



Concentrate Questions and Answers EU Law: Law Q&A Revision and Study Guide (3rd edn)

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p. 139 7. The Free Movement of Persons

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans and suggested answers, author commentary and illustrative diagrams and flowcharts. This chapter presents sample exam questions along with examiner's tips, answer plans, and suggested answers about the free movement of persons in the EU. The area of law straddles three main subdivisions, comprising the free movement of workers, involving most of the secondary legislation and case law; secondly the freedom of establishment and freedom to provide services; and additionally now, Union citizenship. The chapter includes all types of questions, such as combination essay-type questions, combination problem-type questions, problem questions concerned only with the free movement of workers, an essay-type question concentrating on the free movement of professionals and questions which involve citizenship and wider free movement issues.

Keywords: EU law, workers, freedom of establishment, services, citizenship

Are You Ready?

In order to attempt questions in this chapter, you must have covered all of these topics in both your work over the year and in revision:

- The free movement of workers, the freedom of establishment, and freedom to provide services; all of which are dealt with within the **Treaty (Arts 45–62)** and Union Citizenship (**Arts 20–25 TFEU**).

- Citizenship is the new big area of law so I have included questions on this and, as will be seen in the answers, highlighted the leading cases, including the *Sala* and *Grzelczyk* cases (C-85/96 and C-184/99), *Metock* (C-127/08), *Zambrano* (C-34/09), *O, S & L* (C-356-7/11), *Avello* (C-148/02), and *Chen* (C-200/02).
- Questions may concentrate on any one of the topics above or might involve a combination of any two or all of them.

Key Debates

Debate: the shift of emphasis from the rights of economically active workers and self-employed, to citizenship

More recently the case law of the CJEU has focused on the rights which result from the very fact of being an EU citizen without the need for economic activity on the part of the rights' holder. This is becoming a much more integral part of this topic because much of the case law now does not focus on whether a person is a worker or self-employed, but on citizenship and what that means. Indeed, the main provision of secondary legislation in this area, **Directive 2004/38**, is known as the Citizenship Directive, even though it applies and provides rights also for the economically active.

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Question 1

The Court of Justice of the EU (CJEU) has interpreted the provisions of **Arts 45–62 TFEU** and the secondary legislation in a more liberal manner than would be dictated by a purely functional view of the Treaty based on its economic motives.

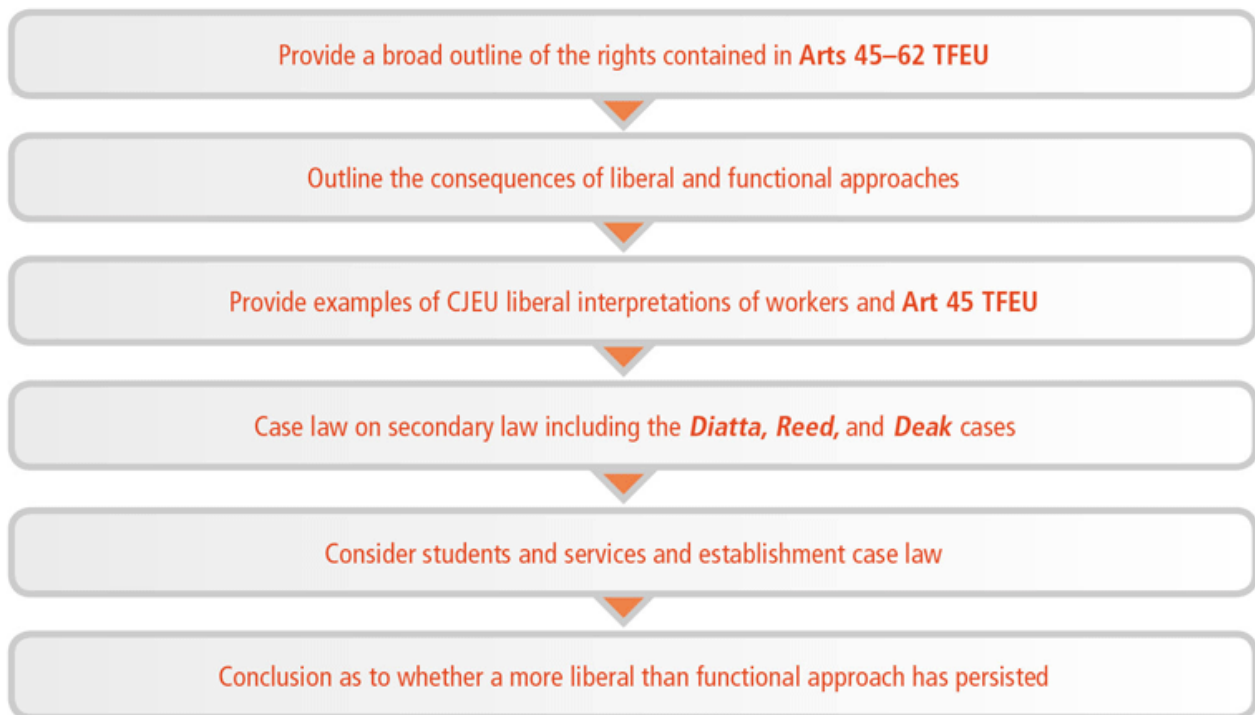
Discuss.

Caution!

■ The secondary legislation in this area of law has been overhauled and the most important acts are **Directive 2004/38**, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and **Regulation 492/2011**. These have replaced and repealed most of the previous secondary legislation in this area. Case law, though, will often still refer to the now repealed acts.

- This is a very wide question and covers the topics of the free movement of workers, the freedom of establishment, and the freedom to provide services. You must therefore plan carefully to make sure you are covering relevant material.

Diagram Answer Plan



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Suggested Answer

The scope of Arts 45–62 TFEU¹

¹ The answer could be structured in two ways. The first would be to consider the functional economic view and then give examples of the Court's liberal interpretations. Alternatively, give the examples first from case law of the liberal interpretations and compare these with how a purely functional view would look.

Articles 45–62 TFEU cover the areas of the free movement of workers, freedom of establishment, and the freedom to provide services.² The free movement of persons has been described as one of the fundamental foundations of the Union but the reason it may be so described is not obvious. Two main grounds might be given. One is that it is fundamental because the area assists the economic goals of the Union in establishing an internal market in which all factors of production can freely circulate. Alternatively, the view might be taken that the aims for these areas of EU law are to improve the opportunities and working conditions of the individuals in the work forces of the Member States. A third alternative is that it is a combination of both the above.

² Start though with reviewing the Treaty Articles covered by the question.

Essentially, the Treaty Articles in the question³ provide that workers and the self-employed can take up employment opportunities in the other Member States without discrimination on the grounds of nationality. Furthermore, they should enjoy the same rights and benefits granted in such circumstances to nationals but certain restrictions may be made in respect of employment in the public service. These basic rights can be viewed, then, in two ways.⁴

³ The range of legislation noted in the question is very wide. It would be too time-consuming to go through every provision, so you have to take an overall view.

⁴ Discuss the view that the Court of Justice has been liberal in its interpretation of the provisions and the fact that this leads to quite different consequences from the CJEU taking a purely functional view of the economic motives of the Treaty.

The functional view⁵

⁵ The functional view appears to be restricted to considering Treaty Articles and secondary provisions and it would seem best to take an overview of the Treaty objectives and then select examples from the provisions.

A purely functional view might be that the economic motives are paramount and therefore it is only the economies of the EU and the Member State that are important. The granting of individual rights is incidental and just a way of ensuring that the commodity of labour can be imported and exported to suit the demands of European capital, and so that it can take advantage of the free market and can

compete equally in attracting and securing labour. The personal rights given to workers are then secondary to the prime objectives in setting up the internal market and ensuring that business in the Member States are operating under the same rules. Under this view, it would be expected that the rights would be subject to the minimum interpretation possible to give effect to the rights granted. For example, there would be no right to be in other Member States whilst unemployed and looking for work; the Member States would have complete freedom to discriminate in the public service, or rights would not be extended to members of the family or to students.

The liberal view⁶

⁶ The liberal interpretation could be demonstrated by an overview and then by explaining selective examples.

The contrasting view is that of the liberal interpretation. The CJEU clearly interprets all parts of the Treaty in a distinct style using the so-called teleological approach. This means that specific measures are interpreted in the light of the objectives and goals of the Union and are not just subject to a literal interpretation of the words.

It is clear that in respect of the free movement of persons the CJEU has gone far beyond a literal or functional interpretation of the provisions and has, in its judgment, sought to give the widest possible scope to the rights provided. The following are examples and are not exhaustive.

Examples of generous interpretations⁷

⁷ There are very many cases you can choose from as examples. It may be that in your course or module other cases have been highlighted which you could cite instead.

Article 45 TFEU and the secondary legislation have been held to provide the status of worker to those who are not employed in the host state and have entered for the express reason to search for work; see the *Antonissen* (C-292/89) and *Lebon* (316/85) cases. The term 'worker' for the purposes of EU law also applies to those in part-time work and those who have worked only a few hours per week or were paid also in kind. See e.g. the cases of *Kempf v Staatssecretaris van Justitie* (139/85), *Lawrie-Blum v Land Baden-Württemberg* (66/85), and *Steymann v Staatssecretaris van Justitie* (196/87). The cases of *Trojani* (C-456/02) and *Ninni-Orasche* (C-413/01) confirm the liberal view of the CJEU in respect of who can constitute a worker under the Treaty.

The general prohibition of discrimination contained in **Art 45** was considered in the *Alluè and Coonan v University of Venice* case (33/88) concerning two non-national language teachers employed by the University of Venice. It was held that discrimination in circumstances where the rule was being applied to both nationals and other EU citizens would still be present but affected the non-nationals indirectly; i.e. indirect discrimination is covered by **Art 45 TFEU**.

The exception, allowed to the Member States under the public service provision in **Art 45(4) TFEU**, has been restricted in two ways. First, once a worker is employed in the public service, there can be no discrimination in respect of the conditions of work and employment. Furthermore, entry is not restricted to levels of the public service which do not exercise power conferred by public law and safeguard the interests of the state. See the cases of *Sotgiu v Deutsche Bundespost* (152/73) and *Commission v Belgium* (149/79). Such restrictions on the Member States' ability are not to be perceived from a functional view of the provision.

When we turn to the secondary legislation, even more surprising interpretations can be cited as examples. Whilst it may be possible to perceive that a non-EU national spouse has the right to stay in a Member State after separation from the EU worker, as in *Diatta* (267/83), it is unlikely that one would realise from the legislation that the rights to the same treatment in social matters would include the right to the companionship of a cohabitee; see *Netherlands v Reed* (59/85). The case law on **Art 7(2) of Regulation 1612/68**, now replaced by **Regulation 492/2011**, has certainly demonstrated

↪ the very liberal interpretation that can be achieved by the CJEU. These include the right of members of the worker's family, regardless of nationality, to join the worker but also to claim various types of social security benefit to financially help them stay in the host state. See e.g. *Fiorini aka Christini v SNCF* (32/75) and *ONE v Deak* (94/84).

The Court has even accorded the status of worker, although not necessarily all of the benefits, to work-seekers in cases including *Lebon* (316/85), *Antonissen* (C-292/89), and *Collins* (C-138/02).

Finally, by way of example, is the extension of the term 'worker' to apply in specific circumstances to students, an interpretation which is not obvious from a reading of the appropriate provisions and took place even before the Directives granting rights of residence were passed by the Council in 1990 and before the citizenship rights of entry and residence were incorporated in the Treaties in 1993. See the cases of *Lair v Universität Hannover* (39/86) and *Bernini v Netherlands Ministry of Education and Science* (C-3/90).

Furthermore, in respect of establishment and services,⁸ the CJEU ruled that **Arts 49 and 56 TFEU** were capable of giving rise to direct effects, an interpretation which could not be expressly derived from the Articles. The fact that the CJEU did not see the need for completing legislation is a liberal interpretation; see the cases of *Reyners* (2/74) and *Van Binsbergen* (33/74).

⁸ As the question is not restricted to workers, you should also include cases involving the self-employed and the provision and reception of services.

With regard to the free movement of services, there was originally nothing in the Treaty to suggest its application to education or the receivers of services; but this has been achieved in a number of cases. For example, *Luisi v Ministero del Tesoro* (286/82) concerned a prosecution under Italian currency regulations for taking money out to pay for tourist and medical provisions abroad. These were held by the CJEU to be payments for services and thus coming under the provisions of the **EEC Treaty**, payments being a fundamental freedom of the Community (now **Arts 56 and 57 TFEU** and **18 TFEU**). *Gravier v City of Liège* (293/83) concerned the decision that the fee charged to foreign students for vocational training courses but not to nationals was contrary to EU law. It is to be noted that **Directive 2004/38** has consolidated both most of the previous secondary legislation in these areas and the case law developments of the CJEU which built upon the statutory rights.

Conclusion

It can be seen from the above cases that there are good examples demonstrating that the CJEU has interpreted Articles and secondary legislation in a far more liberal manner than a functional view would dictate. Adding to this view now is the interpretation that the CJEU has been giving to the citizenship provisions (**Arts 20 and 21 TFEU**) in the cases of *Sala* (C-85/96) and *Grzelczyk* (C-184/99), and today many more cases which have extended Union citizens' rights into the areas of social and welfare law of the Member States.

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Looking for Extra Marks?

- You could mention that citizenship rights and case law are blurring the above boundaries and have provided very extensive rights, not dependent on an economic activity, and serve as further examples of the liberal interpretation of the CJEU, although citizenship is outlined in **Arts 20–25 TFEU** and not **Arts 45–62 TFEU**, which were the focus of this question. Hence, then, any inclusions must be only in addition to a full answer to the question.
- Citing cases to back up the above would be good and the following are just three from many that could be chosen: *María Martínez Sala* (C-85/96), *Grzelczyk* (C-184/99), *Chen* (C-200/02).

Question 2

Lister, a UK citizen, has moved to Denmark to take up employment in the Virtual Reality Computer Company (VRCC) as a technician. He is accompanied by his girlfriend Kristine, also a UK national, who is an expectant mother of twins. The claims she has made for unemployment benefit and maternity payments have been rejected by the authorities in Skive, the town where they have settled. The grounds given are that she is not a national and has not been resident for the required one year. Her claim that she is dependent on Lister is also rejected as she is not married to him and the authorities have now issued a deportation order against her.

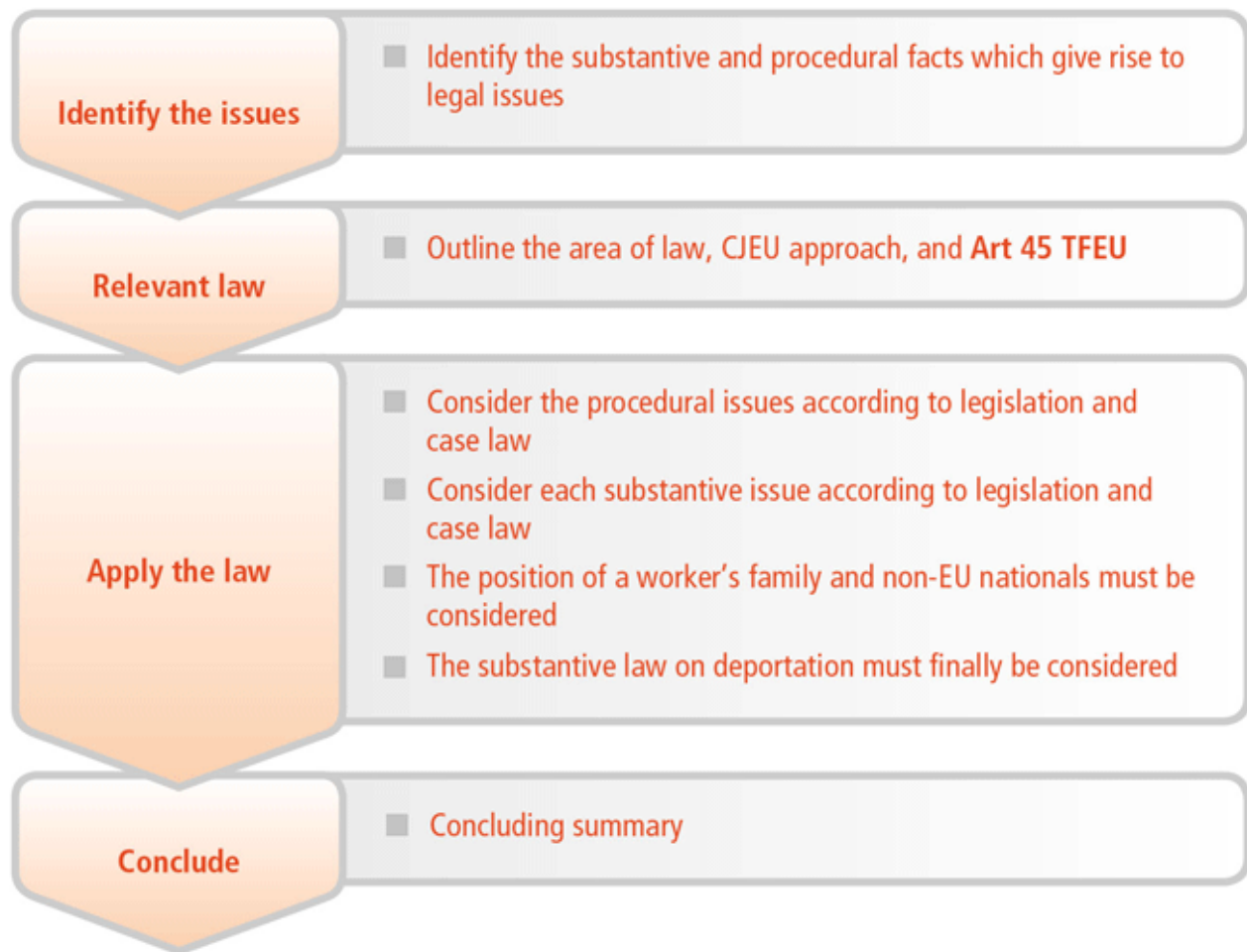
Another UK national, Rimmer, has also obtained work as a technician in VRCC. Once settled, he is joined by his distant cousin, Cat, who is not a Union national. Cat attempts to claim unemployment benefit but is refused. The authorities, now aware of his presence, have issued him with a deportation order which only states that he has no right to remain in Denmark. On a visit to Rimmer's home, a quantity of drugs brought in by Cat was discovered. As a result, Rimmer is also issued with a deportation order, stating that the presence of persons in the possession of drugs is considered to be contrary to public policy.

Advise the parties as to their rights under EU law.

Caution!

- The secondary legislation in this area of law has been overhauled and the most important acts are **Directive 2004/38**, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and **Regulation 492/2011**. These have replaced and repealed most of the previous secondary legislation in this area. Case law, though, will often still refer to the now repealed acts.
- Do not spend an inordinate amount of time proving that Lister or Rimmer are workers, as it is the rights of the others that are more problematic. You should, of course, state that they are workers, but only briefly as this point is not contentious.
- Avoid also entering into a discussion about how criminal law and procedure would regard the discovery of drugs in the home of Rimmer. Stick to the EU law issues at hand.

Diagram Answer Plan



Suggested Answer¹

¹ This problem question on the free movement of persons concentrates to a large extent on the rights of persons connected to and dependent on the worker.

The free movement of workers is provided for in Arts 45–48 TFEU,² secondary EU law, and the case law of the Court of Justice. In this area of law, the CJEU has taken a line which has sought to promote and protect the freedoms available to individual workers and to restrict, where possible, the reasons by which the Member States can restrict those freedoms.

- ² Start with a general introduction to the area of law and the attitude of the CJEU to the rights provided and restriction allowed the Member States.

The facts³

- ³ If you used the plan matrix, you can simply extract the factual issues from that.

The issues arising in this question are the deportation orders issued against Kristine, Cat, and Rimmer; the right of Kristine to remain and claim benefits; the right of Cat to remain and claim benefits; and the reasons given for deportation of Kristine, Cat, and Rimmer.

Deportation procedural rights⁴

- ⁴ The rights of Rimmer and Cat facing deportation should be considered before moving on to consider the substantive rights at issue in the problem as this is of immediate concern to them.

Union citizens in such circumstances and members of the family who are given rights under other EU legislation are provided with rights not to be deported immediately, but to be allowed to stay for at least a month by **Art 30 of Directive 2004/38**. Whether they can stay longer depends on the facts of the case; e.g. whether they can stay to argue the substantive grounds of the deportation decision through the courts, which may take longer (see **Art 9 of Directive of 2004/38** and the cases of *Adoui* and *Cornaille* (115 and 116/81) and *Pecastaing* (98/79)). However, they cannot be subject to immediate deportation. The grounds for deportation can be discussed later now that the immediate threat of deportation has been diverted.

Kristine's right to remain⁵

- ⁵ You have to consider the rights of Kristine, the girlfriend of Lister, to stay and claim benefits.

The first substantive⁶ consideration is that of the right of Kristine to stay in Denmark and claim unemployment and maternity benefits. It should first be noted that, as it is stated in the question that Lister has taken up employment and is a Union national, it can safely be concluded that he is a worker for the purposes of EU law. This point is more important for Kristine.

⁶ This quite simply means the actual rights and not the procedural ones just considered.

First, however, it must be determined whether Kristine has any EU law rights under the free movement of persons.⁷

⁷ This is because Kristine may have rights of her own and not just rights dependent on the status of Lister.

Kristine could be looking for work and would benefit from limited rights provided under **Art 45(3)(b) TFEU**, confirmed in the case of *Antonnisson (C-292/89)*, that Union nationals have the right to enter a host state and stay for a limited period providing they are actively seeking work and there is a genuine chance of being engaged. Given the facts of the case it is unlikely that this conclusion could be reached; however, if she could prove these requirements, she should be given the right to stay for six months at least.

A second and probably stronger possibility exists under **Directive 2004/38, Arts 6 and 7**. Whilst **Art 6** provides that Union citizens have a right of residence for up to three months without condition, **Art 7** extends this beyond three months but subject to the EU citizen being covered by adequate sickness insurance, which Lister could provide, but also that they do not become a burden on the state. The facts do not reveal how long they have been in the host state but the claims she is making would seem to undermine the rights to claim the protection under **Art 7** of this Directive and it appears unlikely that it is applicable in her favour. However, case law has now determined that a person can be a reasonable burden (*Grzelczyk (C-184/99)*), which is ultimately up to the national court to decide, and that the resources of others is acceptable (*Commission v Belgium (C-408/03)*), which would seem to strengthen Kristine's case to stay.

The EU free movement of workers provisions not only give rights for the worker but also rights for the worker's family. **Directive 2004/38** provides the details of those who can claim rights by virtue of their relationship to the worker. The spouse and other members of the family are defined in **Arts 2 and 3**. The Directive extends the rights available to the worker to the spouse and descendants and ascendants regardless of nationality. The descendants can be any nationality and include those under 21 and adult children over 21 where they are dependent on the worker. **Directive 2004/38** includes non-married partners and this issue was also considered previously by the CJEU in the case of *Netherlands v Reed (59/85)*. Reed applied for a residence permit in Holland claiming her right to remain was based on her cohabitation with a UK national working in the Netherlands. The Dutch Government refused to recognise this. The CJEU was aware that provisions of national laws regarding cohabitants' legal rights could be quite varied. It was unable to overcome the clear intention of **Art 10 of Regulation 1612/68** (now repealed) which referred to a relationship based on marriage. The Court

referred instead to the ‘social advantages’ guaranteed under **Art 7(2)** of the Regulation (now **Art 7(2) in 492/2011**) as being capable of including the companionship of a cohabitee which could contribute to integration in the host country. Under the **2004/38 Directive, Art 3**, where such stable and registered partnership relationships amongst nationals were accorded the legal advantages under national law, these could not be denied to nationals of other Member States without being discriminatory and thus breaching **Arts 12 and 39** of the **EC Treaty (now 18 and 45 TFEU)** in addition to the Directive. **Directive 2004/38** will strengthen these rights by providing that partners, where officially recognised by the host state law, shall be equated with spouses in the host state (**Art 2**) and have the same rights to work, education, and social assistance.

Kristine’s right to claim benefits

Therefore, as a cohabitee, or as a partner, Kristine would obtain residence rights to stay but can she claim benefits? There are a number of cases from the CJEU which have confirmed that a number of benefits may be claimed by members of the family. See, in respect of unemployment benefit, the case of *ONE v Deak* (94/84). Furthermore, it has been held that **Art 7(2)** also applies to maternity and childbirth allowances without discrimination; see *Commission v Luxembourg* (C-111/91). Her rights therefore depend on how a national cohabitee would be treated because, if possessing the right to stay, the general prohibition of discrimination under **Art 18 TFEU** would ensure that she should be treated the same. Provided that unemployment benefit and maternity rights were granted to the cohabitees of national workers, it is at least arguable that they would be extended to other Union cohabitees, but a certain result is unclear at this time and a reference to the CJEU would be advisable. The same considerations would seem to apply even under the **2004/38 Directive**.

Cat’s right to stay⁸

⁸ Likewise you must consider all of Cat’s possible rights to stay and claim benefits.

A consideration of the legal position of Cat also involves a discussion of the rights provided in respect to non-immediate members of a worker’s family. He is not a Union national and therefore cannot acquire his own right to stay. **Directive 2004/38, Art 3(2)** also provides that other family members, who are dependent on the Union citizen ↵ with primary right of residence, are to be afforded entry and residence rights but a reference would be advisable to the CJEU to confirm this.

A further argument, which is admittedly slim, to find a right for him to stay is that as cohabitee of Rimmer. Quite whether the CJEU would entertain this and whether the facts would allow this conclusion to be drawn are speculative and would certainly need a reference to the CJEU under **Art 267 TFEU**. This situation is covered by **Art 2(2) of the 2004/38 Directive** as a registered partnership regarded as the equivalent of marriage in the host state. This can be examined by the host state and a reference may still be required to confirm if this is the correct interpretation of the Directive.

Therefore, at present, there is no clear and direct obligation to allow Cat to remain, let alone to claim benefits. In the case of *Lebon* (316/85), a dependent who had the right to stay to find work could be classed as a worker for this purpose but not be able to claim benefits. Other members of the family have, however, been able to claim benefits when their right to stay was established; see *Deak* (94/84).

Cat's deportation⁹

⁹ Although you have already covered deportation rights, those were the procedural rights; you must now consider whether Cat can actually be deported lawfully. The same will be asked of Lister in the next section.

In this case, as the Member State is not obliged to let him stay, it is possibly the case that the possession of drugs would be sufficient excuse for the Member State to deport him, although the Member State has not given the reasons for the deportation, which they are required to do under **Art 30 of Directive 2004/38**. The Directive will only apply if Cat has a right to stay in the first place; if not, then deportation cannot be prevented. The deportation for drugs may well depend on the nature of the drugs involved. On balance, his rights to avoid deportation and stay are very weak.

Rimmer's deportation

The right to deport Rimmer would be subject to other considerations. **Article 27(2) of Directive 2004/38** provides that measures adopted on public policy or security must be based on personal conduct. In this case it appears not to be the personal conduct of Rimmer but that of Cat which has prompted the Member State to order deportation. Thus, as no other reasons are apparent, Denmark would not be justified under EU law in deporting Rimmer.

Looking for Extra Marks?

- If there is time, provide an overall summary chart of the various conclusions reached on each part of the answer.
- Also if there is time, further procedural rights might be included regarding the way in which the deportation is advised, rights to attend court and present your evidence, and the right to remain in the host country whilst doing so.

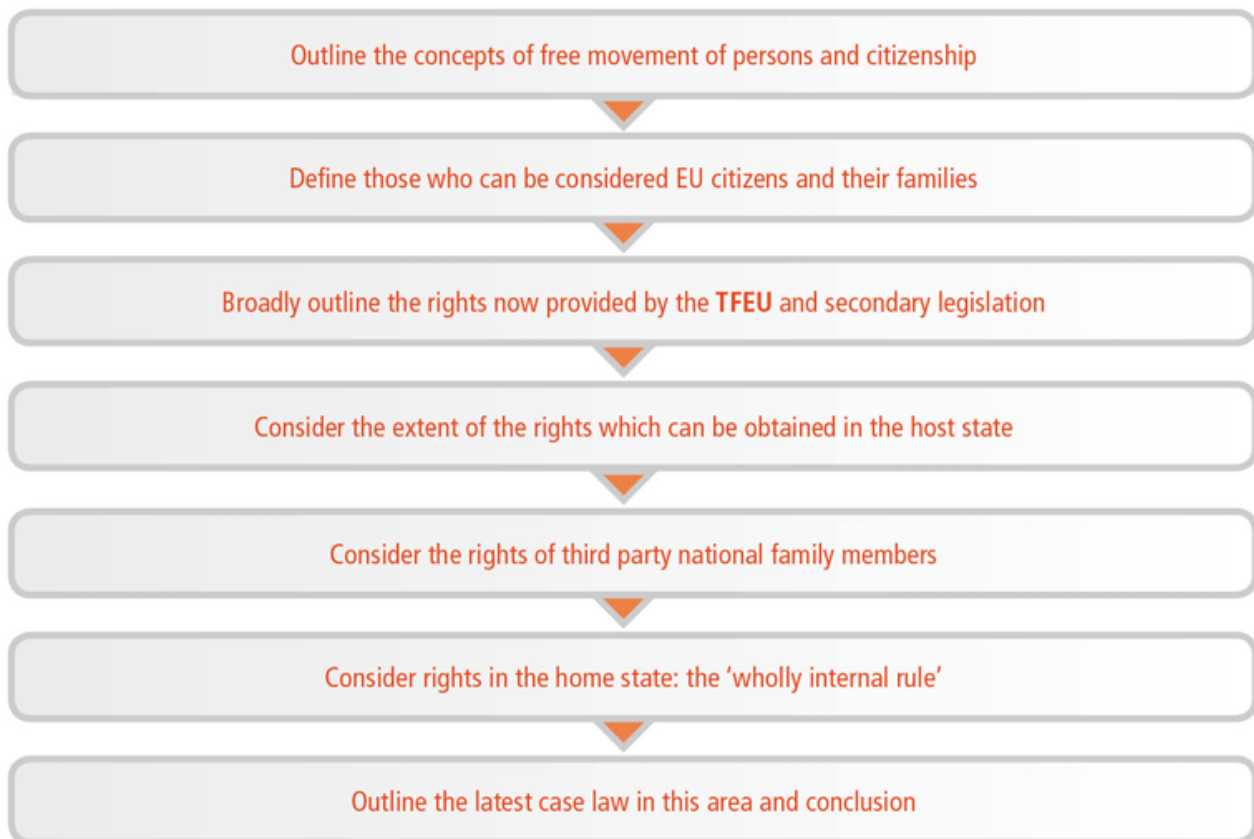
Question 3

Discuss the extent to which free movement of persons and citizenship in the EU legal order now allows EU citizens and their families to reside and obtain equal rights in any Member State of the EU.

Caution!

- The secondary legislation in this area of law has been overhauled and the most important acts are **Directive 2004/38**, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and **Regulation 492/2011**. These have replaced and repealed most of the previous secondary legislation in this area. Case law, though, will often still refer to the now repealed acts.
- This is quite an open question, which allows you to effectively choose the areas of citizenship you write about, which brings with it the danger of choosing too many and writing a long rambling answer, so be careful in your choice of material.

Diagram Answer Plan



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Suggested Answer

Outline of the legal regime for the free movement of persons and citizenship¹

¹ This question asks for a discussion of a consideration of the economically active person, and any EU citizen and members of the family, who can be from outside the EU.

From the start, the EC (now EU) provided for the free movement of persons for workers and those wishing to establish or provide services in another Member State. These rights were granted in favour of the economically active and, with later secondary legislation such as **Regulation 1612/68 (now replaced by Regulation 492/2011)**, rights were also granted to members of that person's family. The legislation also envisaged that those seeking work could also obtain limited rights and this was confirmed by the CJEU in cases such as *Lebon* and *Antonisson* (316/85 and C-292/99). Rights of entry and residence were extended to the non-economically active, first by three general Directives in 1990

and then by the **Treaty of European Union** signed at Maastricht, through the introduction of the citizenship provisions to the **EC Treaty (Arts 17–22 (now 20–25 TFEU))**. Essentially, the rights provided are that the economically active worker or self-employed person who does nothing to offend the public policy or security of the host state has the right not only to reside and stay in the host state but also to bring with him or her other members of the family and to receive employment, social, and tax benefits on an equal basis as nationals of the host state. Members of the family also have extensive rights, whereas a person not economically active has general rights now provided by **Arts 20 and 21 TFEU** to move and reside in a host state subject to any existing restrictions on the free movement of persons in the EU legal order. This means that they must be adequately insured and do not become a burden on the social security systems of the host Member State.

EU citizenship²

² Consider the extent of the rights provided under EU law and whether these rights also apply in the home state and whether all rights can be enjoyed on a par with nationals in a host state.

EU citizenship is defined by reference to each Member State's definition of citizenship as agreed by the Member States in **Declaration No 2** on Nationality attached to the original **TEU**, although no longer present in the Declarations listed by the **Lisbon Treaty**. This provided that nationality shall be settled solely by reference to the national law of the Member State concerned and was upheld in the case of *Manjit Kaur (C-192/99)*, in which the CJEU held that it is for each Member State to lay down the conditions for the acquisition and loss of nationality. The case of *Chen (C-200/02)* further upholds this position.

Family members are not restricted to citizenship of the Union and may include persons from any country as many cases have previously demonstrated, e.g. *ONE v Deak (C-94/84)*, where the Hungarian (then not a Member State) son was also able to obtain social security benefits.

Recent cases by the CJEU have provided a generous interpretation of the rights provided now.³ For example, in the *Sala and Grzelczyk cases (C-85/96 and C-184/99)*, the CJEU held that citizenship required the Union citizen to be treated equally even where claiming non-contributory benefits providing they were not an unreasonable burden on the host state. In the light of these cases, it was considered that this would mean now that once lawfully resident in a host state, citizenship would require that all rights could be enjoyed on an equal basis with nationals, i.e. there would be complete equality before the law. However, in *Collins (C-132/02)*, and confirmed in *Ioannidis (C-258/04)*,⁴ the CJEU has stepped back from confirming this position by following the AG in some of the recent cases in requiring that the EU citizen has some greater degree of connection or genuine link to the state than mere lawful residence to be able to claim all benefits on the same basis as nationals. This position is further confirmed in the cases of *Morgan and Bucher (C-11–12/06)*, *Förster v IB-Groep (C-158/07)*, and *Vatsouras and Koupatantze v ARGE Nürnberg (C-22 and 23/08)*. However, as held in

D'Hoop (C-224/98), any conditions on lawful residence in a host state which are argued to apply to EU citizens must be applied in a proportionate and non-discriminatory way. The development and extension of citizenship rights have been explored in the 2011 and 2012 articles by Hinarejos.⁵

³ It therefore requires a knowledge of Treaty and secondary law and the range of case decisions which has considerably extended EU law and far exceeds any legislative changes to the free movement of persons.

⁴ Provide an outline of the cases in which the CJEU has stepped back from the previous very generous interpretation of citizens' rights.

⁵ Noted in the 'Taking things Further' section at the end of the chapter.

Do EU citizens have EU law rights in any Member State?⁶

⁶ Consider whether in the home state of the EU citizen they can rely on EU law rights or whether the wholly internal rule still continues to apply which does not involve any cross-border element and thus falls entirely within national law.

The early law on this demonstrates how a wholly internal rule appears to give rise to reverse discrimination because nationals are denied rights which EU nationals from another Member State can uphold. In the cases *Morson and Jhanjan v Netherlands* (35 and 36/82), the applicants, both Surinamese nationals, claimed the right to stay in Holland with their Dutch national son and daughter working there. It was held by the CJEU that there was no application of Community (now EU) law to the wholly internal situation where national workers had not worked in any other Member State. However, because there was no movement from one Member State to another, Community (now EU) law did not apply and movement from a third country does not qualify.

More recent case law has weakened this position slightly. EU citizens who have moved across one of the Union internal borders and who have either provided or received services in the host state are able to take advantage of all EU law rights in both the host state and the home state when they return. For example, in *Surinder Singh* (C-370/90), an Indian spouse of a British national was able to use EU law to derive a right of residence in the UK on the basis that the spouse had previously exercised the right of free movement by providing services in another Member State but then re-established

↪ herself in the UK. Further, in *Carpenter (C-60/00)*, the CJEU held that even where there was no movement of the third country national spouse, she had the right to remain in the UK because the husband had provided services in another EU Member State. However, the situation has not yet arisen that all EU law rights can be enjoyed in the home state, unless some form of cross-border economic activity triggers those EU law rights. It is at the moment unclear just how minimum the activity needs to be; e.g. would supplying or ordering cross-border internet services allow an EU citizen to have a spouse from a third country join them and live in their home state? Only a preliminary ruling reference to the CJEU will adequately clear this up.

Summary⁷

⁷ Try to provide a balanced view of the developments thus far which have extended rights but have put a limit on that extension, as outlined in the case law in the answer.

It is clear from the recent case law that EU law is now much more generous than was previously considered to be the case. This has also been backed up by a Directive which consolidates the previous legislation and case law and provides new rights. **Directive 2004/38** has, for example, extended the concept of family to that of the partner's family, where the partnership would be recognised in the host state as equivalent to marriage and will establish a right of permanent residence after five years for both EU citizens and third-country family members. However, the complete equality suggested by the question has not yet been established in EU law and a Member State may impose a time condition on getting all rights and benefits on an equal basis with nationals.

Looking for Extra Marks?

- As this was such an open question there is considerable room for you to add material in the areas of the right to educational services, carer rights, further welfare rights, family rights.
- Additional cases could include: *Metock (C-127/08)*, *Zambrano (C-34/09)*, *O, S & L (C-356-7/11)*, *Avello (C-148/02)*, and *Chen (C-200/02)* according to how much time and space you have.

Question 4

Roger is a Belgian national made involuntarily unemployed in Belgium who decides to spend some time in the UK using his redundancy money. He is questioned on entry to the UK about his intentions, financial state, and insurance and is allowed entry. He rents a large room in a guest house, where he is joined by his sister Auriana from Belgium and his cousin Benedicta from Turkey. He wants to stay long term in the UK but after twelve weeks his money was running out. He therefore applied for social security benefit and housing benefit to enable them to move out of the guest room into a house of their own. Both of these applications are refused.

✦ Auriana is 16 and is physically and mentally disabled. She has applied for a place at a special needs school in the town. Roger applies for a non-contributory educational allowance for her which is refused by the local education authority.

Benedicta is 25 years old, has not worked at all previously and has applied for social benefit as a member of Roger's family. This is refused by the local authorities.

All three appeal against the decisions of the authorities on the grounds that they are being discriminated against in comparison with nationals. The local authorities wish to deport them as contrary to public policy because they have become a burden on the state.

Advise the parties of their rights under EU law.

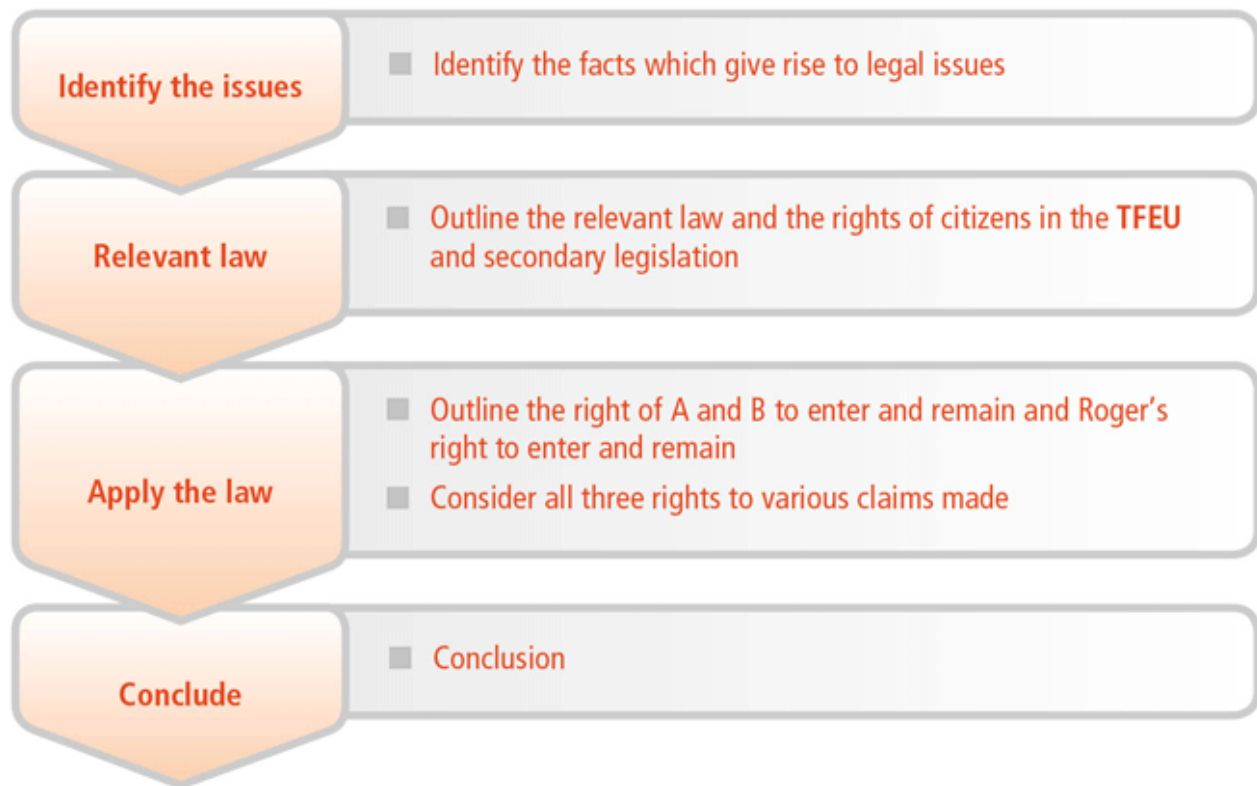
Would your answer be any different if Roger claimed he was entitled to stay because of the services he had regularly received in the UK as a result of his extensive daily use of telephone sex lines?

Caution!

■ The secondary legislation in this area of law has been overhauled and the most important acts are **Directive 2004/38**, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and **Regulation 492/2011**. These have replaced and repealed most of the previous secondary legislation in this area. Case law, though, will often still refer to the now repealed acts.

■ The structure of your answer is very important in identifying and dealing with the various issues arising from the scenario. To help, I have provided a matrix or blueprint which separates and highlights these.

Diagram Answer Plan



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Suggested Answer¹

¹ This is a problem question which requires you to explore some of the issues discussed in essay form in Question 3.

Introduction to citizens' rights²

² As usual, a brief general introduction sets the scene for the rest of the answer.

This question is concerned with the rights of EU citizens under the citizen provisions of the **TFEU**. Whilst the Treaty provision is rather limited and was not expanded significantly for a number of years, these rights have now been supplemented by secondary legislation, in particular **Directive**

2004/38 and by expansive interpretations of the CJEU. Certainly the free movement of workers was strongly upheld as one of the fundamental freedoms and rights with the EU legal order, but the status of citizenship was less clear until recent case law confirmed it as conferring directly effective residence rights on EU citizens.

The factual issues arising

The facts of this problem are that Roger, a Belgian national, enters the UK and is questioned about his intentions and financial state and is allowed entry. He is not working, nor seeking work, but is renting a house. After twelve weeks, he applies for social security and housing benefit but both are refused.

Roger's 16-year-old sister Auriana, also a Belgian national, joins him as does his Turkish cousin, Benedicta.³ Auriana wants to go to a special needs school because of her disabilities and receive a grant to do so but the grant is refused.⁴ Benedicta, who is 25, is not working and applies for social benefit, which is refused. All three face deportation on the ground given by the authorities of being a burden on the state.

³ The dependency of these two family members, one close and one who is not an immediate member of the family, needs to be discussed.

⁴ We are dealing with citizens who on the facts clearly have no basis to claim rights as workers or as self-employed.

The applicable law

The relevant law includes the citizenship **Arts 20–21 TFEU**, **Directive 2004/38**, and **Regulation 492/2011** (which strictly applies to workers only but has been extended by the CJEU to other categories), and the relevant case law of the CJEU.

Deportation threat⁵

⁵ The first matter to address in respect of all three is the possible deportation.

Article 30(3) of Directive 2004/38 provides that even in the event of a deportation order being issued, all three will have a minimum of one month before they can be required to leave the host state. This protection, by virtue of **Art 27**, also applies to Benedicta, the Turkish national. Furthermore, case law—especially the French prostitutes cases, *Adoui* and *Cornaille* (115 and 116/81) and *Pecastaing* (98/79)

—will allow them to argue that they should stay longer. In any event, **Directive 2004/38, Art 31**, requires that they must be allowed to present their case in person. Hence, having secured their temporary right to stay, the national court will have to decide whether ↵ they are a sufficiently serious threat along the guidelines of **Arts 27 and 28 of Directive 2004/38**. Whilst that is very unlikely, their right to resist deportation will ultimately depend on whether they have, in fact, any lawful basis to remain, which will be considered next.

Right of Auriana and Benedicta to enter and remain⁶

⁶ You need to decide the legal basis and the extent to which they can enter and remain in lawful residence in the host state, and claims for various social rights and whether such claims can lawfully be refused by the host state authorities.

Auriana (A) and Benedicta (B)'s rights appear to very much depend on Roger and it is unlikely that they possess their own rights to stay. B is a non-EU national who on her own has no right under EU persons law to enter and remain on her own. The **TFEU** and **Directive 2004/38** do not expressly take into account the position of persons under 18, and whilst entry under **Art 6** of the Directive may be allowed, the degree of disability of A is most likely to be the determining factor for the national authorities. In view of the fact that there is no case law governing this, if it becomes a question in the national court, a reference under **Art 267 TFEU** would appear to be needed.

Thus, if Roger has no right to stay, it is probable that they also must go. The status of Roger must be determined.

Roger's right to enter and remain

Roger is an EU citizen, as defined by **Art 20 TFEU**. He is thus clearly allowed to enter and reside under **Arts 20–21 TFEU**. **Article 21 TFEU** refers obliquely to other rights in secondary law which then further determine his right to stay. **Article 5** of the Directive provides the basic right of entry and **Art 6** provides, without further formality, a right of residence for at least three months, which has not quite expired. Arguably, until it does so he has an absolute right to stay, but one which will not last long, although he does now appear to be out of funds and thus presumably dependent on the state. Again, without clear guidance from the case law, a reference to the CJEU may be necessary.

When the three months expire, his right to remain longer is determined under **Arts 7 and 14 of Directive 2004/38** provided he continues to satisfy the criteria of **Art 7**. He is neither a worker nor self-employed and there are no facts to support the conclusion that he is seeking work and can thus avail himself of **Art 7(3)**, so none of these categories provide the right to remain.

He could stay if he were self-sufficient, as in the *Chen* case (C-200/02), which he was but is arguably no longer. He is, though, lawfully resident in the UK and from the facts not yet a burden on the authorities, although he has now made social benefits claims. Whilst remaining lawfully in the UK, he has the right not to be discriminated against as held in the *Sala* and *Grzelczyk* cases (C-85/96 and C-184/99). But he must not be a burden according to Art 7 of the Directive, although this has been interpreted in *Grzelczyk* as not being an unreasonable burden. It is up to Member State authorities to take a final view on this and the recent cases of *Morgan and Bucher* (C-11-12/06) and *Förster v IB-Groep* (C-158/07) suggest that the Member States do still retain a discretionary right to refuse benefits to those not establishing a sufficiently close connection or degree of integration in the host state. Roger would appear not to possess that. However, whilst Roger is still for the moment lawfully resident in the UK until his money runs out, we have to consider the right of his relations. The development and extension of citizenship rights have been explored in the 2011 and 2012 articles by Hinarejos.⁷

⁷ Noted in the 'Taking things Further' section at the end of the chapter.

A and B are not ascendant nor descendant members of the family within Art 2 of the Directive but more likely under Art 3(2) as other family members and those whose health requires care by Roger. So yes, there is an arguable right to enter and remain under Arts 2, 3, 5, and 6 of the Directive for up to three months.

Realising their claims⁸

⁸ Furthermore, the question of whether the host state can actually deport them must also be addressed.

A seeks to attend a special needs school, a claim which could be made under Art 10 of Regulation 492/2011; strictly that does not apply to non-workers but it might receive a sympathetic interpretation by the CJEU. The various claims for social benefits they have made look less likely to be upheld in view of the later case law of *Collins*, *Bidar*, and *Ioannidis* (C-138/02, C-209/03, and C-258/04) and more recently the cases of *Morgan and Bucher* (C-11-12/06), *Förster v IB-Groep* (C-158/07), and *Vatsouras and Koupatantze v ARGE Nürnberg* (C-22 and 23/08), which suggest that a close connection or link to the state is required. There appears to be no such link and therefore it would appear that none of them have any right to the benefits. Finally, Roger is not a worker, so Art 7(2) of the Regulation would also not apply.

There is a really outside argument that A has the right to have a carer under the *Baumbast* and *Chen* cases (C-413/99 and C-200/02) but as she is not self-sufficient, this is very unlikely.

The conclusion under the present state of the law is that if they are deemed to be a burden on the state which is unreasonable, as they are likely to be found when their claims for benefits are denied, then it would appear that the host state would be justified in deporting them. A reference to the CJEU would certainly clarify this.

The last part of the question asks,⁹ would the answer be different if Roger had used sex lines as services received? No, not if the argument that the situation is wholly internal is employed, as with *Morson and Jhanjan v Netherlands (Cases 35 and 36/82)*. Counter to this would be that fact that Roger has moved from Belgium to the UK (see the *Garcia Avello* and *D'Hoop* cases (*C-148/02 and C-224/98*)). Equally, it might be argued that the renting of premises constitutes receiving services and, whilst a repealed **Directive 64/221** expressly mentioned receiving services, **Directive 2004/38** does not. Indeed, the motive for moving or receiving services may not be important as in *Chen* (*C-200/02*) but, in view of the degree of uncertainty at this stage, an **Art 267 TFEU** reference would be advised.

⁹ Consider the alternative scenario, which will require you to discuss whether the new facts affect your conclusions as to whether Roger and his family may remain lawfully in the UK and whether in addition they may be successful in making their claims for social benefits.

Summary

The facts of this case are at the edge of case law, hence the uncertainty about the outcome of this case and the fact that at various stages a reference to the CJEU has been advised. It may be that cases will soon resolve some of these issues.

Looking for Extra Marks?

- You could make some comments that the claiming of benefits is a very sensitive area of law and that the CJEU may now be aware of that as reflected in some of the latest judgments, which are not as generous in terms of recognising rights as the previous ones.
- You could then back up the general discussion with reference to the latest cases, which include: *Dano v Jobseeker Leipzig* (*C-333/13*) and *Alopka and Moudoulou* (*C-86/12*).

Taking Things Further

- Costello, C, 'Metock: Free Movement and "Normal Family Life" in the Union' (2009) 46 CML Rev 587.

This article considers the support of family life shown in the cases of the CJEU.

■ Hinarejos, A, 'Extending Citizenship and the Scope of EU Law' (2011) 70(2) CLJ 309.

Although a little dated, this provides a good overview of the various developments in this important area of the free movement of persons in the EU.

■ Hinarejos, A, 'Citizenship of the EU: Clarifying "Genuine Enjoyment of the Substance" of Citizenship Rights' (2012) 71(2) CLJ 279.

A further article on the meaning of citizenship in EU law.

■ Kocharov, A, 'What Intra-Community Mobility for Third-Country Workers?' (2008) 33 (6) EL Rev 913.

Looks at the rights of third-country nationals in the EU.

■ Newdick, C, 'Citizenship, Free Movement and Healthcare: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 CML Rev 1645.

Looks at the particular problem of welfare tourism.

Online Resources

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