



ARTICLES

SPECIAL SECTION – SOCIAL INTEGRATION IN EU LAW: CONTENT, LIMITS AND FUNCTIONS OF AN ELUSIVE NOTION

SOCIAL INTEGRATION: THE DIFFERENT PARADIGMS FOR EU CITIZENS AND THIRD COUNTRY NATIONALS

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ABSTRACT: The *Article* analyses whether and how integration considerations are encapsulated into EU secondary legislation establishing the conditions under which EU citizens and third country nationals can reside in a Member State (acts relating to immigration policy, to asylum policy, and to free movement of citizens of the Union), taking due account of the case-law of the Court of Justice. The aim is to compare the different legal regimes under this particular perspective, in order to evaluate whether the regime applicable to EU citizens can be understood as ontologically different from the regime established for third country nationals or rather as a variation of the same regime.

KEYWORDS: integration measures – free movement of EU citizens – migration – family reunification – international protection – treatment of third country nationals.

I. INTRODUCTION

In an article published in 2004, Kees Groenendijk examined three recently adopted directives on Union citizens,¹ long-term residents² and family reunification,³ to understand

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¹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

how the concept of integration was incorporated into those directives.⁴ He defined integration as “the active participation of the immigrant in the social, economic and public life of society” and proposed three different perspectives on the relationship between immigration law and integration: 1) “A secure residence status and equal treatment enhance the immigrants’ integration in society”, 2) “permanent residence status as remuneration for a completed integration”, and 3) “lack of integration or assumed unfitness to integrate as a ground for refusal of admission to the country”. At the end of the analysis, he concluded that the first perspective was present in all three acts, the second was “fully absent” in the law on free movement of Union citizens, but present in at least one provision of the Directive on long-term residents, while the third, which is “clearly contrary to the principles of free movement of persons and, thus, cannot be applied to EU citizens and their family members”, was incorporated into certain provisions of both the Directive on long-term residents and, in particular, the Directive on family reunification.

The aim of this *Article* is to re-examine the three directives from the same perspective but to extend the analysis to other acts of secondary legislation that have been subsequently adopted. The reason for this review is that the three directives have been in force for at least ten years and have been the subject of significant interpretative case-law.⁵ Additionally, further acts have been adopted on immigration and international protection. Therefore, acts applicable to third country nationals will be analysed in sections II and III, depending whether they come within migration or asylum policy, and section IV will dwell upon acts applicable to EU nationals. The examination of these acts and their respective case-law seeks to contribute towards the definition of the concept of integration and to verify that the position remains the same whereby there is no room in Directive 2004/38 for the second and third perspectives of the relationship between rules applicable to foreign nationals and integration.

II. ACTS RELATING TO IMMIGRATION POLICY

The conditions for entry and residence of third country nationals are governed only partially by Union law. It is well known that the Union has had competence in this area for

² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

⁴ K. GROENENDIJK, *Legal Concepts of Integration in EU Migration Law*, in *European Journal of Migration and Law*, 2004, p. 111 *et seq.*

⁵ Only the Directive on long-term residents has been amended: Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 extends its scope to beneficiaries of international protection. In addition, subsequent directives have laid down derogatory provisions to Directive 2003/86, as it will be discussed *infra*.

some time,⁶ but the exercise of that competence was affected by the decision-making procedure initially followed. The need for a unanimous vote in the Council and the purely advisory role of the European Parliament affected the choices made, which proved to be particularly favourable to the States' interests.⁷ The situation has changed now because the ordinary legislative procedure has become applicable, but amending the current acts does not appear to be a political priority of the institutions.⁸ Having said that, there is currently no legislation generally governing immigration in the Union.

Conditions for the issuance of short-stay visas have been harmonised. In this area, integration, but in the State of residence, is a factor that the competent authorities must consider when deciding whether to issue an entry visa. Integration, based on family ties or professional status, helps to assess the applicant's intention to leave the Union at the end of the visit for which the issue of a visa is requested.⁹

A number of directives set out the conditions for entry and residence of certain categories of third country nationals.¹⁰ These are (in chronological order): family members;¹¹ researchers, students, school pupils, trainees, volunteers and *au pairs* (recently recasted),¹² highly qualified workers,¹³ seasonal workers,¹⁴ and intra-corporate trans-

⁶ The Treaty of Amsterdam inserted Art. 63 in the EC Treaty, as legal basis for legislation on immigration. P. DE BRUYCKER, *L'émergence d'une politique européenne d'immigration*, in P. DE BRUYCKER (ed.), *L'émergence d'une politique européenne d'immigration*, Bruxelles: Bruylant, 2003, p. 376 *et seq.*

⁷ F. TRAUNER, A. RIPOLL SERVENT (eds), *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter*, Abingdon: Routledge, 2014.

⁸ Communication COM(2015) 240 final of 13 May 2015 from the Commission, *European Agenda on Migration*, which has developed a comprehensive approach to migration, but it has not led to a revision of the legislation on legal migration in force.

⁹ Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community code on visas (Visa Code), Annex II, let. b), no. 5.

¹⁰ It should be recalled briefly that Union legislation does not apply to Turkish citizens if it is less favourable than the arrangements in place at the time when the association agreement was concluded, by virtue of the standstill clause under which States cannot modify restrictively the conditions in force at that time. K. HAILBRONNER, *The Stand Still Clauses in the EU-Turkey Association Agreement and Their Impact upon Immigration Law in the EU Member States*, in D. THYM, M. ZOETEWIJ-TURHAN (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Leiden: Brill, 2015, p. 186 *et seq.*

¹¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

¹² Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, and Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, both repealed and replaced by Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

¹³ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

feres.¹⁵ Of these, only Directive 2003/86 on family reunification mentions conditions for integration, as we will see further below. None of the others, in listing the conditions that the applicant must meet to secure admission, indicates that integration measures or conditions must be satisfied or allows States to impose such measures. Conditions for admission are detailed exhaustively and the State cannot impose additional requirements, which is clear from the wording of these directives. The directives concern the issue of residence permits in relation to a very specific subject matter and the rules are designed to capture those foreign nationals that the States do not want to be integrated or to lay down roots, to the extent that Directive 2014/36 on seasonal workers provides that, before a residence permit can be issued, the Member State must verify whether the person concerned presents a risk of illegal immigration and intends to leave the country after completing the work for which he or she was allowed entry.

Two further directives – the Directive on long-term residents,¹⁶ and the single permit Directive¹⁷ – establish a set of rights that are to be granted to third country nationals who have been admitted to reside in a Member State, on the basis of a permit covered by national or Union law. The former Directive will be discussed in the following section because it is particularly relevant to this *Article*. The latter, however, does not contain any reference to integration conditions or measures, other than a reference in recital 2, which provides that “a more vigorous integration policy should aim to grant [third country nationals who are legally residing in the territory of the Member States] rights and obligations comparable to those of citizens of the Union”. However, the Directive does not harmonise the conditions for issuing residence permits. It is therefore up to the States to define these conditions, including any integration conditions.

II.1. DIRECTIVE 2003/109 ON LONG-TERM RESIDENTS

The Directive on long-term residents grants rights and protection against expulsion “to third-country nationals who have resided legally and continuously within [the territory of a Member State] for five years immediately prior to the submission of the relevant

¹⁴ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

¹⁵ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

¹⁷ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

application”¹⁸ and establishes the conditions under which a long-term resident can move to another Member State (Chapter III).

According to recital 4, “[t]he integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty”. Recital 12 adds that “[i]n order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive”. The Court of Justice has clarified that the principal objective of the Directive is “the integration of third-country nationals who are settled on a long-term basis in the Member States”.¹⁹ In *Kamberaj*, that objective becomes an instrument for interpreting the notion of “core benefits” referred to in Art. 11, para. 4, of the Directive. Under that article, States may limit equal treatment in respect of social assistance and social protection to core benefits. The case in question concerned the refusal to grant housing benefit to the applicant in the main proceedings, an Albanian national legally resident in Italy. The Court of Justice firstly states that the objective of integration and equal treatment means that any derogation provided for in the Directive must be interpreted strictly. Secondly, it adds that “[t]he meaning and scope of the concept of ‘core benefits’ in Art. 11, para. 4, of Directive 2003/109 must therefore be sought taking into account the context of that article and the objective pursued by that Directive, namely the integration of third-country nationals who have resided legally and continuously in the Member States.”²⁰ Therefore, a State cannot limit equal treatment with respect to benefits “which enable individuals to meet their basic needs such as food, accommodation and health”.²¹

Art. 5 of the Directive sets out the conditions that States require third-country nationals to prove in order to acquire long-term resident status. These conditions are stable and regular resources and sickness insurance. However, the second paragraph allows States to “require third-country nationals to comply with integration conditions, in accordance with national law”. The Directive does not determine what constitutes an integration condition. In its 2011 Report on the application of the Directive, the Commission writes that fourteen States impose integration conditions in relation to language proficiency as well as, possibly, knowledge about the host society or its national legal order. Certain States require third-country nationals to pass an exam while others make it compulsory to follow a course. In assessing compatibility with the Directive, the Commission emphasises the principles of proportionality and effectiveness and com-

¹⁸ Directive 2003/109, cit., Art. 4.

¹⁹ Court of Justice, judgment of 26 April 2012, case C-508/10, *Commission v. Netherlands*, para. 66, referred to a number of times by the subsequent case-law.

²⁰ Court of Justice, judgment of 24 April 2012, case C-571/10, *Kamberaj*[GC], para. 90.

²¹ *Ibid.*, para. 91.

compares the integration conditions required for acquiring citizenship and for granting long-term resident status, on the basis that, in the former case, the State can demand a greater degree of integration than in the latter.²² But not even the Commission specifies what the integration conditions are or what exact purpose they serve.

The interpretation of Art. 5, para. 2, was at the heart of *P and S*,²³ which concerned a Dutch law introducing an obligation to pass a civic integration examination testing oral and written proficiency in the national language and knowledge of the society. Not only newcomers, but even those who held a long-term residence permit needed to pass the examination within a prescribed period of time, under pain of a fine.

Although strictly *obiter dictum*, the Court of Justice states that Art. 5, para. 2, of the Directive “allows Member States to make the acquisition of long-term resident status subject to prior fulfilment of certain integration conditions”.²⁴ The provision says nothing about the possibility for States to require the fulfilment of integration conditions following acquisition of that status, and for that reason it is not useful in resolving the case. The legitimacy of national legislation is instead assessed on the basis of Art. 11 of the Directive, concerning equal treatment with nationals. It is not the examination itself that is contrary to the principle of equal treatment, since long-term residents and nationals of the host State are not in the same situation in terms of language proficiency and knowledge of society. It is rather the means of implementation that must not infringe Art. 11 or jeopardise the effectiveness of the Directive.²⁵ Given the purpose of the Directive, namely to allow the integration of long-term residents, ensuring that the person is proficient in the language and has knowledge of the country’s society does not conflict with the aim of the Directive and, in fact, facilitates integration as well as access to employment and vocational training. However, where the costs of sitting the examination and the fines imposed in case of failure of the examination are of an amount such as to jeopardise the achievement of the objectives of the Directive, an infringement then exists.

As regards the possibility of moving to another Member State, the long-term resident must comply with the conditions set out in the Directive. In the second State, the person immediately enjoys equal treatment with nationals. It is noteworthy here that the second State can impose integration measures, unless the person has already complied with integration conditions in the State in which he or she has acquired a right of permanent residence. The second State may, however, require the person to attend a language course, by virtue of Art. 15, para. 3. In its 2011 Report, the Commission highlights the difference between integration conditions referred to in Art. 5, para. 2, and

²² Communication COM(2011) 585 final of 28 September 2011 from the Commission on the application of Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, p. 3.

²³ Court of Justice, judgment of 4 June 2015, case C-579/13, *P and S*.

²⁴ *Ibid.*, para. 35.

²⁵ *Ibid.*, paras 44 and 45.

integration measures referred to in Art. 15, para. 3.²⁶ It seems entirely logical to consider that if the person does not fulfil the integration condition, he or she will not acquire long-term resident status, whereas if he or she does not comply with the integration measure, a fine may be imposed but the residence permit in the second State cannot be refused or withdrawn.²⁷

Other provisions of the Directive can also be mentioned here even though they do not directly mention integration. These concern the duration of the person's residence and links with the State of residence. Art. 6 provides that the State may refuse to grant long-term residence status on grounds of public policy or public security but, when taking that decision, it must consider both the type of offence committed and "the duration of residence and [...] the existence of links with the country of residence". According to Art. 12 on protection against expulsion, the State must, before taking any expulsion decision, consider a series of factors including "the duration of residence in [its] territory" and "links with the country of residence or the absence of links with the country of origin".²⁸ Duration of residence seems to have merely a quantitative connotation, whereas links with the country of residence could include qualitative considerations.

II.2. DIRECTIVE 2003/86 ON FAMILY REUNIFICATION

Directive 2003/86 applies to the family reunification of a third country national who "is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence".²⁹ Of the directives concerning immigration, this Directive contains the most references to integration. The recitals, after recalling the conclusions of the European Council meeting in Tampere, state that "[f]amily reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the *integration* of third country nationals in the Member State, which also serves to promote economic and social cohesion",³⁰ and clarifies that family reunification facilitates integration of the sponsor already legally residing in the Union. But the Directive also seeks to encourage the integration of family members insofar as it adds that "[t]he integration of family members should be promoted. For that purpose, they should be granted a status independent of that of the sponsor, in particular in cases of breakup of marriages and partnerships, and access to education, employment and vocational training on the same terms as the person with whom they are reunited, under the relevant conditions".³¹

²⁶ Communication COM(2011) 585, cit., p. 8.

²⁷ D. THYM, *Directive 2003/109*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law: A Commentary*, München: C.H. Beck, 2016, p. 505.

²⁸ Art. 12, para. 2, let. a) and d).

²⁹ Directive 2003/86, cit., Art. 3.

³⁰ *Ibid.*, recital 4, emphasis added.

³¹ *Ibid.*, recital 15.

That assertion is reflected in Art. 14, on the rights enjoyed by family members, and in Art. 15, on the grant of an autonomous residence permit after five years.

The Directive gives Member States the power to put in place integration conditions or measures. No specific measures or conditions are imposed by the Directive but States may require third country nationals to comply with any measure or condition provided for in national law. These can relate specifically to children or to the spouse or to all family members indistinctly.

As far as children are concerned, the third paragraph of Art. 4, para. 1, let. d), provides: "By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive." Recital 12 specifies that this right "is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school."³² The provision in question, along with others, was the subject of an action for annulment brought by the European Parliament on the grounds that it infringed fundamental rights. The Court dismissed the action because the States, in implementing the provision, need to respect the fundamental rights referred to in that Directive which are not capable of derogation. Unlike the relevant international agreements on human rights (the European Convention on the Protection of Human Rights and Fundamental Freedoms, the 1966 International Covenant on Civil and Political Rights, the 1989 Convention on the Rights of the Child), which do not establish any right to family reunification, the Directive does confer a right despite allowing the State to derogate from its provisions. Those derogations are an expression of the margin of appreciation that the international texts grant to the States and do not exceed the limits imposed by the latter.³³ In other words, the exercise of the right that the Directive confers upon States is always conditional on respect for fundamental rights and, specifically, on the obligation to have regard to the best interests of children, which permeates all of the rules. Although focussed on the subject of integration, the ruling actually is not very useful in terms of an understanding of the concept. The interest lies

³² Special rules apply if the parent is a highly qualified worker (Directive 2009/50, Art. 15, para. 3), a researcher (Art. 19, para. 3, of Directive 2014/66, and Art. 26, para. 3, of Directive 2016/801) or an intra-corporate transferee (Art. 19, para. 3, of Directive 2014/66). The integration measures may be applied by the Member States only after the person concerned has been granted family reunification. Strictly speaking, these are "integration measures" rather than "integration conditions".

³³ Judgment of 27 June 2006, case C-540/03, *European Parliament v. Council* [GC]. Some legal scholars praised this judgment – see i.e. R. LAWSON, *Family Reunification and the Union's Charter of Fundamental Rights*, in *European Constitutional Law Review*, 2007, p. 324 *et seq.* – while others criticised it, i.e. D. MARTIN, *Case C-540/03, European Parliament v. Council. Comment*, in *European Journal of Migration and Law*, 2007, p. 144 *et seq.*

instead in the definition of the margin of appreciation afforded to the States and in the declaration of the pervasive value of the obligation to respect fundamental rights.³⁴

The judgment provides a better understanding of the function of the third paragraph of Art. 4, para. 1, let. d),³⁵ which is precisely to enable the States to maintain derogations and strict rules, where provided by law, aimed at promoting a prompt reunification of children, so that integration can be achieved primarily through language learning and schooling. The earlier the reunification, the more effective the integration. This axiom is accepted as legitimate by the Court of Justice, which does not ask for any specific justification based on scientific or experiential data. In the cases specified in the provision, the State can therefore presume that the child will find it difficult (or at least less easy) to integrate and can verify this through the use of integration conditions.³⁶ The fact that the concept of integration is not defined cannot, in the Court's opinion, be interpreted as authorising the States to adopt measures that are contrary to fundamental rights because the Directive sufficiently delimits the scope that they enjoy.³⁷ Conditions must be laid down in national legislation and the Court will review the measures concerned and their implementation in order to verify respect for the fundamental rights that the Directive incorporates. It also seems to be the case that national measures must guarantee appropriate flexibility to take account of the circumstances applicable to each individual case.³⁸

In the same judgment, the Court then makes comments about integration with reference to Art. 8 of the Directive, also considered in the action for annulment brought by the Parliament. That provision enables States to impose a waiting period, before family reunification, of up to two years during which the applicant must have resided lawfully, but which can increase to three years "where the legislation of a Member State relating to family reunification in force on the date of adoption of the Directive takes into account its reception capacity". The Court states that "That provision does not therefore have the effect of precluding any family reunification, but preserves a limited margin of

³⁴ E. SANFRUTOS CANO, *Arrêt Parlement c. Conseil «Directive réunification familiale»*, in *Revue du Droit Européen*, 2006, p. 706, highlights the didactic attitude of the Court, who offers guidelines for the application and interpretation of the national implementation provisions.

³⁵ *European Parliament v. Council* [GC], cit., paras from 61 to 76.

³⁶ The threshold sets at twelve is considered as legitimate choice, for reasons linked to both the minor's past ("the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties", para. 74), and future ("children over 12 years of age will not necessarily remain for a long time with their parents", para. 75). E. DRYWOOD, *Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision*, in *European Law Review*, 2007, p. 406, sees in these words of the Court a worrying disregard of minors' rights.

³⁷ *European Parliament v. Council* [GC], cit., para. 71.

³⁸ F. MACRÌ, *La Corte di giustizia sul diritto al ricongiungimento familiare dei cittadini di Stati terzi: la sentenza Parlamento c. Consiglio*, in *Il Diritto dell'Unione europea*, 2006, p. 813.

appreciation for the Member States by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration".³⁹ It adds, however, that the use of that derogation does not preclude respect for fundamental rights or the need to take into account other factors which, in specific cases, may prevail over the requirement to impose a waiting period.⁴⁰

As far as the spouse is concerned, Art. 4, para. 5, provides: "In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her". The rationale is that the younger the spouse is, the more difficult it will be to integrate.⁴¹ This provision has been interpreted differently by the Commission and by the Court. The Commission has asserted that setting a minimum age for reunification cannot operate as an automatic condition whereby no case-by-case assessment is required. If, following an individual assessment, it transpires that the objective of the provision is not fulfilled, reunification must then be allowed. It is a sort of presumption that can be rebutted by proof of the contrary, with the aim of preventing fraudulent behaviour. So, if the couple has had children, reunification should be allowed provided that "there is no abuse". Furthermore, the requirement must be fulfilled at the moment of the family reunion and not when the application is submitted.⁴² In contrast, the Court's interpretation is much more favourable to the State. The *Noorzia* case highlighted the Austrian legislation which provided that at the time when the application for reunification is lodged both the applicant and the spouse must be aged at least 21, failing which the application will be rejected.⁴³ The objective of the provision is construed by the Court of Justice differently from the interpretation described above. The Court indicates that the States fix the minimum age "at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated there".⁴⁴ Here the presumption cannot be rebutted by proof of the contrary. Furthermore, the Court considers that the silence of the Di-

³⁹ *European Parliament v. Council* [GC], cit., para. 98.

⁴⁰ *Ibid.*, para. 99. M. BULTERMAN, *Case C-540/03, Parliament v. Council. Comment*, in *Common Market Law Review*, 2008, p. 253, highlights the link between Art. 8 and Art. 17 established by the Court, which did not derive clearly from the wording of the Directive.

⁴¹ K. GROENENDIJK, *Legal Concepts of Integration*, cit., p. 119.

⁴² Communication COM(2014) 210 final of 3 April 2014 from the Commission on guidance for application of Directive 2003/86/EC on the right to family reunification, pp. 8-9.

⁴³ Court of Justice, judgment of 17 July 2014, case C-338/13, *Noorzia*.

⁴⁴ *Ibid.*, para. 15.

rective as to the moment when the spouses must fulfil the requirement in question gives the States full discretion over that matter, provided that they set a time period objectively and this does not prevent reunification or make reunification unjustifiably difficult. The Austrian legislation in question is deemed to comply with those requirements.

Art. 7 of the Directive sets out the conditions required for reunification. These are adequate accommodation, sickness insurance, and stable and regular resources. The second paragraph adds: "Member States may require third country nationals to comply with integration measures, in accordance with national law." However, it can be argued *a contrario* from the final paragraph – which specifies that if the third country national in question is a refugee or a family member of a refugee,⁴⁵ integration measures may only be applied after family reunification has been granted – that States may, as a general rule, apply those measures before granting reunification. Based on the wording of Art. 7, which uses the terms "integration measures" as opposed to "integration conditions", a technique also followed in Directive 2003/109 which was adopted at around the same time, it could be argued that if failure to meet a condition leads to refusal of reunification, failure to achieve an integration measure cannot produce the same effect but the State can impose special obligations on the family member. The difference in terminology is also highlighted by the Commission in the aforementioned Communication on guidance for application of Directive 2003/86 on the right to family reunification.⁴⁶ The Court, however, does not take account of this and has instead held that the Dutch legislation specifying that, before reunification, the family member must pass a civil integration exam aimed at assessing knowledge of the national language and society and that, if the exam is failed, the application for reunification must be rejected could be consistent with Art. 7, para. 2.⁴⁷ According to the Court, integration measures must be aimed at facilitating integration, not at filtering the family members who are eligible for reunification.⁴⁸ They perform that function if, as in the case in question, they serve to ensure that the family member has a basic knowledge both of the language and of the society. The means by which fulfilment of the obligation was ensured are not, however, deemed compatible with the Directive. The State making use of the derogation must take into consideration the reasons that might explain why the exam was failed as well as the costs of the exam, which must not be unreasonable, having regard to the financial resources of the persons concerned. The first aspect is particularly significant.

⁴⁵ The Directives on highly qualified workers, researchers and intra-corporate transferees attain the same result, albeit in a different manner. See *supra*, note 32.

⁴⁶ Communication COM(2014) 210 final, cit., p. 17.

⁴⁷ Court of Justice, judgment of 9 July 2015, case C-153/14, *K and A*, para. 49. The measure in question is the same one examined by the Court in the light of Directive 2003/109 in *P and S*, cit.

⁴⁸ *Ibid.*, paras 52 and 57. M. JESSE, *Integration Measures, Integration Exams and Immigration Control: P and S and K and A*, in *Common Market Law Review*, 2016, p. 1075, notes that measures such as the civic integration exam in The Netherlands "are in fact intended to select wanted as opposed to unwanted immigrants".

In short, the Court prohibits the State from automatically basing its refusal to grant reunification on the failure to pass the exam and requires States to consider the reasons for that failure. If the reasons for the failure to pass the exam can be attributed, for example, to the family member's "age, illiteracy, level of education, economic situation or health", the State cannot deny reunification on the grounds of failure to pass the exam.⁴⁹ The State is therefore required to admit precisely those persons whom it would actually have preferred to exclude.

III. ACTS RELATING TO ASYLUM POLICY

Specific rules apply to third country nationals in need of international protection and these are set out in a series of regulations and directives adopted in the early part of the century and subsequently amended. These acts concern: determination of the State responsible for examining applications for international protection (the so-called Dublin Regulation);⁵⁰ the EURODAC database,⁵¹ which contains data on applicants' fingerprints in order to identify whether an application for international protection has previously been lodged; reception conditions that must be established for applicants for international protection;⁵² procedures for examining applications for international protection⁵³ and definition of status for refugees and beneficiaries of subsidiary protection and associated rights.⁵⁴

III.1. THE DUBLIN REGULATION

The Dublin Regulation does not take any account of the applicant's integration prospects when determining the State responsible for deciding on an application for international

⁴⁹ *K and A*, cit., para. 58.

⁵⁰ Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, repealing Regulation (EC) 343/2003.

⁵¹ Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, repealing Regulation (EU) 2015/2000.

⁵² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, repealing Directive 2003/9/EC.

⁵³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, repealing Directive 2005/85/EC.

⁵⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, repealing Directive 2004/83/EC.

protection. This is evident from the relocation system introduced in 2015 and from the judgment dismissing the action for annulment brought by Hungary and the Slovak Republic. The Court clarifies that the criteria for determining the responsible State as set out in the Dublin Regulation “[do] not specifically seek to ensure that there are linguistic, cultural or social ties between the applicant and the responsible Member State”.⁵⁵

The relocation system was designed as a measure of solidarity towards Italy and Greece, both of which, in 2015, had to contend with an unexpected and unforeseeable flow of third country nationals who had reached their territory illegally. Under the Dublin Regulation, the criteria for determining the responsible State are applied in the order in which they are set out. Although the criterion whereby responsibility lies with the State whose borders the applicant has irregularly crossed is one of the last listed, it was actually the one most commonly applicable, with the result that Greece and Italy were forced to examine a greater number of applications than their competent structures were able to handle, thus making the system unsustainable.⁵⁶ The solution identified to relieve the pressure on Italy and Greece was the relocation system,⁵⁷ under which the other Member States would take charge of a certain number of applicants for international protection, thus becoming responsible for examining the respective applications, notwithstanding the Dublin Regulation. The relocation State for each individual applicant eligible to benefit from the system was identified according to the willingness expressed by the States themselves. “The specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation” could help to identify the State best placed to take charge of and relocate the person.⁵⁸ The aim was therefore to seek to relocate

⁵⁵ Court of Justice, judgment of 6 September 2017, joined cases C-643/15 and C-647/15, *Hungary and Slovak Republic v. Council* [GC], para. 334.

⁵⁶ In reality, only some of the people who arrived lodged an application for international protection in the two States. The majority were seeking to reach other destinations. However, the States where the applications were lodged were often not responsible for examining them and the applicants were transferred to the responsible State, in accordance with the Dublin regulation. However, the Greek reception system had already reached collapsing point to the extent that transfers were no longer possible because they would have constituted a breach of the prohibition on inhuman treatment. M. DEN HEIJER, J. RIJPM, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, p. 607 *et seq.*

⁵⁷ This system was established by Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The latter decision differs from the former in that it provides for mandatory allocations for States. E. GUILD, C. COSTELLO, V. MORENO-LAX, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*, Study for the LIBE Committee, 2017, www.europarl.europa.eu.

⁵⁸ Recital 28 of Decision 2015/1523 and recital 34 of Decision 2015/1601.

each applicant in the State where they had the greatest possibility of integration. With a certain degree of optimism, the recitals of Decision 2015/1601 provide “[t]he integration of applicants in clear need of international protection into the host society is the cornerstone of a properly functioning Common European Asylum System”.⁵⁹ Poland, intervening in the action for annulment brought by Hungary and the Slovak Republic, maintains that the decision fails to define the criteria for identifying the State to which the applicant will be relocated, with the effect that persons “could [...] be resettled in distant regions of the European Union with which they have no cultural or social ties, which would make their integration in the society of the host Member State impossible”.⁶⁰ The Court rejects the ground of complaint and maintains that the elements listed in recital 34 and the consultation mechanism between the relocation State and Italy or Greece, based on solidarity and fair sharing of responsibility between Member States, fulfil that function in a non-arbitrary manner.⁶¹ The Court diminishes the scope of integration requirements in determining the relocation State, giving greater weight to solidarity requirements, quite rightly, because the function of the relocation system is to help Italy and Greece rather than satisfying the wishes of applicants or relocation States. If ease of integration were the main criterion for the allocation of applicants, States would have an easy way of avoiding the obligations laid down in the decision and, more generally, in the entire European Asylum System.

III.2. THE QUALIFICATIONS DIRECTIVE

Among the acts that make up the European Asylum System, Directive 2011/95 (Qualifications Directive) is the only one that contains express references to integration. Emphasis is placed on the State’s obligation to draw up integration programmes to facilitate the integration of beneficiaries of international protection. It is not an instrument for selecting beneficiaries of international protection, given that States are obliged to admit these people and issue them with a residence permit, but for helping them and thus reducing the social costs that can be generated when foreign nationals arrive outside of any planning mechanism. Recital 41 recognises that beneficiaries of international protection have “specific needs” and are confronted with “particular integration challenges”. This justifies the treatment that they must receive as well as the need for States to provide “integration programmes [...] including, where appropriate, language training and the provision of information concerning individual rights and obligations relating to

⁵⁹ Indeed, the Dublin Regulation does not rank the criteria according to the chance the person concerned has to integrate, except for the criteria connected to family ties. However here again, family ties depend more on the residence permit of the member of the family, than on the degree of kinship as such.

⁶⁰ *Hungary and Slovak Republic v. Council* [GC], cit., para. 320.

⁶¹ *Ibid.*, para. 332.

their protection status in the Member State concerned".⁶² It is clear from recital 48 that national programmes can be based on "common basic principles for integration".

Art. 34 describes the right to access to integration facilities in the following terms: "In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes".⁶³ Recital 40, however, specifies that "[w]ithin the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit." The scope of that provision, which does not have a corresponding provision in the text of the Directive, was appropriately diminished by the Court in the *H.T.* case.⁶⁴ This case concerned the revocation of a residence permit for compelling reasons of national security, given that the refugee had provided support to a terrorist organisation. Although revocation is not governed by the Directive, it is nonetheless possible in the Court's view.⁶⁵ However, until the person has been expelled, he continues to hold refugee status and is entitled to the treatment established by the Directive. The State cannot therefore deny him the benefits specified. With reference to recital 30 of Directive 2004/83, which corresponds to recital 40 of Directive 2011/95, the Court states:

"While it is true that recital 30 of Directive 2004/83 provides that Member States may, within the limits set by their international obligations, lay down that 'the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit', the condition thus imposed nevertheless refers to processes purely administrative in nature, since the objective of Chapter VII of the Directive is to guarantee refugees a minimum level of benefits in all Member States. Moreover, as that recital does not have a corresponding provision among the provisions of the Directive, it cannot constitute a legal basis allowing Member States to reduce the benefits guaranteed by that Chapter VII where a residence permit is revoked".⁶⁶

In addition to the express reference made to integration in Directive 2011/95, it should be recalled here that the need to facilitate the integration of beneficiaries of

⁶² See recital 47 of the Directive.

⁶³ The provision was already present in Directive 2004/83 (Art. 33), but it treated refugees, who were entitled to access to integration programs, and beneficiaries of subsidiary protection, who could have access only if the State considered it appropriate, differently.

⁶⁴ Court of Justice, judgment of 24 June 2015, case C-373/13, *H.T.*

⁶⁵ P. DUMAS, *L'arrêt H.T.: La Cour de justice entre protection et déconstruction des droits garantis aux réfugiés*, in *Revue trimestrielle de droit européen*, 2016, p. 64, highlights that the Court is exercising a sort of "*pouvoir normatif*" to fill the gaps in the Directive.

⁶⁶ *H.T.*, cit., para. 96.

subsidiary protection was behind the decision to give them equivalent treatment as that given to refugees. Under the previous Directive 2004/86, the decision to extend the treatment established for refugees to beneficiaries of subsidiary protection was substantially left to the discretion of the States. Directive 2011/95 removed many of the differences in treatment. In particular, it is evident from the preparatory acts that the States, which were favourable to the change, justified the decision to extend to beneficiaries of subsidiary protection the possibility of immediate access to employment after obtaining that status (which the Directive indeed does), on the basis that it facilitated integration into society.⁶⁷

The Court of Justice has since had the opportunity to assess whether a State could take account of integration requirements in granting the treatment provided for in the Directive. In *Alo and Osso*, the Court examined the German system which imposes a residence condition on beneficiaries of international protection to whom welfare benefits have been granted.⁶⁸ That obligation is justified by the objective of facilitating their integration. In particular, with the words used in the judgment to summarise the objectives of the provision:

“the residence condition provided for by German law seeks, on the one hand, to prevent the concentration in certain areas of third-country nationals in receipt of welfare benefits and the emergence of points of social tension with the negative consequences which that entails for the integration of those persons and, on the other, to link third-country nationals in particular need of integration to a specific place of residence so that they can make use of the integration facilities available there”.⁶⁹

The Court assesses the conformity of the requirement with the Directive, based on the provisions of the Directive itself, and finds that it is not discriminatory on grounds of nationality, with respect to treatment of nationals and other foreign nationals.⁷⁰ As far as the former are concerned, the Court rules out any conflict with the Directive, because beneficiaries of international protection are not in a comparable situation with nationals “so far as the objective of facilitating the integration of third-country nationals is

⁶⁷ H. BATTJES, *Chapter VII Directive 2011/95*, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law*, cit., p. 1252; V. MORENO-LAX, M. GARLICK, *Qualification: Refugee Status and Subsidiary Protection*, in S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD (eds), *EU Asylum Law*, Leiden: Brill Nijhoff, 2015, p. 170.

⁶⁸ Court of Justice, judgment of 1 March 2016, joined cases C-443/14 and C-444/14, *Alo and Osso* [GC].

⁶⁹ *Ibid.*, para. 58.

⁷⁰ The fact that the Court does not consider fundamental rights is criticized, even though the outcome of its reasoning is mostly appreciated. See L. MAROTTI, *Sul diritto di scegliere la residenza per i beneficiari dello status di protezione sussidiaria: profili evolutivi e aspetti problematici nell'approccio della Corte di giustizia*, in *Diritti umani e diritto internazionale*, 2016, p. 487 *et seq.*; J.Y. CARLIER, *Choice of Residence for Refugees and Subsidiary Protection Beneficiaries; Variations on the Equality Principles: Alo and Osso*, in *Common Market Law Review*, 2017, p. 642 *et seq.*

concerned".⁷¹ As regards third country nationals who reside under a different status from beneficiaries of international protection and who receive welfare benefits without being subject to a residence condition, the Court leaves this decision to the national court, which must examine whether beneficiaries of international protection face greater difficulties relating to integration than other foreign nationals.⁷² If the national legislation grants welfare benefits to third country nationals residing for reasons other than subsidiary protection only after a certain period of residence, because they were admitted on condition that they were able to support themselves financially, and only after a certain period can they be considered sufficiently integrated, the national court could then conclude that beneficiaries of international protection indeed face greater difficulties relating to integration and that these justify the residence condition.⁷³ The reasoning is somewhat convoluted. But it is clear that, in this context, integration is a mere consequence of the duration of residence and is dependent on the latter. Since beneficiaries of international protection, unlike foreign nationals, do not need to wait to receive welfare benefits, the presumption is that they are less well integrated and a residence condition can be imposed on them.

IV. ACTS RELATING TO FREE MOVEMENT OF PERSONS

Special rules and acts apply to Union citizens and their family members. They are foreigners for the host State, but as nationals of Member States they benefit of a different treatment than third country nationals. In EU law, these rules and acts are known as free movement of persons. Nowadays, Directive 2004/38 governs the conditions for entry, residence and expulsion of Union citizens and their family members, in a different Member State from that where they have citizenship. It replaces the acts of secondary legislation that previously applied to specific categories of Union citizens⁷⁴ or which tackled horizontally the particular problem of restrictions on free movement on grounds of public policy, public security and public health.⁷⁵ Unlike these acts, Art. 24 of Directive 2004/38 provides that Union citizens also enjoy equal treatment with nationals of the host State. The previous secondary legislation did not contain any provisions concerning rights associated with residence and, in particular, equal treatment with na-

⁷¹ *Alo and Osso* [GC], cit., para. 59.

⁷² According to E. GUNN, *Comment*, in *Journal of Immigration, Asylum and Nationality Law*, 2016, p. 181, the Court leaves too wide a margin of discretion for the national judge.

⁷³ *Alo and Osso* [GC], cit., para. 63.

⁷⁴ Directives 68/360/EEC (workers), 73/148/EEC (self-employed workers), 75/34/EEC (right to remain for self-employed workers), 90/364/EEC (self-sufficient EU citizens), 90/365/EEC (retired workers) and 93/96/EEC (students).

⁷⁵ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, and subsequent amendments.

tionals. In fact, Art. 3 of Directive 96/93 on the right to residence for students, provided that “[t]his Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence”. Although equal treatment for workers was specified in Regulation 1612/68, which has been interpreted extensively by the Court as we will see shortly, the possibility or otherwise of invoking equal treatment for other Union citizens exercising free movement rights on another basis was directly dependent on primary law.

IV.1. REGULATION 1612/68 ON FREE MOVEMENT OF WORKERS

Before examining Directive 2004/38 to identify how the concept of integration is considered in that Directive, a few comments should be made about Regulation 1612/68⁷⁶ (now replaced by Regulation 492/2011,⁷⁷ which did not introduce any changes of interest to us here). The Regulation and its respective case-law bear witness to the interpretative possibilities offered as a result of the reference to integration contained therein.

The fifth recital (corresponding to the sixth recital in Regulation 492/2011) provided:

“Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family and the *conditions for the integration of that family into the host country*” (emphasis added).

The Court of Justice has addressed this recital several times and has referred to elements of this recital for the purposes of interpreting the regulation’s provisions, in relation principally, but not exclusively, to family members. Firstly, it has construed the reference to integration to mean that equal treatment must be ensured with nationals of the host country in terms of a child of a migrant worker being able to access the advantages associated with education⁷⁸, even though Art. 12 (now 10) of the Regulation did not expressly mention this. Secondly, integration is considered when interpreting Art. 7, para. 2, of the Regulation, which provides that the migrant worker “shall enjoy

⁷⁶ Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

⁷⁷ Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

⁷⁸ Court of Justice: judgment of 11 April 1973, case 76/72, *Michel S.*, regarding benefits provided for with the view of allowing the rehabilitation of the handicapped; judgment of 3 July 1974, case 9/74, *Casa-grande*, on measures relating to educational grants; judgment of 15 March 1989, joined cases 389/87 and 390/87, *Echternach and Moritz*, on the assistance granted to cover the costs of students’ education and maintenance; judgment of 13 November 1990, case C-308/89, *Di Leo*, on educational grants, where the education or training is pursued in the State of origin.

the same social and tax advantages as national workers". In determining whether a non-economic advantage falls within the scope of Art. 7, para. 2, the Court has highlighted the contribution that this can make to the migrant worker's integration into the host country. In *Mutsch*, the social advantage that contributes towards integration is the right to use one's own language in proceedings;⁷⁹ in *Reed* it is the right to obtain a residence permit for an unmarried partner.⁸⁰ Thirdly, Art. 11 of the Regulation, interpreted in the light of the fifth recital, has led the Court to state that a spouse, national of a non-member country, has the right to pursue a regulated profession if he or she holds the qualifications required by national law.⁸¹ In these rulings, the reference to integration serves to reinforce equal treatment, which is an instrument for integration and contributes towards the achievement of free movement of workers. In other words, a migrant worker is integrated if the State grants him or his children the same advantages that it grants to a national worker or his children. The State therefore promotes integration through full recognition for migrant workers of equal treatment with nationals.

The most daring interpretation of the regulation and, in particular, of Art. 12, from the perspective of integration, is the Court of Justice's interpretation in *Echternach and Moritz*.⁸² The case was unusual because it concerned the possibility for the migrant worker's son to continue his studies in the migrant worker's previous country of residence. The son would have accompanied his parents to the State to which the family moved but, in that State, he would not have been able to complete the education that he began in the other State, because of a lack of coordination. The Court states that integration of the migrant worker in the society of the host country is only possible if the child is able not only to begin his education but also to complete that education. In the subsequent case *Baumbast and R.*, the Court generalises that right to finish one's studies and extends it to cases where the element of necessity found in *Echternach* is not present, thus clarifying that the right is acquired not only when the child is prevented from completing his education in the country to which the family has moved but also simply on account of having started his education.⁸³

The migrant worker's child retains that right, which also includes the right to State funding of studies, as well as the associated right of residence, even where the parent has left the country. This is therefore a right (or, rather, a set of rights) that is granted irrespective of the worker's integration in the host State, because it survives the migrant worker's departure. Here it seems more likely that the Court is wishing to keep the mi-

⁷⁹ Court of Justice, judgment of 11 July 1985, case 137/84, *Mutsch*.

⁸⁰ Court of Justice, judgment of 17 April 1986, 59/85, *Reed*.

⁸¹ Court of Justice, judgment of 7 May 1986, case 131/85, *Gül*. Directive 2004/38 repealed Art. 11 of Regulation 1612/68. Art. 23 of the Directive corresponds to Art. 11 of the Regulation. Regulation 492/2011 does not have any equivalent provision.

⁸² *Echternach and Moritz*, cit.

⁸³ Court of Justice, judgment of 17 September 2002, case C-413/99, *Baumbast*, para. 53.

grant worker's child within the scope of European Union law and, specifically, within the scope of the right to equal treatment with nationals of the host State, albeit through the fiction of the requirement to ensure the integration of a migrant worker who has now departed. The integration facilitated by this case-law is, at best, that of the migrant worker's child.⁸⁴

The right that the migrant worker's child derives from Art. 12 of Regulation 1612/68 is an independent right, capable of supporting the right of residence of the parent who is the primary carer, even if the latter is a third country national or does not have sufficient resources, where the child is unable, owing to his age or for other reasons,⁸⁵ to live on his own in the State in which he is studying.⁸⁶

IV.2. DIRECTIVE 2004/38

Looking now at Directive 2004/38, the principle established in that Directive can be summarised as follows: all Union citizens have the right of residence for up to three months and retain that right unless they become an excessive burden on the host State. During that period (and unless they are workers), Union citizens are not eligible for social assistance. For periods of residence of more than three months, Union citizens have the right of residence in a Member State other than their own if they are workers or self-employed persons, they are students and have sufficient resources to support themselves financially or if they are neither workers nor students but have sufficient resources to support themselves financially without claiming benefits from the host State.⁸⁷ During that period, Union citizens are entitled to equal treatment with nationals, with the sole exception of maintenance grants and student loans, to which they are not entitled unless – again – they are workers. After five years of legal and continuous residence, Union citizens acquire a right of permanent residence, with which certain specific rights are associated. Firstly, residence is no longer subject to conditions. Thus it does not matter if they lose their job or no longer have sufficient resources, circumstances which would previously have caused them to lose their right of residence. Moreover, a person does not become an excessive burden on the host State simply on

⁸⁴ In *Echternach and Moritz*, the Court refers to the workers' integration in para. 20 and to the children's integration in para. 35.

⁸⁵ Court of Justice, judgment of 8 May 2013, case C-529/11, *Alarape and Tijani*. The child was a 22-year-old doctoral student, but the Court called upon the national judge to evaluate whether he nonetheless needs the presence of his mother to finish his studies.

⁸⁶ *Baumbast*, cit.; Court of Justice, judgment of 23 February 2010, case C-480/08, *Teixeira* [GC]; Court of Justice, judgment of 23 February 2010, case C-310/08, *Ibrahim* [GC].

⁸⁷ Directive 2004/38: Arts 6 (right of residence for up to three months) and 7 (right of residence for more than three months). On the Directive, see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive. A Commentary*, Oxford: Oxford University Press, 2014; C. BARNARD, *The Substantive Law of the EU. The Four Freedoms*, Oxford: Oxford University Press, 2016, p. 331 *et seq.*; C. MORVIDUCCI, *I diritti dei cittadini europei*, Torino: Giappichelli, 2017.

account of having applied for or received social benefits. Secondly, a person is fully entitled to non-discrimination on grounds of nationality, and the host State cannot lawfully invoke derogations under Art. 24. Thirdly, a person enjoys enhanced protection against expulsion, which, under Art. 28, para. 2, can be decided only “on serious grounds of public policy or public security”.

The Directive contains few references to integration. These can be found principally in the recitals and concern two areas: right of permanent residence and protection against expulsion.

As to the right of permanent residence,⁸⁸ recital 18 describes it as being a vehicle for integration, specifying that it is a genuine vehicle for integration if “once obtained, [the right of residence is no longer] subject to any conditions”.

As regards protection against expulsion, the system introduced in the Directive is summarised in recital 24: “the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be”. The system, as the Court does not fail to point out, “is based on the degree of integration of those persons in the host Member State”,⁸⁹ but does not clarify when the person is integrated, leaving the national authorities to assess that matter. Art. 28 requires a State intending to expel a Union citizen on grounds of public policy or public security, to take account of a series of considerations “such as 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 Member State and the extent of his/her links with the country of origin”. Here integration is qualified by the adjectives “social and cultural” and is mentioned separately from duration of residence, thus the two concepts can be regarded as being different. The provision, read in the light of recitals 23 and 24,⁹⁰ can be interpreted in the sense that States must apply the principle of proportionality before taking an expulsion decision, and only if the State’s interest in having the individual expelled prevails over the latter’s interest in remaining can the State legitimately take the expulsion decision. According to the wording of the Directive, it therefore seems possible to conclude that even an integrated person can be conceived to behave in a manner such as to constitute a threat that is abstractly sufficient to justify an expulsion decision, were it not for the fact that the taking of that decision would be disproportionate in the case in question (because, as Art. 27, para. 2, states: “The personal conduct of the individual concerned must rep-

⁸⁸ The right of permanent residence is a novelty in EU law: see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 183.

⁸⁹ Court of Justice: judgment of 23 November 2010, case C-145/09, *Tsakouridis* [GC], para. 25; judgment of 16 January 2014, case C-400/12, *M.G.*, para. 30.

⁹⁰ Recital 24 has already been quoted in the text. Recital 23 itself provides that expulsion of Union citizens or their family members can harm those who “have become genuinely integrated into the host Member State”.

resent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”).

As regards integration being one of the factors that the State needs to take into account before taking an expulsion decision, mention can be made of the *Tsakouridis* judgment, in which the Court stated the following:

“a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned [...], on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which [...] is not only in his interest but also in that of the European Union in general”.⁹¹

These words reinforce the idea that even an integrated person can behave in such a way that is abstractly capable of justifying an expulsion decision. Furthermore, they connect integration with social rehabilitation, suggesting that rehabilitation can be more successful in the State in which the person is integrated than in the State of origin. According to the traditional interpretation, expulsion is simply the State’s decision to “dispose” of an unwelcome person and is not accompanied by any rehabilitation programme or any form of coordination with the State of origin. The concern is that the State of origin will readmit the person,⁹² not that it will rehabilitate him or do anything to deal with the danger that he presents. Social rehabilitation requirements do not appear to be given similar consideration in subsequent judgments, as we will see below.

Integration requirements are therefore behind the requirement for a certain period of residence before being able to claim equal treatment. As already mentioned, Art. 24 of the Directive provides that the degree of equal treatment is determined on the basis of duration of residence. In the *Förster* case, the Court had stated that the period of five years of residence provided for in Dutch law before students could obtain maintenance assistance was an appropriate length of time to ensure that the Union citizen had integrated into the host State.⁹³ The Directive was not applicable *ratione temporis*, but it is interesting to note that the waiting time is exactly the same as that specified in Art. 24 of the Directive, which the Court nonetheless quoted anyhow. It is safe to assume

⁹¹ *Tsakouridis* [GC], cit., para. 50.

⁹² Art. 27, para. 4, of Directive 2004/38 establishes that “the Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute”.

⁹³ Court of Justice, judgment of 18 November 2008, case C-158/07, *Förster* [GC]. The requirement that a Union citizen who is not a worker must demonstrate a certain degree of integration with the host State in order to enjoy equal treatment with nationals had been accepted by the Court in *Bidar*: see Court of Justice, judgment of 15 March 2005, case C-209/03, *Bidar* [GC]. Integration could be ensured by a certain period of residence. In *Förster*, however, the Court accepts that a predefined period of residence is sufficient without the need to conduct a proportionality assessment based on the specific characteristics of the case.

therefore that the justification accepted for the national measure is transposable to the Directive.⁹⁴ This conclusion is corroborated by subsequent Court judgments. In *Commission v. Netherlands*,⁹⁵ the Court states that where a worker has participated in the employment market of the host State and contributed to the financing of the State through social contributions and taxes, he has a sufficient link of integration to claim equal treatment with nationals and no waiting period can be imposed on him.⁹⁶ In *Commission v. Austria*,⁹⁷ the Court examined whether the Austrian legislation that granted the benefit of reduced fares on public transport to students whose parents received family allowances in Austria was compatible with the prohibition of discrimination on grounds of nationality. In order not to be indirectly discriminatory, the criterion for selection of beneficiaries should have been established objectively, so as to ascertain that “there is a genuine link between a claimant to a benefit and the competent Member State”.⁹⁸ This link exists where the beneficiary “is enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training, in accordance with the first indent of Art. 7, para. 1, let. c), of Directive 2004/38”.⁹⁹

Besides these express or implied references, the Directive does not mention the concept of integration again. In fact, States cannot stipulate that integration conditions must be fulfilled before the right of residence is granted, even if such conditions are laid down by law. The requirements on which residence is conditional are listed exhaustively in the Directive itself and the States cannot add others.¹⁰⁰

However, this analysis cannot be limited to an examination of the wording of the Directive and ignore the trend observed in the case-law of the Court, which, consciously or otherwise, has considered the matter of integration in its interpretation of the Di-

⁹⁴ According to N. NIC SHUIBHNE, *The Third Age of EU Citizenship. Directive 2004/38 in the Case Law of the Court of Justice*, in P. SYRPIS (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge: Cambridge University Press, 2012, p. 350, “the Court [...] issued a clear signal of deference to the legislature”.

⁹⁵ Court of Justice, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*.

⁹⁶ An additional source of concerns is the case law that makes satisfying not better-defined integration links a condition for access to benefits for frontier workers. On this subject, which falls outside the present paper’s focus, because it does not deal with the application of Directive 2004/38, see S. MONTALDO, *Us and Them: Restricting EU Citizenship Rights Through the Notion of Social Integration*, in *Freedom, Security & Justice: European Legal Studies*, 2017, p. 40 *et seq.*

⁹⁷ Court of Justice, judgment of 4 June 2015, case C-75/11, *Commission v. Austria*.

⁹⁸ *Commission v. Austria*, cit., para. 59.

⁹⁹ *Ibid.*, para. 64.

¹⁰⁰ Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock* [GC], stating that Art. 10 of Directive 2004/38 lists exhaustively the documents which third-country nationals family members may have to present in order to have a residence card issued (para. 53). The same reasoning, which is grounded on the wording of the provision, may be transposed to Art. 7 of the Directive as well.

rective, with rather worrying outcomes.¹⁰¹ In the opinion of this author, this case-law has developed without considering the overall picture and has gradually taken a somewhat unexpected direction.

The starting point can be traced back to the judgment in *Lassal*, concerning the right of permanent residence, in which the Court took inspiration from the part of the recitals which read: "The EU legislature made the acquisition of the right of permanent residence pursuant to Art. 16, para. 1, of Directive 2004/38 subject to the integration of the citizen of the Union in the host Member State".¹⁰² Integration becomes a condition for acquiring the right of permanent residence and not as a consequence of that right, as could be assumed from the recitals to the Directive. In *Lassal*, this assertion was perhaps linked to the peculiarities of that case, because the underlying problem for the Court was to determine whether a person who, before the entry into force of the Directive, had resided for five years in the host State and had subsequently been absent from that State for around ten months was able to acquire a right of permanent residence. In giving more weight to the period of residence than the period of absence, the Court follows a substantialist approach whereby any continuous period of residence as a worker or person seeking work guarantees the integration required for acquiring the right of permanent residence. In the ruling, the sentence quoted is placed in the context of the proceedings, because integration is considered to exist in the case of prolonged residence. The point in discussion was, instead, whether the link with the State arising from prolonged residence was jeopardised by an absence of a certain duration.¹⁰³ In short, the Court was attempting to attach importance to the period of residence completed before the entry into force of the Directive and consistent with the conditions laid down by the Union law applicable at the time, to avoid any damage being caused to the new system, which was designed to enhance rather than diminish the rights of Union citizens.

In the subsequent *Dias* case,¹⁰⁴ the Court was once again faced with events occurring prior to the entry into force of the Directive. The difference with the previous case is that the applicant in the main proceedings, after residing for a continuous period of five years, remained in the State without working or looking for work and yet retained her residence permit.¹⁰⁵ Referring to its established case-law whereby a residence per-

¹⁰¹ Among the most critical comments, see N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: the Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 953 *et seq.*

¹⁰² Court of Justice: judgment of 7 October 2010, case C-162/09, *Lassal*, para. 37; judgment of 16 January 2014, case C-378/12, *Onuekwere*, para. 24.

¹⁰³ *Lassal*, cit., paras 48, 55 and 56.

¹⁰⁴ Court of Justice, judgment of 21 July 2011, case C-325/09, *Dias*.

¹⁰⁵ The residence permit was the document that, on the basis of Directive 68/360 applicable to the facts in question, was issued to the worker.

mit does not give rise to any right to reside,¹⁰⁶ the Court states that mere possession of a residence permit does not mean that residence is legal for the purposes of acquiring the right of permanent residence. The legality of the residence depends in fact on whether the conditions laid down in the Directive have been fulfilled. Mrs Dias had left her job voluntarily after childbirth, in order to look after her son and received a social allowance during that period of around one year. The Court does not try to consider whether she could retain the status of worker. It is true that Directive 2004/38 does not include, among the situations in which a worker retains the status of worker despite not working, any periods spent looking after children,¹⁰⁷ but this issue deserves to be looked at sooner or later. The Court ultimately treats as an absence any period of residence that does not meet one of the conditions set out in Art. 7, para. 1, of the Directive. Based on the premise that the right of permanent residence is lost in the case of two-year absences because they call into question “the integration link between the person concerned and that Member State”, the Court concludes that this integration link “is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence”.¹⁰⁸ In para. 64, it adds: “The integration objective which lies behind the acquisition of the right of permanent residence laid down in Art. 16, para. 1, of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State”. Here the Court separates integration from presence in the State, giving integration a qualitative connotation not further specified. The assertion, which could have been interpreted as an unfortunate consequence of the characteristics of that case,¹⁰⁹ can be found again in *Onuekwere*.¹¹⁰ Here the Court was trying to assess whether a period of imprisonment following a criminal conviction could be taken into consideration for the purposes of acquisition of the right of permanent residence. The conclusion is that such residence is not legal pursuant to Art. 16 of the Directive and interrupts continuity of

¹⁰⁶ Court of Justice: judgment of 8 April 1976, case 48/75, *Royer*, para. 47 (on the residence card established by pre-Directive 2004/38 legislation); judgment of 8 October 2009, case C-123/08, *Wolzenburg* [GC], para. 51 (on the document attesting to the permanence of the EU citizens’ residence, under Directive 2004/38).

¹⁰⁷ The problem was addressed in Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*. The Court stated that Art. 45 TFEU itself grounds the maintenance of the right to reside in these cases. C. O’BRIEN, *Civis Capitalist Sum*, cit., p. 971 *et seq.*, highlights the disproportionate impact upon women exerted by the traditional reading of free movement rights.

¹⁰⁸ *Dias*, cit., para. 63.

¹⁰⁹ If the same facts had occurred after the entry into force of Directive 2004/38, Mrs Dias would not have lost the right of permanent residence, during the period in which she had left work to look after her son and she would have been entitled to any benefit available to nationals of the host State. E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive* cit., p. 202, were hoping that this interpretation would be limited “to the transposition period for the Directive”.

¹¹⁰ *Onuekwere*, cit.

residence. Firstly, the Court, after recalling para. 64 of the *Dias* judgment, continues by stating that “[t]he imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law”, thus the taking into consideration of such periods would be contrary to the aim pursued by the Directive.¹¹¹ Secondly, the Court states that the “condition of continuity of legal residence satisfies the integration requirement which is a precondition of the acquisition of the right of permanent residence”.¹¹² However, this interpretation is not the only interpretation possible. Legal scholars had put forward another interpretation, namely that since, on the basis of recital 17 and Art. 21, only the enforcement of an expulsion decision interrupts continuity of residence, it must be inferred that imprisonment not accompanied by expulsion does not prevent the right of permanent residence from being acquired.¹¹³

The effect of the case-law mentioned above can be summarised as follows: in order to obtain the right of permanent residence, it is necessary to reside under the conditions laid down in the Directive,¹¹⁴ in other words as a worker or self-employed person, student or self-sufficient person, or family member, and never to have infringed the law or spent time in prison. In short, the Court, with respect to the system provided for in the Directive, seen through the prism of integration, infers additional obligations to those expressly specified.¹¹⁵ Furthermore, the Court has denied that periods of residence based on national law or on other provisions of Union law can be taken into consideration for the purposes of acquiring the right of permanent residence.¹¹⁶

This case-law has affected the interpretation of other provisions of the Directive. In particular, in order to claim equal treatment under Art. 24, the Court has stated that Un-

¹¹¹ *Ibid.*, para. 26.

¹¹² *Ibid.*, para. 30. Other language versions are even more explicit: In Italian, the words “obbligo d’integrazione” are used and, in French, “obligation d’intégration”.

¹¹³ E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 193.

¹¹⁴ Legal residence is thus defined by recital 17. The Court accepts this interpretation and considers it to be exhaustive, even though other interpretations are possible: see the next footnote.

¹¹⁵ In her suggestive interpretation of the Directive from the perspective of restrictions on free movement as opposed to from the traditional perspective of rights, N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 920, adds that “a duty to integrate properly” can be inferred from that case-law.

¹¹⁶ As to period of residence under national law: “[A] period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Art. 7(1) of Directive 2004/38 cannot be regarded as a ‘legal’ period of residence within the meaning of Art. 16(1)”: Court of Justice, judgment of 21 December 2011, joined cases C-424/10 and C-425/10, *Ziolkowski* [GC], para. 47. As to period of residence under other provision of EU law, see Court of Justice, judgment of 6 September 2012, joined cases C-147/11 and C-148/11, *Czop and Punakova*, and *Alarape and Tijani*, cit., stating that residence under Art. 12 Regulation 1612/68 (now Art. 10 Regulation 492/2011) cannot be considered as legal residence for the purpose of Art. 16 Directive 2004/38. For critical remarks on these statements, see E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 163 *et seq.*

ion citizens must reside under the conditions set out in the Directive, with any periods of residence accrued in accordance with national law being disregarded.¹¹⁷

The integration requirement has since slipped into the application of enhanced protection against expulsion, which is acquired after ten years of residence, pursuant to Art. 28, para. 3, let. a). In the first case in which the Court had to interpret the provision in question, it stated that the ten years of residence are calculated backwards from the date of the expulsion decision.¹¹⁸ However, the practical usefulness of the provision is called into question by two comments made by the Court. Firstly, the commission of particularly serious offences denotes a lack of willingness to integrate, which removes the protection that the Directive connects with integration into the host State. Secondly, imprisonment also demonstrates a lack of willingness to integrate and interrupts continuity of residence,¹¹⁹ with the result that a person who is in prison at the time the ten years of residence are calculated will rarely manage to enjoy enhanced protection against expulsion.¹²⁰ In fact, the only people who can enjoy this protection are those who have not committed any criminal offence of a particular severity but whom the State nonetheless wishes to expel on grounds of public security. As legal scholars have rightly pointed out, lack of integration risks becoming a ground for expulsion not provided for in the Directive.¹²¹ The Court does not seem to maintain any separation between duration of residence, which reduces the cases in which the State can expel a Union citizen, and integration, which, if limited or absent, can justify the adoption of an expulsion decision in a specific case. The wording of Art. 28, para. 3, let. a), of the Directive does not support the Court's interpretation because, unlike Art. 16, it does not in any

¹¹⁷ Court of Justice, judgment of 11 November 2014, case C-333/13, *Dano* [GC]. For comments, see D. THYM, *When Union Citizens Turn into Illegal Migrants: The Dano Case*, in *European Law Review*, 2015, p. 249 *et seq.*; H. VERSCHUEREN, *Preventing "benefit tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in Dano?*, in *Common Market Law Review*, 2015, p. 363 *et seq.* This line of reasoning has subsequently "infected" Regulation 883/2004, on social security, because the fact that a State has limited non-contributory cash benefits to those residing under the conditions set out in Directive 2004/38 has been considered as being compatible with Union law: Court of Justice, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*. For comments, see C. O'BRIEN, *The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom*, in *Common Market Law Review*, 2017, p. 209 *et seq.* Access to social assistance benefits is one of the most complex matters in the application of the Directive. The wording of the Directive is ambiguous and its application at national law is inconsistent. See P. MINDERHOUD, *Access to Social Assistance Benefits and Directive 2004/38*, in E. GUILD, K. GROENENDIJK, S. CARRERA (eds), *Illiberal Liberal States. Immigration, Citizenship in the EU*, Farnham: Ashgate, 2009, p. 221 *et seq.*

¹¹⁸ *Tsakouridis* [GC], cit., para. 32.

¹¹⁹ *M.G.*, cit. para. 31.

¹²⁰ M. MEDUNA, *'Scelestus Europeus Sum': What Protection against Expulsion Does EU Citizenship Offer to European Offenders?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism. The role of Rights*, Cambridge: Cambridge University Press, 2017, p. 405 *et seq.*

¹²¹ L. AZOULAI, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 189; M. MEDUNA, *'Scelestus Europeus Sum'*, cit., p. 404.

way require that residence be legal.¹²² In any event, the case-law in question can also be criticised from a different perspective, namely for the excessively extensive interpretation given to compelling grounds of State security, which ultimately correspond to public policy grounds.¹²³

It is clear from the analysis carried out above that a worker is considered automatically integrated provided that he does not commit offences of a particular severity, whereas this is not the case for a Union citizen residing on another basis. If a Union citizen resides under the conditions laid down in the Directive, his residence constitutes, again automatically, a guarantee of integration, both for the purposes of acquisition of the right of permanent residence and enjoyment of equal treatment. The need for qualified integration seems to arise only for a Union citizen who does not meet the conditions laid down in the Directive. However, it is perfectly clear that, under current case-law, a Union citizen who does not meet the conditions laid down in the Directive is automatically excluded from equal treatment, from acquiring the right of permanent residence and from enhanced protection against expulsion, without the possibility of any individual assessment.¹²⁴ For such citizens, qualified integration remains a dream that is difficult to realise.

Somewhere between those meeting the conditions laid down in the Directive and those not meeting those conditions, there lies a particular category of Union citizens: job-seekers. After the first three months, they do not reside under the conditions set out in Art. 7 of the Directive, but cannot be expelled, in accordance with Art. 14, para. 4, “for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged”. They can be denied welfare benefits until they have found employment. However, the Court has stated that the right to the social assistance benefits that help a job-seeker to find employment originates from the Treaty and cannot be restricted if the job-seeker demonstrates a real and genuine link with the labour market in the host State.¹²⁵ In this case, the link, rather

¹²² E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 273.

¹²³ Not only “the direct involvement in major terrorist offences” (E. GUILD, S. PEERS, J. TOMKIN, *The EU Citizenship Directive*, cit., p. 277), but any serious criminal behaviour risks being labelled as triggering imperative grounds of public security: D. KOSTAKOPOULOU, *When EU Citizens Become Foreigners*, in *European Law Journal*, 2014, p. 459. See also extensively M. MEDUNA, ‘*Scelestus Europeus Sum*’, cit., p. 405.

¹²⁴ Also S. IGLESIAS SÁNCHEZ, D. ACOSTA ARCARAZO, *Social Justifications for Restrictions of the Right to Welfare Equality: Students and Beyond*, in P. KOUTRAKOS, N. NIC SHUIBHNE, P. SYRPIS (eds), *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality*, Oxford: Hart, 2016, p. 101, highlight that the degree of integration possibly reached by those who do not reside according to Directive 2004/38 is immaterial.

¹²⁵ Court of Justice, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*. The Court recognised a job-seeker as being a worker first for the purposes of the right of residence for a period of at least six months (see Court of Justice, judgment of 26 February 1991, case C-292/89, *Antonissen*) and then for the purposes of the right of access to employment, including any benefits disbursed by the public authorities for that purpose (see Court of Justice, judgment of 23 March 2004, case C-138/02, *Collins*). The *Vatsouras* judgment has been criticised by legal writers, particularly for the

than being synonymous with integration, serves to avoid abuse by distinguishing between those genuinely seeking employment and those simply stating that they are. However, the more a person is integrated, the more he will be able to demonstrate real and genuine links.

V. CONCLUSIONS

Despite the numerous references to integration in the Union's acts and case-law, the notion, despite its importance, remains largely indeterminate.¹²⁶ It sometimes corresponds to the reason justifying immediate access to favourable legal treatment; it sometimes relates to a certain period of residence, such that a foreign national is integrated if he has resided for a certain period of time; it sometimes presupposes knowledge of language and culture and it sometimes covers foreign nationals who are in employment.

The three legislative areas examined are very different. The State enjoys a margin of appreciation in the admission of foreign nationals but is obliged to admit applicants for international protection, family members of foreign nationals who are legally residing and Union citizens. The rules governing free movement of persons give the States a lesser margin of appreciation compared with those on immigration. States only enjoy discretion to impose integration conditions and to exclude benefits (whether these be family reunification or acquisition of long-term resident status) in the area of immigration policy. The resulting effect is territorial fragmentation of the applicable rules. In the States that have not exercised derogations, legality of residence and a certain duration of residence are sufficient to presume integration and entitlement to rights whereas, in others, individuals need to demonstrate integration by passing examinations imposed by the State. The discretion enjoyed by the States is extensive but subject to external review by the Court of Justice. Measures may only be applied in the context of derogations, must be laid down by law and must be devised so as not to constitute a selection tool or create a disproportionate obstacle to the exercise of rights.

difficulty in identifying the benefits to which the person seeking employment is entitled compared with those from which he may be excluded. See E. FAHEY, *Interpretative Legitimacy and the Distinction Between "Social Assistance" and "Work-Seekers' Allowance": Comment on Vatsouras*, in *European Law Review*, 2009, p. 941 *et seq.*; D. DAMJANOVIC, *Comment*, in *Common Market Law Review*, 2010, p. 859 *et seq.* Indeed, the existence of criteria for identifying the benefits in question is crucial to counteract the tendency of States (especially those with more generous welfare systems) to consider all benefits as being included in the social assistance system and therefore to exclude persons seeking employment from those benefits. This tendency, which the Court seems to support, is clearly reflected in *Collins*. See also Court of Justice, judgment of 15 September 2015, case C-67/14, *Alimanovic* [GC]. A. ILIOPOULOU-PENOT, *Deconstructing the Former Edifice of the Union Citizenship? The Alimanovic Judgment*, in *Common Market Law Review*, 2016, p. 1007 *et seq.*

¹²⁶ What D. THYM, *Directive 2003/109*, cit., p. 431, wrote in relation to the long-term residents Directive (integration is "a concept which remains surprisingly vague at closer inspection") can easily be extended to the overall legislation analysed in the present *Article*.

The case-law relating to the integration status of Union citizens in the host State seems to be particularly disturbing. The interpretation given by the Court does not appear to originate necessarily from the wording of the Directive, which can be interpreted in different ways. Furthermore, in the area of free movement of persons, integration is not about knowledge of language or local customs but is instead associated with compliance with the law. Individuals are integrated if they reside under the conditions laid down in the Directive and if they do not commit offences and are not imprisoned. Integration becomes the way to introduce additional conditions to those set out in secondary legislation, in relation to access to equal treatment, right of permanent residence and enhanced protection against expulsion. But these conditions do not fall within the framework of express derogations and do not need to meet requirements of transparency, foreseeability and legal certainty such as in the directives on immigration policy.

There is no doubt that free movement of persons is a peculiar system because it is based on the individual's right. However, the approach taken by the Court leads to the exclusion of "undeserving" persons from the right of free movement.¹²⁷ Although being undeserving can sometimes be the result of a conscious choice, it is often the result of circumstances. Consider those who have been forced to accept occasional work, perhaps interspersed by periods of inactivity. They are at risk of not acquiring the right of permanent residence.¹²⁸

We have reached a crossroads: either full effect is given to Union citizenship and any importance attached to integration is disregarded, or the uncertainties that the current rules allow are removed, for example by following the example of the Directive on long-term residents where more weight is attached to residence determined on the basis of national law and long-term resident status can be refused on public policy grounds.¹²⁹ If the former path is followed, we will move towards the fundamental status that Union citizenship aspires to be; if the latter path is followed, we will achieve a flexible system for treatment of foreign nationals, one that is more transparent and less hypocritical than the current system.

¹²⁷ E. SPAVENTA, *Striving for Equality: Who 'Deserves' to be a Union Citizen?*, in *Scritti in onore di Giuseppe Tesaurò*, Napoli: Editoriale Scientifica, 2014, p. 2449 *et seq.*

¹²⁸ O'BRIEN, *Civis Capitalist Sum*, cit., p. 953 *et seq.*, analyses the national legislations, which make the proof of the status of worker more difficult.

¹²⁹ The five years of residence necessary for acquiring long-term resident status can be calculated on the basis of a permit governed by Union law or by national law. Under Art. 6 of Directive 2003/1009, the State can refuse to grant that status on public policy or public security grounds. A conviction does not appear to preclude automatically the acquisition of that status, since the provision itself establishes that the severity or type of offence committed is considered in the light of the duration of residence and the existence of links with the host country.