Family Migration and Access to Social and Economic Rights under the Legal Regimes of the EU and the Council of Europe

N. Mole

The AIRE Centre

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THE IMPACT OF RESTRICTIONS AND ENTITLEMENTS ON THE INTEGRATION OF FAMILY MIGRANTS

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N. Mole, nmole@airecentre.org

The AIRE Centre

Note that this paper is correct as of the date of publications. Laws and cases may change after publication.

Abstract

This paper provides an overview of the case law of the European Court of Justice (ECJ/CJEU) and of the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR) on access to social rights – such as work, housing, health care, education and social welfare benefits – by foreigners resident in European states and in particular by their third country national family members. It looks at European Union (EU) law, the European Convention on Human Rights (ECHR) and the European Social Charter. The detailed provisions of the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international human rights instruments and the decisions made by their monitoring bodies are not covered in detail, though reference will be made to them where particularly important provisions or decisions exist[1]*. Those instruments are indirectly applicable under Article 53 of the EU Charter of Fundamental Rights (CFREU), and Article 53 of the ECHR.*

[1] An excellent overview of those instruments can be found in *Migration and Human Rights Law*, International Commission of Jurists Practitioners guide No 6, 2011.

The EU has adopted extensive legislation in this field but has, in comparison, very little case law. The very extensive and complex EU regime for the co-ordination of social security schemes[2] applies mostly to those EEA nationals who are not the subject of this paper. It is only very recently that third country nationals (TCNs) have been included in these schemes, and the export of benefits to those who move within the EU is beyond the scope of this paper and will only be looked at *en passant* in cases of particular relevance to this paper's core theme.

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[2] Now under Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems, and extended to third country nationals by Regulation (EC) No. 1231/2010 of the European Parliament and of the Council of 24 November 2010 on extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

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Abbreviations

European Law, particularly European Union law, is full of institutions and documents with long titles normally referred to by acronyms and abbreviations. We have set out here some of the acronyms most frequently used in this paper for ease of reference:

CERD	Committee on the Elimination of Racial Discrimination
CFR	Council on Foreign Relations
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe (list of members in Annex 2)
ECMW	European Convention on Migrant Workers
ECR	European Court Reports
ECSM	European Convention on Social and Medical Assistance
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union (list of members in Annex 1)
EEA	European Economic Area (list of members in Annex 1)
EFTA	European Free Trade Area (list of members in Annex 1)
ESC	European Social Charter (List of parties to the original 1961 Charter in Annex 3; list of parties to the Revised Charter in Annex 3)
ECSR	Council of Europe European Committee on Social Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LTRD	Long Term Residents Directive
TCN	Third Country National (term used in EU law to denote non-EU Citizens)
MS	Member States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

The first hurdles that migrants, or would-be migrants, have to overcome in order to be able to enter a state of which they are not citizens, or to remain in it once they have entered, is complying with immigration controls and conditions. This can be particularly challenging for those who are the family members of migrants already present in the host state. Measures have been adopted at the EU level such as the Long Term Residents Directive (LTRD)[3] designed to facilitate the closer approximation of longer term residents to the status of EU citizens, and the Family Reunification Directive (FRD)[4] to promote harmonised family reunion as an aid to integration (the UK, Ireland and Denmark do not participate in these EU immigration measures). However, the reality is that the conditions, particularly the social and economic conditions that Member States of the EU have superimposed on the implementation of both directives, has actually made both acquiring long term residence status and securing family reunification more inaccessible in many cases. So called 'integration measures', such as very demanding minimum financial and language requirements, have made family reunification in particular somewhat illusory for many settled migrants.

Crossing these immigration hurdles will sometimes depend from the outset on demonstrating that, if admitted or permitted to remain, the family members will have sufficient resources, so that they will not need to access certain social welfare rights, and often that they will have appropriate and sufficient resources without working or becoming a burden on the state. The right to enter or remain may be made subject to restrictions prohibiting access to particular social rights such as the right to take up employment – often the gateway right to accessing other social provisions – or the right to have recourse to public funds. The right of the family members of those foreigners already lawfully present in a state to enter or remain in that state may be dependent on the lawfully resident sponsors' own right to access employment, housing, healthcare and other financial resources. The migrant *sponsors'* rights to access social rights may therefore dictate not only whether their family members are permitted to join them but also what social rights those family members can in turn access if they succeed in being admitted.

[3] Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.
[4] Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

Those migrants in an irregular situation have, as will be shown, only the very barest entitlements to core subsistence. But even for those lawfully present, accessing employment, education, housing, health care, social security and social assistance and other social benefits can be as difficult and complex as obtaining permission to enter or remain. However, an acknowledged authorisation to enter or remain is normally imposed by states as a pre-requisite to enjoying the right to access most social rights. In the national law of most European states, only a few rights can be invoked by those who are in an irregular situation and the law of both main European legal orders (EU and ECHR) has taken a very cautious approach to insisting on social rights, even minimal social rights, for irregular migrants – even when they are the recognised family members of regular migrants.

Bodies applying international human rights law can take a more liberal approach[5] and the Council of Europe's European Committee on Social Rights (ECSR), which monitors compliance with the European Social Charter (ESC), has found that the exclusion of undocumented migrants from benefits such as health care, which are closely connected to the right to life itself, is unacceptable as it goes to the very dignity of the human being.[6]

This paper sets out to present a brief overview of the legislative and case law developments at European level which determine the ability of TCNs and their TCN family members to access social and economic rights. Whilst the European Union legislation on the rights of TCNs to acquire Long Term Resident Status is relatively simple it leaves considerable discretion to each Member State to set the detailed requirement which they will impose. The Family Reunification Directive similarly allows states a wide degree of discretion in setting the detailed economic and social criteria for family reunification to occur, particularly when applying so-called integration measures. Those TCNs and their family members who wish to move within the EU are faced with a regime for the co-ordination of social security and social welfare benefits which is exceptionally complex. And it must be remembered throughout the course of this paper that a number of Member States do not participate in these regimes at all. The adoption of 'uniform rules' designed to assimilate the situation of TCNs as closely as possible to that of Union citizens – as was foreseen in the Tampere Conclusions of 1999 – is still a distant and elusive goal, if it remains a goal at all.[7]

5 Article 2 ICESCR, General Comment No. 20 CESCR, Article 42 Limburg principles, General Comment No. 28 ICCPR.
6 International Federation of Human Rights Leagues (FIDH) v. France ECSR No. 14/2003, para 30-3.
7 At the time of writing a major review of both directives with a view to their reform is being undertaken at EU level and

2. The Concept of Nationality or Citizenship

The terms 'nationality' and 'citizenship' are used interchangeably in this paper. In many European languages, the word for nationality means ethnic origin and only the word citizenship signifies a legal link to the state. In this paper, both words are used to denote *the legal link which an individual has with a state* and which is typically acknowledged by the issue of a passport or national identity card to that person.

The right to grant or withhold citizenship is a key element of state sovereignty. In international law, everyone has the right to enter his 'own' country – that is the country of which he or she is a citizen. However, states normally have an unfettered sovereign power to determine who is or is not their citizen, unless they would thereby infringe their other international obligations. This has been the subject of recent litigation in both the EU and ECHR legal orders.[8]

Citizens normally have the right to access social benefits but, as will be shown, even they can sometimes be made subject to a residence requirement. In 1993, the Treaty of Maastricht created Citizenship of the European Union as a new concept, now enshrined in Article 20 Treaty on the Functioning of the European Union (TFEU), but that citizenship does not exist independently. It can only derive from the possession of the citizenship of one of the EU Member States. Those who are not Citizens of the Union are described in EU law and policy as third country nationals (TCNs). In other non-EU parts of the European legal space, they are simply foreigners.[9] Citizens of the Union and citizens of certain other states have privileges in Member States of the EU other than their own, as well as in the EEA and EFTA states, and discrimination on the ground of nationality between citizens of EU Member States is in principle prohibited under the EU treaties.[10]

Another key attribute of state sovereignty is the power to admit or to refuse entry or residence to anyone who is *not* a citizen. Only if some other provision of international law would be violated by such a refusal is any constraint placed on that power. The European

readers should be aware that this is an area of law in constant flux.

[8] See Case C-135/08, *Janko Rottman v. Freisaat Bayern* [2010] ECR 1-01449, and ECtHR *Kurić and Others v. Slovenia*, Grand Chamber Judgment of 26 June 2012, Application No. 26828/06. Genovese v Malta App 53124/09 Judgment 11/10/2011.

[9] The term 'foreigners' rather than 'aliens' is used in this paper, as 'aliens' has a specific meaning in English law being used to describe only those foreigners who are neither EU nor Commonwealth Citizens.

[10] Article 18 Treaty on Functioning of the European Union.

Court of Human Rights (ECtHR) has long recognised the legitimacy of the privileged treatment given within the EU to Citizens of the Union[11] and other privileged groups.[12]

This paper is concerned with access to social rights by migrants moving into and within Europe. Its focus is on the rights of TCNs, particularly those TCNs who are the *family members of citizens or settled migrants*, not on the rights of EU citizens themselves. This categorisation may be misleading. Many people who fall into the 'family members' category, specified above, may also *simultaneously* belong to other categories of migrants. They may be, for example, the family members of citizens of other EU states, asylum seekers, failed asylum seekers, or refugees. Students could be or could become EU Blue Card (now Single Permit) or work permit holders. Being a 'family member' of a citizen or settled migrant does not exclude belonging to many other migration categories in many Member States. The Court of Justice of the EU (CJEU) has made clear that national law cannot be invoked to deprive individuals of rights which they enjoy under European law.[13] The CJEU has frequently noted that a given individual's situation may simultaneously fall within several categories. For example the same person can be an EEA national exercising treaty rights of movement, the spouse or child of an EEA national exercising treaty rights of movement, a person entitled to social advantages as a worker, a person entitled to export national benefits under the EU social security co-ordination scheme and a person entitled to benefits, on account of race, age, or disability from the non-discrimination directives.[14]

Many of the applicable standards emphasise that the rights they enshrine are to be enjoyed in a non-discriminatory way.[15] The EU Charter of Fundamental Rights (CFREU), as we shall see, sets out a catalogue of EU fundamental rights which must be respected across the EU in the adoption or application of EU law (but not in other situations).[16] The CFREU contains, in Title I, a list of rights connected with dignity but, as will be seen, some social rights have a close connection to the right to dignity. Title III contains a general guarantee of equality and non-discrimination. These guarantees apply in addition to the prohibition on discrimination

[11] See e.g. ECtHR *Moustaquim v. Belgium,* Chamber Judgment of 18 February 1991, Application No. 12313/86, and ECtHR *Bah v The United Kingdom,* Judgment of 27 September 2011, Application No. 56328/07, infra note 128.
[12] See e.g. ECtHR *Ponomaryovi v. Bulgaria,* Judgment of 21 June 2011, Application No. 5335/05.
[13] See e.g. Case C-369/90, Micheletti and Others v. Delegación del Gobierno en Cantabria, [1992] ECR 1-04239.
[14] People who were previously nationals of a state with an agreement with the EU lose the right to claim those benefits once they become EEA nationals.
[15] See e.g. FRA Handbook on Non-discrimination, March 2011. Available at: http://fra.europa.eu/en/publication/2012/handbook-european-non-discrimination-law.
[16] The CFREU only applies to situations which are regulated by EU law.

between EU citizens found in Article 18 of the TFEU.

Not every difference in treatment amounts to prohibited discrimination. Differential treatment on the ground of *national origin* (which is widely prohibited) is different from differential treatment on the ground of *nationality.*[17] The closer the right being enjoyed is to the physical survival or the essential human dignity of the affected individual, the greater the justification for a difference in treatment is needed if it is not to be considered discriminatory. The closer the difference in treatment is to the right of states to admit or exclude non-citizens on a differential basis according to their citizenship (which is so linked to the sovereign power to admit or exclude foreigners) the wider the margin of appreciation in these matters. The ECtHR has always maintained that states enjoy a wide margin of appreciation in the area of immigration control, but there is a much narrower margin of appreciation in respect of infringements of personal dignity. Both the revised provisions of social security (Article 4, Regulation 883/2004) and Directive 2004/38 (the Citizens' Directive) expressly prohibit anything discriminating against EU citizens and their TCN family members, or against anyone who falls within the ambit of the social security schemes.

[17] See e.g. Andrejeva v Latvia 2009, Gaugusus v Austria 1996.

3. The Different European Legal Orders

This paper focuses primarily on the standards and case law of two European legal orders – that of the European Union (EU) and that of the Council of Europe (CoE). Both legal orders recognise that the provisions of their legislative measures in the field of human rights must not be interpreted in a way which would diminish the protection guaranteed either under a state's national law or under any other international instrument to which that state is a party.[18]

3.1 European Union

Primary EU law is found in the provisions of the Treaties (at present consolidated by the Treaty of Lisbon which came into force on 1st December 2009). The Charter of Fundamental Rights of the European Union (CFREU) became legally enforceable under the Treaty of Lisbon and has equal force to the treaty itself.[19] Secondary EU law is mainly found in Regulations and Directives.[20] Regulations are automatically and directly enforceable throughout the Union. Directives have to be 'transposed' into national law by the Member States. It is a violation of EU law to fail to transpose, or to transpose improperly, a Directive, and it is a violation of EU law to fail to implement or act in compliance with either a Regulation or Directive. Those adversely affected by such a failure will normally be able to bring an action in their national courts to assert their EU rights and to obtain compensation if appropriate.[21] The Court of Justice of the EU[22] exists to ensure correct and uniform application of EU law and to provide guidance to national courts in this context. This is mainly (in the field covered by this paper) achieved either by infringement proceedings being brought by the European Commission against a state in which the Commission alleges that the state has failed to implement EU law, or by a national court sending a reference to the CJEU (under Article 267 of the TFEU) to ask for the preliminary ruling in a case pending before it which involves the application of EU law. There is no normal avenue for individuals

[18] Article 53 ECHR and Article 53 CFREU.
[19] Article 6(1) Treaty on European Union.
[20] Also e.g. decisions of the Association Council made under the 1970 protocol to the Ankara Agreement, and other agreements made with third countries. There are other EU legal instruments but they are not normally engaged in the subject matter of this paper.
[21] Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italian Republic,* [1991] ECR 1-05357.
[22] Until the entry into force of the Treaty of Lisbon in December 2009 the Court was known as the ECJ (European Court of Justice).

to access the CJEU directly if they feel aggrieved by the perceived failure of a state to apply their EU law rights in their favour.

States which are parties to EFTA have their own regime, broadly similar to that of the EU. Monitoring compliance falls to the EFTA Surveillance Authority and legal questions are determined by the EFTA Court.[23]

The EEA comprises of all the EU states plus all of the EFTA states, except Switzerland, which has a special arrangement with the EU.[24] EEA and Swiss nationals are generally able to access most social rights in EEA states on the same basis as EU nationals. Foreigners (most often the family members of EEA and Swiss nationals) of whatever nationality whose situation is assimilated to and regulated by EU law have equal access to most social rights.[25]

3.2 Council of Europe

At the Council of Europe level, there are two main legal orders applicable to the subject matter of this paper – the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). The European Court of Human Rights (ECtHR) was set up to ensure that states complied with their obligations under the ECHR.[26] Individuals who have 'exhausted domestic remedies' – that is, have explored all avenues of recourse at the national level – can take a complaint to the ECtHR alleging that they are a victim of a failure by the state in question to comply with a particular provision of the ECHR.[27] The ECHR is primarily concerned with civil and political rights rather than economic, social and cultural rights but some important decisions in this field have been made by the ECtHR and are referred to below.

All the states party to the ECHR agreed to be bound by the judgments of the ECtHR (Article 46 ECHR). Judgments of the ECtHR are thus binding on the state which has been found in violation, and their execution is collectively and politically overseen by the Committee of Ministers of the Council of Europe which has a delegate from each of the Member States (MS). No state has ever refused outright to comply with a judgment, though

[23] www.eftacourt.int See e.g. case E 4/11 Clauder.
[24] The Swiss opted not to join the EEA.
[25] The family members, including TCN's, of EEA nationals enjoy the same benefits as the EEA nationals themselves, as do those TCN's who are covered by the cross border social security regimes.
[26] Article 19 ECHR.
[27] Articles 34 and 35 ECHR.

there has sometimes been protracted delay in adopting the necessary measures for execution.

The European Social Charter is not one instrument but two. Participation at Council of Europe level is complex. There is the original ESC dating from 1961 which was revised in 1996. Many states which are party to the original Charter have not become party to the Revised ESC. Only 17 of the 27 EU states are party to the Revised Charter. However, *all* Council of Europe Member States (see Annex 2) are party to *either* the original ESC *or* the revised ESC. The ESC complements the civil and political rights in the ECHR in the field of economic and social rights. It does not however have a *judicial* body to oversee its functioning, but a Committee of Experts – the European Committee on Social Rights (ECSR) – which monitors compliance and considers complaints. Under Part I of the Charter, Member States are required to report periodically to the ESCR, even on provisions which they have not accepted. These reports and the conclusions of their examination by the ESCR are then transmitted to the Committee of Ministers of the Council of Europe and to its Parliamentary Assembly. There is no right for individuals to bring complaints but a collective complaints procedure exists. However, only 15 of the 47 Member States of the Council of Europe have accepted this procedure. Under the collective complaints procedure, only certain entities can file complaints with the European Committee of Social Rights. These are:

(i) The European Trade Union Confederation, Business Europe and the International Organisation of Employers;
(ii) NGOs with participative status with the CoE which are on a list drawn up for this purpose by the Governmental Committee;
(iii) Employers' organisations and trade unions in the country concerned and; in the case of states which have agreed, national NGOs.

The Committee also monitors compliance by means of an obligatory periodic reporting mechanism. The examination of those reports will often inform the Committee's consideration of the complaints brought under the collective complaints mechanism.

These legal orders can and often do overlap and their teleological purposes are different. An individual whose situation falls within overlapping orders needs to be particularly well informed in order to ensure that the most advantageous regime will prevail.

4. An Introductory Overview to the Main Legal Instruments Applicable to Migrants' Access to Social Rights

4.1 Under EU Law

This paper is primarily about the rights of 'third country' (non-EEA) nationals (TCNs) and their family members but must also look at the situation of EEA nationals since their *designated family members of whatever nationality* have rights derived from (and normally the same as) those of their EEA national family member who is exercising rights under the EU treaties. Much of the case law of the CJEU on the free movement rights of EEA nationals is about the rights of their TCN family members.[28] Where the rights of EU Citizens are discussed in this paper it is because the direct beneficiaries of CJEU decisions are often TCNs or the rulings on EU Citizens must be applied to qualifying family members who are TCNs.

Under EU law, the Charter of Fundamental Rights (CFREU) has several important provisions relating to social rights, some of which are stated to apply to 'everyone', some of which do not specify the beneficiaries, and some of which are restricted to either Citizens of the Union, to workers, or to lawful residents.

Under the EU treaties and in particular under the provisions of the Citizens Directive,[29] citizens of the European Union, (and their designated accompanying family members of whatever nationality) in principle have the right to reside in other EU Member States unless excludable for public policy reasons,[30] and cannot be made subject to discriminatory measures.[31] They enjoy corresponding rights in EEA/EFTA states as do nationals of those states in the EU. Swiss nationals (and their family members) are in a position closely akin to EEA nationals although Switzerland is not a party to the EEA, but they do not enjoy full

[28] See e.g. Case C-53/81 *Levin v. Staatsecretaris van Justitie,* [1982] ECR 01035; Case C-370/09 *The Queen v. IAT and Surinder Singh, ex parte SSHD,* [1992] ECR 1-04265; Case C-60/00 *Mary Carpenter v. SSHD,* [2002] ECR 1-06279; Case C-413/99 *Baumbast and R v. SSHD,* [2002] ECR 1-07091; Case 1/05 *Yungying Jia v. Migrationsverket,* [2007] ECR I-1; Case C-157/03 *Commission v. Spain* , [2005] ECR I-2911, Case C-34/09 *Ruiz Zambrano v. ONEM,* [2011] ECR I-01177.

[29] 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.

[30] Directive 2004/38/EC, Chapter IV.

[31] Article 18 TFEU.

protection from discriminatory treatment. The ECJ (as the CJEU was formerly known) held in the *Hengartner and Gesser,*[32] that a Swiss national who was a recipient of services in Austria could be subjected to different treatment from that reserved for three other categories: (i) those whose principal residence was in Austria, (ii) Citizens of the European Union, and (iii) persons who are equated to those citizens under European Union law. The Agreement between the European Community and its Member States and the Swiss Confederation, which provides for the free movement of persons, did not preclude the Swiss national from being subjected to a tax payable for the provision of services – such as the right to hunt – which EU Citizens would not have to pay.

The *designated accompanying family members of whatever nationality* of EEA and Swiss nationals not only have the right to enter and reside in other Member States but also *the right to access the labour market*[33] and to enjoy *social and tax advantages* available to the state's own citizens. At the time of writing, legal proceedings are being taken by the European Commission against the UK which asserts that some EEA nationals and their TCN family members – who are not excludable under the provisions of the Citizens Directive on public policy, public security or public health grounds – must meet an additional 'right to reside' test not found in EU law and which seeks to exclude many EEA nationals and their family members from the social benefits to which they would otherwise be entitled.

EU free movement law, and its application to *TCN family members*, requires that the EEA national has moved between states[34] or if no movement has occurred, is present in a state other than the state of citizenship. That is to say it can only be relied on in a state *other than the state of citizenship* or on return after exercising treaty rights in another state. Where a child citizen of the Union needs the presence of the custodial TCN parents in order to enjoy the right to reside either in another EU state or in the state of which it is a citizen, the TCN parents must also have a derived right to reside. In the well-known case of *Zambrano*,[35] the children were citizens not of another Member State but of Belgium, the state where they were born and where they resided, so they did not fall under the free movement provisions. Their case was considered exclusively on the basis of their rights, as EU citizens, to reside in the EU. The CJEU held that the TCN parents had not only to be given the right to reside

[32] Case C-70/09 *Hengartner and Gesser* [2010] ECR I-07233.
[33] Citizens of Bulgaria and Romania will not have free access to the labour market until the end of 2013.
[34] Cases C-35/82 and C-36/82 *Morson and Jhanjan* [1982] ECR 03723.
[35] Case C-34/09 *Ruiz Zambrano v. ONEM,* [2011].

with them, but also, and importantly, for the subject matter of this paper, the right to work to support them. This decision was based purely on the Union Citizenship of the children and did not dependent on the exercise of any rights of free movement.

However, in the case of *Dereci*, decided soon after *Zambrano*, the Court held that where the Union Citizens could move to another Member State and take their TCN family members with them under the EU free movement rules, so that the Union Citizens are not forced to leave the territory of the Union, EU law does not require that the TCN family members should have their situation regularised in the Union Citizens' own state.[36] The recent decision in *Iida*[37] confirmed that a TCN did not have the right to continue to reside in Germany in order to maintain contact with his child after the couple had separated and the mother had moved with the child to Austria.

Although this paper focuses mainly on the access to social rights of TCNs and the TCN family members of settled migrants, it is important to be aware of the evolution in EU law in complementary fields – such as the free movement of citizens – since the policy of the EU is to bring the situation of settled migrants more closely in line with the situation of EEA nationals themselves.[38] The concept of 'denizen' has been developed to this end in the academic literature and the LTRD and the FRD were adopted to further that teleological aim.[39]

The preambles to the LTRD and FRD refer, albeit in slightly differing terms, to the 'near equality' aims set out in the 1999 Conclusions of the European Council at Tampere ('the Tampere Conclusions'). Unfortunately, the fine ideals of according TCNs treatment nearly equal to that enjoyed by citizens which were adopted at Tampere became somewhat diluted when the instruments designed to give them effect, and drafted by the Commission, went to the Member States for approval. When confronted with the reality of according equal treatment to TCNs, several states argued successfully for more national discretion to be given and for the instruments to reflect this approach. Although infringement proceedings were brought against a number of states for failure to transpose within the prescribed deadline, it was some time before the Court of Justice had the opportunity to rule on

[36] Case C-256/11, Murat Dereci and Others v. Bundesministerium für Inneres, [2011] ECR 0000.
[37] Case 40/11 Yoshikazu Iida v. Stadt Ulm, [2012].
[38] This was the approach adopted at the Tampere summit in 1999, known as the 'Tampere Conclusions'.
[39] See Groenendijk on denizen status, available at: www.imiscoe.org and see also WP2, literature review of IMISCOE project.

compatibility with EU law generally and the Directives, in particular of the compatibility of law and practice adopted in the Member State.

Turkish Citizen migrants and their family members fall into a special separate category in EU law, and a distinct regime applies to them. They benefit from the provisions of the Ankara Agreement of 1963. This was adopted as a 'pre-accession' agreement with a view to Turkey's eventual accession to the EU. Turkish Citizens have long had a privileged position under the Ankara Agreement, and in particular under the 1970 Additional Protocol to the Agreement and the decisions of the Agreement's Association Council.[40] They come close to enjoying parity with Union Citizens in many respects except that they do not enjoy a direct right of entry as such. Nor do they have a general, direct right of access to the labour market derived from the agreement or its protocol. But if they have been admitted to a Member State and have taken up employment there, they have the right to remain in that employment and eventually to have free access to the labour market. A recent decision of the CJEU in 2011 in the case of *Akdas* even suggests that they are able to benefit from some rights which are not available to EU citizens.[41] The special position of Turkish Citizens and their family members is discussed below in the various thematic sections and a list of the more important judgments of the ECJ/CJEU on the Ankara Agreement and its Protocol is attached at Annex IV.

In states participating in the EU Long Term Residents Directive,[42] all TCNs who have resided legally and continuously in a Member State for five years, subject to a requirement that they have stable and regular resources and comprehensive sickness insurance are eligible for Long Term Residence status. However they must apply for and be granted that status in the state where they reside. Beneficiaries of the EU Family Reunification Directive[43] also have access to some social advantages which are discussed below in the thematic sections.

The adoption over the past decade of the various measures, now comprising the EU *asylum acquis*,[44] have provided for access to certain social rights for asylum seekers and those

[40] See e.g. 'The Privileged Treatment of Turkish nationals', D. Martin in *The First Decade of EU Migration and asylum law*, Eds Guild and Monderhoud, Marintus Mijhoff 2012, see also Chs. 17 -21 of *The Free Movement of Persons in the Enlarged European Union*, 2nd edition Rogers, Scannell and Walsh, Sweet and Maxwell 2012.
[41] Case 485/07 Raad van Bestuur v. Akdas and others, [2011] ECR 00000.
[42] Directive 2003/109/EC; not UK, Ireland and Denmark.
[43] Directive 2003/86/EC; not UK, Ireland or Denmark.
[44] A body of EU law which has formed either by legislation or case law is often referred to in the EU as the *acquis* of that particular field.

granted refugee status or subsidiary protection.[45] All the measures adopted under the asylum *acquis* have been or are in the process of being "recast". Details of which countries participate in which measures can be found in Annex V.

Citizens of other states – such as states party to the Euro-Mediterranean Agreement, citizens of the Afro-Caribbean Pacific countries under the Cotonou agreement, and others – enjoy equal treatment in many respects but those agreements fall short of offering full access to the equal treatment which is enjoyed in principle by Union Citizens.[46]

The EU Charter of Fundamental Rights expressly guarantees social rights, particularly in Title II (Freedoms), Title III (Equality) and Title IV (Solidarity); but many rights are restricted either to EU Citizens[47] or those who are lawfully resident[48] or workers.[49] Title I (Dignity) may well prove to be the greatest guarantor of those rights to migrants and their family members, although they are not expressly mentioned in that title and there has been very little EU case law on the concept.[50] Since the coming into force of the Lisbon Treaty in December 2009, every act or omission in an area which is regulated by EU law must comply with all the applicable Charter provisions. The rights contained in Title I (Dignity) have already been applied by the CJEU when assessing the compatibility with fundamental rights of the social conditions of asylum seekers in Greece.[51]

4.2 Council of Europe

At the Council of Europe level, the ECHR contains only very limited provisions relevant to this field, and thus there is very little case law. The ECtHR has looked at the exclusion from employment and welfare benefits (on the ground of alien status) of an individual who had paid taxes and social security contributions and found it discriminatory[52] and rejected the argument that an individual could similarly be excluded from benefits because his country of origin had not signed a reciprocity agreement with his host state.[53] The European Social

[45] Directive 2004/83/EC.
[46] See the free movement of person in the EU, Rogers, Scannell and Walsh, 2nd editions Sweet and Maxwell 2012 Ch. 14.
[47] See e.g. Article 15(2).
[48] See e.g. Art 15 (3).
[49] See e.g. Articles 27, 28, 30 and 31.
[50] See e.g. Oxford Colloquium on Human dignity and access to Health care 2012, available at: www.bfriars.ox.ac.uk.
[51] Case C-411/10 *NS v SSHD,* [2011] ECR 00000.
[52] ECtHR *Gaygusuz v. Austria,* Judgment of 16 September 1996, Application No. 17371/90.
[53] *Koua Poirrez* v. France, Judgment of September 2003, Application No. 40892/98.

Charter and its associated 'case law'[54] is more in point. Both are discussed below.

4.3 Other International Instruments

There are many other key international and regional instruments which are applicable in this field: The European Convention on Social and Medical Assistance (ECSM) and the European Convention on Migrant Workers (ECMW) are also relevant, as is the ILO Convention 143 for those European states which are parties to it. Not all Member States of either the EU or the CoE have ratified these instruments or, if they have, have not accepted all their provisions.

However the ECtHR has held that this is not essential when it is using them as an aid to applying and interpreting the provisions of the ECHR which *have* been ratified by the relevant state. In the case of *Demir and Baykara v. Turkey*, the Grand Chamber of the ECtHR considered a provision of the European Social Charter relating to trade unions which had not been ratified by Turkey. It held that this did not prevent it from "drawing guidance" from the provisions of the ESC which Turkey had not expressly accepted when applying ECHR norms which were binding.

> *"The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common*

[54] The decisions of the European Committee of social rights are not judicial decisions but are often referred to as 'case law'.

ground in modern societies.[55]"

Particular social rights will now be looked at thematically. These include employment, education, housing, healthcare, social security and social assistance, voting rights, the right to marry and the right to legal assistance.

[55] *Demir and Baykara v. Turkey* of 12 November 2008 [GC]:Paragraphs 85 and 86, Demir and Baykara.

5. Employment

The thematic consideration of the access to social rights by TCNs and their TCN family members starts with looking at access to employment and self-employment. The right to engage in an economic activity is often the key right not only to subsistence but also to accessing other social rights and to being affiliated to the social insurance schemes which are the necessary pre-requisites for many other benefits. It is also identified as a key element of assisting the integration of TCNs and their family members into their host society.

The right to work is enshrined in several international human rights treaties, such as the Universal Declaration of Human Rights (UDHR) (Article 23),[56] the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 6(1)), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Article 5), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Article 11 (1)).

As defined under Article 6(1) of the ICESCR, the right to work encompasses *the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts*.[57] However, the realisation of full protection of this right by State parties is governed by the principle of 'progressive realization' which is applied to economic, social and cultural rights. Moreover, the monitoring system of the ICESCR does not include individual complaints. These two factors weaken the protection given by the ICESCR to the right to work (and to social rights in general). The General Comment on the Right to Work, published by the Committee on Economic, Social and Cultural Rights, constitutes a guidance on the content of this right.[58]

Similarly, the 1961 European Social Charter and the Revised European Social Charter recognise that *everyone shall have the opportunity to earn his living in an occupation freely entered upon* (see also Article 1(3)). Articles 18 of both instruments also recognise *a right to engage*

[56] These rights are not judicially enforceable, as a Declaration only has the status of soft law.
[57] Article 6(1) to be read in conjunction with the non-discrimination provision provided for by Article 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. However, this article includes a possibility for developing countries to restrict the scope of application of the Covenant to their national (see Article 2(3)).
[58] General Comment 18, Committee on Economic and Social rights, E/C.12/GC/18.

in a gainful occupation in the territory of other Parties.[59]

The ILO Convention relating to migrant workers 143[60] does not explicitly refer to a fundamental right to work but recalls that State Parties to the Convention shall ensure *equality of opportunity and treatment in respect of employment and occupation* to migrants working lawfully within their territory (Article 10). Whereas this Convention is ratified by a limited number[61] of European countries, the principle of elimination of discrimination in respect of employment and occupation has been widely recognised by the 184 Member States of the International Labour Organisation in the ILO Declaration on Fundamental Principles and Rights at Work in 1988.[62]

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[63] protects specifically the rights of migrant workers (independently of their status, i.e. regular or irregular migrants) and their family members. The Convention defines a migrant worker as *a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national* and includes a general non-discrimination principle. The prohibited grounds are 'sex, race, colour, language, religion or conviction, political or other opinion, *national, ethnic or social origin,* nationality, age, *economic position*, property, marital status, birth or other status'.

Regarding the rights of persons granted refugee status, Article 17 of the Geneva Convention on the Status of Refugees states that '[t]he Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment'. State Parties may apply some restrictions on access to the labour market. Additionally, Article 18 recognises a right to self-employment in the country of asylum.

These provisions are all applicable when considering either EU law or the ECHR because Article 53 of the Charter of Fundamental Rights (CFREU) and Article 53 of the European Convention on Human Rights (ECHR) ensure that neither EU law nor the ECHR are applied

[59] This right only applies to those who are nationals of parties to the Charter and it can only be exercised in states which are also parties.
[60] C143 Migrant Workers (Supplementary Provisions) Convention, 1975.
[61] 23 ratifications so far, see http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C143, (last visited on 31 May 2012).
[62] Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.
[63] This international convention established an individual complaint mechanism. However, this mechanism will only enter into force once 10 states have accepted the procedure, which is not the case at present (only two states have accepted the procedure).

in a way which provides fewer guarantees than the other legal instruments to which states are party.

Under EU law, one of the freedoms enshrined in the CFREU is the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15(1) EU CFR). The Charter grants *everyone*[64] the right to free placement services (Article 29). Every worker, thus including non-EU nationals, enjoys protection from unjustified dismissals (Article 30), the right to fair and just working conditions, as well as the right to rest and to paid annual leave (Article 31). Article 16 guarantees the freedom to conduct business.

EEA nationals, EFTA nationals and Swiss nationals *(and their accompanying family members of whatever nationality)* have the right to move freely throughout Europe for the purposes of employment and self-employment, to provide and receive services and to establish themselves in business. Article 14(4)(b) of the Citizens' Directive (Directive 2004/38) refers to EU citizens (and their designated TCN family members) who entered the territory of the host Member State in order to seek employment and stipulates that such persons may not be expelled 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.[65]

5.1 Transitional Regime for Nationals of New Member States

Under the treaty which governs the accession of Bulgaria and Romania to the EU, Member States are allowed to impose transitional restrictions on the free movement of labour from those countries.[66] During the transitional regime, access to the labour market by Bulgarian and Romanian nationals is regulated by national measures or those resulting from bilateral agreements. Bulgarians and Romanians legally working in a Member State for a continuous period of 12 months at the end of that period enjoy unrestricted access to the labour market of that state only. After the first five years from accession, Member States can maintain measures restricting access to the labour market in case of 'serious disturbances of its labour market or threat', until the end of the seven year period from the date of

[64] It must always be recalled that the EU CFR only applies to situations falling within the ambit of EU law.
[65] EU Regulation No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. This Regulation codifies and replaces those parts of Regulation 1612/68 which were no amended by the Citizens' Directive (Directive 2004/38 in 2004).
[66] See Annex VI and Annex VII on the 'Freedom of movement of person' for Bulgaria and Romania respectively.

accession. The transitional regime for Bulgaria and Romania will end on 31 December 2013.

The Accession Treaty signed with Croatia on 9 December 2011, which will enter into force on 1 July 2013 upon ratification by EU Member States, provides similar transitional arrangements which apply to free movement of workers (Paragraph 2 to the Treaty concerning the accession of the Republic of Croatia).

Under Spanish law, Romanian workers enjoyed unrestricted access to the Spanish labour market from 1 January 2009. However, the Commission has recently authorised[67] Spain's temporary suspension of the application of Articles 1 to 6 of Regulation (EU) No 492/2011 with regard to Romanian workers until 31 December 2013, in the light of the current serious disturbance in the Spanish labour market following the economic recession which started in 2008.

Although nationals of Romania and Bulgaria do not have automatic access to the labour market until the end of December 2013, *as EEA nationals* they enjoy all other rights including self-employment and the right to provide and receive services. Their *family members of whatever nationality* have the same rights as the family members of other EEA nationals. For example, if a Romanian national is working as a self-employed translator in another EU Member State, she herself will not have an EU law right – as a Romanian – to access the national labour market until December 2013. However, paradoxically, her husband and children – whether Romanians or third country nationals – have the right to take up employment as they are the family members of an EU Citizen exercising other treaty rights.

All EEA nationals *(and their designated family members of whatever nationality)* have the right to equal treatment with a state's own nationals once they are exercising treaty rights. This includes the prohibition on discrimination in access to employment[68] on the grounds of both nationality and ethnicity. The case of *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, concerned proceedings brought against an employer who advertised for workers but made it clear that he did not wish to employ immigrants. The Court found that such conduct was contrary to Directive 2000/43 which prohibits discrimination in employment on the grounds of race or ethnic origin. The case is illustrative of the important interface between the enforcement of EU measures like the Directive

[67] Commission Decision 2011/503/EU.
[68] Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, [2008] ECR I-5187.

which - on the surface - have nothing to do with the citizenship or immigration status of TCNs but are based on prohibiting discrimination on the basis of race or ethnic origin, and the right, in reality, of TCNs to access employment.

The case law on the free movement of citizens under the Citizens' Directive[69] has largely been concerned with whether or not the nature of the work meant they were to be considered as workers for the purpose of EU law, not with their right of access to employment. Workers under EU law include those *engaged in part-time work* and in *work paid in kind* as well as in cash. One of the first cases which looked at part-time work was the case of *Levin v. Staats secretariat van Justitie*[70] in which a British Citizen working part-time as a chambermaid in the Netherlands was able thereby to secure residence rights there for her third country national husband who was unable to live with her in the UK under UK Immigration Rules (there were several reasons why this might have occurred but the judgment does not indicate on what basis he was refused by the UK.)

In 1997, the EC adopted Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by the United Nations Children's Fund (UNICEF), European Centre of Employers and Enterprises (CEEP), and the European Trade Union Confederation (ETUC) which reinforces the importance attributed by the social partners to part-time work.[71] Directive 2008/104/EC affirms the principle of equal treatment in relation to temporary agency work.

Workers include those who are actively looking for work[72] as well as the involuntarily unemployed and their *accompanying family members of whatever nationality*. The case law makes clear that the economically inactive third country national family members of a person who at one time worked as an EU migrant worker can continue to invoke that status with a view to maintaining a right of residence whilst the children exercise their right to continue to pursue their education.[73] This area of the law will be looked at in more detail in the sections of education and social security and social assistance benefits below.

[69] Directive 2004/38/EC, see above.
[70] Case C-53/81 Levin v. Staatssecretariat van Justiie [1982], Case C-139/85 Kempf v. Staatsecretariat van Justitie, [1986] ECR 01741.
[71] See also the case of Case C-14/09, *Genc v. Land Berlin,* [2010] ECR in relation to Turkish workers.
[72] Case C-258/04 Office National de l'emploi v. Ioannidis [2006] ECR I-8275.
[73] Case C-413/99 *Baumbast and R* [2002].

5.2 States are Allowed to Reserve Employment in the Public Service

The EU Treaties allow Member States to restrict employment of non-nationals in the public service. In its case law, the EU Court has interpreted this provision restrictively. In the *Sotgiu*[74] case, German authorities applied a disadvantageous provision regarding separation allowances to non-German post office workers. The Court found that Member States are not allowed to define themselves within the scope of the exception under Article 39(4) of the Treaty (now Article 45(4)) which allows Member States to restrict employment of non-nationals in the public service. In *Commission v. Belgium*,[75] the Court gave some precisions regarding the nature of the posts covered by this exception by stating that '[s]uch posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bound of nationality'.[76] In the *Sotgiu* case, the Court held that Article 39(4) 'cannot justify discriminatory measures with regards to remuneration or other conditions of employment against workers once they have been admitted to the public service'.

In *Commission v. Belgium*,[77] the Court specified two interpretive criteria to determine the meaning of 'public service': the activities carried on in the employment must be 'entrusted with the exercise of powers conferred by public law' and 'with responsibility for safeguarding the general interest of the State, to which the specific interest of local authorities must be assimilated'.[78]

EU law requires states to show that 'the reciprocity of rights and duties which form the foundation of the bond of nationality' are engaged in any specific case. In *Lawrie Blum v. Land Baden Wurtenberg*,[79] the ECJ rejected the German Government's argument that the public service exception could apply to a trainee teacher. It took the same approach in *Allue and Coonan v. Universita degli studi di Venezia*[80] in relation to foreign language assistants in an Italian University.

These principles apply under Article 24 of the Citizens Directive to the rights of third

[74] Case C-152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost*,[1974] ECR 00153, see paragraph 4 of the decision.
[75] Case C-149/79, *Commission v. Belgium*, [1980] ECR 03881 see paragraph 10.
[76] Compare the case law of the ECtHR in e.g. *Frydlender v. France* Grand Chamber Judgment of 27 June 2000, Application No. 30979/2000 in relation to the nature of the relationship between civil servants and the state.
[77] Case C-149/79 *Commission v. Belgium*, [1980].
[78] Paragraph 7.
[79] Case C-66/ 85 *Lawrie Blum v. Land Baden-Württemberg*, [1986] ECR 02121.
[80] Joined Cases C-259/91, C-331/91 and C-332/91, Allué and Coonon and Others v. Università degli studi di Venezia and Università degli studi di Parma, [1993] I-04309.

country national family members of an EEA national exercising treaty rights to access public service positions.

5.3 Posted Workers

The ECJ held in the case of *Van der Elst*[81] that *third country nationals lawfully employed in one Member State* could be sent by their employers to carry out work for them in another Member State without formality. This judgment was subsequently converted into legislation in the Posted Workers Directive (Directive 96/71) which covers the situation of those in a comparable situation to the workers in the *Van der Elst* case. The ECJ *Viking Line*[82] and *Laval*[83] judgments triggered a debate about the extent to which trade unions are able to defend workers' rights in cross border situations, involving posting or relocation of companies.

A new Enforcement Directive (Com 2012/131) obtained the approval of the European Parliament in January 2013. It seeks to enhance the rights of posted workers and to ensure that their rights under the Posted Workers Directive are adhered to in practice.[84]

5.4 Mutual Recognition of Qualifications

In order to facilitate the genuine free movement of *workers and their family members of whatever nationality*, the EU has developed complex legislation on the mutual recognition of qualifications, Directive 2005/36/EC, which applies to regulated professions.[85] There are complicated provisions relating to those who have obtained all or part of their qualifications outside the EU even if those qualifications have already been recognised in one Member

[81] Case C-43/93 Van der Elst v. Office des Migrations Internationales, [1994] I-03803.
[82] Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, [2007].
[83] Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, 18 December 2007.
[84] The Monti II regulation proposed in March 2012 has now been withdrawn.
[85] Article 3 (1) (a) defined a regulated profession as follows: a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit. Where the first sentence of this definition does not apply, a profession referred to in paragraph 2 shall be treated as a regulated profession. This Directive reorganises and rationalises the provisions of earlier directives and, in particular, replaces Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48, and other sectoral directives.

State. This is particularly problematic for the TCN family members of EEA nationals. There have been more than 130 judgments of the Court on the mutual recognition of qualifications.

In the case *Rubino*,[86] the Court clarified that the general system on the recognition of qualifications 'do not concern the choice of selection and recruitment procedures for filling posts' and 'cannot be relied on as the basis for a right actually to be recruited'.[87] Candidates could not rely on Directive 2005/36 to obtain a dispensation from part of the selection and recruitment procedure.[88] On the other hand, qualifications obtained in other Member States had to be accorded their proper value and be duly taken into account in such a procedure.

The Commission brought infringement proceedings against Italy about the recognition of qualifications obtained in another Member State by foreign candidates who want to become full professors.[89] Under current Italian rules, while holders of the Italian qualification as associate professors are not subject to a teaching test in order to become full professor, the holders of comparable qualifications obtained in other Member States of the EU are not exempted. The Commission took the view that this is in breach of the treaty provision on freedom of movement of workers.

CJEU case law has determined standards that can be applied even in circumstances falling outside the scope of Directive 2005/36. In those cases, the host state must assess, on an objective basis,[90] whether the knowledge and qualifications acquired in another Member State are, 'if not identical, at least equivalent to those certified' by the national qualification.[91] This assessment is made by way of comparison between the knowledge and qualifications acquired in order to exercise a certain profession in another Member State and those required by the national rules. The national authorities are entitled to require the person concerned to prove that he or she has acquired the qualifications which are lacking when

[86] Case C-586/08 *Angelo Rubino v. Ministero dell'Università e della ricerca,* OJ C O51, 17 December 2009. The applicant held the 'habilitation' to teach oceanography as a full professor in the German higher education system. While working as a researcher at an Italian University, he applied to have the qualification he acquired in Germany recognised in Italy, in order to be able to become a full professor there. His application was rejected.
[87] Paragraph 27.
[88] Paragraph 28.
[89] Infringement proceedings against Italy (24/11/2011).
[90] The Court held that the 'assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates' Case C-340/89 *Vlassopoulou v. Ministerium für Justiz, Bundes- u. Europaangelegenheiten Baden-Württemberg*, 7 May 1999, paragraph 16.
[91] Case 340/89 *Vlassopoulou* [1991], paragraph 17.

they correspond only partially to those required by national law. The host Member State must determine whether professional experience acquired either in the state of origin or in the host Member State can be regarded as satisfying the requirement of the completion of a period of preparation or training for entry into the profession, required by national law. In any case, in accordance with EU law, the host Member State must provide for a judicial remedy against the decision, and the person concerned must be able to ascertain the reasons for the decision taken in his regard.

The Directive also applies to nationals from third countries who are members of the family of an EU citizen exercising his or her right to free movement within the European Union, and to nationals of third countries who have been granted the status of Long Term Residents. However, as this paper frequently recalls the rights of long-term residents are generally more limited than those of the family members of an EU citizen. The Directive does not apply to the United Kingdom, Ireland and Denmark and only covers permanent establishment. It does not apply to the temporary provision of services. It also applies to nationals of third countries who have refugee status in a Member State. The refugee should be treated as a national of the Member State in which he or she has been granted refugee status. If a refugee has a professional qualification awarded in another EU Member State, the Member State that granted him or her refugee status should recognise this professional qualification pursuant to Directive 2005/36/EC.

In 2012 a proposal for a new Directive was made which was to have been adopted by the end of 2012. In view of its complexity and contentiousness its progress has been delayed and it was only on 23rd January 2013 that the European Parliament gave the green light for negotiations with the European Council to start on the updated Directive.

The proposal covers partial access, traineeships, a professional skills card, and an alert mechanism and language checks for health professionals, as well as the particularities of traineeship contracts, the presumption of innocence regarding the alert mechanism for health professionals and the preference of measuring training requirements for sectoral professions on competences rather than duration. The exclusion of notaries and the requirements for certain sectoral professions, such as nurses, are areas where further

discussions are still needed.[92]

The Directive will also apply to nationals of third countries who have a higher education diploma and a job offer (holders of an EU Blue Card), but only for activities exercised as an employee. However, this will not apply to the United Kingdom, Ireland or Denmark.

In *Tawil-Albertini v. Ministre des Affaires Sociales*,[93] a French national obtained a dentistry qualification in Lebanon which was then subsequently recognised in Belgium as equivalent to its national requirements. He later applied to practice in France, which refused to recognise his Lebanese qualification on the ground that it was not included in the Directive of that time. The applicant claimed that as it had been recognised by Belgium as equivalent to the Belgian requirement, which was in the Directive, then his qualification was equivalent to the French. The ECJ held that the simple fact that one Member State accepted the equivalence of qualifications did not bind other Member States if those qualifications were not mentioned in the Directive.

There will be automatic recognition of an applicant's qualification, even though part of the training for the qualification was outside the EU, so long as the Member State awarding the qualification has recognised that training as valid and this qualification satisfies Directive requirements (*Tennah-Durez*).[94]

Neither the Treaty nor the legislation recognises non-EU nationals. Apart from nationals of the EEA (the European Economic Area – EU, Iceland, Liechtenstein and Norway) and Swiss nationals, the nationals of non-EU countries who are established in the EU have no general rights of mutual recognition or permission to practise.

However Recital 23 of the preamble to the Single Permit Directive (see below) stipulates that Member States should recognise professional qualifications acquired by a TCN in another Member State in the same way as those of Union Citizens and should take into account qualifications acquired in a third country in accordance with Directive 2005/36.

In the case of *Dr A*,[95] the EFTA Court held that, if there was evidence about the applicant's

[92] (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20130121IPR05411%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN)
[93] Case C-154/09 Tawil-Albertini v. Ministre des Affaires Sociales [1994] ECR 1-451.
[94] Case C-110/01 *Tennah-Durez* [2003] ECR 1 – 6239.
[95] Case E-1/11 EFTA Court of Justice, 15 December 2011.

abilities which would have given grounds for the suspension of an existing authorisation, Norway was entitled to refuse to grant authorisation (or grant a limited authorisation) to practice medicine to an EEA national holder of an equivalent qualification. The case concerned the refusal of the Norwegian Registration Authority for Health Personnel to grant the applicant a licence to practise as a medical doctor in Norway.

Directive 2005/36/EC was last consolidated in March 2011. Community rules on the recognition of professional qualifications (including rules on the recognition of third country qualifications) are applicable to third country national family members under Directive 2004/38/EC (the 'Citizens Directive') accompanying the EEA family member who is moving within the Member States. Similarly, community rules on the recognition of professional qualifications apply in the Member State where a TCN migrant has obtain the status of Long Term Resident.[96] However, as mentioned earlier, the rights of long-term residents are more limited than the rights of family members of the EU citizens. This Directive only covers permanent establishment and not temporary provision of services.[97]

5.5 EU Blue Cards and the Single Permit Directive

The EU enacted Directive 2009/50/EC (the Blue Card scheme) in order to attract *highly skilled TCN workers* to Member States.[98] Third country nationals with a high level of professional qualification can apply for an EU Blue Card[99] which entitles them to take up employment in a specified Member State. In order to be eligible to apply for a Blue Card, a worker must have professional level qualifications, a work contract or job offer from an EU employer for at least one year with a salary at least 1.5 times the average gross national salary (with certain exceptions permitted for workers in professions with particular needs), a valid travel document, sickness insurance and must not be considered to pose a threat to public policy, public security or public health. Although this was a measure adopted at EU level, Member States retain the right to determine the number of highly skilled workers they admit. After two years of legal employment, they are entitled to equal treatment with nationals regarding access to any highly qualified employment in their host state. After 18

[96] Directive 2003/109/EC.
[97] http://ec.europa.eu/internal_market/qualifications/docs/future/faq_en.pdf
[98] Not applicable in UK Ireland and Denmark.
[99] EU Regulation 1030/2002.

months of legal residence, they may move to another Member State to take up highly qualified employment (subject to the limits which may be set by the Member State on the number of non-nationals accepted). For some, appropriately qualified, family members of settled migrants, the Blue Card route may prove easier than the family reunification route.

Under Article 15(6) of the Blue Card Directive, the family members of EU Blue Card holders, of whatever nationality, acquire an automatic general right to access the labour market. They are not subject to a time limit.

Researchers are covered by Directive 2005/71/EC.[100] An applicant must present a valid travel document, a hosting agreement signed with a research organisation, a statement of financial responsibility and must not be considered to pose a threat to public policy, public security or public health.

In December 2011, the EU adopted Directive 2011/98, the Single Permit Directive, which will introduce a single application procedure for TCNs to reside and work in the territory of a Member State and for a common set of rights for legally residing TCN workers. This Directive must be transposed by 25th December 2013.

Other proposals are in the pipeline.

Seasonal Employment. Under Proposal 12208/10, an applicant must have a valid travel document, sickness insurance, a work contract or binding job offer that specifies a level of remuneration and the working hours per week or month, evidence that the worker will benefit from appropriate accommodation, sufficient resources to maintain him or herself without having recourse to a social assistance system and must not be considered to pose a threat to public policy, public security or public health.

Intra-corporate transfer. Under Proposal 12211/10, an applicant must provide evidence that the host and third country undertakings belong to the same undertaking or group of undertakings; provide evidence of employment within the same group of undertakings for at least 12 months immediately preceding the date of transfer and that he or she will be able to transfer back at the end of the assignment; present an assignment letter from the employer that includes the duration, the location, the remuneration, and evidence that the applicant is

[100] Not applicable in UK Ireland and Denmark.

taking a position as a manager, specialist or graduate trainee; has the necessary professional or educational qualifications; present documentation certifying that the applicant fulfils the conditions to exercise the regulated profession; present a valid travel document; provide sickness insurance; and must not be considered to pose a threat to public policy, public security or public health.

5.6 Nationals of Turkey and their Family Members

Turkish Citizens have a particularly privileged position under the 1963 Ankara Agreement and its 1970 Protocol and the decisions taken by the Association Council set up under those instruments. Although they do not have the direct right to enter any EU Member State in order to take up employment there, if they are permitted to do so by national law, they have the right to continue in that same employment after one year.[101] After three years, under certain conditions, they have the right to seek other employment (also, under certain conditions) under Article 6(1) of Decision 1/80. Article 12 of the Ankara Agreement refers to the EEC treaty provisions of free movement of workers by stating that: 'The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them'.

The ECJ held in the joined cases of *Abatay*[102] that no work permit requirement can be imposed on Turkish nationals if it was not a requirement when the standstill clause came into effect in 1973. (There was no work permit requirement for Turks in Germany at that date.)

Turkish nationals, like EEA nationals, who work only a limited number of hours a week are considered as workers for the purpose of the renewal of their permit to work and access to further employment in a Member State. The Court concluded in *Genc*[103] that a Turkish national who works for only a particularly limited number of hours (5.5 hours per week, in that case) for and under the instruction of an employer in return for remuneration, which

[101] Case C-386/95 Eker v. Land-Baden Württemberg [1997].
[102] Joined cases C-317/01 and C-369/01, *Eran Abatay and Others and Nadi Sahin v. Bundesanstalt für Arbeit*, [2003] ECR I-12301.
[103] Case C-14/09 Hava Genc v. Land Berlin.

covers only partially the minimum necessary for her subsistence, is a worker within the meaning of Article 6(1) of Decision No 1/80 of the EEC-Turkey Association Council, provided that her employment is real and genuine.

Neither the Ankara agreement nor the 1970 Protocol nor the decisions of the Association Council provide expressly for any right of Turkish family members to enter a Member State to join a Turkish worker. Under Article 7 of the Decision 1/80, the family members (of whatever nationality) of a Turkish worker can obtain an unlimited right to access the labour market under certain conditions, i.e. a period of legal residence or, for children of Turkish nationals legally employed in the host country for at least three years, after the completion of vocational training.

In the *Ayaz*[104] case, the Court interpreted the personal scope of Article 7 of Decision 1/80, i.e. the definition of a family member of a Turkish worker. The Court held that a stepson who is under the age of 21 years or is a dependant of a Turkish worker, duly registered as belonging to the labour force of a Member State, is a family member of that worker and therefore enjoys the rights conferred on him by Decision 1/80, provided that he has been duly authorised to join that worker in the host Member State.

In the *Derin*[105] case, the Court held that a Turkish national, who joined his Turkish parents, legally working in Germany as a child, could only lose the right of residence in Germany (derived from a right to free access to employment) on grounds of public policy, public security or public health or where he left the territory of the states for a significant period of time without good reason.

In the case of *Recep Tetik v. Land Berlin*,[106] the German authorities did not want to grant a residence permit to Mr Tetik who had completed his three years and was looking for other employment. The ECJ found that, under Decision 1/80, he had to be permitted a reasonable period of lawful residence in order to seek the work which he would be entitled to take up if he found it. In the most recent decision in *Pehlivan*,[107] decided in 2011, the CJEU considered a Dutch law providing that the child of a Turkish worker who marries or forms a relationship during the first three years in the Netherlands is automatically deemed to have

[104] Case C-275/02 Engin Ayaz v. Land Baden-Württemberg, 30 September 2004.
[105] Case C-325/05 Ismail Derin v Landkreis Darmstadt-Dieburg, 18 July 2007.
[106] Case 171/95 *Recep Tetik v. Land Berlin*, [1997] ECR I-00329.
[107] Case C-484/07 *Pehlivan* [2011].

severed the family link and thus the benefit of Article 7, Decision 1/80. The Court found that this rule went beyond the limits of measures which the Member State was authorised to adopt on the basis of Decision 1/80.

5.7 Nationals of Other Countries with Association or Cooperation Agreements, i.e. Algeria, Morocco, Tunisia, Russia, Andorra, San Marino, Western Balkan countries[108] and 79 ACP countries

The cooperation agreements with these neighbouring European and Mediterranean countries and the ACP countries do not create for their nationals a direct right to enter and work within the European territory. However, nationals from these countries, working legally in a Member State of the European Union, are entitled to the same working conditions with the nationals of this Member State.

For instance, Article 64(1) of the Euro-Mediterranean Agreement with Morocco[109] establishes that 'the treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, *as regards working conditions, remuneration and dismissal*, relative to its own nationals'. Article 41(1) of the same agreement introduced also non discrimination in the field of social security. For employment on a temporary basis, non discrimination is limited to working conditions and remuneration.[110] Similar provisions are introduced in the agreements with Algeria[111] and Tunisia.[112]

The Court found that this provision of those agreements had a 'direct effect', that is they could be relied on without the need for any additional implementing regulations: for instance, in the *Gattoussi*[113] decision which concerned a Tunisian national whose residence permit had expired but whose work permit was still valid. The Court found that the provisions of the Tunisian Euro- Mediterranean agreement meant that his right to work

[108] Stabilisation and Association Agreements have entered into force for the following countries: the former Yugoslav Republic of Macedonia, Albania, Croatia and Montenegro.
[109] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (entered into force on 1 March 2000).
[110] Article 64(2).
[111] Article 67.
[112] Article 64.
[113] Case C-97/05 *Mohamed Gattoussi v. Stadt Rüsselsheim*, [2006] ECR I-11917, see paragraph 39; see also *inter alia* Case C-416/96 *El-Yassini*, [1996] ECR I-01209, paragraphs 64, 65 and 67.

could not be curtailed by the curtailment of the residence permit.

Similarly, Article 80 of the Stabilisation and Association Agreement between EU Member States and Albania[114] establishes that: '[i]n relation to migration, the Parties agree to the fair treatment of nationals of other countries who reside legally on their territories and to promote an integration policy aiming at making their rights and obligations comparable to those of their citizens'.

In a less extensive manner, Article 23 of the Russia Agreement[115] establishes, regarding labour conditions, that 'subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'. The non discrimination provision laid down in Article 23 was interpreted by the Court in the *Simutenkov* case[116] concerning a Russian national, employed as a professional football player in a Spanish Club, whose participation in competitions was limited by the Spanish rules because of his nationality. The Court held that a rule drawn up by a sports federation of a Member State which provides that clubs may field in competitions organised at national level only a limited number of players from countries which are not parties to the EEA Agreement is not in compliance with the purpose of the Article 23(1).

5.8 Asylum Seekers and Refugees

In the past decade, the EU has adopted a number of measures in relation to asylum which are collectively known as the *asylum acquis*. The *asylum acquis* includes a number of provisions relating to social rights including relating to the right to take up employment.

Under EU law, asylum seekers may be permitted to take up employment. Article 11 of the Reception Conditions Directive at present in force states that:

[114] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (entered into force on 1 April 2009).
[115] Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (entered into force on 1 December 1997).
[116] C-265/03 Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol, [2005] ECR I-02579.

(1) Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not ha*ve access to the labour market;*

(2) If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant;[117]

(3) Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decis*ion on the appeal is notified;*

(4) For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals.

5.9 Refugees and those Granted Subsidiary Protection (under the Qualification Directive)

The Qualification Directive not only sets out the criteria for granting individuals refugee status or other forms of international protection but also sets out the rights to which they are entitled if they have been given that protection. Article 26(1)(3) of the Qualification Directive recognises the right of refugees and those granted subsidiary protection to take up employment and to be self-employed. This reflects Articles 17, 18 and 19 of the Geneva Convention on the Status of Refugees.

The Directive currently in force obliges the state to guarantee access to vocational training and employment for refugees under the same conditions as nationals. However, the state can consider the current situation of the labour market when granting access to employment for beneficiaries of subsidiary protection. Reference has already been made above to the fact that all the measures adopted under the *asylum acquis* are now in the process of being redrafted ('recast'). The Qualification Directive has now been amended ('recast') as

[117] This has been reduced to 9 months in the recast directive

Directive 2011/95 and participating Member States must have transposed it into their national law by the end of 2013. Denmark, the UK and Ireland do not participate in the recast, and the UK and Ireland will continue to apply the old Directive (Denmark does not participate at all). The recast Qualification Directive will: a) recognise equal protection for refugees and beneficiaries of subsidiary protection; and b) provide for more activities for refugees and beneficiaries of subsidiary protection, such as training courses for upgrading skills and counsel services.

Article 26 of the Qualification Directive at present in force makes the two following provisions:

> (1) Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted,

and

> (3) Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

In practice, many of those recognised as being in need of international protection experience significant difficulties in enjoying equal treatment with a state's own citizens. It is useful here to recall the judgment of the ECtHR in the case of *Thlimmenos v. Greece*,[118] where the Court held that discrimination did not only occur when people who were entitled to be treated the same, were treated differently, but also when people who had a justifiable claim to be

[118] ECtHR *Thlimennos v. Greece,* Grand Chamber Judgment of April 6 2000, Application No. 34369/97.

treated differently were treated the same. Many refugees and other TCNs, including TCN family members, can legitimately allege that the 'equal treatment' which they receive takes no account of their vulnerability and thus discriminates against them.

5.10 Third Country Nationals Who Have Been Granted Long Term Residence under Directive 2003/109/EC and Third Country Nationals whose situation is regulated by the Family Reunification Directive 2003/86

Under Article 11(1) of the Long Term Residents Directive[119] (LTRD), third country nationals who have been granted long term residence are entitled to enjoy equal treatment with nationals in a number of areas. Those who have acquired *long-term resident status* enjoy *equal treatment* with nationals with regard to: *access to employment and self-employed activity*; conditions of employment and working conditions (working hours, health and safety standards, holiday entitlements, remuneration and dismissal); and freedom of association and union membership and freedom to represent a union or association.

However, the Directive includes a broad limitation for long term resident TCNs to access the labour market where occupation entails '*even occasional involvement in the exercise of public authority*'. This limitation can be read in conjunction with the possible restriction laid down in Article 11(3)(a), i.e. access to employment or self-employed activities reserved to nationals, EU or EEA citizens.

LTRs also acquire the right to move to other Member States under Chapter III of the LTR Directive and to exercise economic activities there. Article 14 states:

> (1) A long-term resident shall acquire the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three months, provided that the conditions set out in this chapter are met.
>
> (2) A long-term resident may reside in a second Member State on the following grounds:

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

(a) Exercise of an economic activity in an employed or self-employed capacity;

(b) pursuit of studies or vocational training;

(c) other purposes.

In cases of an economic activity in an employed or self-employed capacity referred to in paragraph 2(a), Member States may examine the situation of their labour market and apply their national procedures regarding the requirements for, respectively, filling a vacancy, or for exercising such activities.

For reasons of labour market policy, Member States may give preference to Union citizens, to third-country nationals, when provided for by Community legislation, as well as to third-country nationals who reside legally and receive unemployment benefits in the Member State concerned.

Their *family members* are entitled to join and accompany them in a member state other than the one in which they acquired long term residence.

Article 16 states:

Family members

(1) When the long-term resident exercises his/her right of residence in a second Member State and when the family was already constituted in the first Member State, the members of his/her family, who fulfil the conditions referred to in Article 4(1) of Directive 2003/86/EC shall be authorised to accompany or to join the long-term resident.

(2) When the long-term resident exercises his/her right of residence in a second Member State and when the family was already constituted in the first Member State, the members of his/her family, other than those referred to in Article 4(1) of Directive 2003/86/EC may be authorised to accompany or to join the long-term resident.

The Family Reunification Directive (Directive 2003/86/EC) governs the right to family

reunification.[120] Under Article 14 of the Directive, the *family member* granted a residence permit under the Directive shall be entitled to access *employment and self-employed activities*. Access to the labour market is subject to a time limit after arrival in the host state which cannot exceed 12 months during which time the State will be able to consider the current state of its labour market.

5.11 Irregular Employment

The measures described above relate to the right to engage in economic activities of those whose immigration status permits them to do so. But many of those working in the EU are in an irregular immigration situation. At EU level one of the most important measures relating to the employment of migrants is the Employer Sanctions Directive (Dir 2009/52/EC). This Directive is a key element in EU efforts to combat irregular migration. It prohibits the employment of irregular migrants from outside the EU by punishing employers through fines or even criminal sanctions in the most serious cases. All Member States, except Denmark, Ireland and the UK, are bound by the Directive. However it is not only intended to penalise and discourage those who employ illegal migrants, which may appear to be its main function, but it is also intended to protect the migrant workers from abuse and exploitation.

Under the Directive, before recruiting a third country national, employers are required to check that they are authorised to stay, and to notify the relevant national authority if they are not. Employers who can show that they have complied with these obligations and have acted in good faith are not liable to sanctions. As many irregularly-staying migrants work in private households, the Directive also applies to private individuals as employers.

Employers who have not carried out such checks, and are found to be employing irregular migrants, will be liable for financial penalties, including the costs of returning irregularly staying third-country nationals to their home countries. However, and importantly, they have to repay all outstanding wages[121] as well as taxes and social security contributions. In the most serious cases, such as repeated infringements, or the illegal employment of

[120] Not UK, Ireland and Denmark.
[121] The UK cites this as a reason for not opting in – asserting that such a right would encourage unauthorised employment.

children, or the employment of significant numbers of irregularly-staying migrants, employers are liable to criminal penalties.

The Directive protects migrants by ensuring that they get any outstanding remuneration from the employer and by providing access to support from third parties, for example trade unions or NGOs.

The Directive puts a particular emphasis on the enforcement of the rules. Many Member States already have employer sanctions and preventive measures in place, however in practice both their scope, as well as their enforcement, varies greatly across the EU.[122]

5.12 Working Conditions

Under EU law, the Charter of Fundamental Rights of the European Union provides for labour rights in Articles 27-31, including expressly the right to fair and just working conditions in Article 31. This is a right guaranteed to *all workers*, not just citizens or legal residents. In addition to the rights found in the Charter of Fundamental Rights and in the Employer Sanctions Directive, Directive 2009/52/EC, mentioned above, targets employers who take advantage of irregular migrants' precarious position and employ them in low-paid jobs with poor working conditions. The Directive strengthens the rights of the individual migrant by requiring employers to pay outstanding wages.

5.13 The Right of Establishment in Self Employment or Business and the Provision of Services

EEA, Swiss nationals, and *their accompanying family members of whatever nationality* have the right to establish themselves in *self-employment or business* and to *provide and receive services* throughout the EEA. Nationals of Bulgaria and Romania have this right in full, although they

[122] Letters of formal notice (the first step of the infringement procedure) were sent to Belgium and Sweden on 30 September 2011 and to Luxembourg on 4 November 2011. Whereas Luxembourg has yet to reply, Belgium and Sweden explained that the measures fully transposing the EU legislation were not expected to enter into force before mid-2012. The Commission therefore decided to issue a reasoned opinion (Article 258 TFEU), formally requesting those three Member States to comply with EU law. At the same time the Commission decided in February 2012 to end the proceedings against Austria, Germany, France and Malta. These countries were late in implementing the Employer Sanctions Directive, leading the Commission to start legal proceedings against them, but they have now brought into force the national legislation necessary to apply the Directive.

do not as yet have the full right of direct access to the labour market as employed workers. Paradoxically, the family members - of whatever nationality, including Bulgarians and Romanians and TCNs - of nationals of those countries who are exercising these self-employed rights have themselves the right to take up salaried employment, even though the person from whom they derive this right does not.

In relation to the *right of establishment or the provision of services,* Turkish Citizens benefit from the standstill clause in Article 41 of the 1970 Additional Protocol to the Ankara Agreement which *prohibits the creation of any new obstacle to establishment or the provision of services,* in addition to those which were in place when the Protocol entered into force in 1973. The ECJ considered the case of a Turkish company providing services in Germany. The Court held in the case of *Soysal* that the standstill clause even ensures that if no visa or work permit requirement was imposed on Turkish Citizens at the time at which Article 41 of the Additional Protocol came into force, in respect of a particular Member State, then that state is prohibited from imposing a visa or work permit requirement now. *Soysal*[123] concerned Turkish lorry drivers employed by a Turkish company in Turkey to drive lorries in Germany. The Turkish company was thus providing services in Germany. When Article 41 of the Protocol came into force for Germany, no visa was required for such drivers. Even though the visa was one which was subsequently specifically made mandatory across the EU in Regulation 539/2001,[124] it still could not be imposed in the context of a Turkish company providing services in Germany, in the light of the standstill clause.

The recent decision in *Oguz*[125] builds on the previous decision in *Tum and Dari*[126] and makes it clear that those seeking to establish themselves in self-employment (in the UK) must have the full benefit of the immigration rules that were in force in 1973 when the Protocol entered into force and states cannot apply additional criteria (such as not having been in breach of immigration rules), if those criteria did not apply in 1973.

In relation to the newer Member States of the EU, the relevant date for the operation of the Turkish standstill clause is the date on which the states in question joined the Union.

[123]Case C-228/06 Mehmet Soysal and Ibrahim Savatli v. Bundesrepublik Deutschland, [2009] ECR I-01031.
[124] This regulation specifies the states' nationals which are required to have a visa before crossing the external borders of the Union.
[125] Case C-186/10 *Tural Oguz v. SSHD,* [2011] ECR 00000.
[126] Case C-16/05 The Queen, Veli Tum and Mehmet Dari v. SSHD, [2007] ECR I-07415.

5.14 Under the ECHR

The ECHR does not generally protect economic and social rights, with the exception of the prohibition of slavery and forced labour (Article 4) and the right to form trade unions (Article 11).

Through an expansive interpretation of existing Convention rights, the Court has guaranteed the protection of at least some rights and interests, which are traditionally classified as socio-economic rights (rather than civil and political rights). For example, the Court has used Article 8 to protect the right to seek employment and Articles 6 and 8 to protect workers from 'unfair dismissal'.

A broad restriction of the right to seek employment may come under the scrutiny of the Court under Article 8(2) and needs to be justified in the light of the standards set by this provision. The following cases illustrate the approach the ECtHR has taken to economic activities. In *Campagnano v. Italy* (Application No. 77955/01), the restrictions that Italian law posed on bankrupts from engaging in any professional or business activities for a period of five years was found to violate the Article 8 right to respect for private life, in that they 'affected the applicant's ability to develop relationships with the outside world'. The measure was lawful and legitimate but not necessary because the legal restriction applied automatically to all bankrupts without any judicial determination, and lasted five years without any consideration of individual circumstances. In *Lykourezos v. Greece* (Application No. 33554/03), two judges endorsed the idea that Article 8 protected the right to a 'private professional life'.

A judgment which may be relevant to migrants who do not share the same culture/religion of the employer is that of *Ahmad and others v. UK*, where a Muslim teacher, who had *voluntarily* entered into a full time employment contract, complained that his work hours meant that he could not attend a mosque on Friday. The Court held that the applicant waived his right when he decided to sign the contract of employment. From the Court's case-law it emerges that only obligations contracted voluntarily can limit the protection of Article 8 (see *Schüth v. Germany* Application No. 1620/03, where a German church organist was dismissed from his position because, whilst separated from his wife, he was having a

child with his partner).

The Court recently found that Article 8 (right to respect for private life) applied to the situation of a foreigner who was denied the right to work as a lawyer although she had been permitted to undertake all the preparatory steps in Greece.

In *Bigaeva v. Greece*,[127] a Russian Citizen had been permitted to study law, take exams and complete the 18-month placement mandatorily undertaken with a view to being admitted to the Order of Advocates to work as a lawyer. Her lack of Greek nationality had not been raised as a bar to these activities. The Court found that, in those circumstances, subsequent refusal of the Greek authorities to permit her to be admitted to the Order of Advocates violated her Article 8 rights. However, it did not find a violation of Article 8 taken together with Article 14 (prohibition on discrimination) as it did not consider that the exclusion of foreigners from the exercise of the liberal profession of lawyer was, in itself, discriminatory.

The Court has also looked at the situation of individuals who have been discriminated against in their access to employment because of, for example, their 'lack of loyalty' to the state.[128]

5.15 Under the ESC

Under the European Social Charter, Article 18 provides for the 'right' to engage in a gainful occupation in the territory of other parties, but the right is exhortatory rather than mandatory. Article 19 includes a long catalogue of provisions supporting migrant workers on the territory of other Parties but with the proviso that they must be there lawfully.

The ESC also provides in Article 11 for the protection of health and safety at work. In 2006, the Committee examined a case brought by the Marangopoulos Foundation for Human Rights against Greece.[129] The case is not about migrants but is very pertinent to their situation since migrants find themselves disproportionately engaged in work which lacks proper health and safety regulation or, if it is in place, is inadequately enforced. The case

[127] ECtHR *Bigaeva v. Greece,* Judgment of 28 May 2009, Application No. 26713/05.
[128] ECtHR *Sidabras v. Lithuania*, Judgment of 27 July 2004, Application. No. 55480/00 and 59330/00; and ECtHR *Zickus v. Lithuania*, Judgment of 7 April 2009, Application No. 26652/02; ECtHR *Rainys and Gasparavicius v. Lithuania*, Judgment of 7 April 2005, Application No. 70665/01 and 74345/01.
[129] ECtHR *Mangoropoulos Foundation for Human Rights v. Greece,* Judgment of 6 December 2006, Application No. 30/2005.

concerned those working in the lignite mines or living in the areas where lignite is mined. The Committee found *inter alia* that Greece had failed to honour its obligation to provide effective monitoring of the enforcement of regulations on health and safety at work and noted the lack of inspectors and the ability to provide precise data to the Committee.

6. Education

The right to education for *children* is protected under all the international human rights instruments, and the committees overseeing the Convention on the Rights of the Child (CRC), the ICESCR and Committee on the Elimination of Racial Discrimination (CERD) have consistently held that the non-discrimination requirements of those instruments apply to refugees, asylum seekers and both regular and, importantly, *irregular* migrants.

6.1 Under EU Law

The EU Charter of Fundamental Rights provides in Article 14 that everyone has the right to education and talks about the 'possibility' of receiving free compulsory education. The *children of whatever nationality of EEA and EFTA nationals exercising treaty rights* have the right to education in the host state[130] and in addition will often have the right to remain for the continuance or completion of their education after the EEA national has moved on.[131] These children also have the right to be accompanied by the custodial third country national's parent in order to make this right practical and effective.[132]

The measures adopted under the EU *asylum acquis* reflect the provision of Article 22(1) of the Geneva Convention on the Status of Refugees and provide for the right to education of asylum seeking children and for those granted refugee status or subsidiary protection.

6.2 Students

Under EU law, EEA national workers and their accompanying family members of whatever nationality have the right of access to vocational training but not *under this heading* to university studies which are not recognised as vocational schools for this purpose.[133]

Under Article 7(1)(c) of the Citizens Directive, they have the right to come to another

[130] Recital 10, Regulation 492/2011 (this regulation replaced those parts of Regulation 1612/68 which remains in place following the adoption of the Citizens' Directive (Dir 2004/38). See also Case C-413/99 *Baumbast* [2002], fn 96.
[131] Case C-389/87 and C-390/87 Echternach and Moritz v. Minister van Onderwijs en Wetenschappen.
[132] Case C-60/00 *Carpenter* [2002]; Case C-413/99 *Baumbast* [2002]; Case C-310/08 *London Borough of Harrow v. Ibrahim* [2010]; the case C-529/11 *Alarape and Tijani,* which also looks at the situation of the parents of students, is currently pending before the CJEU.
[133] Case C-197/86 *Brown v. Secretary of State for Scotland,* [1988] ECR 03205.

Member State to receive educational services.[134] They must have sufficient means for themselves and their family members not to become a burden on the social assistance system and comprehensive sickness insurance. But such students must have equal access to loans and grants as a country's own nationals.[135]

6.3 Long Term Residents

Third country long term residents, recognised as such under the Long Term Residents Directive, have the right to move to other Member States for education and vocational training, the right to recognition of qualifications and study grants.[136]

6.4 Students under Directive 2004/114

Special provisions also exist at EU level for TCN students. Directive 2004/114/EC[137] covers TCNs from outside the EU who wish to access studies, pupil exchanges, unremunerated training or voluntary service in the EU. An applicant must present a valid travel document, present parental authorisation, if a minor, have sickness insurance, provide proof of payment of the necessary fee, have been accepted by an establishment of higher education, provide evidence of sufficient resources, and evidence of language competence in the field of study, and must not be considered to pose a threat to public policy, public security or public health.

6.5 Under the ECHR

The rights enshrined in the ECHR are not formally limited to either citizens of states which are party to the Convention or to those who are lawfully resident in Europe. This means that, in principle, everyone within the jurisdiction of a state which is a party to the Convention can benefit from its provisions.

[134] Case C-293/83 *Françoise Gravier v. City of Liège*, [1985] ECR 00593.
[135] Case 209/03 Bidar v. London Borough of Ealing and Secretary of State for Education and Skills, [2005] ECR I-02119.
[136] NB The UK, Ireland and Denmark are not in this scheme.
[137] The UK and Ireland do not participate in this Directive.

Article 2 of Protocol 1 provides for the right to education, and Article 14 and Protocol 12 prohibit discrimination on the ground of 'national origin'. This is a right which is enjoyed by "everyone within the jurisdiction" under Article 1 ECHR, but the inability to continue in national education as a consequence of an expulsion measure is not seen as a separate issue from the Article 8 issues that expulsion of long term residents ordinarily engages[138]. A failure of the Turkish Cypriot authorities in Northern Cyprus to make available appropriate secondary school facilities to the Greek Cypriots resident in the TRNC was found to violate the Convention.[139] Article 2 of Protocol 1 only guarantees the right to primary and secondary education but, if tertiary education is provided, it must be provided in a non-discriminatory manner.

The case of *Timishev v. Russia*[140] concerned Chechen migrants who, though not foreigners, lacked the required local migration registration to enable their children to attend school. The Court, finding a violation, held that the right for children to be educated is one of 'the most fundamental values of democratic societies making up the Council of Europe'.

In *Ponomaryovi v. Bulgaria*,[141] the ECtHR found that a requirement to pay secondary school fees which was predicated on the immigration status and nationality of the applicants was not justified. The Court noted particularly that the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling. Even when the applicants fell, somewhat inadvertently, into the situation of being aliens lacking permanent residence permits, the authorities had no substantive objection to their remaining in Bulgaria, and apparently never had any serious intention of deporting them. Any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants.

The approach taken by the Court in the *Ponomaryovi* case did however suggest that the court might not have reached the same conclusion if the applicants had been illegal immigrants seeking to take advantage of free public services.

An earlier decision of the now defunct European Commission on Human Rights in the case

138 Vikulov v Latvia 16870/03 Admissibility decision.
139 Cyprus v Turkey 2001 paras 278-280o.
140 ECtHR *Timishev v. Russia,* Judgment of 13 December 2005, Application Nos. 55762/00 and 55974/00.
141 ECtHR *Ponomaryovi v. Bulgaria,* Judgment of 21 June 2005, Application No. 5335/05.

of *Karus v. Italy*[142] had found in respect of tertiary education that charging higher fees to foreign university students did not violate the right to education as the differential treatment was reasonably justified by the Italian government's wish to have the positive effects of tertiary education staying within the Italian economy.

A number of cases have looked at the segregation of Roma children in schools,[143] and have found that such segregation is discriminatory when not shown to be objectively justified by the educational needs. Although the children in question were not foreign migrants, but members of an ethnic minority, the decisions in these cases may be applicable by analogy to migrant children. The Court is more concerned about the provision of education than the specifics of its content or mode of delivery. In the case of *Skender v. FYROM*[144] two applications were brought in which the applicant complained that his daughter was refused access to a Turkish speaking school on the ground of his place of residence, the complaints were declared inadmissible.

Probably because the provision of education most frequently concerns children, and reflecting the statement from *Timishev* quoted above, there seem to have been few complaints brought to the ECtHR relating to the denial of access of education to children – including TCN migrant children.

6.6 Under the ESC

Under the ESC, Article 17 governs the right to education and is subject to the provisions of Articles 18 and 19 in relation to migrants. In principle the charter only protects those who are a national of signatory states lawfully resident in the host country – but the committee has taken on a liberal approach where the social rights of vulnerable children are concerned.

The approach taken to access to housing and health care for undocumented TCNs by the ECSR in the *Defence of Children International* and *FIDH* cases is noted below and the same approach might well be adopted in relation to education were the question of access to education to come before the Committee.

[142] ECtHR *Karus v.* Italy, Judgment of 20 May 1998, Application No. 29043/95.
[143] ECtHR *DH and Others v. Czech Republic*, Grand Chamber Judgment of 13 November 2007, Application No. 57325/00; ECtHR *Oršuš v. Croatia,* Grand Chamber Judgment of 16 March 2010, Application No. 15766/03.
[144] ECtHR *Skender v. FYROM,* Judgment of 22 November 2001, Application No. 62509/00.

7. Housing

7.1 Right to Adequate Housing under EU Law

Being able to access shelter in the form of appropriate housing or of access to support in obtaining it, is the first priority of a TCN permitted to access the territory of a European state. In many cases family members will only be admitted for family reunification if their sponsor is able to demonstrate that they will have suitable housing without becoming a burden on the state. After they arrive, they will often therefore be denied the right to access housing support which is provided to other legally resident members of their community.

It is unsurprising therefore that the right to freedom of movement for EEA nationals and their accompanying family members of whatever nationality was initially (under Article 10 of Regulation 1612/68) subject to the requirement that they had housing suitable for their family (the housing requirement for family members was omitted from the Citizens' Directive in 2004 so the provision is now only of historical interest). It has to be remembered that Europe was then only terminating the process of replacing the housing stock depleted by WWII. The ECJ limited this requirement to an "on entry" condition, holding that it could not be applied to European migrant families whose housing needs grew and changed after their arrival. In Case C-249/86 *Commission v. Germany*, 'the European Court of Justice (ECJ) held that a German law making the grant of a residence permit conditional on a worker to be able to continue to meet the on entry housing requirement in the host state was in breach of EC law'. [145]

Reflecting this approach, the housing requirement was omitted altogether from the Citizens' Directive. The situation now is that EEA/EFTA nationals and their designated family members of whatever nationality must have the same access to social and tax advantages as the state's own nationals and cannot be subjected to restrictions on their right to access housing, including socially supported housing or the financial support for housing needs. Those economically inactive EEA nationals and their family members who must show that they are economically self-sufficient may not (as it has not yet been tested at EU level) be eligible for financial assistance for their housing needs. Moreover, EU citizen migrant

[145] Case C-249/86 *Commission v. Germany,* [1989] ECR 1263.

workers are entitled to put their name down on the housing list in the region in which they are employed, and enjoy the resultant benefits and priorities. The migrant worker's family who have remained in the state of origin must be considered, for this purpose, as residing in the region in which their family member is employed, but only if national workers benefit from a similar provision (Article 9 Regulation 492/2011 on freedom of movement for workers in the European Union).

In the case C-269/07 *Commission v. Germany*, the Court found that the law of the Federal Republic of Germany making 'the use of the subsidized capital for the acquisition or construction of an owner occupied dwelling subject to the condition that the property be located on German territory' (paragraph 76) was indirectly discriminatory towards non-nationals. The Court pointed out that 'non-residents are more likely to be interested in purchasing a dwelling outside Germany than residents' (paragraph 79). Thus, while German law did not expressly discriminate between German nationals and cross-border workers, it afforded less favourable treatment to cross-border nationals than enjoyed by workers resident in Germany. This constituted indirect discrimination on the ground of nationality (paragraph 80) contrary to Community law (in particular, Article 39 EC and Article 7 of Regulation (EEC) No. 1612/68 on freedom of movement of workers within the Community).

Similarly, in *Commission v. Italy* Case 63/86, 'a restriction of access to reduced mortgage rates and other access to social housing, based on a requirement of Italian nationality, residence qualifications, and the granting of social housing for those near to their place of work, was held in breach of the rules on right to establish oneself in business or self-employment under Article 52 and Article 59 of the Treaty of Rome'.

The case of *Teixeira*[146] originated from a claim for housing assistance for a homeless person. The applicant was a Portuguese national, who had previously worked in the UK but was not employed at the time of the claim. The applicant was stated not to have the right to reside under Article 7(1) of the EU Directive 2004/38 because she was unemployed. However, she had a right to reside based on the fact that her daughter was in education in the UK and so could not be denied housing assistance. While entitlement to housing is as a norm reserved to economically active migrants or their family members, economically inactive migrants are often in need of housing assistance. The risk of social exclusion is higher for them.

[146] Case 480/08 Teixeira v. London Borough of Lambeth and SSHD, [2010] ECR I-01107.

The Charter of Fundamental Rights provides in Article 1 for the right to dignity and provides in Article 34 for the right to social assistance with regard to housing (see below the consideration of Art 34 in the case of *Kamberaj* which concerned the right of a person claiming to be entitled to the benefits of the Long Term Residents Directive to access housing support. The case is discussed in more detail in the section on social security and social assistance).

This is an area of law that is in a current state of flux and will need to be revisited in the course of the IMPACIM project.

7.2 Asylum Seekers and Refugees

Under the Asylum Reception Conditions Directive, those seeking international protection have a right to be provided with minimum shelter. The benefits of this Directive must also be applied to the TCN family members of TCNs who are seeking international protection. Under Articles 13 and 14 of the Directive, Member States are required to provide asylum seekers with 'material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence'. This provision can be in cash or in kind by the provision of appropriate housing.

Case 411/10 *NS v. SSHD* and Case 493/10 *ME v. ORAC* were decided by the CJEU in 2012. They were joined by cases from the UK and Ireland about returning asylum seekers to Greece under the Dublin Regulation. The CJEU, following the Strasbourg Court's decision in *MSS*, (see below) established that asylum seekers could not be returned to Greece as the serious failure to implement the provisions of the Reception Conditions Directive, including the failure to provide shelter, amounted to a violation of the fundamental rights guaranteed under the Council on Foreign Relations (CFR).

7.3 Recognised Refugees and those Granted Subsidiary Protection

Refugees and beneficiaries of subsidiary protection must have access to accommodation on the same basis as other third country nationals in the territory (Article 32 Qualification

Directive in force). The recast of the Qualification Directive, while maintaining the same disposition, provides also that Member States 'endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and ensuring equal opportunities regarding access to accommodation' (Article 32(2) Recast of the Qualification Directive, entry into force 21 December 2013).

7.4 Equal Treatment in EU Law

Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, applies to 'all persons, as regards both the public and private sectors, including public bodies, in relation to: (…) access to and supply of goods and services which are available to the public, including housing' (Article 3(h) Council Directive 2000/43/EC).

Council Directive 2004/113/EC, also known as the 'Gender Directive', implements the principle of equal treatment between women and men in the access to and supply of goods and services, including housing (Article 3(1)). The prohibition applies across the board including to migrants.

7.4.1 Equal Treatment and TCNs

Third country nationals who have been granted Long Term Resident status enjoy equal treatment with nationals as regard to access to procedures for obtaining housing (Directive 2003/109/EC Article 11(1)(f)) and financial support for low income tenants. Article 11(1)(d) Case C-571/10 *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano* (IPES)24 April [2012] referred to and relied upon general principles relating to the elimination of social exclusion and poverty implicit in Article 34 CFREU (right to social security and social assistance) to confirm the entitlement to housing benefit for low income tenants of TCN's, lawfully resident under Article 11(1)(d) of the Long Term Residents Directive who claimed equal treatment with EU nationals. The Court stated that it 'recognises and respects the right to social and housing assistance so as to ensure a decent

existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices'.

7.5 Under the ECHR

Under the ECHR, Article 8 provides for the right to respect for one's home but does not provide for the right to have a home in the first place. So there is *no right to a home*,[147] only a right to respect for the home which one already has or had. The ECtHR interprets the concept of 'home' as an 'autonomous concept, which does not depend on classification under domestic law' (*Globa v. Ukraine*, Application No. 15729/07, 5 July 2012, paragraph 37). Factual circumstances such as 'the existence of a sufficient and continuous link with a specific place' are taken into account to determine whether or not a particular premise constitutes a 'home' within the ambit of Article 8. Mere entitlement to housing is insufficient. The case of *Globa* concerned a Ukrainian employed by a collective agricultural enterprise which had its own housing allocated to its workers or members. Notwithstanding the fact that the applicant was first in the waiting list, the tenancy of the house was attributed to two other persons. The applicant sought judicial revocation of the tenancy allocation. The national court found that he had priority for occupation from the flat and ordered the eviction of the occupants. The European Court however found 'that even if the applicant had had the enforceable right to enter and occupy the flat in question, it did not constitute his "home" within the meaning of Article 8 of the Convention' (paragraph 40). It was a *de jure* right to a home, that is a right in law, not a *de facto* home that is the home which he occupied.

However the destruction of homes[148] and forced evictions[149] do fall within the ambit of the 'home' rubric of Article 8 ECHR. For example, in the case of *Moldovan and Others v. Romania* (Application No. 41138/98, 12 July 2005), the applicants were deprived of their homes and forced to live in poor and degrading conditions, after a fight triggered a reaction of the villagers who burnt and destroyed properties and houses belonging to people of Roma origin. Although the victims in Moldovan were Romanian citizens, this case might have relevance for the harassment and eviction cases of foreign Roma.

147 See e.g. ECtHR *Chapman v. UK,* Judgment of 18 January 2001, Application No. 27238/95.
148 ECtHR *Akdivar and Others v. Turkey,* Judgment of 16 September 1996, Application No. 21893/93.
149 ECtHR *Mentes and Others v. Turkey,* Judgment of 28 November 1997, Application No. 23186/94.

Immigration and other comparable controls which limit an individual's access to his own home have been the subject of several decisions under the ECHR.

In the case of *Gillow v. UK*,[150] the court found a violation of Article 8 when a non-British couple who had worked many years abroad were refused the residence permit that would enable them to return to live in the home they owned and which they had built 20 years beforehand.

In *Blečić v. Croatia*,[151] the court looked at the case of an elderly (non-Croat) lady who had fled her home in Croatia during the hostilities to go and live with her daughter in Italy. When she wished to return, she was unable to resume occupancy of her house as it had been given to an ethnic Croat. The Court found that the decision of the national courts that she was not entitled to return, as she had left 'voluntarily' and thus forfeited her right to resume occupancy, had occurred before Croatia ratified the Convention although the Constitutional Court's upholding of the decision post-dated ratification. The complaint was inadmissible because the decision that the court found determinative had occurred before ratification.

In some cases, the European Court has applied Protocol 1 Article 1 protecting entitlements to social housing as 'property rights'. For example, the Court held that the tenant has an interest on the continuation of an established tenancy in the case *Stretch v. United Kingdom* (Application No. 44277/98 2003), and treated it as 'possession'.

The case of *Bah v. UK*,[152] concerned the refusal by a local authority to accord 'priority need' for re-housing to an unintentionally homeless family on the basis that the newly arrived migrant son could not be counted for the assessment of such need. The local authority instead assisted the applicant to find another private tenancy when she was no longer able to continue to occupy the previous accommodation.

The Court found there was nothing arbitrary in the denial of "priority need" to the applicant when it would be based solely on the presence in her household of her son, a person whose leave to enter the United Kingdom, granted only a few months before the applicant's request for housing assistance, was expressly conditional upon his having no recourse to public funds. By bringing her son into the United Kingdom in full awareness of the condition

[150] ECtHR *Gillow v. UK,* Judgment of 24 November 1986, Application No. 9063/80.
[151] ECtHR *Blečić v. Croatia,* Judgment of 8 March 2006, Application No. 59532/00.
[152] ECtHR, *Bah v. UK,* Judgment of 27 September 2011, Application No. 56328/07.

attached to his leave to enter, the applicant accepted this condition and effectively agreed not to have recourse to public funds in order to support her son. The Court found that as the applicant was not a refugee, her immigration status and that of her child involved a 'certain element of choice'. Immigration status was not an inherent or immutable personal characteristic such as sex or race. It therefore required less weighty justification than differential treatment on the ground of nationality. The Court upheld the Government's argument that it was justifiable to differentiate between those whose attempted reliance on priority-need status was based on the presence of a person - the son - who was in the United Kingdom unlawfully or –in this case- on the condition that he had no recourse to public funds and others who were lawfully present and not subject to such conditions. The Court found that the legislation in issue in this case pursued a legitimate aim, namely allocating scarce housing resources fairly between different categories of claimants. Whether the court would have taken the same approach if the family had actually become homeless and destitute remains speculative.

With regard to the rights of asylum seekers, in *MSS v Belgium and Greece*,[153] the European Court of Human Rights considered a case concerning the failure of Greece to make adequate provision for accommodation under the EU Reception Conditions Directive and the consequent destitution to which the applicants had been exposed. In considering whether the destitution was sufficiently severe to meet the "threshold of severity" demanded by Article 3 ECHR, they took into account the fact that Greece was under a very specific duty in EU law to provide adequate reception conditions. They found Greece's failure in this respect so serious that it reached the threshold required for there to be a violation of Article 3 of the ECHR.

The European Court has ordered interim measures to ensure that asylum-seeking families are provided with shelter whilst their claims before the ECtHR are pending.

7.6 Adequate housing under the ESC

Article 19(4)(c) of the Revised European Social Charter provides that states must ensure adequate accommodation to migrant workers. The European Social Charter's case law is

[153] ECtHR *MSS v. Belgium and Greece,* Judgment of 21 January 2011, Application No. 30696/09.

more proactive in relation to the right to housing. The right to housing (Article 31) has been seen as the gateway to a series of additional rights laid down in Articles 11 (right to health), 13 (right to social and medical assistance), 16 (right to appropriate social, legal and economic protection for the family), 17 (right of children and young persons to appropriate social, legal and economic protection) and 30 (right to protection against poverty and social exclusion) alone or read in conjunction with Article E (non-discrimination) of the European Social Charter (revised).[154]

In *Defence for Children International (DCI) v. the Netherlands*,[155] it was alleged that Dutch legislation deprived children residing illegally in the Netherlands of the right to housing (and thus to the other rights set out above). The European Committee of Social Rights held that the Charter could not be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including in the instant case those relating to the provision of adequate shelter to any person in need, regardless of whether s/he is on the State's territory legally or not. Under Article 31(2), States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available. Since, in the case of unlawfully present persons, states may be required to provide no alternative accommodation, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity. The Committee concluded that states parties were required to provide adequate shelter to children unlawfully present in their territory for as long as they were in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.

In *Cohre v. Croatia*, the Committee found that there was a violation of Article 16 on the grounds of both the failure to implement a housing programme within a reasonable time frame and a failure to take into account the heightened vulnerabilities of ethnic Serb displaced families who were lawful residents. The Committee stressed that 'States parties must be particularly mindful of the impact their choices will have for groups with heightened

[154] It must always be remembered that the ESC rights normally only apply to nationals of states party to the Charter.
[155] ECSR, No. 47/2008, 20 October 2009.

vulnerabilities'.[156]

The ECSR has held that 'illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However, the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure, and these should be sufficiently protective of the rights of the persons concerned'. Evictions must be justified and carried out in conditions that respect the dignity of the persons concerned. Alternative accommodation must be made available. The law must establish procedures and timing of the eviction, provide legal remedies and offer legal aid to those who need it to seek redress to courts. Finally, the system must provide for compensation. Legal protection for persons threatened by eviction must include, in particular, an obligation to consult the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction.

It should also be noted that forced evictions, either by the state or by private parties, may amount to cruel, inhuman or degrading treatment, for example when this involves destruction of the home, or is based on discriminatory grounds.

The cases of *ERRC v. Greece* 15/2003 (2004), *ERRC v. Bulgaria*, 31/2005 (2006), *ATD v. France* 33/206 (2006), *FEANTSA v. France* 39/2002 (2007), and *ERRC v. France* 51/2008 (2009) all addressed the issues of forced evictions.

In *Cohre v. France*, the Committee found that the evictions of Roma from their dwellings and their expulsions from France constituted a breach of Article E when read in conjunction with Article 19 §8.[157] Similarly, in *Cohre v. Italy*, the Committee found violations of Article E in conjunction with various other articles in regards to Italy's treatment of the Roma.[158]

The right to *adequate housing* for migrants is protected as part of the right to an adequate standard of living in Article 11 ICESCR. It is distinct from the right to respect for the *home*, which is related to the right to respect for private life. The right to adequate housing, as protected under ESC rights, includes the right to adequate shelter and accommodation and to security of tenure, which requires legal protection against forced eviction, harassment and other threats; the right to have adequate housing with facilities essential for health, security,

156 ECSR, No. 52/2008, 5 May 2011.
157 ECSR, No. 63/2010, 28 June 2011.
158 ECSR, No. 58/2009, 25 June 2010.

comfort and nutrition; financial costs associated with housing at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised; housing that is habitable, safe, protects from the elements and from disease and provides adequate space; housing that is accessible to those entitled to it; and that is located so as to allow access to employment, health-care services, schools, child-care centres and other social facilities.

7.7 Discrimination in Housing and Equal Application to Migrants

The enjoyment of the right to housing, including the prohibition of arbitrary forced evictions, must not be subject to any form of discrimination, whether caused by actions of the state or of third parties. This principle applies to non-citizens, regardless of their immigration status. *ILO Convention No. 97* and the *European Social Charter (revised)* both provide for the obligation of host countries to apply a treatment no less favourable than that which it applied to its own nationals, without discrimination in respect of nationality, race, religion or sex, in respect of accommodation.

This paper looks primarily at European case law, but in the field of human rights it is often instructive to look to further afield. Socio-economic rights are often seen as an aspect of human dignity and the right to shelter as an aspect of the right to dignity has been invoked in a number of well-known decisions from other jurisdictions.[159]

[159]In the *Grootboom* case, the Constitutional Court of South Africa considered the connection between dignity and socio-economic rights: 'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Constitution's Bill of Rights]'. The right to adequate housing 'is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right'.
The *South African Port Elizabeth Municipality* case is also instructive. The city of Port Elizabeth sought an eviction order against a group of individuals occupying private land. Although the city proposed that the group move to a different piece of land, the individuals rejected the offer because the proposed site of relocation was crime-ridden, crowded, and would not offer them security from another eviction. The city had housing to serve the needs of the poor, but contended that allowing individuals to receive priority in the allocation of this housing was tantamount to rewarding them for illegally occupying land. The Court found itself in a situation of conflicting rights: the right of the landowners not to suffer arbitrary or unlawful deprivation of their land, and the right of the squatters to have access to adequate housing. Justice Sachs was clearly unwilling simply to use a utilitarian approach to resolve the conflict: 'In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable

8. Health Care

This section of the paper looks at the approach taken by the different European legal orders to the rights of TCNs and their family members to health care.

The mechanisms which ensure people are entitled to access public health care in EU Member States vary widely from state to state. In the discussion below , the terms 'insured' and 'affiliated' are used to describe the wide variety of schemes in operation. Both terms are used to mean that individuals have acquired an entitlement to use the public health care system in the Member State in which they are 'insured' or 'to which they are affiliated'. Health care is not totally free in many Member States even to those who are duly 'insured' or 'affiliated'. The EU system in place does not harmonise these different schemes but co-ordinates them so that those who move from one Member State to another are entitled to treatment in the Member State to which they move which is , broadly, equivalent to the treatment to which those who are affiliated to that state's own national scheme are entitled.

The TCN family members of a British Citizen (and the British Citizens themselves) moving to France will thus be normally entitled to the same health care as a French Citizen – but this will not necessarily be the same health care benefits as those to which they were entitled in the UK.

The TCN family members of migrants exercising treaty rights in another Member State have access to health care wherever they go based on their affiliation to the public health system of one Member State. This applies to all those whose right to move to another Member State is regulated by EU law and not just to EEA national exercising rights of free movement under the Citizens' Directive.

For those whose situation is not covered by EU law the position is weaker, as there is no express right to health care in the ECHR.

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hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided'. Instead, in deciding the case, the Court emphasised that the 'starting and ending point of the analysis must be to affirm the values of human dignity, equality, and freedom'. The Court made no attempt to identify dignity with only one side of the conflict, but rather concluded that both rights pertained to property and were underpinned by dignity. Given that they were commensurate, the Court's role was to seek the solution that would best comport with dignity. When the Court decided that it would not uphold the eviction order, it justified its decision to limit the right of the landowners to be free from unlawful deprivation of their land as being the choice more congruent with dignity.

8.1 Under EU Law[160]

The starting place for this discussion is the Charter of Fundamental Rights (CFREU). The Charter does not include a right to health as such, but recognises related rights such as the protection of human dignity (Article 1) and the right to physical integrity (Article 3). It includes the right to 'health care' under Article 35. This provision states that 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices' (it must once more be remembered that the Charter rights only apply in areas which are already regulated by EU law and cannot extend the scope of EU law beyond its existing parameters). A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities. The Charter does not make any distinction on the ground of nationality; however, it makes the exercise of the right to health care subject to national laws and practices. In the Explanations relating to the Charter of Fundamental Rights,[161] this specific right is noted as being based on Article 168 TFEU (in relation to the protection of public health) and on Articles 11 and 13 of the European Social Charter (see below).

Regarding the objective of protection of public health, the ECJ/CJEU has held, in its case law[162] on the organisation of health services such as provided for by a pharmacy, that Treaty provisions on freedoms (freedom of establishment in particular) prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of those freedoms in the healthcare sector and that, when assessing those obligations, 'account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States must be allowed discretion' (*Apothekerkammer des Saarlande*s, paragraph 19*)*.

In the joint cases C-570/07 and C-571/07, where the dispute concerned domestic restrictions on the opening of new pharmacies in the Austria region, the Court stated that

[160] The EU Fundamental Rights Agency has published a comprehensive report on the access to health care for migrants. Migrants in an irregular situation: access to healthcare in 10 EU Member States, FRA 2011.
[161] 2007/C 303/02, Explanations relating to the Charter of Fundamental Rights.
[162] Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes und Deutscher Apothekerverband and Helga Neumann-Seiwert v. Saarland, Ministerium für Justiz, Gesundheit und Soziales, [2009] ECR I-04171., see para. 18 and 19.

'The importance of that objective is confirmed by Article 168(1) of the TFEU and Article 35 of the Charter of Fundamental Rights of the European Union, under which, *inter alia*, a high level of protection for human health is to be ensured in the definition and implementation of all policies and activities of the European Union'.[163]

Under EU free movement law, EEA and Swiss nationals *and their accompanying family members of whatever nationality* who are exercising treaty rights are entitled to receive health care in other Member States.

Article 24(1) of Directive 2004/38 (the 'Citizens' Directive') states that: all Union Citizens residing on the basis of this directive in the territory of the host Member State enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. For self-sufficient EEA migrants and their family members, who are not exercising an economic activity, such as salaried employment, self-employment or establishing a business, Article 7(1)(b) of the Directive establishes that they must have 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'. The same requirement of sickness insurance applies to migrant students as well (Article 7(1)(c)).

Everyone who is affiliated to a national health scheme in their EEA state of residence, *whether they are an EEA national or a TCN*, can benefit from local health care provision when they visit other EEA Member States and Switzerland (except that there are special rules for Denmark and for Bulgarians and Romanians in Switzerland).

8.2 Right to Health of Migrants During a Temporary Stay/Visit in Another Member State

Those who are *affiliated to a national health care system*,[164] *regardless of their nationality*, of any Member State and travel for a temporary stay in another Member State, can benefit from

[163] Joined Cases C-570/07 and C-571/07 José Manuel Blanco Pérez, María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias , [2010] ECR I-04629. see paragraph 65.
[164] Affiliation to national health care systems can come about in different ways in different countries e.g. by –inter alia- contributions, by sectoral affiliation or by operation of law.

the health care system of the host Member State. In order to demonstrate a person is affiliated to the national health care system of a Member State the possession of a European Heath Insurance Card (EHIC) is needed. This card allows its holder to receive treatment under the same conditions as a national of the receiving Member State and at the same cost.

In its 2010 annual report on the implementation of EU law and the accompanying Commission staff working paper, the Commission reported 'cases of refusal of valid EHIC by the medical professionals, cases of disproportionate administrative procedures for issuing an EHIC and cases of non-acceptance of EHIC as a sufficient document for providing access of insured persons staying abroad to necessary healthcare and medicine under the same conditions as to insured nationals'.[165]

However, access to health care can also be problematic for persons who are not affiliated or covered by a health care system of EU Member States, especially third country nationals.

Those who wish to travel to other Member States *for the purpose of receiving medical treatment* are covered by a different regime.

The Court has been asked to interpret the main EU rules (i.e. Regulation 883/2004 and Treaty provisions on freedom of movement of service) as regards the reimbursement of costs of cross border healthcare in different occasions.

In the Case *Vanbraekel*,[166] a woman insured in Belgium underwent orthopaedic surgery in France without the authorisation of the competent institution in Belgium. Despite being refused authorisation, the claimant went ahead with the operation in France, but the reimbursement of the cost of that treatment was refused to her. The Court found that

> *Where the request of an insured person for authorisation on the basis of Article 22(1)(c) of Regulation No 1408/71 (now repealed by Regulation 883/2004) has been refused by the competent institution and it is subsequently established that such refusal was unfounded, the person concerned is entitled to be reimbursed directly by the competent institution by an amount equivalent to that which would have been borne by the institution of the place of treatment under the rules laid down by the legislation*

[165] Commission staff working paper: situation in the different sectors, accompanying the document report from the Commission's 28th annual report on monitoring the application of EU law (2010), COM(2011) 588 final, see page 45.
[166] Case C-368/98, Abdon Vanbraekel and Others and Alliance nationale des mutualités chrétiennes (ANMC), [2001] ECR I-05363, para. 53

applied by the latter institution if authorisation had been properly granted in the first place.

The Court also found that where the rules covering the health care system are less advantageous in the Member State of registration than in the Member State of treatment, 'additional reimbursement covering that difference must be granted to the insured person by the competent institution' relying on the treaty provision of the freedom to provide services.

The more recent case of *Commission v. France*[167] concerned medical services implying the use of major medical equipment. The Court held that prior authorisation for reimbursement for medical services available at a general practitioner's surgery and requiring the use of major medical equipment could be allowed. A similar approach was taken in *Watt*,[168] where a British national, treated in France, had to pay for the costs and asked for reimbursement as she would not have had to pay in the UK.

8.3 Unforeseen Treatment for those who move between Member States for Tourism or Education Purposes

As regards unforeseen treatment for those who have travelled for tourism or education purposes, the Court was asked in *Commission v. Spain*[169] whether the refusal of the Spanish authorities to reimburse the costs of the medical treatment of a French citizen insured under the Spanish national health system that occurred during her temporary stay in France was in compliance with EU law. In that case, the Court held that 'with regard at least to hospital care, cases of "unscheduled treatment", as referred to in Article 22(1)(a) of Regulation No. 1408/71, must be distinguished, in the light of Article 49 EC, from cases of "scheduled treatment", as referred to in Article 22(1)(c) of that regulation, at issue both in *Vanbraekel and Others* and in *Watts*'. The Court did not apply the reasoning as regards to the reimbursement of difference of cost in scheduled treatment and concluded that:

With regard to an insured person whose travel to another Member State is for reasons relating to tourism or education, for example, and not to any inadequacy in the health

[167] Case C-512/08, *European Commission v. French Republic*, [2010] ECR I-08833.
[168] Case C-372/04, Yvonne Watts v. Bedford Primary Care Trust, Secretary of State for Health, [2006] ECR I-04325.
[169] Case C-211/08, *European Commission v. Kingdom of Spain*, [2010] ECR I-05267, para. 58 and 61.

service to which he is affiliated, the rules of the Treaty on freedom of movement offer no guarantee that all hospital treatment services which may have to be provided to him unexpectedly in the Member State of stay will be neutral in terms of cost.

Directive 2011/24, the Cross Border Health Care Directive, has now put in place additional safeguards for patients' rights in cross border health care. But as will be seen below in the section on social security co-ordination, its advantages are limited to those who are 'insured persons' under the cross border social security regimes. The Directive applies to insured EU citizens exercising free movement rights and their TCN family members. It also applies, by virtue of Article 3(b)(ii), to those insured TCNs who were brought within the cross border co-ordinated social security regime by *either* Regulation 859/2003 or Regulation 1231/10. In situations which are regulated by affiliation to the UK's schemes, Regulation 859/2003 will cover them because the UK has chosen not to extend to TCNs the comprehensively revised social security co-ordination scheme put in place by Reg 1231/10 (see below section on social security). Neither of these Regulations apply in the case of Denmark and so TCNs insured in Denmark, or seeking treatment in Denmark on the basis of this Directive, do not benefit from the rights given by the Directive. The Directive has to be transposed by October 2013, but as the preamble makes clear,[170] its provisions cannot be applied so as to reduce the benefits to which the person would be entitled under the cross border social security schemes described below.

8.4 Asylum Seekers

Under Articles 13 and 15 of the Reception Conditions Directive asylum seekers are entitled to emergency care and essential treatment for illness as well as necessary medical or other assistance to those who have special needs.

8.5 Recognised Refugees and those with Subsidiary Protection

Under the Qualification Directive, recognised refugees and those with subsidiary protection are entitled to equal access to health care as the state's own nationals, but this can be

[170] Preamble recitals 21, 31 and 46.

limited to 'core benefits' yet includes treatment for conditions associated with the circumstances which led to their grant of status. There are special provisions for those with special needs.

8.5.1 Family Reunification Directive

Under the Family Reunification Directive, both the sponsor and each family member seeking admission have to meet a resources test. In order to be admitted to the territory the sponsor may be required to prove that she/he has, in particular, a 'sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family and stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned' (Article 7(1)(b)(c)). Not only the sponsor, but each family member seeking reunification shall prove that s/he has sufficient resources 'to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned' and to have sickness insurance to cover all risks (Article 5(1)). Persons who obtained the status shall be subject to equal treatment with nationals of the host members as regards 'social security, social assistance and social protection as defined by national law' (Article 11 (1)(d)). Recital 13 of the Directive states that as regards 'social assistance', 'the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, *assistance in case of illness*, pregnancy, parental assistance and long term care. The modalities for granting such benefits should be determined by national law'.

Whilst EU law goes some way to ensuring that those TCNs who are already entitled to public health care in one Member State should be entitled to it when they travel to another Member State the patchwork acceptance of EU competence in this field means that this is a principle far from uniform application across the territory of the EU.

8.6 Under the ECHR

Under the ECHR, there is no express right to health care which is considered as an aspect of 'moral and physical integrity' which falls within the private life rubric of Article 8. The European Court of Human Rights, although it has not expressly recognised a right to health, has found that the right to respect for private and family life 'is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants [and might be] applicable to […] complaints about insufficient funding of [health] treatment'.[171] According to the Court, the right to life (Article 2 ECHR) might also enter into play as,

> *[i]t cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2 [and] an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.*[172]

The Court also found that the right to life (Article 2 ECHR) 'require[s] States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives'. The European Court of Human Rights has also recognised that states have a positive duty under the right to a family life (Article 8 ECHR) and the right to life (Article 2) to ensure that the right to a healthy environment is respected and guaranteed both by public authorities and private entities and individuals.[173]

The Court held in *Cyprus v. Turkey* in 2001 that health care provision must be non-discriminatory:[174] Greek Cypriots in Northern Cyprus must have the same access to health care as Turkish Cypriots and Turkish nationals.

In relation to migration, health care issues have primarily arisen under the ECHR in the context of health care needs being invoked as a shield against expulsion, which in extreme cases may engage Article 3 ECHR.

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171 ECtHR *Pentiacova and Others v. Moldova* Judgment of December 2005, Application No. 14462/03; ECtHR *Sentges v. Netherlands,* Judgment of December 2003, Application No. 27677/02; ECtHR *Cyprus v. Turkey,* Grand Chamber Judgment of 2001, Application No. 25781/94.

172 ECtHR *Powell v. UK,* Judgment of 4 May 2000, Application No. 45305/99; *Nitcki v. Poland,* Judgment of December 2002, Application No.

173 See e.g. ECtHR *López Ostra v. Spain,* Judgment of 9 December 2004, Application No. 16798/90, *Guerra v. Italy*, Judgment of 19 February 2008, Application No. 14967/89.

174 ECtHR *Cyprus v. Turkey,* Judgment of 10 May 2001, Application No. 25781/94.

In *D v. UK,* a man who had only a very short time to live (with or without the palliative care he was receiving in the UK) was being expelled to St Kitts, an Island in the Caribbean which had no health care for AIDS nor any social welfare provision for the dying. The man had no family there. The ECtHR found that his expulsion would violate Article 3. This decision can be contrasted with the later decision of *N v. UK*, where the Court found that the expulsion to Uganda of a woman receiving treatment for AIDS in the UK would not violate Article 3.[175][176]

8.7 Under the ESC: Article 11 and 13 of the Revised European Social Charter[177]

Article 11 covers the protection of health, including access to health care. The Committee has made some observations[178] regarding Article 11 of the Revised Charter.

In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in such a way as to impede the effective exercise by these groups of the right to protection of health. This interpretation imposes itself because of the non-discrimination requirement (Articles E of the Revised Charter and Preamble of the 1961 Charter) in conjunction with the substantive rights of the Charter.

In the case *International Federation of Human Rights Leagues (FIDH) v. France*,[179] the FIDH submitted that the French provisions on the entitlement to state medical assistance for non-nationals constitutes a violation of Article 13 of the Revised Charter in that 'they ended the exemption of illegal immigrants with very low incomes from all charges, and beneficiaries now have to pay a flat-rate charge (*ticket modérateur*) for medical treatment outside hospital and a daily charge (*forfait journalier*) for in-patient hospital treatment' and that they required 'that individuals must spend an uninterrupted period of three months in France before being entitled to state medical assistance and restricting the emergency medical care covered to

[175] ECtHR, *D v. UK,* Judgment of 2 May 1997, Application No. 30240/96.
[176] EctHR, *N v.UK,* Judgment of 27 May 2008, Application No. 27565/05.
[177] Not all Member states have ratified the Revised Charter. In the new version, Article 11(3) of the Charter of 1961 is slightly modified and Article 13 remains unchanged. Even though there is no provision on equal treatment comparable to Article E of the revised Charter, non-discrimination is included in the preamble of the Charter 1961.
[178] Conclusions 2005, General introduction, Volume 1, page 11.
[179] International Federation of Human Rights Leagues (FIDH) v. France, Collective Complaint No. 14/2003, 17 June 2004.

hospital treatment to situations which involve an immediate threat to life'. According to the FIDH, the introduction of patient charges denies young non-nationals the rights set out in Article 17. The Committee found a violation of Article 17 and held 'that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter', because 'it is connected to the right to life itself and goes to the very dignity of the human being'.

Article 13 covers social and medical assistance.

The Council of Europe's European Convention on Social and Medical Assistance provides for mutual assistance as between contracting parties for nationals of those contracting parties.

9. Social security and social assistance

'Social security' is a term normally used when describing schemes under which individuals become *entitled* to receive, under certain conditions, certain benefits as a consequence of having paid contributions (usually compulsorily) into a social security scheme during their periods of employment or other economic activity.

'Social assistance' is a term normally used when describing schemes under which individuals may become *eligible* under certain conditions, to receive certain benefits as a consequence of their actual needs. Their eligibility may be linked to them being affiliated to, and having contributed to a social security scheme, or it may not.

The entitlement of TCNs and in particular of family members of TCNs (and own nationals) to social security benefits in the country in which they have always lived is normally the same as that of the state's own nationals and others who, like them, have paid appropriate contributions into the social security scheme. s

Their entitlement to social assistance may be limited by the conditions applied to the grant of that assistance under the social welfare legislation itself, or by conditions that were attached to them as a consequence of the immigration rules which facilitated their admission to and residence in the country in which they live and which continue to apply to them until they achieve a right of residence independent of those rules. This may be a few months or several years depending on national legislation. Restrictions on such access to social assistance are often described as a requirement that they may have 'no recourse to public funds'.

EEA nationals and their TCN family members, and other eligible TCNs and their family moving between EU Member States are subject to a special regime described, in a brief and oversimplified way, below.

9.1 Under EU law

This paper will first look at the entitlement to social assistance for the TCN members of

EEA nationals moving from one EU state to another.

The TCN family members of EEA nationals exercising treaty rights are generally entitled to equal treatment. But with regard to social assistance,[180] Article 24(2) of Directive 2004/38 on the free movement of persons, stipulates that the host Member State shall not be obliged to confer entitlement to social assistance *during the first three months of residence* or, where appropriate, during the longer period provided for in Article 14(4)(b).[181] It appears from the wording of Article 7 (1)(b), that the Directive makes a distinction between the social assistance system and sickness insurance.

In EU law, the entitlement of EEA/EFTA nationals exercising free movement rights to social security and social assistance is governed by a series of regulations which are far too complex to be covered fully in this paper. What follows below is a brief summary of the key elements of the scheme as it affects TCNs and their family members. But in order to understand how the co-ordination scheme affects TCNs it is first necessary to try to understand how the scheme works generally

There is no harmonised system of social security and social assistance in the EU, only a system of co-ordination designed to ensure that those who move from one member state of the EU to another do not thereby lose the benefits to which they are entitled at home or to which they would be entitled if they had not left their home state. Certain persons, under e.g. the *asylum acquis* or agreements between the EU and particular third country states, are entitled to equal treatment to own national or to EU Citizens.

9.1.1 The General Scheme

The EU, and before it the EC and before the EC the Common Market, created a system of co-ordination designed to ensure that those who exercised their right to move from one Member State (MS) to another would not find themselves deprived of the benefits of the social security rights to which they had contributed because of residence requirements or

[180] It is not clear whether 'social assistance' includes health care and medical assistance. The Court clarified the notion of 'social assistance' within Article 24(2) in the joint cases of *Vatsouras and Koupatanze* by stating that benefits intended to facilitate access to the labour market shall not be considered to be 'social assistance' and confirmed the position of the Advocate General in that case: that 'the objective of the benefits must be analysed according to its results and not according to its formal structure'.

[181] Provision on non-refoulement of job seekers.

nationality or because the payments they had made had been in a Member State other than the one in which they were living could not be aggregated to the payments made in their state of current residence. The difficulties were compounded if a person had lived and worked in several states.

The provisions of the scheme are extremely complex and are made even more complex by the fact that some Member States have national law provisions which overlap and supplement the EU regime (but it is a general principle of EU law that national provisions can only enhance and not reduce the benefits to which a person is entitled under EU law).

The scheme was originally adopted in 1958 by Regulation 3. It applied to those who had moved across borders in the exercise of an economic activity. The major consolidating legislation which is to this day the foundation of the scheme was elaborated in Regulation 1401/71 adopted in 1971. The legislation focuses on two principles: the waiving of residence clauses and the right to export benefits.[182] It has been amended, revised and corrected countless times since 1971.

Generically the rule is that entitlement to benefits depends on the state of employment for the economically active and the state of residence for the economically inactive**.**

Social security benefits should, in principle, be able to be exported when an individual moves to another Member State. Social assistance benefits, in principle, are not exportable.

Since many of society's most vulnerable and disadvantaged members have special needs which make them reliant on social assistance benefits these rules mean that such people are restricted in the enjoyment of their right to move.

9.2 Social security, social assistance and special non-contributory benefits of a mixed kind

Exporting some benefits like retirement pensions was relatively uncontroversial but the export of family benefits has often been hotly disputed.[183] The legislation itself permits

[182] Article 7, Regulation 883/2004.
[183] See e.g. Case C-41/84 *Pinna;* Case C-212/05 *Hartmann;* Case C-363/08 *Slanina.*

restrictions on the export of unemployment benefits[184] and that provision has also been the subject of litigation.[185]

But Member States have most strongly resisted the export of non-contributory tax-financed benefits – not only social assistance but also other minimum subsistence support often tied to the cost of living in the Member State concerned. Even the original legislation, Regulation 3 of 1958, made a distinction between social security benefits and social assistance.[186] It was not just the nature of the benefit (needs based or contribution based) that was the key to its classification as one or the other, but also whether the benefit was a legal entitlement or a discretionary award. Regulation 1408/71 expressly excluded (in Article 4(4)) the possibility of exporting benefits which were classified as social *assistance* rather than social security.[187]

But some benefits were not so easy to classify and became known as *special non-contributory benefits of a mixed kind* (SNCBs) as they fell somewhere between social assistance and social security. During the 70's and 80's the ECJ had to rule on challenges that were brought to the refusal by states to facilitate the export of certain minimum subsistence benefits on the basis that they were social assistance. These benefits were recognised by the ECJ as being 'mixed' as they were half way between being social security and social assistance. The ECJ held that several of these benefits should not be considered non-exportable under the Regulation.

As will be seen many of the disputed benefits relate to the seriously disadvantaged family members of EEA nationals (the analogous situation of TCNs who are not family members of EEA nationals is looked at below in the sub-section on citizenship).

In the early case of *Callemeyn*[188] the court found that the refusal on the grounds of nationality to award special benefit for disabled people to the applicant because she was not Belgian contravened Regulation 1408/71. *Inzirillo* concerned the French 'allowance for handicapped adults'. The Court found that, national legislation which, in a Member State, gives a legally protected right to an allowance for handicapped persons also applies to a handicapped adult national of another Member State who has never worked in the state which adopted the legislation in question but who resides there. 'As regards more particularly the case of a

[184] Article 64 of Regulation 883/2004.
[185] See .g. Case C-406/04 *de Cuyper;* Case C-363/08 *Petersen.*
[186] See Case C-1/72 *Frilli.*
[187] Cf ILO Convention 188, which has similar provisions.
[188] Case C-187/73 *Callemeyn.*

handicapped child who from his minority fulfils the conditions entitling him to benefit, as a member of the employed person's family, from allowances for the handicapped, the equality of treatment under Article 3 of Regulation No. 1408/71 cannot terminate when he ceases to be a minor, if the child by reason of his handicap is prevented from himself acquiring the status of employed person within the meaning of the regulation. The case of *Piscitello* concerned the exportability of an Italian social aid pension supplement for elderly people[189]**.** The Court found that the benefit conferred on recipients a legally defined status which is not conditional upon any discretionary individual assessment of their personal needs or circumstances, and could be paid as a supplement to the income of recipients of social security benefits. It thus in principle fell within the field of social security. It was not excluded from the scope of Regulation No. 1408/71 by the provisions of Article 4(4). A benefit of this kind is paid in accordance with the conditions and on the basis of objective criteria laid down by that law to elderly nationals in order to provide them with minimum means of subsistence. Such a pension must therefore be assimilated to an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71. Consequently, it is included amongst the benefits to which the waiver of residence clauses provided for in Article 10(1) of that regulation applies and must be able to be exported.

As it was clearly not conducive to legal certainty for exportability to be determined ad hoc by the Court, in response to these judgments, the EC legislature intervened. One of the most important amendments to Regulation 1408 was thus in 1992 when the EC legislature created a special co-ordination system for these hybrid benefits. Regulation 1247/ 92 created a co-ordination system for special non–contributory benefits, that is those benefits which are half way between social security (contribution based) and social assistance (theoretically, needs-based but sometimes linked to contribution based benefits). Annex IIa to Regulation 1247/92 listed the benefits provided in each Member State to which the Member State could apply a residence restriction which prevented their export.

The theory was that although people would lose the provision of that benefit by the Member State they left, they would be eligible to receive a comparable benefit in the Member State to which they moved.

[189] *Case 139/82 Piscitello [1983] ECR 1427*

One problem – a consequence of the lack of harmonisation - was that there was often not a comparable benefit in the state to which they moved. The cases of *Jauch* (Case C-215/99) and *Leclere* (Case C-43/99) looked at the effect that such restrictions might have on the enjoyment of the right of citizens to freedom of movement (a wider issue beyond the scope of this paper). The Court in *Jauch* and *Leclere* affirmed the right of states, in principle, to restrict the export of Annex IIa benefits but considered that the benefits in question in the cases before them had been erroneously included in Annex IIa as they did not meet the criteria of being 'special' or 'mixed'.

In subsequent cases, on the other hand, the Court resisted claims that certain benefits should not be in the Annex. In *Kersbergen-Lap* for example it found that the Dutch 'Wajong' – an incapacity benefit for young disabled people - was rightly included in the Annex and therefore non-exportable.

As a consequence, when the co-ordination scheme was radically overhauled in 2004, a similar restriction to the one which existed under Regulation 1408 on the export of social assistance was repeated in Article 3(5) of Regulation 883/2004.

The provisions on special non-contributory benefits were redrafted by the EC legislature in 2004 with the adoption of Regulation 883/2004. The 2004 regulation amended the whole co-ordination scheme in a wide range of fields – not just SNCBs - and was the most far reaching reform of the whole system since 1971 (see below). And so, in order to give Member States the opportunity to adjust their national social security and social welfare systems to comply with it, it was determined that Regulation 883/2004 should not come into effect until 2010. So a separate Regulation was adopted in 2005 (Regulation 647/2005) which revised the content of Annex IIA on SNCBs and integrated it into the existing amended Regulation 1408/71 - which was already in force – without having to wait for 2010.

There was thus in theory under Regulation 647/2005 a system in place which met the requirement of legal certainty. Everyone should now know which benefits were exportable and which were not.

This certainty was short lived. The inclusion, at the request of a number of Member States of certain national benefits in the list of unexportable benefits annexed to Regulation 647/2005 was challenged. In 2007, the ECJ annulled the inclusion as unexportable in Regulation

647/2005 of some of the listed benefits.

The Court considered that the inclusion of Finnish Child Care Allowance, Swedish Disability Allowance and Care allowance for disabled children and the UK's Disability Living Allowance, Attendance Allowance and Carer's Allowance was unlawful.[190] It re-stated the operative principles. The following extract from the Court's judgment is quoted in full as it clearly sets out the applicable principles:

> *First, under Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended, a benefit can be deemed to be special only if its purpose is solely that of specific protection for the disabled, closely linked to the social environment of those persons in the Member State concerned. In the present case, the benefits at issue do not have that sole function. In fact, although they unquestionably promote the independence of the persons who receive them and protect the disabled in their national social context, they are also intended to ensure the necessary care and the supervision of those persons, where it is essential, in their family or a specialised institution. They cannot, therefore, be classified as special benefits in the light of Article 4(2a)(a)(ii) of Regulation No 1408/71 as amended.*
>
> *Secondly, besides the specific case described in the preceding paragraphs, pursuant to Article 4(2a)(a)(i) of Regulation No 1408/71 as amended, a special benefit for the purpose of that provision is also defined by its purpose. It must either replace or supplement a social security benefit, while being distinguishable from it, and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria (see Case C-154/05 Kersbergen-Lap and Dams-Schipper [2006] ECR I-6249, paragraph 30, and the case-law cited).*
>
> *By contrast, a benefit is regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (Case 249/83 Hoeckx [1985] ECR 973, paragraphs 12 to 14; Case C-356/89 Newton [1991] ECR I-3017; Case C-78/91 Hughes [1992] ECR I-4839, paragraph 15; Molenaar, paragraph 20; and Jauch, paragraph 25). It was*

[190] The UK was represented in this litigation by Christopher Vadja – now the UK judge on the CJEU.

on the basis of that case-law, which takes account of the components of German care insurance benefits, that the Court held, in paragraph 25 of Molenaar, that those benefits were to be regarded as sickness benefits' for the purpose of Article 4(1)(a) of Regulation No 1408/71 and, in paragraph 36 of that judgment, that they were to be regarded as cash benefits' of sickness insurance as referred to inter alia in Article 19(1)(b) of that regulation (see also Jauch, paragraph 25).

This same benefit that had been recognised as correctly listed as non-exportable in *Kersbergen Lap* (see above) was later examined in the case of *Hendrix* but this time in a situation where the young disabled person was entitled to the benefit which supplemented the low paid work he was able to do where he received a wage which was lower than the statutory minimum wage, his wage was supplemented by the *Wajong* benefit.[191] Mr Hendrix was employed in the Netherlands. He moved to Belgium but continued to work in the Netherlands. The authorities then suspended payment of the benefits under the *Wajong* and as his employer refused to increase his wage, that employment was terminated, Mr Hendrix then found other employment where he was paid the statutory minimum wage. He then took up residence again in the Netherlands. The Court found that if, when resident in Belgium he had retained sufficient links to the Netherlands by continuing to work there he could not be prevented from exporting the benefit because he was within the scope of the provisions relating to freedom of movement for workers (Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraphs 31 and 32, and Case C-212/05 *Hartmann* [2007] ECR I-0000, paragraph 17).

This principle would apply, mutatis mutandis, to a TCN or the family member of a TCN who came within the scheme as consequence of the rules on TCNs described below.

A separate Regulation (Regulation 988/2009) was required to integrate a revised annex (equivalent to the old Annex IIa) into Regulation 883/2004 and the benefits affected can now be found in Annex X to Regulation 883/2004. There are about 70 such benefits listed in Annex X, about two thirds of which are related to old age, invalidity or disablement.

An important question arises as to whether this listing is compatible with the obligations undertaken by the EU in ratifying the UN Convention on the Rights of Persons with

[191] See the earlier reference to Kersbergen Lap above.

Disabilities read together with the Charter of Fundamental Rights since the prohibition on exportability significantly affects the ability of disabled persons to move between states. As will be seen below it may also prevent third country nationals – including third country national family members - with disabilities from exercising the rights to freedom of movement which they have under the Long Term Residents' Directive. The CJEU has recently (13th April 2013) provided the EU law definition of disability in the case of *Jette Ring*, and *employment discrimination case*.[192]

Some of the problems – though not the disadvantages for those already marginalised by disability - were resolved by Regulation 987/2009 which calls upon Member States to establish by common agreement where an individual's 'Lebensmittelpunkt' (centre of interest) lies for the purpose of establishing eligibility for benefits.

9.3 Workers, the self-employed, and the economically inactive

In 1981 Regulation No 1408/71 was extended to self-employed persons and members of their families by Regulation No 1390/81. The scheme was significantly and fundamentally amended by Regulation 883/2004 in more far reaching ways. Under Regulation 883/2004 the personal scope has been expanded to include all nationals of a Member State who are or have been subject to the social security legislation of one or more Member States.[193] Without referring to the status of employed or self-employment, as Article 2 of Regulation 1408 did, more economically inactive people were brought into the scheme so that the economically inactive as well as the economically active should, in principle now be within the scope of the schemes.

Previously the benefits of the co-ordination scheme for the economically inactive were generally limited to pensioners. The extension of the scheme to the economically inactive has had inevitable consequences for the pressure on special non-contributory benefits even for citizens and their family members exercising treaty rights. Article 5 of the Regulation also provides for 'equal treatment of benefits, income, facts or events'. This means that the receipt of an equivalent benefit or income from another Member State must be treated in

[192] Joined cases 335/11 and 337/11.
[193] Article 2, Regulation 883/2004.

the same way as it would be if the benefit had been awarded in the competent state. This becomes even more complex when we look below at the position of third country nationals and *their* family members

This two steps forward one step back scenario is not just of historical interest as certain Member States have opt-ins and outs of the evolving legislation so that some Member States still function under the old system and some under the new.

9.4 Citizens and third country nationals (TCNs) and TCN family members

Having looked at the general provisions of the scheme, the situation of TCNs and their TCN family members will now be considered.

The first regulations, Regulation 3 of 1958 and Regulation 1408/71 applied only to *citizens* exercising free movement rights (and their qualifying TCN family members), to *stateless persons* and to *refugees* (and their family members and survivors).

For many years the EC/EU did nothing to address, generically, the rights to social security and social assistance of TCNs who were not the family members of those citizens who moved unless they were stateless or were recognised refugees (see *Khalil Bundesanstalt fur Arbeit and Others*, Cases 95/99 to 98/99 and 180/99.)[194]

Other TCNs who themselves moved – legally – from one Member State to another to work were unable to be excused regarding residence requirements or to benefit from the aggregation of their contributions, despite not being exempted from contributing in each successive Member State in which they exercised an economic activity. Only TCNs who were either

(a) family members[195] of those citizens exercising free movement rights or

(b) nationals of a Member State which had concluded specific agreements with the EC/EU or

[194] The Khalil group of cases emphasised that the scheme could not apply to those stateless person or refugees who had not moved between two Member States but had only come from a third country into a Member State.
[195] Article 2(1).

(c) stateless persons and refugees

had co-ordination rights.

The EU summit in 1999 adopted the principle of granting long term resident TCNs 'near equality to EU citizens' (the 'Tampere Conclusions').

In 2003 in the context of the Tampere Conclusions, the adoption of Regulation 859/2003 finally put an end to this anomaly by applying the co-ordination system that had hitherto applied only to Union Citizens and their family members to TCNs residing lawfully on the territory of a Member State and their family members so that they too were able to benefit from the co-ordination scheme set up under Regulation 1408 in its various reincarnations.

Importantly, the third country national family members of those TCNs who are the principal beneficiaries of the extension in Regulation 859/2003 to TCNs are also covered. The Regulation only provides for social security co-ordination for those TCNs if they are otherwise able to move lawfully between Member States under some other migration regime. It does not in any way give them the right to move *(*long term residents have the right to move under Chapter III of the LTR Directive).

The result of all of this was that both EU citizens and their family members and TCNs and their family members who moved lawfully between Member States were in principle all now covered.

However, this was followed by a wholesale revision of the scheme in 2004. Although adopted in 2004, Regulation 883/2004 only came into effect in 2010 (as already noted above, the provisions relating to special non-contributory benefits were integrated into Regulation 1408/71 (already in force) by Regulation 647/2005 as the matter was deemed to be too urgent to wait for 2010).

Just as the provisions of Regulation 1408/71 were extended to TCNs by Regulation 859/2003, the provisions of Regulation 883/2004 have been extended to TCNs by Regulation 1231/ 2010. The scheme also applies to the EEA and to Switzerland.

However, Denmark does not participate at all in the regime which applies to TCNs. The UK and Ireland opted in to Regulation 859/2003 (which extended the co-ordination scheme

under Regulation 1408 to TCNs) but only Ireland has chosen to opt in to Regulation 1231/2010. The UK remains outside the scheme in place under Regulation 1231/2010 so that TCNs with a UK connection still remain within the scheme put in place under Regulation 1408 (extended to TCN's by Regulation 859/ 2003) and cannot benefit from the more comprehensive scheme under Regulation 883/2004 which came into force in 2010.

The result is that in Member States like Denmark and the UK the old (Regulation 1408/71) scheme (as amended before the adoption of Regulation 883/2004) still applies to third country nationals and their family members. The new scheme under Regulation 883/2004 does not apply to them (this is so although the scheme under Regulation 883/2004 applies automatically to those TCNs who are the family members of those exercising free movement rights or those who have rights under EU agreements with their countries of origin).

It is therefore impossible to make any accurate *general* statement about the rights of TCNs and their TCN family members who fall within the EU social security co-ordination scheme as the applicability of the scheme has become so fragmented.

Because of this, problems may arise under Chapter III of the LTR Directive[196] for LTR's who wish to take advantage of the rights which they have under the Directive to move to other Member States. Article 14 provides for free movement rights to other Member States for those granted LTR status. Article 15(2) states, in relation to the exercise of those rights that

> *2. Member States may require the persons concerned to provide evidence that they have:*
>
> *(a) stable and regular resources which are sufficient to maintain themselves and the members of their families, without recourse to the social assistance of the Member State concerned. For each of the categories referred to in Article 14(2), Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions;*
>
> *(b) sickness insurance covering all risks in the second Member State normally covered for its own nationals in the Member State concerned.*

[196] Neither the UK nor Ireland participate in the LTR Directive.

Article 15(2)(a) should be read as including in their resources all benefits which they are able to export[197] from the state where they acquired LTR status, and a purposive reading of the LTR Directive - applying by analogy the ruling in *Hendrix* - may influence the approach taken by the CJEU to deciding whether particular benefits are exportable by moving LTRs or not. As noted above any other reading might fall foul of the EU's commitments when it ratified the UN Convention on the Rights of Persons with Disabilities.

Article 15(2)(b) must be read as including as "sufficient sickness insurance" the right to medical treatment in cross border situations, as an insured person and his family members, which are now covered by Article 3(b)(ii) of Directive 2011/24.

The schemes are constantly being updated and never allowed to remain static.

9.5 The export of benefits by Turkish Citizens and their family members (whether Turkish or not) and the decision in Akdas

As this paper has noted elsewhere, Turkish Citizens and their family members (whether Turkish or not) have had a privileged position in the EU since the Ankara Agreement of 1963, its 1970 Additional Protocol (AP) and under the decisions of the Association Council adopted thereafter.

The basic principles are that, once admitted to exercise an economic activity in an EU Member State they are entitled to treatment equal to the treatment applied to EU citizens. Turkish nationals having worked in a Member State of the EU are able to export their benefits not only when they move to another MS of the EU but even if and when they decide to return to Turkey.[198] However, Article 59 of the AP provides, broadly, that they shall not be entitled to more favourable treatment than that accorded to EU citizens.[199]

The recent case of *Akdas* examined the meaning and scope of Article 59. Mr Akdas and the other litigants were granted an incapacity for work benefit which was lower than the minimum wage and consequently they were paid a supplement. This was a special non-

[197] Under Regulation 1408/71 or Regulation 883/04 as applicable.
[198] Article 39 Additional Protocol and Decisions 3/80. The decision was held to be self executing in the case of *Surul* (Case C-262/ 96).
[199] Case C-228/06 *Soysal.*

contributory benefit (SNCB) of a mixed kind and was listed in Annex IIa of Regulation 1408/71 (and Annex X of Regulation 883/2004) and therefore could not, in principle be exported by EU citizens.

These Turkish citizens had become permanently incapable of work, and, unlike EU citizens, (who have the right to remain in their host state in such circumstances) Turks have no right under Association Council Decision 1/80 to remain on the territory following an accident at work which has made them permanently incapacitated. Mr Aktas and his co-litigants thus returned to Turkey.

The Court held that the situation of Turkish Citizens could not therefore be compared to that of the EU citizen who does have the right to remain in the host state after becoming incapacitated and who can consequently thus retain the benefit. The Court found that therefore he did have the right to export that benefit even though an EU citizen who chose to return to his country of origin would not have that right. The decision has prompted considerable debate as it is perceived as giving Turkish Citizens more rights than those which EU Citizens enjoy.[200]

9.6 The Euro Mediterranean Agreements

Just as with their predecessors – the co-operation agreements of 1976 – the Euro-Mediterranean Agreements each contain provisions on non-discrimination in respect of lawfully resident workers and their family members in relation to social security benefits. So for example in the case of *Echouikh,*[201] the French were precluded by the Agreement from refusing to grant to a Moroccan national an armed forces invalidity pension available to a French citizen in similar circumstances. The agreement contains a clause that provides for Magreb workers the free transfer to their country of origin of annuities in respect of old age, survivor status, industrial accident or occupational disease (or of invalidity resulting therefrom).

[200] See e.g. ELR 2012 Case Comment Portability of social benefits and reverse discrimination of EU citizens vis-à-vis Turkish national : comment on Akdas, Katherina Eisele and Anne Pieter van der Mei.
[201] Case C-336/05.

9.7 The *asylum acquis* and the Trafficking Directive

Outside the cross border regime discussed above, which requires movement between Member States in order for it to apply - but drawing on it conceptually - provisions relating to social assistance have been incorporated in the context of the *asylum acquis* and the Trafficking Directive.[202] The details are beyond the scope of this paper.

9.8 The role of the Charter of Fundamental Rights in the EU social security co-ordination scheme

The CFREU provides in Article 34 that:

> *In order to combat social exclusion and poverty the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*

The Charter applies, but *only* applies, in situations which are, in themselves, governed by EU law. This not only has implications for the application of Article 34 itself but for the ancillary provisions such as are found in Article 41 (the right to good administration), Article 46 (effective judicial protection) and Article 47 (the right to an effective remedy).

The role of the Charter in relation to social security co-ordination has been complicated by the EU and Poland. Article 34 CFREU quoted above is in Title IV to the Charter. Title IV - Solidarity - was the express focus of the UK and Poland's Protocol 30 to the Lisbon Treaty, which declared that the Charter would have a limited application in those states. But if lack of benefits leads to destitution or impinges on human dignity it is inevitably not just a question of solidarity but linked to Article 1 CFREU (the right to human dignity). It remains to be seen what the CJEU considers will be the implications of the UK/Poland Protocol in relation to the provisions of the Charter which fall outside Title IV (Solidarity). Neither Ireland nor Denmark joined the UK in the UK/Polish Protocol and so the Charter fully applies to all aspects of EU social security which they have opted into. In Denmark and Ireland the Charter clearly applies, in principle, to those aspects of the social security co-

[202] As noted above this paper does not cover the important and complex interface between the social security co-operation schemes and the residence rights of EU citizens.

ordination scheme found in the instruments of secondary legislation which those countries have opted into - but may not apply to those instruments which they have chosen not to opt in to - as they will arguably fall outside the scope of EU law. The effect of the Protocol on the position of the UK has not yet been considered by the Court in this context, although it was treated as irrelevant in a different context in a case concerning the transfer of asylum seekers from the UK to Greece.[203]

The Tampere Conclusions (1999) proclaimed that the EU should ensure fair treatment of third country nationals who reside legally on the territory of its Member State, and grant them a set of uniform rights and obligations comparable to those of EU citizens. As noted elsewhere, a number of measures were adopted to meet these goals including the Long Term Residents Directive (Directive 2003/109) the Family Reunification Directive (Directive 2003/86) and the Regulation extending the cross border application of the social security regimes under Regulation 1408/71[204] to third country nationals who had previously been excluded from its benefit (Regulation 859/2003, and subsequently Regulation 1231/2010).[205] The LTRD and the FRD govern the situation of those TCNs who are lawfully resident in a Member State. The regulations on social security co-ordination apply *only* to those persons who move to a Member State other than the one in which they had previously established their residence. This section of this paper will first address the LTRD and the FRD and then refer briefly to the provisions of the social security co-ordination measures.

The Court first considered the significance of the new approach to TCN migrants in the case of *Chakroun* which concerned the FRD and then went on to consider the situation of long term residents in the case of *Kamberaj.* In both cases it upheld the rights which those directives had granted against the attempts by the respective member states to dilute them in accordance with their own particular policies.

Mr Chakroun was a Moroccan Citizen who had been resident in the Netherlands for decades and married to his wife for over 30 years, although she had hitherto resided in Morocco. He then sought to bring her to the Netherlands. In 2008 the Dutch Council of State (Raad van Staat) made a reference to the ECJ (as it then was) asking a number of

[203] Case C-411/10, *NS v SSHD*.
[204] Now Regulation 883/2004, since amended by Regulation 465/2012- applicable in all Member States and of relevance to the EEA and Switzerland.
[205] Regulation 1231/2010 extended the provisions of Regulation 883/2004 and Regulation 987/2009 TCNs previously excluded on grounds of nationality. The UK has not opted into this measure, but Ireland has. Denmark does not apply it.

questions one of which related to the resources which a sponsor had to show under Article 7(1)(c) in order to be eligible for family reunification.

Article 7(1) provides that, when an application for family reunification is submitted, the Member State concerned may require evidence that the sponsor has (a) normal accommodation for the family, meeting general health and safety standards, (b) sickness insurance for the whole family and:

> *(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without* recourse to the social assistance system *of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members (emphasis added).*

Mr Chakroun was in receipt of *contribution based unemployment benefit* - not social assistance. It was deemed sufficient for his and his family's general needs in Dutch law. However it was such that he could have been entitled to claim additional special assistance in exceptional circumstances. Various kinds of special assistance (and remission of local taxes) could be granted by local authorities, not only to those whose income was less than the minimum wage, but also to those who, while having resources equal or superior to that wage, were unable to meet essential costs arising from exceptional circumstances. Such special assistance was granted on a sliding scale and no longer available at all once income reached 120% to 130% of the minimum wage.

The question was therefore whether Article 7(1)(c) allows a Member State to set - for the purposes of family reunification - an income threshold at a level which rules out any possibility of recourse to special assistance of that kind (in the *Chakroun* case the threshold set was 120% of the minimum wage).

'Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly. Furthermore, the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family

reunification, and the effectiveness thereof'.[206] The Court found that the mere possibility of being able to claim certain types of social assistance in exceptional circumstances (themselves assessed case by case) could not be a ground for systematically rejecting an application for family reunification. That is in contrast to a level of resources which means that an individual or family would automatically receive social assistance – a situation which clearly falls within the scope of the condition authorised by Article 7(1)(c) of the Directive. Member States must refrain from adopting rules in respect of family reunification which result in such reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family. This is so even if he would be entitled to claim special assistance in order to meet exceptional, individually determined, essential living costs, tax refunds granted by local authorities on the basis of his income, or income-support measures in the context of local-authority minimum-income policies ('minimabeleid').

The Court agreed with Ms Chakroun that the concept of 'social assistance system of the Member State' is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law. In the light, in particular, of the differences existing between the Member States in the management of social assistance, that concept must be understood as referring to social assistance granted by the public authorities, whether at national, regional or local level. Article 7(1)(c) makes no reference to national law – unlike Article 7(2) which refers to national law when providing for the possibility of imposing 'integration measures'.

The Kamberaj case concerned the availability of housing benefit to a TCN who had been lawfully resident in Italy for many years. In 2010 the Tribunale di Bolzano in Italy made a reference to the CJEU. It asked a number of questions about the compatibility with EU law of the system in place in Bolzano for allocating 'housing benefit' (a financial contribution to assist with the payment of rent by tenants on low incomes) to denizens of the region. Because of the unusual characteristics of the Bolzano Autonomous Region, Italian citizens and EEA nationals were required to declare their affiliation to one of the three linguistic groups and funds were allocated in proportion to the size of the group to which they belonged. TCNs and stateless persons fell in a different category and did not have to declare

[206] para 43, Case C-578/08, Chakroun *v Minister van Buitenslandse Zaken*.

their linguistic affiliation but funds were allocated to that group on a less favourable basis. Lawfully resident third country nationals were thus treated less favourably than EU citizens. The key question was whether this less favourable treatment for long term residents in comparison with EU (including Italian) citizens was compatible with EU law and in particular with the Long term Residents' (LTRs) Directive (Directive 2003/109).

Article 11(1) of the Directive provides that LTRs

> *'shall enjoy equal treatment with nationals as regards*
>
> *(d) social security, social assistance and social protection as defined by national law; (emphasis added)*

and

> *(f) access to procedures for obtaining housing.*

Article 11(4) of the LTRD provides that states may limit equal treatment in respect of social assistance and social protection to *core benefits* (emphasis added). It should be noted that this limitation does not apply to social security.[207]

In answering the question the Court emphasised that, as the Directive lays down a specific procedure for those who are eligible to acquire it to be *granted* LTR status, it was for the national court to decide if the claimant actually enjoyed LTR status (i.e. had been granted it) and was thus entitled to equal treatment at all. Merely being eligible to apply for such a status was not sufficient to bring a TCN within the ambit of the equal treatment provisions of the Directive.[208] This is a clear contrast to, for example, rights of residence under the Citizens' Directive (Directive 2004/38), where the right is derived from the factual situation and the recognition of that status by the host state is merely declaratory and not determinative. In the event of the national court finding that the claimant had been granted the status, the Court went on to consider the effect of the words 'as defined by national law' in Article 11(1)(d). It also examined the impact of Article 34(3) of the EU Charter of Fundamental Rights on the limitation to core benefits permitted under Article 11(4). The

[207] This is an anomaly here/Article 11(1)(d) appears to leave it to the states to define social security, whereas in Regulation 883/2004, the range of benefits covered by this concepts is listed.
[208] See generally 'The long Term Residents Directive: a fulfilment of the Tampere Objective of Near Equality'. Louise Halleskov Sorgaard, in the First Decade of EU Migration and Asylum Law, eds Elspeth Guild and Paul Monderhoud, Martinus Nijhoff, 2012.

Charter only applies to scenarios which fall within the ambit of EU law so it was important to establish first if the claimant was someone who actually benefited from the status of LTR and thus was entitled to equal treatment. As noted above, Article 34 of the CFREU 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by EU law and national laws and practices'.

The national court's role was to assess whether, as a matter of national law, the housing benefit in question fell within Article 11(1)(d). This must be contrasted with the quite different approach taken in *Chakroun* where the court had held that social assistance was an EU concept not a national one. If the benefit did fall within the national classification of social assistance and taking Article 34 CFREU into account when making its assessment, could Article 11(4) be applied so as to limit the principle of equal treatment?

Applying by analogy its findings in *Chakroun* (see above) the court considered that Article 11(4) could only apply if the Italian Republic (not the regional authority in question) had stated clearly that it wanted to rely on invoking the limitation to core benefits set out in Article 11(4). Such reliance must, in any event, not exclude equal treatment in relation to benefits 'which enable individuals to meet their basic needs such as food accommodation and health'. Benefits which are needed to fulfil the purpose of Article 34 of the CFREU must be considered core benefits.[209]

9.8.1 Asylum seekers and refugees

Under the Reception Conditions Directive (RCD), asylum seekers have no specific right to access social assistance as such. However, Article 13 sets out general rules on the availability of material receptions conditions and Article 13(5) expressly states that these may be provided in kind or in the form of financial allowances or vouchers or in a combination of these provisions.

Refugees and beneficiaries of subsidiary protection are ensured, under Article 28 of the Qualification Directive, 'necessary social assistance' as provided for nationals in the host state but this can be limited to 'core benefits'. It may be supposed that core benefits will be

[209] The Court did not consider in this context the relationship between Article 34 CFREU and Article 1 CFREU – the right to human dignity.

given the same meaning as the court gave in the *Kamberaj* case. Article 23 of the Directive regulates family unity and Article 23(2) states that any benefits provided must guarantee an adequate standard of living.

9.9 Long Term Residents

Under the Long Term Residents Directive, those who have acquired that status are entitled to equal treatment with the state's own nationals with regard to welfare benefits (family allowances, retirement pensions, etc.) and sickness insurance; social assistance (minimum income support or retirement pensions, free health care, and so on); social benefits, tax relief and access to goods and services (see *Kamberaj* above).

9.10 Nationals of States with Special Relationships with the EU

The Euro-Mediterranean Agreements with Tunisia, Morocco and Algeria provide for non-discrimination for lawfully resident workers and their families in the field of social security. The Court recognised in the *Kziber*[210] case that the non-discrimination provision in the field of social security introduced under Article 41(1) of the EEC Morocco Cooperation Agreement had a direct effect. The Court concluded that this provision must be interpreted as meaning that it precluded a Member State from refusing to grant an *allocation d'attente*, provided by its legislation for young persons in search of employment, to a *member of the family of a worker of Moroccan nationality* living in France.

In *Echouikh*,[211] a Moroccan national who had served in the French army could not be excluded from an armed forces invalidity pension on the ground that he was not French.

The definition of family members in these agreements, or at least the way in which the concept is applied by the CJEU, is broad. The Court held in the case of *Mesbah*[212] that it included not only the worker's spouse and children and relatives in the ascending line but also those related not by blood but by marriage. A Moroccan mother-in-law wanted to rely on the non-discrimination provisions in favour of the family members of Moroccan workers,

210 Case C-18/90, *Office nationale de l'emploi v. Bahia Kziber*, [1991] ECR I-00199.
211 Case C-336/05 Optimus — Telecomunicações SA v. Fazenda Pública, [2006] ECR I-04985.
212 Case C-179/98 *Belgian State v. Fatna Mesbah,* [1999] ECR I-07955.

but her son-in-law had naturalised as a Belgian and thus as a matter of Belgian law (though not of Moroccan law) could only be considered Belgian. The mother-in-law could not therefore rely on the non-discrimination provision in the Agreement because her son was no longer Moroccan, but the Court was quite clear that she could otherwise have relied on her relationship with her son-in-law. The Agreement with Former Yugoslav Republic Of Macedonia,[213] Croatia, Albania and Montenegro states that nationals of those states who are legally employed are to be free from discrimination and their legally resident spouses and children are to have access to the labour market.

9.11 Under the ECHR

Under the ECHR, entitlement to social security and assistance may be founded in Article 1 of Protocol 1 (the right to the peaceful enjoyment of property and possessions) in relation to contribution-based benefits or in Article 8 in relation to non-contribution based needs. The right to benefits due as a consequence of payments made as contributions to a social security scheme are considered to be counted as pecuniary possessions so that they fall within the scope of Article 1 of Protocol No. 1 which protects the peaceful enjoyment of such possessions.[214] The Court has been highly critical of states which refuse benefits to lawful residents on the basis that they do not meet a nationality requirement.

Gaygusuz v. Austria[215] concerned the denial of unemployment benefits to a Turkish Citizen on the basis that he did not have Austrian nationality and *Koua Poirrez v. France*[216] concerned the denial of disability benefits to a migrant lawfully residing in France because he was neither French nor a national of a country with a reciprocal agreement with France. In both cases, the Court found violations of the Convention on the ground of nationality (although it was silent as to the impact of the Ankara Agreement in the *Gaygusuz* case).

In *Andrejeva*,[217] the applicant who had worked most of her life in Latvia, when it was part of the Soviet Union, but had at a certain point been transferred to Ukraine was denied a part of

[213] The Former Yugoslav Republic of Macedonia.
[214] See e.g. ECtHR *Gaygusuz v. Austria,* Judgment of 16 September 1996, Application No. 17371/90and ECtHR *Koua Poirrez* v. France, Judgment of September 2003, Application No. 40892/98.
[215] ECtHR *Gaygusuz v. Austria,* Judgment of 16 September 1996, Application No. 17371/90.
[216] *Koua Poirrez* v. France, Judgment of September 2003, Application No. 40892/98.
[217] ECtHR *Andrejeva v. Latvia,* Grand Chamber Judgment of 18 February 2009, Application No. 55707/00.

her pension because she had been working outside Latvia and was not a Latvian citizen. The Court could not accept the Government's argument that it would be sufficient for the applicant to become a naturalised Latvian citizen in order to receive the full amount of the pension claimed. The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question, for example, by acquiring a nationality, would render Article 14 devoid of substance. A violation was found.

The case of *Carson and others*[218] concerned UK citizens who had gone to live abroad and were awarded pensions that were less than those who had paid the same national insurance contributions from their salaries but still lived in the UK. The Court found that the pension system of the UK was logically designed to take into account the needs of those residing in the UK, which was presumed to be the case of the vast majority of pensioners and found no violation but the minority of 6 judges thought this was no justification for subjecting pensioners who chose not to live in the UK to extremely unfavourable and unequal treatment in comparison with those who do.

The case of *Niedzwiecki v. Germany* 58453/00 2005 and 12852/08 2010 concerned Polish nationals resident in Germany who were refused child benefits; they did not hold unlimited residence permits. The Court found a violation of Article 14 taken together with Article 8.

Weller v. Hungary[219] concerned a Hungarian father and Romanian mother who had a residence permit, but not settled status (the impugned decision occurred before Romania became a Member State of the EU). Hungarian law provided that maternity benefits could only be granted to the mother and that the mother must have Hungarian Citizenship or be an EEA national with a long term residence permit. The Government argued that 'exclusion from the benefit served the purpose of reducing the number of marriages of convenience....'. Applicants relied on Article 5 of Protocol No. 7 to the Convention, since men with foreign spouses were treated less favourably in the enjoyment of the benefit than those with Hungarian wives. The Court found that the law was a violation of Article 14 taken together

[218] ECtHR *Carson and Others v. The United Kingdom,* Judgment of 16 March 2010, Application No. 42184/05.
[219] ECtHR *Weller v. Hungary,* Judgment of 31 March 2009, Application No. 44399/05.

with Article 8.

Article 12(4) of the European Social Charter stipulates that social security benefits cannot be only applicable to nationals (see Tulkens separate opinion in *Weller*). Hungary, whilst being a party to the Revised Social Charter, has not accepted Article 12(4). However, as noted above, the Court has already had occasion to rely on provisions of the Social Charter which have not been accepted by the respondent state (see *Demir and Baykara v. Turkey* of 12 November 2008 [GC], §§ 45, 46, 49, 50, 86, 103, 129 and 149, regarding Articles 5 and 6 of the Social Charter).

The case of *Luczak v. Poland*[220] concerned exclusion of French self-employed farmer from a Polish social security scheme and found a violation. It contrasted the situation with the case of *Stec v. UK,* Application No. 65731/01 (2006), where differential retirement ages for men and women was found not to amount to discrimination.

In *Zeibek v. Greece*, the ethnic Turkish Muslim mother of several children was deprived, together with her children, of her Greek citizenship during a visit to Turkey. This resulted in her no longer being eligible for the pension to which she would otherwise have been entitled as the mother of a large family. The Court noted that this treatment was frequently meted out to ethnic Turkish Muslims in Thrace in North East Greece. Although her citizenship was eventually restored to her, the ECtHR found a violation of Article 1 of Protocol No. 1 because of the discriminatory nature of what had occurred.

From the foregoing examples it would appear that the approach taken by the ECtHR has been to focus primarily on considering whether the denial of a particular benefit has been grounded on one the grounds of prohibited discrimination expressly set out in Article 14 and (with the exception of *Niedzwiecki*) not on the immigration status of the individual applicants.

The structure of the ECHR and the formal content of its provisions as they were drafted has not lent itself comfortably to the application to economic and social rights and this explains why there is relatively little jurisprudence in this field. Since most of the cases that have been brought to the Strasbourg Court involved allegations of discrimination(under Article 14 ECHR) in relation either to Article 8 or Article1 Protocol 1 (peaceful enjoyment of

[220] ECtHR *Luczak v. Poland*, Judgment of 27 November 2007, Application No. 77782/01.

possessions) the jurisprudence may become more developed once aggrieved individuals start to have recourse to the broader non-discrimination provisions of Protocol 12. That protocol does not require the discrimination to be tied to another Convention right, but only to a right "set forth in [national] law".

10. Voting Rights for Migrants

In the past two decades, since Citizenship of the European Union came into being with the Treaty of Maastricht, a discourse has developed around the situation of those who are not Citizens, but integrated long term residents in the EU, sometimes known as denizens. The Treaty of Lisbon has introduced a commitment to the integration of these migrants into European society. The right to vote (and its corollary right to stand for public office) is a key element of this.

In some European countries, the question of TCNs voting excites strong reactions, in others none at all. The UK has a very open approach:[221] all Commonwealth Citizens with either the right of abode (that is those who are exempt from immigration control) or indefinite and limited leave to remain are entitled to be on the electoral register and to vote in all elections local or national. Irish Citizens can likewise be on the register and vote in all UK elections. This is not because this right has been *given* to them, but because they always had it historically as British Subjects and it was not taken away when their countries became independent. EU citizens can be on the electoral register but EU law[222] only gives them the right to vote in European and local elections. Other European States have only reluctantly accepted the decision that EU citizens resident in the state have to be permitted to vote not only in European Parliament elections but also in local elections.

However, whilst voting in national elections is still normally restricted to citizens, most EU Member States[223] permit non-EU non-nationals to vote in *local* elections in one way or another either on the basis of duration of residence, registration, particular residence status or reciprocity. As far as is ascertainable there has been no litigation brought before the ECHR challenging the absence of voting rights for non-nationals. A comprehensive survey of the measures in place in EU Member States was carried out in 2008 by Professor Kees Groenendijk.[224]

[221] Except to the question of prisoners' voting.
[222] See footnote 221 above.
[223] Germany is a notable exception.
[224] See 'Local Voting Rights for Non-nationals in Europe: What We Know & What We Need to Learn', 2008, Transatlantic Council on Migration, available at: www.migrationpolicy.org/transatlantic/docs/Groenendijk-Final.pdf.

10.1 Under EU Law

In the EU, Citizens of the Union have the right to vote and stand as candidates in elections to the European Parliament and municipal elections in their Member State or residence under the same conditions as nationals of that state.[225] Those who exercise their right to freedom of movement are entitled to stand for election and vote in this way in any member state in which they reside.[226]

Unlike most of the other rights attached to free movement, the designated family members of other nationalities, i.e. TCNs, who have the right to install themselves in any Member State with the Citizen of the Union, do not have any voting rights provided for under EU law.

Although Article 79(4) of the TEU (ex Article 63 of TEC) provides that the EU may provide incentives and support for the action of Member States with a view to promoting the integration of third country nationals residing legally in their territories, it emphatically excludes any harmonisation of the electoral laws and regulations of the Member States. That means that it is not just that no EU secondary legislation has so far been agreed or adopted in this field but there is no scope, under the existing Treaties, for such legislation to be agreed or adopted. This would require a full treaty amendment. The Long Term Residents Directive is thus silent as to voting rights for those who acquire this status.

10.2 Under the ECHR

Under the ECHR, Article 3 of Protocol No. 1, which regulates electoral rights, is not expressed in terms of a right or freedom. Rather than being drafted in terms of 'the right to vote', it states that the parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the 'free expression of the people in the choice of the legislature'. It is the only article of the ECHR which takes this form. The Court has however held that it does confer individual rights,[227] although the state's margin of appreciation in this field is very wide.

[225] Article 20(2)(b) TFEU.
[226] Article 22(1).
[227] *Mathieu-Mohin and Clerfayt v. Belgium,* ECtHR Application No. 9267/81 [1987].

Restrictions on the right to vote based on citizenship, or residence requirements, have been considered by the Strasbourg organs but normally in the context of those who once had the right to vote and lost it rather than those who never acquired it. No violation was found when a British Citizen living abroad could not, at the time, vote in parliamentary elections nor was there any discrimination in the fact that British Citizen diplomats and servicemen abroad could vote.[228] In *Hilbe v Liechtenstein,* Application No. 31981/96 (1999), a Liechtenstein Citizen resident in Switzerland for four years had lost the right to vote in Liechtenstein without acquiring the right to vote in Switzerland. The court found no violation. In *Doyle v UK,* Application No. 30158/06 it was not found to be disproportionate that a UK Citizen lost the right to vote after 15 years living abroad. *PY v France,* Application No. 66289/01 (2005) raised the question of the ten-year residence requirement in order to be able to vote which was imposed on French Citizens who moved from metropolitan France to New Caledonia. The Court held that the 10-year residence requirement could appear disproportionate at first sight. Although Mr Py had not sought to *settle* in New Caledonia he had been subject to the laws voted by the New Caledonian Congress and, in particular, to the criminal laws which could provide for prison sentences, and the 10-year residence requirement corresponded to two terms of office of Congress members. However, the Court found that New Caledonia's current status amounted to a transitional phase prior to the acquisition of full sovereignty and was part of a process of self-determination. After a tormented political and institutional history the 10-year residence condition had been a key factor in appeasing the deadly conflict. In the Court's opinion, the history and status of New Caledonia were such that they could be regarded as amounting to "local requirements" of a kind warranting the restrictions imposed on the applicant's right to vote. Consequently, the Court held unanimously that there had not been a violation of Article 3 of Protocol No. 1 and considered, having regard to that conclusion, that it was not necessary to examine the complaint based on Article 14.

[228] Application No. 7566/76 v. United Kingdom [1976] 9 DR 124.

11. The Right to Marry

Despite the increase in the incidence and formation of informal partnerships and informal families prevalent across Europe, many still adhere to the traditional wish to marry and in many migrant communities, living together without being married is still culturally and socially unacceptable. The right to marry was a provision which was introduced into the ECHR in direct response to the rules adopted in Nazi Germany which prevented German Citizens from marrying foreigners and in that context the attempts that have been made by states to restrict the right to marry to control immigration should be particularly carefully scrutinised. It is also clear that the phenomenon of forced marriages is well documented and vulnerable young women (and some men) need some special protection. "Sham marriages" which are discussed below are an abuse of the institution of matrimony. However governments have sometimes been ready to condemn as "shams" marriages situations where one party's immigration situation may merely be the catalyst for a marriage that would otherwise have taken place.

The right to marry (and found a family) is about the right to enter into a marital relationship and to found a family. The right to marry is a right which is separate and distinct from the right to respect for the family life of those who are *already married* which is protected under both Article 8 ECHR and Article 7 of the Charter of Fundamental Rights (CFREU). It is not an absolute right - and states have the right to take measures to reduce the incidence of "sham" or forced marriages. A "sham marriage" is identified as one entered into purely for immigration purposes 'with the sole aim of circumventing the rules on entry and residence'[229] and without any intention to cohabit or share the other social characteristics of marriage. Knowingly facilitating a "sham marriage" is also a criminal offence in many jurisdictions. However, many national authorities and courts continue to have difficulty making the distinction between a "sham marriage" as defined above and one which, though genuine, will *prima facie* confer an immigration advantage on a TCN spouse, and is for that reason regarded as suspicious. This reluctance is particularly prevalent in the case of 'arranged marriages', a term that can cover a variety of situations – from something close to a forced marriage to a system whereby the spouses freely and voluntarily select a mate from

[229] Article 1 of Council Resolution 97/C382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience.

a short list of candidates proposed by their families after careful research as to their suitability. *Forced marriages* occur when one (or both) of the spouses is an unwilling party to the marriage. Coercing someone into a forced marriage is now a criminal offence in many jurisdictions. Forced marriages are different from "sham marriages" in that there is an intention that the parties should, however unwillingly, cohabit. There is no European legislative measure or case law on forced marriages.

Marriages of convenience, sometimes referred to as "sham marriages", have always existed but forced marriages are a relatively newer phenomenon in modern Western Europe. So long as individuals are permitted to marry, the right is respected and any positive or negative immigration consequences that may follow the marriage are about the right to respect for family life (and the couple's choice of residence) not about the right to marry itself. A discussion of the right to family reunion in Europe is outside the scope of this paper.

11.1 Under EU law

EU law does not generically regulate marriage, although the right to marry is protected under Article 9 of the Charter of Fundamental Rights in situations which are regulated by EU law. European states and the EU have, however, put in place restrictions on the right to marry as marriages of convenience are seen as a device for circumventing immigration controls. The perceived incidence of sham marriages for immigration purposes led to the adoption at EU level of Council Resolution 97/C382/01. This Resolution reflected the concern among European states about marriages of convenience (as defined in the paragraphs above) and the Resolution listed factors which might provide grounds for considering that a marriage was one of convenience.

11.2 Under the ECHR

The right to marry is protected by Article 12 ECHR. Simple prohibitions on marriage, based on immigration status, are not permitted; neither are restrictions on marriage, purported to have been introduced to reduce the incidence of "sham marriages", if the restrictions make no attempt at assessing the genuineness of the relationship.

O'Donoghue v. UK[230] concerned the impediments to contracting a marriage (and thus forming a *de jure* family) that were imposed by the UK. Those subject to immigration control were required to obtain the permission of the immigration authorities before they were able to contract a marriage with civil validity, unless they opted to marry in the Church of England[231]. The ECtHR found that the scheme was not rationally connected to the *stated aim of reducing the incidence of sham marriages,* since when deciding whether to issue the required certificate, the determinative test was only *the immigration status* of the individual applicant and no enquiries were made to establish the genuineness or otherwise of the marriage. The Court found that the scheme violated Article 12. It was also held to be discriminatory on the ground of religion as only marriages celebrated in the Church of England were exempt from the Certificate of Approval (CoA) requirement. The restriction was imposed by the immigration authorities on the right to marry itself, and was not a rule about the immigration consequences that might flow from the marriage: The Court also found that the fees charged for CoAs were excessively high and did not provide for waiver or reduction for needy persons. The refusal of a certificate could not be challenged on the basis that it was unreasonable to expect the couple, who were indigent, to pay the fees.

The UK Supreme Court has recently struck down a provision of the Immigration Rules raising the age for marriage visas to 21.[232] The rule had ostensibly been introduced to reduce the incidence of forced marriages but in the *Quila case* there was not even a suspicion that there was a forced marriage. Indeed, the couple had been granted permission by the UK immigration authorities to marry under the Certificate of Approval scheme described above in the *O'Donoghue* case. The Supreme Court found that there was no logical connection between such a blanket rule, which permitted of no exceptions, and the incidence of forced marriage.

Restrictions on the right to marry which are too susceptible to annulment by the courts are being replaced by ever greater restrictions on the rights of TCNs to achieve family reunion with those who are settled migrants in Europe.

[230] ECtHR, *O'Donoghue v. the United Kingdom*, Judgment of 14 December 2010, Application No. 34848/07.
[231] In the UK, for historical reasons, everyone – whether Christian or not – has the right to marry in the Church of England church of the parish where they reside. Marriages in the Church of England have automatic civil validity.
[232] R (Quila and Another) v. Secretary of State for the Home Department [2011] UKSC 45.

12. Access to Remedies: Legal Aid

The foregoing sections of this paper have considered the substantive social rights to which TCNs and their family members may be entitled. This section of the paper looks at the rights which people have to challenge the refusal to accord them social rights to which they claim an entitlement: *ubi ius ibi remedium* –where there is a right there must be a remedy people's entitlements are not worth the paper on which they are written if they neither know what those entitlements are nor have the means to vindicate them. Those migrants who are already marginalised socially and linguistically are often particularly at risk of missing out on the rights to which they are entitled if they have now access to legal advice which will inform them about their entitlement and help them to claim them effectively.

12.1 Under EU Law

The right to an effective remedy is accorded much stronger protection under EU law than under the ECHR. EU law not only guarantees the right to an effective remedy (discussed below) but also the right to good administration (now also enshrined in Article 41 of the CFREU). The Court of Justice has held that this may even in some cases require the individual to have access to legal assistance at the administrative stages on the recognition of an EU right. [233]

It is therefore of crucial importance in this context whether the right that is claimed is one which falls within the scope of EU law or not. It is a key fundamental general principle of EU law that all EU rights should enjoy "effective judicial protection"[234]. Any right which falls within the scope of EU law is thus guaranteed effective judicial protection. This means that an individual must be able to bring the complaint that his EU law rights have not been properly recognised before a court which can examine all the details of the complaint in a procedure which complies with all the guarantees of the right to a fair trial and can grant redress which is legally enforceable.

Article 47 of the Charter of Fundamental Rights (CFREU) additionally guarantees effective

[233] See e.g. Case 63/01 Evans 2003.
[234] Cf Art 46 EU CFR.

remedies to all whose EU law rights have arguably been infringed. Its application is not restricted to citizens or lawful residents. This right includes the fair trial rights set out in Article 6 ECHR. The ECtHR has consistently held however that the right to a fair trial set out in detail in Article 6 does not apply to the resolution of cases which relate to asylum or immigration.[235] The only procedural protection in those fields comes from Article 13[236] ECHR which guarantees the right to an 'effective remedy' – but not necessarily to a judicial remedy - if another Convention right is engaged. Article 47 of the CFREU is different. It makes expressly clear that the fair trial guarantees found in Article 6 ECHR will apply to any issue raising a matter of EU law. The matters already discussed in this paper clearly show not only that many of the questions concerning migrants' access to social rights, but also many questions concerning their immigration status, are regulated by EU law. It is important to note that all the fair trial guarantees of Article 6 ECHR apply to the effective judicial protection of all those EU law rights even though as noted above, those same guarantees do not apply under the ECHR itself. Crucially this includes the right to legal aid, the importance of which the CJEU has recently emphasised.[237]

In addition anyone who has suffered damage as a result of the failure to accord them the rights which are guaranteed under EU Regulations or Directives may bring an action for pecuniary damages in their national courts.[238]

12.2 Under the ECHR

The right to legal aid is found in Article 6 – which as has been explained does not apply to challenges to immigration decisions themselves although it does apply to litigation challenging the denial of social welfare benefits which have been held to be covered by Article 1 of Protocol No. 1.[239]

The Court considered in the case of *Anakomba Yula v. Belgium,* Application No. 45413/07

[235] See e.g. ECtHR *Maaouia v. France* Grand Chamber Judgment of 2000, Application No. 39652/98. Article 6 applies only to the determination of civil rights or criminal charges and immigration and asylum matters are considered to be administrative and therefore fall totally outside the scope of application of the article.
[236] The right to an effective remedy.
[237] The importance of legal aid in asserting EU rights was recently affirmed by the CJEU in the Case of DEB Case 207/09 2010.
[238] Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italian Republic,* [1991] ECR 1-05357.
[239] See the cases of ECtHR *Gaygusuz v. Austria,* Judgment of 16 September 1996, Application No. 17371/90 and ECtHR *Koua Poirrez v. France*, Judgment of September 2003, Application No. 40892/98.

(2009) the refusal of legal aid to a Congolese national in an irregular immigration situation to enable her to bring paternity proceedings in the civil courts to establish that the father of the child was a Belgian Citizen was held to be a violation of Article 6 taken together with Article 14. The Court held that as the determination of paternity was the determination of a civil right relating to family life it fell within the ambit of Article 6 and the interests of justice required that she should be granted legal aid for this type of family proceedings. The regularisation of her status in Belgium depended on her being able to prove the paternity and the legal aid was refused because of her irregular immigration status. The fact that one of her motives in establishing the child's paternity was that this would enable her to regularise her immigration status could not deprive her of her entitlement to legal aid. Had she sought legal aid in the course of proceedings relating to her immigration status to enable her to establish the child's paternity the result might have been very different.

In the present climate of austerity the legal aid budgets are being cut all across Europe, including the provision of legal aid in the field of immigration, so that it will become increasingly important for claims that migrants have been wrongly denied access to social rights can be shown to fall within the scope of EU law, or involve the determination of 'civil rights' – and thus must be supported by legal aid under either EU law or the ECHR when the interests of justice so require.

13. Conclusion

This paper has assembled a miscellany of legal provisions and jurisprudence from the legal orders of the EU and the Council of Europe as they affect the social rights of migrants and their family members. As has been seen, the picture is overlapping, fragmented and often lacks coherence. There have been many advances in recent decades from the courts of both European legal orders and both courts and the committee of experts of the ESC have been as robust within the confines of the regulations that constrain them.

Despite the passage of over a decade since the adoption of the Tampere Conclusions, third country nationals in the EU, particularly in certain Member States, remain second class citizens. The fine principles of promoting equality and integration often crumble when states are faced with the reality of sharing scarce resources fairly amongst all taxpayers, as well as amongst those most needy, especially if they are foreigners. Access to the labour market is often denied for political rather than economic reasons, forcing people who would be only too willing to work for their living further into poverty. Whilst it is rare for migrant children to be unable to access basic education, the support needed to enable them to acquire further qualifications is sometimes absent and meaningful integration can thus be delayed. Everyone needs a roof over his head, but the complexities of national rules on housing and access to housing benefits mean that many migrants – even those with children - can find themselves excluded from the schemes. The safety net of social security and social assistance is sometimes denied not only to the marginalised TCNs but the even more marginalised amongst them who are old or disabled. Many problems occur as a consequence of basic minimum benefits being insufficient for people to live on, and a complex system of supplements – many of which are not exportable – has had to be introduced.

In a time of austerity, the policy considerations that impose conditions of economic self-sufficiency on the right to family reunion are understandable, but the justification of the reluctance to permit third country national taxpayers and their children from accessing the social benefits that will assist their full integration into their hosts societies is less obvious.

But perhaps the greatest problems derive from the complexity of the overlapping regimes which defy comprehension even by experts and form a maze which is complex and confusing for those who are supposed to be its beneficiaries. Laws, under the ECHR, must be 'precise

and ascertainable so that an individual may regulate his conduct by them'. The rule on the access to social benefits for migrants and their family members fall far short of the spirit of that standard.

14. Annex 1: List of members in the Council of Europe

Albania

Andorra

Armenia

Austria

Azerbaijan

Belgium

Bosnia and Herzegovina

Bulgaria

Croatia

Cyprus

Czech Republic

Denmark

Estonia

Finland

France

Georgia

Germany

Greece

Hungary

Iceland

Ireland

Italy

Latvia

Liechtenstein

Lithuania

Luxembourg

Malta

Moldova

Monaco

Montenegro

Netherlands

Norway

Poland

Portugal

Romania

Russia

San Marino

Serbia

Slovakia

Slovenia

Spain Sweden

Switzerland

The Former Yugoslav Republic of Macedonia

Turkey

Ukraine

United Kingdom

15. Annex 2: List of members in the EU, EEA and EFTA

15.1 List of members in the EU

Austria

Belgium

Bulgaria

Cyprus

Czech Republic

Denmark

Estonia

Finland

France

Germany

Greece

Hungary

Ireland

Italy

Latvia

Lithuania

Luxembourg

Malta

Netherlands

Poland

Portugal

Romania

Slovakia

Slovenia

Spain

Sweden

United Kingdom

15.2 List of members of the EEA

Austria

Belgium

Bulgaria

Cyprus

Czech Republic

Denmark

Estonia

Finland

France

Germany

Greece

Hungary

Iceland

Republic of Ireland

Italy

Latvia

Liechtenstein

Lithuania

Luxembourg

Malta

The Netherlands

Norway

Poland

Portugal

Romania

Slovakia

Slovenia

Spain

Sweden

UK

15.3 List of members of EFTA

Iceland

Liechtenstein

Norway

Switzerland

16. Annex 3

16.1 List of parties to the ESC Charter of 1961

Croatia

Czech Republic

Denmark

Germany

Greece

Iceland

Latvia

Liechtenstein

Luxembourg

Poland

Spain

United Kingdom

16.2 List of parties to the Revised ESC Charter of 1966

Albania

Andorra

Armenia

Austria

Azerbaijan

Belgium

Bosnia and Herzegovina

Bulgaria

Cyprus

Estonia

Finland

France

Georgia

Hungary

Ireland

Italy

Lithuania

Malta

Monaco

Republic of Moldova

Montenegro

Netherlands

Norway

Portugal

Romania

Russian Federation

San Marino

Serbia

Slovak Republic

Slovenia

Sweden

The Former Yugoslav Republic of Macedonia

Turkey

Ukraine

17. Annex 4: List of CJEU judgments on Ankara Agreement and its Protocol

C-186/10 Oguz v. Secretary of State for the Home Department

C-16/05 Tum and Dari [2007] ECR I-7415

C-37/98 Savas [2000] ECR I-2927

C-228/06 Soysal and Savatli [2009] ECR I-1031

C-300/09 and C-301/09 Toprak and Oguz [2010] ECR I-0000

C-171/95 Recep Tetik v. Land Berlin

C-337/018, Altun Case December 2008

C-329/97, Ergat v. Stadt Ulm, 16 March 2000

C-92/07, Commission v. Netherlands, 2010

C-371/08 Nural Ziebell, formerly Nural Örnek v Land Baden-Württemberg

C-187/10 Baris Unal v Staatssecretaris van Justitie

C-256/11 Murat Dereci and Others v Bundesministerium für Inneres

C-484/07 Fatma Pehlivan v Staatssecretaris van Justitie

T-210/09 Formenti Seleco v Commission

C-303/08 Land Baden-Württemberg v Metin Bozkurt

C-14/09 Hava Genc v Land Berlin

C-462/08 Ümit Bekleyen v Land Berlin

C-242/06 Minister voor Vreemdelingenzaken en Integratie v T. Sahin

C-453/07 Hakan Er v Wetteraukreis

C-152/08 Real Sociedad de Fútbol SAD, Nihat Kahveci v Consejo Superior de Deportes,

Real Federación Española de Fútbol

C-294/06 Ezgi Payir, Burhan Akyuz, Birol Ozturk v Secretary of State for the Home Department

C-372/06 Asda Stores Ltd v Commissioners of Her Majesty's Revenue and Customs

C-255/06 Yedaș Tarim ve Otomotiv Sanayi ve Ticaret AȘ v Council of the European Union, Commission of the European Communities

C-349/06 Murat Polat v Stadt Rüsselsheim

C-16/05 The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department

C-374/03 Gaye Gürol v Bezirksregierung Köln

C-136/03 Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg

C-467/02 Inan Cetinkaya v Land Baden-Württemberg

C-373/02 Sakir Öztürk v Pensionsversicherungsanstalt der Arbeiter

C-188/00 Bülent Kurz, né Yüce, v Land Baden-Württemberg

C-251/00 Iluminação e Electrónica Lda v Chefe da Divisão de Procedimentos Aduaneiros e Fiscais/Direcção das Alfândegas de Lisboa

Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99, Kaufring AG and Others v Commission of the European Communities

C-65/98 Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg

Joined Cases C-102/98 and C-211/98 Ibrahim Kocak v Landesversicherungsanstalt Oberfranken und Mittelfranken

C-340/97 Ömer Nazli, Caglar Nazli, Melike Nazli v Stadt Nürnberg

C-262/96 Sema Sürül v Bundesanstalt für Arbeit

C-1/97 Mehmet Birden v. Stadtgemeinde Bremen

C-210/97 Haydar Akman v. Oberkreisdirektor des Rheinisch-Bergischen Kreises

C-98/96 Kasim Ertanir v. Land Hessen

C-36/96 Faik Günaydin, Hatice Günaydin, Günes Günaydin, Seda Günaydin v. Freistaat Bayern

C-285/95 Suat Kol v. Land Berlin

C-386/95 Süleyman Eker v. Land Baden-Württemberg

C-351/95 Selma Kadiman v. Freistaat Bayern

C-277/94 Z. Taflan-Met, S. Altun-Baser and E. Andal-Bugdayci v. Bestuur van de Sociale Verzekeringsbank

C-355/93 Hayriye Eroglu v. Land Baden-Württemberg

C-237/91 Kazim Kus v Landeshauptstadt Wiesbaden

C-192/89 S. Z. Sevince v. Staatssecretaris van Justitie

Case 485/07 Raad van Bestuur v. Akdas and others

IMPACIM

THE IMPACT OF RESTRICTIONS AND ENTITLEMENTS ON THE INTEGRATION OF FAMILY MIGRANTS