

ERA - Applying the Charter of Fundamental Rights of the European Union

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Freedom of Movement and Residence of Persons within the EU



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INTRODUCTION: unpacking the law for migrants EU CITIZENS

1. Who can benefit from the freedom of movement and residence?
2. Non-discrimination on grounds of nationality
3. Possible restrictions
4. CJEU case law on EU citizenship/residence

THIRD COUNTRIES' NATIONALS

1. Legally resident
2. Illegal immigrants

CONCLUSIONS

Unpacking the law for migrants



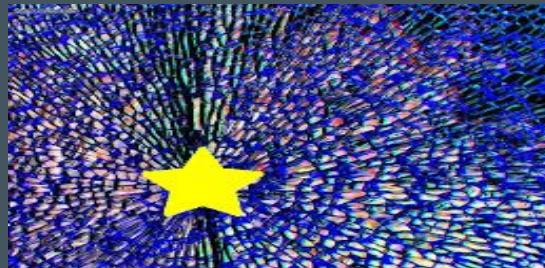
- Citizenship, Migration and Human Rights are key items of European and domestic agendas - who has the right to enter and settle in Europe and under what conditions, is a widely debated topic.
 - Tensions between restrictive migration policies as opposed to commitment to strengthen protection of fundamental rights
 - Citizenship and Migration: at the intersection of 3 areas of law:
 - Free movement provisions for EU citizens
 - Area of freedom, security and justice
 - Fundamental rights

Unpacking the law for migrants



- Mapping exercise of migrants within the EU - Variables triggering different levels of protection:
 - EU qualified citizens
 - Intra-mobility clause for EU citizens
 - Length of residence
 - TCNs: depending on their entry and length of residence
- Nested entitlements to achieve social cohesion - citizenship versus denizenship - Matroska doll

Who can benefit from free movement and residence?



EU citizens:

- Enjoy a **quasi-equality of rights** based on non-discrimination on the ground of nationality & Union citizenship status - free movement rights (with restrictions)
- However **HIERARCHY** of entitlements: depending on **qualified status** (workers, self-employed people, students, persons with independent means) or/and **length of residence** (up to 3 months , between 3 months and 5 years, 5 years and over)

TCNs:

- if part of **EU citizen's family** subject to Union citizenship provisions
- Otherwise **area of freedom, security and justice** (Title V TFEU)



EU citizens: free movement and residence

PRIMARY LEGISLATION:

- Article 45 TFEU - Free movement of workers
- Articles 20 & 21 TFEU - EU Citizenship
- EU Charter of Fundamental Rights (Arts 39 - 46), Art 45 Charter refers to free movement
- Art 21 Charter non-discrimination

SECONDARY LEGISLATION:

- Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence
- Other pieces of secondary legislation regulates equal access and conditions of work (Reg 492/11) and the right to remain after being employed (Reg 635/2006/EC)



EU citizens: free movement and residence

Article 20(2) TFEU Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the MSs

Article 21(1) TFEU Every citizen of the Union shall have the right to move and reside freely within the territory of the MSs, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

- Article 45 Charter - Freedom of movement and of residence
- 1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
- 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.



EU citizens: free movement and residence

CJEU: emphasised the importance of intra-Union mobility: core legal component of right to freely move and reside

Not an unlimited right to residence in the host state under Directive 2004/38 (known as CR Directive)

CJEU's approach more flexible to cover grey areas combining art 20 TFEU and art 18 TFEU = the non-discriminatory model - equal treatment for legally residing citizens (*Maria Martinez Sala, Grzelczyk, Trojani, Bidar*) = if lawful residence then entitlements to EU citizens.

Grzelczyk case (C-184/99) status of EU citizenship as: "destined to be the fundamental status of nationals of the MSs, to enjoy the same treatment in law within the area of application ratione materiae of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for...".

Directive (CRD) 2004/38

- Consolidates, updates and replaces most of the legislation governing the rights of movement & residence of all categories of persons under part 2 TFEU (non-discrimination and citizenship)

Aim

it facilitates exercise of rights by reducing administrative formalities, gives a better definition of the status of family members, limits the scope for refusing entry or terminating the right of residence

(citizenship and social rights -different degrees of solidarity to which Union citizenship gives rise)

Who is covered by Directive 2004/38/EC?

- **Citizens** of an EU member state who visit, live, study or work in a different member state
- The EU citizen's **direct family members**, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- **Other family members** who are "beneficiaries"
- **Different entitlements** depending on the length of residence.

Directive (CRD) 2004/38

- Right to move & reside up to 3 months = Short-term residence
- Right to residence for more than 3 months up to 5 yrs = Mid-term residence
- Permanent residence for more than 5 yrs = Long-term residence

Short-term residence: Right to move/reside/remain up to 3 months (art 6 Directive 2004/38)

- Right to enter another MS by virtue of having an identity card/valid passport: no special conditions required
- If citizen has no travel documents, the host MS must afford them every facility in obtaining the documents
- Family members without a MS nationality enjoy same rights; may be subject to a short stay visa requirement/residence permit (in case of non-European nationals)
- MSs are not under an obligation to confer entitlements to social assistance during the first 3 months.

Mid-term residence: more than 3 months and up to 5 yrs (art 7 Directive 2004/38)

Residence is a fundamental right derived from the Treaty and is not dependent upon the possession of a resident permit, which it has only probative value (C-85/96 *Martinez Sala v Freistaat Bayern*)

Conditions apply. The right of residence can be derivative of:

- Economic activity (employed or self-employed basis) or
- Vocational training as a student and/ or
- Sufficient resources & sickness insurance to ensure not becoming a burden on social services of host MS or
- Family member (residence card if non-EU national)

Long-term residence: Permanent Residence

OXFORD
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UNIVERSITY

5 yr period of uninterrupted legal residence (art 16 Directive 2004/38)

- Document certifying permanent residence = ASAP to be issued to EU nationals (if required)
- Non-EU family members when lived with EU citizen in the host member state for 5 years (derivative right) = "permanent residence card" (automatically renewed every 10 yrs)
- It can be lost if temporary absence from the host MS for more than 2 consecutive years

Workers

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

No definition of “workers” in primary or secondary legislation

The CJEU: concept of “worker” is a Union Law concept
(Levin Case 53/61)

Article 2 Directive 2004/38:

'family' entails citizen's:

- (a) spouse;
- (b) partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a MS, if the legislation of the host MS treats registered partnership as equivalent to marriage [...]
- (c) direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b).
- (d) dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Automatic right of entry and residence in the host MS

Article 3 Directive 2004/38:

[...] host MS shall facilitate the entry of two other groups of people :

- (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested [...] any denial of entry or residence to these people [needs to be justified]

Students

Free movement BUT:

Students must demonstrate

- (i) sufficient resources to avoid becoming a burden on the social assistance system of the host MS and
- (ii) full sickness insurance.

Same fees but for grant provisions see Article 24(2)
Directive 2004/38 (see CJEU case law)

Interface between migrant students and migrant workers
who become migrant students - Access to 'Vocational
education' for workers

Full equality of children of migrant workers

Retired people

Right of entry and residence to employees and self-employed persons that have ceased their occupational activity

AND

- are they are the recipients of an invalidity or early retirement pension or old-age benefits, or a pension in respect of an industrial accident or disease
- and provided that they are covered by sickness insurance or have sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence.

People with independent means

Right of entry and residence to any EU national, their spouse and dependents

on the **CONDITION** that they have:

- sufficient means to avoid being a burden on the social assistance scheme of the host MS
- and that they have **sickness insurance**.

The spouse and the dependent children of a national of a MS entitled to the right of residence within the territory of the MS may take up any employed activity anywhere within the territory of that MS, even if they are not nationals of a MS.

Who is not covered by Directive 2004/38/EC?

- A static citizen who has never moved in which all movement of non-EU family members into the home state is governed by national law.
- Special “transitional” arrangements for new MS (Bulgaria and Romania) maintained until 2017. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EU countries who are not travelling with or joining family members who are EU citizens.

2. Non-discrimination on grounds of nationality

- A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.
- B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union which supplements art 45 TFEU and its associated secondary legislation (extensive use by the CJEU of art 20-21 TFEU combined with art 18 TFEU)
- C. Non-discrimination - Article 21 (2) Charter (Equality Title III) - [...], any discrimination on grounds of nationality shall be prohibited.

3. Possible Restrictions

Art 45 (3) TFEU. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health

Article 27(1) Dir. 2004/38.

[...] MSs may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Article 28 Dir. 2004/38 - Protection against expulsion

1. Before taking an expulsion decision [...], the host MS shall take account of [...] how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host MS and the extent of his/her links with the country of origin.
2. The host MS may not take an expulsion decision against Union citizens or their family members [...] who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

Beyond Classic Free Movement Case Law

- Case C-34/09 *Gerardo Ruiz Zambrano*
- Case C-434/09 R (*McCarthy*)
- Case C-256/11 *Dereci*
- Case C-40/11 *Yoshikazu Iida v Stadt Ulm*
- Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration*
- Case C-165/14 *Alfredo Rendón Marín v Administración del Estado*



To what extent does EU citizenship legislation impact on TCNs residence rights?



Before the entry into force of the Lisbon Treaty/Charter and the CR Directive - Case of Zu and Chen (C-200/02)

To what extent does EU citizenship legislation impact on TCNs residence rights?

- Facts: Chinese family who gave birth to second child, Catherine, in Belfast and then moved to Cardiff. Catherine acquired Irish nationality, as she was born in the island in accordance with section 6(3) of the Irish Nationality and Citizenship Act. Her dad was working in China but part of his business was carried out in the UK. She had independent means of support and sickness insurance.
- CJEU: Article 20 TFEU and the then Council Directive 90/364/EEC, confer on a young minor who is a national of a MS, covered by appropriate sickness insurance and sufficient resources: right to reside for an indefinite period in that State and a parent who is that minor's primary carer to reside with the child in the host MS.

To what extent does EU citizenship legislation impact on TCNs residence rights?



After the entry into force of the Lisbon Treaty /Charter and the CR Directive - Case of Zambrano (C-34/09)

To what extent does EU citizenship legislation impact on TCNs residence rights?

- Facts: Mr Zambrano, his wife and child arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in Colombia. The application was denied but the appeal lasted 12 years. In the meantime Mr Zambrano found employment and had two more children who by virtue of Belgian law became Belgian citizens, which is the corollary of EU citizenship.
- AG Sharpston: EU citizenship's philosophy reversing the relationship between the refugee (TCN) and citizen. EU Citizenship not used to exclude the refugee, but to bring the refugee in.

To what extent does EU citizenship legislation impact on TCNs residence rights?

Case of Zambrano (C-34/09) - Test of 'genuine enjoyment of the substance of citizenship rights'.

CJEU: Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights.

Innovative element: extension of the principle to a child who never exercised intra-Union mobility (no application of CR Directive) and with no independent means of support - art 20 TFEU independent source of residence rights. Rights protected in the Charter mentioned by the referring Court in one of the three questions which have been simplified by the CJEU in one question.



"It's been not so bad ... I have fallen
asleep only after the Zambrano case."

To what extent does EU citizenship legislation impact on TCNs residence rights?

McCarty v SSHD (C-434/09). McCarthy case limited potentially wide-ramification of Zambrano.

Facts: a British national (Mrs McCarthy) who was born in the UK and always lived there, following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the UK on rights associated with European citizenship. Consequently, her husband applied for a residence document as the spouse of a Union citizen.

Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom. The Charter was just briefly mentioned to state the rights to free movement for Union citizens (art 45 Charter)

To what extent does EU citizenship legislation impact on TCNs residence rights?

McCarty : the right of free movement and residence in the CR Directive is a unitary right, not two different rights, as it seemed to suggest in Zambrano in relation to Article 20 TFEU.

CJEU: Test of 'genuine enjoyment of the substance' of citizenship rights to the fact = negative reply of the Court in relation to Art 3(1) Dir 2004/38 and also art 21 TFEU. In McCarty CJEU focused the analysis on Article 21 TFEU.

Whether "the national measure at issue [...] has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the MSs, in accordance with Art 21 TFEU." (para 49)

To what extent does EU citizenship legislation impact on TCNs residence rights?

Dereci and others (C-256/11)

Facts: a 5 joint applications: 1. A Turkish national (Mr Dereci) who entered Austria illegally, married an Austrian citizen, 3 Austrian minor children; 2. A Nigerian national (Mr Maduike) who entered Austria illegally and married an Austrian national; 3. A Sri Lankan national (Mrs Heiml) who entered Austria as a regular migrant and married an Austrian national; 4. A Yugoslav national (Mr Kokollari) entered Austria legally at age of 2 with his Yugoslav parents. Now 29 yrs old resident in Austria and dependant on his mother, now Austrian; 5. A Serbian national (Mrs Stevic) resident in Serbia with her husband and 3 adult children, seeking family reunification with her father, a naturalised Austrian resident in Austria, from whom she receives monthly financial support.

All applications for residence permits rejected + 4 of them expulsion orders and individual removal orders.

To what extent does EU citizenship legislation impact on TCNs residence rights?

CJEU: Test of '*genuine enjoyment of the substance of citizenship rights*': very cautious application of the test.

Risk expulsion: Re-assertion of the '*genuine enjoyment*' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66).

Decision left to the national court. [...] if the referring court considers [...] that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for *private and family life* (Article 7 Charter). On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR (para 72)

To what extent does EU citizenship legislation impact on TCNs residence rights?

Yoshikazu Iida v Stadt Ulm (Case C-40/11)

Facts: Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.

German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion.

To what extent does EU citizenship legislation impact on TCNs residence rights?

CJEU: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.

Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.

Finally, he cannot rely on the Charter, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident (Directive 2003/109), his situation shows no connection with EU law.

To what extent does EU citizenship legislation impact on TCNs residence rights?

Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration (C-86/12)

Facts: a Togolese national (Mrs Alokpa) was rejected asylum seeker application in Luxembourg but discretionary leave to remain granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.

CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory ... in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights ... to be determined by the referring court (reference to the Charter by the referring Court) ..as a consequence of such a refusal, those children would find themselves obliged to leave the EU.

To what extent does EU citizenship legislation impact on TCNs residence rights?

Alfredo Rendón Marín (C-165/14)

Facts: a Colombian national (Mr Rendón Marín) is the father of 2 minor children born in Malaga (Spain): a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. The father was granted sole care and custody of his children. The 2 children are receiving appropriate care and schooling. He has a criminal record. (9 months imprisonment) but granted a provisional 2 year suspension of that sentence. He was awaiting a decision for his criminal record to be removed from the register

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a TCN to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen [...]. Decision left to the national court on the use art 20 TFEU to be interpreted in the same manner as above if conditions for the Directive 2004/38. Mention to art 7 and 24 Charter!



Legally Resident TCNs: free movement and residence

PRIMARY LEGISLATION:

- Article 67-80 TFEU
- EU Charter of Fundamental Rights Art 45 Charter free movement
- Art 21 Charter non-discrimination

SECONDARY LEGISLATION:

- Long-Term Residence Directive 2003/109/EC
- EU Blue Card Directive 2009/50/EC
- Students and Researcher Directive 2016/801
- Intra-Corporate Transfer Directive 2014/66/EU
- Single Permit Directive 2011/98/EU
- Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.
- Family Reunification Directive
- Return Directive 2008/115/EC



Legally Resident TCNs: free movement and residence

Entry and Residence of TCNs: fragmented status depending on whether they are economically or non-economically active, highly or low skilled or meet the integration requirements (i.e. language test) or hold the permanent residence status.

Thus, depending on whether they are asylum seekers and beneficiaries of international protection, economic migrants, long-term residents and family members have diversified entitlements.

Some approximation of norms for asylum seekers + EU Asylum Package Denmark, UK and Ireland Special Protocols. The UK and Ireland began taking part in some aspects of the Schengen agreement, such as the Schengen Information System (SIS), from 2000 and 2002 respectively.

Free movement rights for TCNs

Category of migrants	Free movement rights
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions: Long Term Residents (after 5 years of legal continuous residence) but free movement in another MS for more than 3 months subject to conditions See art 14(2) (3), 15 (1) and (2) (a) and (b) Family members of LTR can move too (see art 16 (1)) Blue Card holders/Students/Researcher limited facilitation for intra-EU mobility. Intra-Corporate Transferees conditional intra-EU mobility (art 20) Family members can move (art 19)
Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.

Security of residence for TCNs

Category of migrants	Security of residence
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	<p><u>Students</u> are excluded from the scope of the LRD, not entitled to permanent residence.</p> <p><u>ICT</u> no right to permanent residency – max stay in the host country, 3 years.</p> <p><u>Refugees and beneficiaries of subsidiary protection</u> only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).</p>
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed
Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated.

Illegally Resident TCNs



Return Directive 2008/115/EC: key legal instrument for returning TCNs staying illegally on the MS's territory. UK and Ireland have decided not to opt into this area.

A MS can issue a return decision including a period from 7 to 30 days to return voluntary. If the TCN does not return within the voluntary period, then the MS can take the necessary measures to enforce return of the TCN.

MS may refrain from making the decision:

- if the MS decides to grant the TCN a residence permit based on humanitarian reasons.
- if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations.

Conclusion



EU citizens: Free movement and residence for EU citizens and their families subject to conditions applied restrictively.

However status of EU citizenship as: "destined to be the fundamental status of nationals of the MSs, to enjoy the same treatment in law within the area of application ratione materiae of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for..." (Grzelczyk case (C-184/99)).

TCNs: fragmented status linked to entry and length of residence in the host state. Intra-mobility possible for those who have acquired the permanent residence status.

The End



FOR LISTENING!