treatment.[154] This section will examine, however, how the Court's interpretation of the citizenship provisions, in combination with Article 12 EC, has enabled lawfully resident, albeit economically inactive, citizens to claim a greater stake in the right to equal treatment and, as a result, better access to a form of (European) social citizenship. Again, this is discussed within the framework of CEE migration during the transitional periods and the impact of Directive 2004/38 on the rights of equal treatment available to EU8 and EU2 migrants is examined.

Article 17(2) EC provides that citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. One such right conferred by the Treaty is that

[150] Although the discussion here is restricted to those EU8 and EU2 nationals who are not workers, such as students or the financially independent (as compared to Community migrant workers), Dougan puts forward a convincing argument about the potential application of Article 18 EC to those EU8 nationals who work *illegally* but satisfy the criterion of being economically active or financially independent, see Dougan, *Op. Cit.* n.82, 128-132

[151] For example in relation to workers they flow from Article 39 EC and are articulated in Directive 2004/38 (previously Directive 68/360 [1968] O.J. L257/13)

[152] Article 24, Directive 2004/38

[153] Article 7(2), Regulation 1612/68. For example, Cases 249/83 *Hoeckx* [1985] E.C.R. 973; C-237/94 *O'Flynn* [1996] E.C.R. I-2617

[154] For example, Case 197/86 *Brown* [1988] E.C.R. 3205

contained in Article 12 EC – the right to be protected against discrimination on the grounds of nationality. It was the case of *Martinez Sala* which first established that citizens lawfully resident in a Member State could challenge unequal treatment they experienced, in comparison to nationals of the host state, on the basis of Article 12 EC.[155] Mrs Martinez Sala, a Spanish national, had moved to Germany as a child in 1968. She had been employed there, in a variety of jobs, until 1989 but since then had received social assistance from the city of Nuremberg. Up until 1984, Sala had been granted residence permits but, from then on, she was simply in possession of a series of documents certifying that she had applied for an extension to her residence permit. She was, again, issued with a residence permit in 1994 but in 1993 she had applied for, and been refused, a child-raising allowance. Her application was rejected on the basis that she did not have German nationality, a residence permit or residence entitlement. The Court, first, held that Sala, as a national of a Member State lawfully residing in the territory of another Member State,[156] came within the scope *ratione personae* of the citizenship provisions in the Treaty.[157] Secondly, the ECJ went on to state that such a Union citizen could benefit from the equal treatment principle in Article 12 EC in relation to all matters that fell within the scope *ratione materiae* of the Treaty.[158] The child-raising allowance was found to fall 'indisputably' within the material scope of the Treaty by analogy with the benefits available to workers under Article 7(2) of Regulation 1612/68 and those qualifying as 'family benefits' under Article 4(1)(h) of Regulation 1408/71.[159]

Martinez Sala has had significant implications for the status of Union citizenship and its relationship with the principle of non-discrimination. O'Leary makes the point that:

'Martinez Sala confirms that Union citizenship explodes the "linkages" with EC law previously required for the principle of non-discrimination to apply, namely performance or involvement in an economic activity as workers, established persons or providers and recipients of services,

[155] Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691. See Tomuschat, C., 'Comment on Maria Martinez Sala', (2000) 37 *Common Market Law Review*, 449; O'Leary, S., 'Putting Flesh on the Bones of European Union Citizenship', (1999) 24(1) *European Law Review*, 68

[156] On the basis of national law as opposed to Article 18 EC, see below

[157] *Martinez Sala*, para. 61

[158] *Martinez Sala*, para. 63

[159] *Martinez Sala,* para. 57. Tomuschat is critical of the application of principles developed in relation to economically active migrant workers to a non-economically active migrant citizen, *Op. Cit.* n.155, 452

preparation for a future economic activity as a student or stagiaire or some sort of relationship with an economic actor as a family member or dependant'.[160]

Lawful residence is thus the key to establishing a right to equal treatment as a Union citizen and, as Dougan and Spaventa point out:

'Equal treatment not only flows from lawful residency; it also makes the latter status more meaningful in practice'.[161]

Grzelczyk demonstrates this point nicely. We have already seen that Grzelczyk had a right to reside in Belgium on the basis of Article 18 EC and therefore he fell within the scope ratione personae of the Citizenship provisions. With regard to the refusal of the Belgian authorities to grant him the minimex the Court further held that this amounted to direct discrimination – comparable with the discrimination experienced by Martinez Sala - which was strictly prohibited by Article 12 EC:[162]

'It is clear from the documents before the Court that a student of Belgian nationality… who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to it being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality'.[163]

In relation to the scope ratione materiae, the ECJ in *Grzelczyk* again drew a parallel with Article 7(2) of Regulation 1612/68.[164] Further, the Court stated that, simply through students' movement and residence in another Member State, provisions of Community law relating to them fall within

[160] O'Leary, *Op. Cit.* n.155, 77
[161] Dougan and Spaventa, *Op. Cit.* n.88, 708
[162] Indirect discrimination is discussed more specifically below in relation to the status of workseekers in the UK but, for now, it is sufficient to note that the Court does adopt a different approach when dealing with a national measure that is indirectly discriminatory on the grounds of nationality. Indirect discrimination can be justified by reference to objective justification under the doctrine of mandatory requirements. In particular, it appears that a Member State is entitled to require that an individual demonstrate a genuine link to the national territory before he/she is able to claim equal treatment as regards to welfare benefits: Case C-209/03 *Bidar* [2005] E.C.R. I-2119; Case C-224/98 *D'Hoop* [2002] E.C.R. I-6191; Case C-138/02 *Collins* [2004] E.C.R. I-2703; Case C-258/04 *Ioannidis* [2005] E.C.R. I-8275
[163] Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193, para. 29
[164] *Grzelczyk*, para. 27

the material scope.[165] The ECJ was of the opinion that the introduction in the EC Treaty of the citizenship provisions and a chapter on education and vocational training,[166] alongside the existence of the Students' Residence Directive 93/96, had altered the position of Community law. In the earlier case of *Brown*[167] it had been decided that, at the stage of development Community law was at, there was no anti-discrimination protection available in the area of maintenance or training grants.[168] Following *Grzekczyk*, then, *Brown* is no longer regarded as a correct statement of the law[169] and the elevated status of students as Union citizens means that the equal treatment principle can apply as regards social security and assistance benefits available to students under national law.

Migrating as a student may be an attractive option to EU8 and EU2 nationals during the operation of the transitional arrangements on the free movement of workers. Furthermore, moving as a student may hold out the possibility of entering to reside via the 'back door' as there is somewhat of a grey area surrounding the right of CEE students to access part time work in a Member State applying transitional restrictions. Students usually are allowed access to the labour market on the basis of the principle of non-discrimination but the position as regards EU8 and EU2 migrant students in Member States applying transitional restrictions is more ambiguous; arguably, under the terms of the Accession Treaties, Member States are lawfully able to prevent labour market access by this group. Surely it will be in a Member State's interest to allow (genuine) students to access part time employment on their territory, although fears of bogus students using the status as a cover for labour market access may persuade Member States that it is safer to deny access. The UK requires EU8 students to fulfil the registration requirements of the Worker Registration Scheme in order for their employment activity to be considered lawful.[170] In any event, the ability to move as a student may tempt some with the notion that labour market access will follow. In addition to this perceived attractiveness of moving as a student, however, the legal status is potentially quite a far-reaching one,[171] although the impact of Directive 2004/38 does need to be considered in this respect.

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[165] *Grzelczyk,* para. 35
[166] Title XI, Chapter 3 of Part three of the EC Treaty
[167] Case 197/86 *Brown* [1988] E.C.R. 3205
[168] Although pre-*Brown*, in Case 293/83 *Gravier* [1985] E.C.R. 593, the ECJ had held that there was a right to equal treatment in relation to fees for Higher Education
[169] Grzelczyk, paras. 34-35
[170] Thus subjecting them to a £70 fee
[171] See further Dougan, M., 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education in the EU?', (2005) 42 *Common Market Law Review*, 943

Following *Grzelczyk*, the extent of students' equal treatment rights was considered further in *Bidar.*[172] Mr Bidar, a French national, had resided in and been enrolled at a secondary school in the UK for three years before he entered university there. Whilst he was charged the same tuition fee rate as national students he was denied financial assistance to cover his maintenance costs in the form of a student loan. First, Bidar was clearly entitled to a right of residence in the UK under Article 18 EC read in conjunction with the general residence Directive 90/364 (not the Students' Directive) the conditions of which he satisfied.[173] As a result of his lawful residence Bidar was entitled to equal treatment as regards social assistance benefits (as in *Grzelczyk*) but the issue then was whether those benefits included assistance for maintenance costs through subsidised loans or grants. Once again the Court referred to the developments in Community law cited in *Grzelczyk*[174] before confirming that social assistance:

'whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC'.[175]

This ruling, therefore, fortified the citizenship status of migrant students by confirming that developments in Community law had extended the scope of benefits they could access by virtue of the equal treatment principle. Despite this extension in the scope of equal treatment rights available to students the reasoning of the Court suggests it will be by no means easy for EU8 (or EU2) nationals who move during the transitional period to benefit from such equal treatment in relation to student loans (and grants). As the UK legislation at issue imposed a requirement of three years prior residency before a student could claim a loan it did not overtly discriminate directly on the ground of nationality; instead, the requirement was intrinsically liable to impact on more non-nationals than nationals and, hence, amounted to indirect discrimination. Thus, the ECJ confirmed that Member States can legitimately expect the individuals in question to display a degree of integration into the host society before granting them access to assistance covering the maintenance costs of students.[176] Therefore, CEE nationals residing lawfully in the territory of an

[172] Case C-209/03 *Bidar* [2005] E.C.R. I-2119, see Barnard, C., 'Comment on Bidar', (2005) 42 *Common Market Law Review*, 1465
[173] *Bidar,* para. 36
[174] *Bidar,* para. 39
[175] *Bidar,* para. 48
[176] *Bidar*, para. 57

EU Member State during the transitional periods would have to demonstrate a sufficient degree of integration and prior-residency before being able to access the type of benefits in *Bidar*. This is quite a high hurdle to overcome and, in effect, requires the migrant to reside in the host Member State for a significant period prior to the enrolment on a course. Thus, it is unlikely to assist those who moved from the EU8 to the EU15 after 1 May 2004 to study (or those who moved from the EU2 after 1 January 2007) as they have not built up any residence, and hence rights to solidarity,[177] within that territory. Bidar himself did not gain access to the right of equal treatment by virtue solely of the status of migrant student. He had not moved *in order* to study; rather, his access to university stemmed from a long-term residence in the UK which he fulfilled as a financially independent person (he had lived with his grandmother, as her dependant). The circumstances were somewhat exceptional. In addition, even though the Court in *Bidar* spoke in terms of student 'grants and loans' this was in the context of Directive 90/364 not Directive 93/96 which specifically excluded maintenance grants from the scope of equal treatment.[178]

Those CEE students who are integrated to a sufficiently high extent, perhaps by having gained entry prior to the enlargement, will probably be entitled to protection against discrimination in the area of maintenance loans or grants for students by analogy with *Bidar*. Furthermore, it should be remembered that those legally residing in a Member State for a year prior to accession are not subject to transitional mobility restrictions. This group, then, is privileged as compared to those CEE nationals who moved after the date of accession. In any event, this discussion may be slightly superfluous following the entry into force of the citizenship Directive in 2006. Directive 2004/38 appears to step back from the decision in *Bidar* and, on a literal interpretation, provides that both maintenance grants and loans are excluded from the principle of equal treatment in Article 24 until the individual claiming entitlement has lawfully resided in the territory for five years and is, consequently, a permanent resident under Article 16 of the Directive.[179] To an extent this can be seen as a codification of the Court's stance in *Bidar* that an individual should be able to display a sufficient degree of integration into the host society, though five years is clearly a harsher test of integration than the three years specified in *Bidar*.

[177] Barnard, C., 'EU Citizenship and the Principle of Solidarity' in Dougan, M. and Spaventa, E. (Eds.), *Social Welfare and EU Law*, (Oxford: Hart, 2005), 157

[178] Article 3, Directive 93/96. Therefore the status of maintenance grants and loans, as opposed to general social assistance, under Directive 93/96 was unclear. For further analysis of the impact of *Bidar* (and *Grzekczyk*) on the exclusion in Directive 93/96, see Dougan, *Op. Cit.* n.171 and Barnard, *Op. Cit.* n.172

[179] Article 24(2), Directive 2004/38.

Some commentators[180] expect that the Court will continue to apply the *Baumbast*-style principle of proportionality to the terms of the new Directive so the five year threshold may not have to be met in all circumstances in order for the equal treatment principle to be activated in respect of maintenance grants and loans.[181] Hailbronner, for example, makes reference to the Court's application of proportionality to the requirements in Directives 90/364 and 93/96 and suggests that:

'The principle of proportionality, devoid of any precise content if not applied restrictively and its proper systematic context, may again serve as an almost unlimited instrument to amend secondary Community law'.[182]

It would seem that at the point of five years residence the right to equal treatment accrues *de jure*, regardless of the level of actual integration. Prior to this point, the *de facto* degree of integration can be examined (via a test of proportionality) and may be held sufficient to invoke the equal treatment principle. Therefore, the notion of proportionality may be used again by the Court to justify a departure from the strict letter of the law. Given the emphasis in the caselaw, however, on the importance of integration as a key to unlocking the right to solidarity[183] it is likely to remain the case that those who show insufficient levels of integration into a host state, and/or have resided only for a short period of time, will not be able to claim student maintenance grants or loans even with the principle of proportionality being applied to the new legislative regime. *Post-accession* EU8 and EU2 migrants thus are likely to be excluded from this right. There is a developing consensus in the literature that residence, as a symbol of integration, is not only the key to equal treatment but also the differentiator which determines the *extent* of the application of equal treatment to any one individual.[184] With this in mind Dougan argues that:

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[180] Dougan, M., *Op. Cit.* n.171, 969, see also Hailbronner, *Op. Cit.* n.99, 1264; Dougan, M. and Spaventa, E., "Wish You Weren't Here…' New Models of Social Solidarity in the European Union' in Dougan, M. and Spaventa, E. (Eds.), *Social Welfare and EU Law*, (Oxford: Hart, 2005), 181; Dougan, M., 'The Constitutional Dimension to the Case Law on Union Citizenship', (2006) 5 *European Law Review,* 613, 627-633

[181] Note also that similar considerations are relevant to workseekers. The Directive appears to step back from decisions such as Case C-138/02 *Collins* [2004] E.C.R. I-2703 in relation to workseekers' equal treatment rights as Article 24(2) similarly states that the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence, or during the extended period of residence where the workseeker provides evidence that he or she is continuing to seek employment and has genuine chances of being engaged.

[182] Hailbronner*, Op. Cit.* n.99*,* 1264

[183] Most notably Case C-209/03 *Bidar* [2005] E.C.R. I-2119 and Case C-456/02 *Trojani* [2004] E.C.R. I-7573

[184] In particular, Dougan and Spaventa, *Op. Cit.* n.180; Barnard, *Op. Cit.* n.177; Golynker, O., *Ubiquitous Citizens of Europe: The Paradigm of Partial Migration*, (Oxford: Intersentia, 2006)

'It might still emerge from the caselaw itself that new or very recent arrivals cannot challenge apparently discriminatory restrictions on access to welfare benefits because they are not in fact in a comparable situation to own nationals or other Union citizens who have actually resided in the host state'.[185]

From this perspective new arrivals are entitled to equal treatment as regards access to certain advantages in the host Member State[186] but often will not be able to rely on the principle with regard to social welfare benefits. Barnard describes the situation, in terms of solidarity, as such:

'While Article 18(1) EC gives newly arrived migrants the right to move and reside freely in the host state there is insufficient solidarity between the newly arrived migrant and the host state taxpayer to justify requiring full equal treatment in respect of social welfare benefits'.[187]

This tendency of the Court, to use previous periods of residence as a means to measure the degree to which an individual citizen can access equal treatment, clearly has implications beyond students as a category of migrant as it applies also in the realm of financially independent persons and workseekers. The transitional arrangements, although applicable only to workers and restricted to the equal treatment rights contained in the provisions granting labour market access, may have an indirect impact on the longer-term ability of EU nationals in general to benefit from the non-discrimination right in Article 12 EC. By denying CEE nationals the right to reside in a territory to take up employment the Accession Treaties are denying them the ability to employ one of the main methods citizens have used to build up entitlement to equal treatment - integration into a society.[188] Moreover, the Court's reliance on residence as the main indicator of integration is by no means immune from criticism. For example, it may be that EU8 and EU2 nationals who have taken up work in an EU15 Member State since accession, despite only having resided there themselves for a short period, have strong family ties to that host state.

[185] Dougan, M., *Op. Cit.* n.171, 969, on this comparability model see Dougan and Spaventa, *Op. Cit.* n.180
[186] Case C-274/96 *Bickel and Franz* [1998] E.C.R. I-7637 (the right to have criminal proceedings conducted in the citizen's mother tongue); Case C-148/02 *Garcia Avello* [2003] E.C.R. I-11613 (the right of the children of a Union citizen to take their mother's surname where the national law of the host state specified it had to be the father's surname)
[187] Barnard, *Op.Cit.* n.172, 172
[188] Both *Martinez Sala* and *Grzelczyk* had been employed in the respective host Member States, a point that did not go unnoticed by the Court

EU8 and EU2 migrants who are (almost) financially independent and are lawfully residing in an EU Member State will have access to the principle of equal treatment in Article 12 EC. It would seem that the longer they have resided lawfully - and the extent to which they demonstrate assimilation into the host society - the more far-reaching this right will be. In particular, social benefits may require a high level of integration and, as we know, this may be difficult for post-accession CEE migrants to attain currently. EU15 Member States troubled by the obligation to extend equal treatment rights to EU8 and EU2 nationals may come to the conclusion that it is mutually beneficial for such individuals to work during the transitional period. In this scenario the Member State benefits from the economic contribution of the taxpaying worker and the individual gains the more secure status of Community worker with a more protected equal treatment entitlement. In any event, those EU8 and EU2 nationals that do obtain access to social benefits on the basis of their lawful residence may find themselves particularly at risk of losing their right of residence. It is only 'a certain degree of financial solidarity' that Member States must show to nationals of other Member States[189] and a host Member State remains entitled to take steps to prevent nationals from other Member States becoming an unreasonable burden on the social assistance system.[190] This illustrates the link between the notions of lawful residence, discussed above, and equal treatment:

'Lawful residency entitles them to equal treatment within the host territory; but exercise of that right to equal treatment might, depending on the circumstances, enable the Member State to consider that the claimant has become an unreasonable financial burden'.[191]

When assessing whether an unreasonable burden on the social assistance system of the host Member State exists the Court has, so far, adopted a very individualistic approach, applying the principle of proportionality to the particular circumstances of the claimant at issue.[192] This approach has been criticised by Hailbronner as being too narrow:

[189] *Bidar,* para. 56
[190] Though expulsion cannot be an automatic consequence of recourse to social assistance, *Grzelczyk*, para. 43; Article 14(3), Directive 2004/38
[191] Dougan and Spaventa, *Op. Cit.* n.88, 708
[192] Case C-413/99 *Baumbast* [2002] E.C.R. I-7091; Case C-184/99 *Grzelczyk* [2001] E.C.R. I-6193

'In any individual case it will hardly ever be possible to show the unreasonableness of a burden. The social system as such cannot be substantially affected by one additional beneficiary'.[193]

Up until this point the potential cumulative effect of a number of similar cases, in Grzelczyk's position for example, has not been considered within the confines of the unreasonable burden test.[194] The 2004 and 2007 enlargements may present the Court with the opportunity to incorporate such an element into to its reasoning, should it wish to and should the chance arise, as 'eastern enlargement clearly has greater *cumulative* implications for the existing Member States than they believed they had assumed'.[195] The transitional restrictions were adopted, partly, to prevent the Member States from having to deal with (potential) claims for social benefits by (presumably low-paid) CEE migrant workers. Thus, the Member States are likely to be equally concerned about the potential impact of a large number of claims on the basis of Article 12 EC by (almost) financially independent EU8 and EU2 citizens; conceivably, the transitional arrangements actually encourage reliance on this right thus increasing the potential cumulative impact. Therefore, should a situation come before the Court involving an EU8 or EU2 national in a position similar to that of Baumbast or Grzelczyk, the Court may adopt a wider approach to the consideration of whether there is a threat of an unreasonable burden being imposed on the Member State's social welfare system and reach a different conclusion as to the proportionality of denying access to such benefits.

One issue not yet mentioned, which relates back to the *Trojani* case, is the possibility for migrants who cannot benefit from a right to reside by virtue of Article 18 EC to derive such a right from the national law of the host Member State and then claim resultant access to the equal treatment principle. Trojani, the Court held, despite not fulfilling the conditions of Directive 90/364 appeared to be lawfully residing on the basis of Belgian national law as he had been issued with a residence permit.[196] The right not to be discriminated against attaches to those lawfully resident as a matter of either Community law, such as *Grzelczyk*, or national law, such as *Trojani*.[197]

[193] Hailbronner, *Op. Cit.* n.99, 1261
[194] Dougan and Spaventa, *Op. Cit.* n.88, 707
[195] Dougan, *Op. Cit.* n.82, 117
[196] Case C-456/02 *Trojani* [2004] E.C.R. I-7573, para. 37. The claimant in Case C-85/96, *Martinez Sala* [1998] E.C.R. I-2691 also derived her right to reside from the national law of the host state. On *Sala* see Fries and Shaw, *Op. Cit.* n.82
[197] *Trojani,* para. 39

However, as Van Der Mei acknowledges, this residence under national law is at the discretion of the Member State:

'The ECJ merely said that if Belgium, for whatever reasons, decided to award Mr Trojani lawful residence status, it must also treat him equally as Belgian nationals'.[198]

A Member State in this situation is by no means obliged to continue to grant a right of residence to such an individual who does not meet the requirements of sufficient resources and sickness insurance.[199] This particular method of gaining access to the equal treatment principle is highly unlikely to be a viable option for EU8 or EU2 nationals during the time that the transitional arrangements are in force. During this period the national law of the EU15 is likely to offer very limited opportunities for CEE nationals to establish any form of residence.

The discussion here has demonstrated how the citizenship provisions provided the Court with the foundations to develop the citizenship status of economically inactive migrants by reinforcing the rights of residence and equal treatment available to them. In order to achieve this, the Court has relied on certain notions, such as 'proportionality', 'unreasonable burden' and 'financial solidarity' which have informed the application of the citizenship provisions. These concepts are ubiquitous in the Court's judgments on citizenship yet their actual meanings are not entirely clear and they largely remain undefined.[200] This may be particularly true for 'financial solidarity' which is historically contingent. Its meaning depends on the Member State under consideration (place) and the particular point in time. 'Proportionality' and 'unreasonable burden' encompass standards which will inevitably be heavily dependent on context rather than rules. As a consequence of the vague nature of these notions the Court has been able to maintain a degree of flexibility in the development and application of citizenship.

Certainly, the Court's interpretation of, and reliance on, these concepts has resulted in non-market migrant citizens enjoying greater access to a form of European social citizenship. Valuable though these mobility rights flowing from Articles 18 and 12 EC are, the distinction

[198] Van Der Mei, *Op. Cit.* n.130, 210
[199] *Trojani*, para. 45
[200] For example, 'unreasonable burden' has never been quantified. As a general principle of Community law, however, the meaning of proportionality as a concept is clearer: Article 5(3) EC; Case C-331/88 *ex parte Fedesa* [1994] E.C.R. I-48663; Case 181/84 *ex parte Man* [1985] 2889

between economically active market citizens and the economically inactive remains very much alive and the difference in each group's access to the equal treatment principle reaffirms this distinction. EU8 and EU2 nationals' inability to access the status of worker in the Member States imposing transitional restrictions clearly places them in a disadvantageous position, although in some circumstances this may be tempered by their ability to move under Article 18 EC (and perhaps claim equal treatment rights on this basis). There is greater potential for EU8 and EU2 migrants to enhance their citizenship potential, or shift between the different (multiple)[201] citizenship statuses (from student to worker for example), than was available to those subject to transitional restrictions after previous enlargements. The Court's reliance on the notion of integration (on the basis of residence), however, is likely to be a major obstacle to access of the equal treatment principle in respect of social welfare benefits.

Conclusion

Drawing on the established caselaw and literature on the notion of Union citizenship this paper has attempted to incorporate the enlargement process into the discussion, and chart some aspects of the relationship between the developing citizenship *acquis* and the transitional mobility restrictions. The symbolic notion of EU enlargement creating a United Europe, unifying nations which once stood on opposite sides of the Cold War divide, has been weakened by the existence of transitional measures that grant Union citizens different access to the right of free movement as a worker on the basis of nationality. From an equality perspective, particularly given the significance of the principle of non-discrimination on the grounds of nationality in Community law, transitional arrangements are difficult to justify.

The discussion of Union citizenship here, and its application to nationals of the CEE Member States, would support the assertion put forward by Kofman that membership of the citizenship community is 'messy' in practice.[202] Everson argues that the European market citizen is the 'role which nationals of the Member States have been expected to play' to help achieve the 'legal and practical realisation of the internal market'.[203] This is not the role assigned to EU8 and EU2 nationals, at least in the initial phase of their formal membership of the Union. Instead they are expected to forgo participation in EU15 labour markets to ease the fears of the EU15. Ironically,

[201] See Kostakopoulou (2001), *Op. Cit.* n.92; Kostakopoulou (1999) *Op. Cit.* n.92; Kostakopoulou, D., 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 68(2) *Modern Law Review*, 233, 234
[202] Kofman, *Op. Cit.* n.7, 122
[203] Everson, *Op. Cit.* n.24, 85

although EU8 and EU2 nationals do not have full access to the status of European market citizen by virtue of the transitional mobility restrictions this is tempered, to some limited extent, by their ability to move simply as Union citizens whose citizenship status has been fortified in recent years and, in some circumstances, can itself allow access to the equal treatment principle and bestow some aspects of solidarity. There is a further (cruel) irony, however, in that, as the EU is moving away from a citizenship conception construed only in economic terms, and when EU8 and EU2 nationals can rely on the status of non-economically active Union citizen, the status they appear to most desire, that of active market citizen, is not accessible to them.

Finally, it should not be forgotten that citizenship of the Union, in the sense of the formal provisions, was introduced to increase the EU's legitimacy and bring Europe 'closer to its citizens' but the very existence of transitional arrangements on free movement suggests that Europe does not desire to be close to all of its citizens – or, at least not as close to some as it is to others. After all, it is predominantly through exercising rights of mobility that Member State nationals experience meaningful citizenship. As a consequence of this selective intimacy, the legitimacy of the EU in the eyes of some of its newest citizens may be damaged irrevocably as a result of transitional mobility restrictions.