EU Law Concentrate: Law Revision and Study Guide (8th edn)
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6. Free movement of persons

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Abstract

This chapter discusses the law on the free movement of persons in the EU. Free movement of persons is one of the four 'freedoms' of the internal market. Original EC Treaty provisions granted free movement rights to the economically active: workers, persons exercising the right of establishment, and persons providing services in another Member State. The Treaty also set out the general principle of non-discrimination on grounds of nationality, 'within the scope of application of the Treaty'. All these provisions are now contained in the Treaty on the Functioning of the European Union (TFEU). Early secondary legislation granted rights to family members, students, retired persons, and persons of independent means. The Citizenship Directive 2004/38 consolidated this legislation.

Keywords: EU law, citizenship, TFEU, Citizenship Directive 2004/38, worker

The assessment

Free movement of persons is a popular assessment topic. A topical issue for essay questions is the development of Union citizenship rights, associated case law, and **Directive 2004/38**. Other favourites are the rights of the self-employed and the developing alignment of the principles applying to persons exercising the right of establishment and persons providing services in another Member State. Some courses concentrate on free movement of workers, frequently the basis of problem questions. Look out for situations involving Union citizens seeking to exercise worker rights in another Member State and family members wishing to move with them. EU law on the free movement of persons is a combination of Treaty provisions, secondary legislation, and case law.

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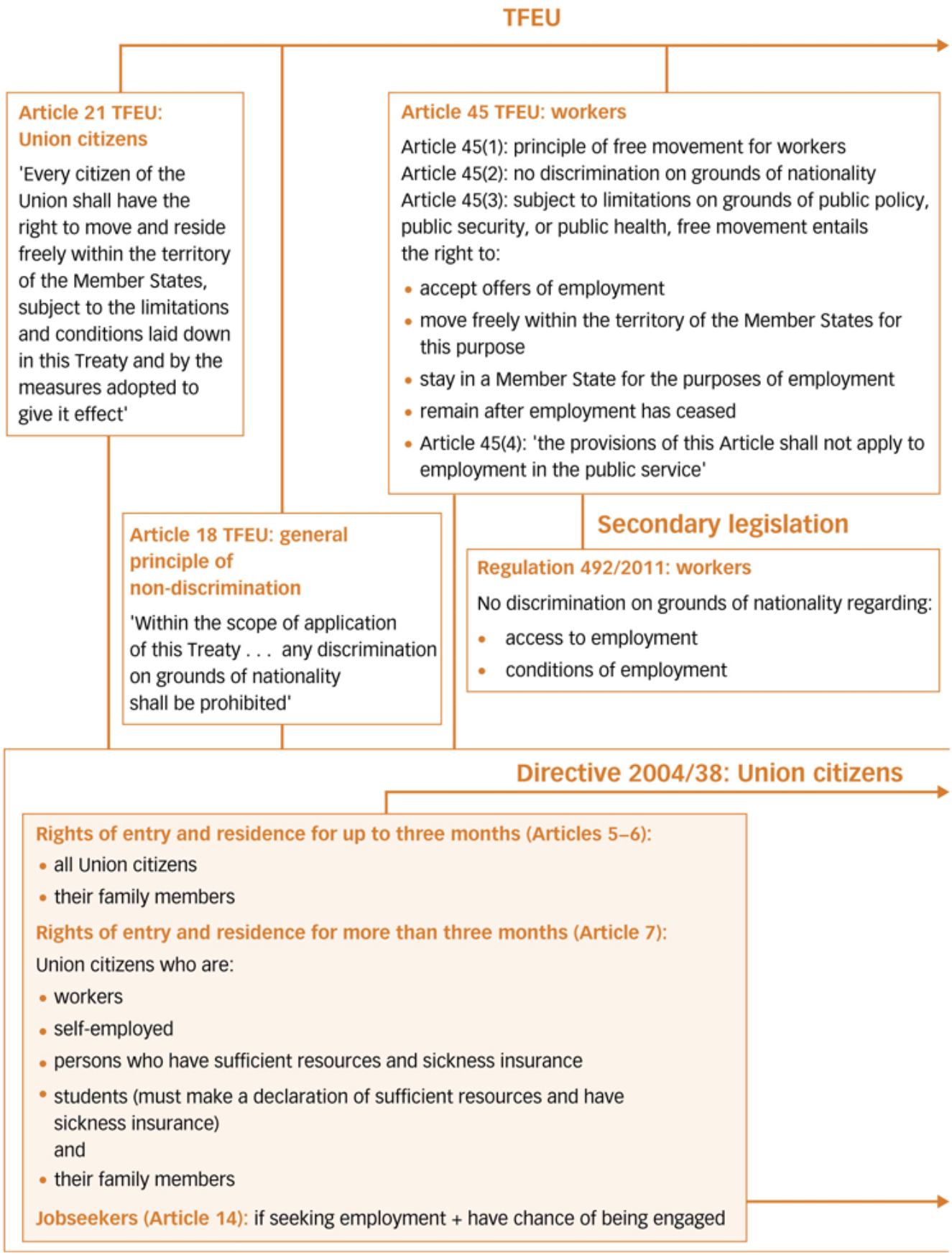
Overview: legislation



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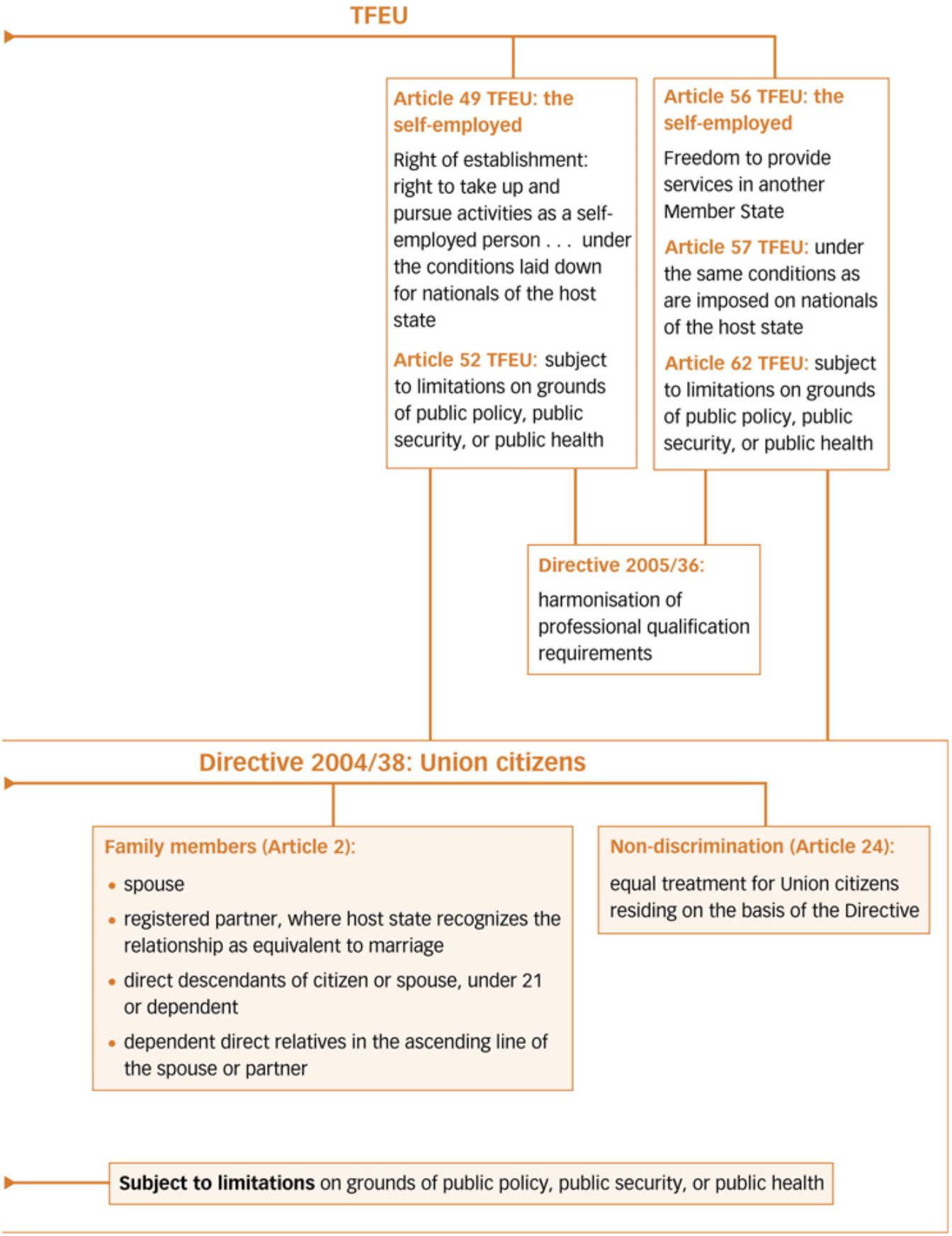

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Key facts

- Free movement of persons is one of the four 'freedoms' of the internal market.
- Original Treaty provisions granted free movement rights to the **economically active**: workers, persons exercising the right of establishment, and persons providing services in another Member State.
- The EC Treaty also set out the general principle of non-discrimination on grounds of nationality, 'within the scope of application of the Treaty'.
- All of these provisions are now contained in the **Treaty on the Functioning of the European Union (TFEU)**.
- Early secondary legislation granted rights to family members, students, retired persons, and persons of independent means. The **Citizenship Directive 2004/38** consolidated this legislation as well as clarifying and supplementing the rights of Union Citizens and their family members.
- The **Treaty on European Union** introduced the concept of Union citizenship into the EC Treaty, together with the right of all Union citizens to move freely and reside in another Member State. The **TFEU** now incorporates these provisions.
- The Court of Justice began to use Union citizenship as the basis of rights, declaring that 'Union citizenship is destined to be the fundamental status of the nationals of the Member States'.
- With the adoption of **Directive 2004/38**, EU law moved further towards breaking the link between rights and economic status.
- However, the economically active (workers and the self-employed) and their families, together with students and persons with independent means, still enjoy more extensive rights than are granted to persons simply by virtue of Union citizenship.
- Union citizenship rights are subject to 'the limitations and conditions' in the **TFEU** and secondary legislation. Member States can impose restrictions on grounds of public policy, public security, or public health, though the Court of Justice interprets these grounds restrictively.

Following the outcome of the referendum on UK membership of the EU in 2016, the departure of the UK from the EU in January 2020 and the end of the so called transition period on 31 December 2020, the rights of EU citizens and their families to reside and work in the UK and the rights of UK nationals and their families to reside and work in the EU will no longer apply and a new immigration regime will be implemented. However, EU citizens who resided in the UK before or during the transition period were able to apply by 31 June 2021 to remain in the UK under the EU Settlement Scheme.

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Free movement rights

Free movement of people is one of the four freedoms upon which the EU was built. The concept is referred to specifically in **Article 3(2) TEU** and **Article 26(2) TFEU** and is fundamental to the functioning of the internal market.

Original Treaty provisions reflected the EU's economic origins, allowing the **economically active**, workers, the self-employed, and persons providing services, to move around the EU to take up employment or business activity and established the principle of non-discrimination on grounds of nationality. The **TFEU** now incorporates these rights in **Articles 45** (workers), **49** (the self-employed), **56** (persons providing services), and **18** (non-discrimination). Later provisions, introduced by the **Treaty on European Union**, created Union citizenship and granted free movement rights to all Union citizens (**Articles 20 and 21 TFEU)**.

These provisions were supplemented by secondary legislation granting free movement rights to family members, students, retired persons, and persons of independent means (respectively Directives 68/360, 90/366, 90/365, 90/364). These directives have been repealed and their provisions consolidated into the **Citizenship Directive 2004/38** along with key principles arising from the Court of Justice's case law.

Limitations

Rights of free movement are not unlimited. **Article 21 TFEU** makes them subject to the 'conditions and limitations laid down in the Treaties and by the measures adopted to give them effect'. Member States can limit free movement and residence rights on grounds of public policy, public security, and public health. These grounds, set out in the **TFEU**, are defined and elaborated in **Directive 2004/38**.

Revision tip

It is essential to get to grips with this legislation. As you work through this Chapter, use the legislation overview chart to help you.

Citizens of the European Union

Article 20 TFEU provides that 'Citizenship of the Union is hereby established' and that every national of a Member State is a Union citizen. **Article 21** grants free movement rights to all Union citizens, subject to 'the limitations and conditions' in the Treaties and secondary legislation. Clarification of the scope of Union citizens' free movement rights is found in case law and in **Directive 2004/38**.

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Overview: case law

Union citizens
(Article 21 TFEU)

- *Grzelczyk*: 'Union citizenship is destined to be the fundamental status of the nationals of the Member States'
- Court of Justice based non-discrimination rights on citizenship
- *Baumbast*: the Court of Justice based residency rights on citizenship status, while recognizing that the Article 21 TFEU rights remain 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'

Workers
(Article 45 TFEU, Directive 2004/30, Regulation 492/2011)

Who is a 'worker'? (no Treaty definition):

- *Lawrie-Blum*: '[the] essential feature of an employment relationship . . . is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'
- *Levin,Kempf*: part-time work
- *Steymann*: unpaid work
- *Bettray, Trojani*: is rehabilitation 'work'?

Equal access to employment (Regulation 492/2011):

- *French Merchant Seamen*: a breach of Article 4 (no limits by number or percentage)
- *Groener*: no breach of Article 3 (linguistic knowledge)

Access to public service posts (Article 45(4) TFEU):

- *Commission v Belgium*: 'public service' involves 'the exercise of power conferred by public law' where there is a 'responsibility for safeguarding the general interests of the State'

Equality of treatment in employment (Regulation 492/2011):

- *Cristini*: 'social and tax advantages' need not form part of the contract of employment

Jobseekers
(Directive 2004/38 (Article 14))

- *Royer*: right to enter to seek work
- *Antonissen*: right to remain if making genuine efforts to find work, with a real chance of being employed

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Self-employed persons

(Article 49 TFEU—right of establishment, Article 56 TFEU—freedom to provide services, Directive 2004/38—right to enter and remain)

Establishment

Rules of professional conduct:

- *Gebhard*: 'measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty' must be applied in a non-discriminatory manner, justified in the general interest and suitable for and proportionate to their objective

Professional qualifications:

- *Thieffry*: qualifications recognized as equivalent must be accepted

Provision of services

- *Van Binsbergen*: professional requirements are compatible with EU law provided they are equally applicable to host state nationals, objectively justified in the public interest, and proportionate
- *Säger*: Article 56 not only requires the abolition of discrimination but also restrictions that are 'liable to prohibit or otherwise impede' the provision of services. Restrictions are acceptable only where justified by imperative reasons in the public interest, equally applicable to national and non-national providers insofar as the interest is not protected by rules applying in the state of origin, and proportionate

Recipients of services

(Directive 2004/38)

- *Cowan*: recipients of (tourist) services entitled to equal treatment under Article 18 TFEU

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Rights attached to Union citizenship: the Court of Justice

Originally, free movement and non-discrimination rights were largely confined to the economically active and their families, though the Court of Justice consistently stressed the importance of free movement as a matter of social justice, as the means for individuals to pursue enhanced life quality through increased mobility. Significantly, after Union citizenship was created, the Court began to use citizenship as the basis for rights, declaring that 'Union citizenship is destined to be the fundamental status of the nationals of the Member States' (***Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve (Case C-184/99)***).

Later, the Court based residency rights on citizenship status, while recognising that such rights remain subject to limitations and conditions.

Baumbast v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091

Facts: Baumbast, a German national who had been employed and then self-employed in the UK, challenged the refusal to renew his residence permit on the grounds that he was no longer economically active in the UK.

Held: The Court of Justice declared that Union citizenship formed the basis for residency rights, albeit subject to the conditions imposed by the relevant secondary legislation granting residency rights to financially independent persons, provided they had sufficient financial means and sickness insurance. Baumbast had sufficient means not to become a financial burden on the UK and, whilst his sickness insurance fell short of what was required, it would be disproportionate to refuse him residency rights. He had a continued right of residence in the UK, arising by direct application of [**Article 21**].

These principles were applied and confirmed in *Chen.*

Zhu and Chen v Secretary of State for the Home Department (Case C-200/02) [2004] ECR 1-9925

Facts: Mrs Chen, a Chinese national entered the UK whilst pregnant and gave birth in Northern Ireland and the child acquired Irish citizenship. The child subsequently lived with her mother in Wales, UK.

Held: the child, as a Union citizen was entitled to rely directly on **Articles 20 and 21 TFEU** to establish her right of residence in the UK. Her mother, as her primary carer, was also entitled to remain in the UK as otherwise the child's citizenship rights would be deprived 'of any useful effect'.

Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) (Case C-34/09) [2011] ECR 1-1117

Facts: The Zambranos were Columbian nationals registered as resident in Belgium. In 2003 and 2005 they had two children who acquired Belgian nationality. The parents sought to take up residence as ascendants of Belgian nationals but this was refused.

p. 130 ↵ **Held:** Emphasising the fundamental status of EU citizenship, the Court of Justice recalled that **Article 20 TFEU** provided citizenship rights to all nationals of Member States and the Zambrano children enjoyed such status. **Article 20 TFEU** precluded national rules which would deprive the citizen of the substance of those rights. The refusal to grant a right of residence to the parents would have the consequence of depriving the children of the substance of the citizenship rights conferred upon them. Indeed, the refusal to grant a right of residence would lead to the children being forced to leave the Member State in order to reside with their parents.

The subsequent cases of ***McCarthy*** and ***Dereci (Case C-256/11) [2011] ECR 1 -11315***, have confirmed the Court's 'genuine enjoyment' test from ***Zambrano***, but with the acknowledgement that this may not be applicable on the facts.

McCarthy (Case C-434/09) [2011] ECR 1-3375

Facts: McCarthy had dual Irish and British nationality but had only ever lived in the UK. She sought to rely on her EU law residence rights so that her Jamaican husband could enjoy a derived right of residence.

Held: Her claim should be rejected as not being covered by **Article 21 TFEU** (or the relevant secondary legislation) as this was a wholly internal matter since McCarthy had not previously exercised her free movement rights (see below).

Looking for extra marks?

Even before Union citizenship was established, Directives 90/364, 90/365, and 90/366 concerning students, retired persons, and persons with independent means had extended free movement rights to **economically inactive** persons. The economic link was further weakened as the Court of Justice

granted rights of non-discrimination and residence on the basis of Union citizenship. **Directive 2004/38** reiterates that Union citizenship is the fundamental status upon which free movement rights are based (**recital 3**).

Revision tip

Be familiar with these cases. You will need to discuss them in an answer concerning the significance of Union citizenship and its development as the basis for free movement rights.

Rights attached to Union citizenship: Directive 2004/38

Directive 2004/38 lays down the conditions governing the exercise of free movement and residence rights by Union citizens and their families in the EU, their rights of permanent residence, and the limitations on grounds of public policy, public security, or public health.

References in this section are to Articles of Directive 2004/38 unless otherwise stated.

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All Union citizens and their families

The Directive allows all Union citizens, and their family members irrespective of nationality, to leave their home state and move to and reside in another Member State for up to three months, without conditions or formalities, other than the requirement to hold a valid identity card or passport for Union citizens or a passport for non-EU family members. Non-EU nationals may also be required to hold an entry visa (**Articles 4–6**). For economically inactive Union citizens and their family members, the rights apply provided individuals do not become an unreasonable burden on the host state's social security system. However, expulsion must not be an automatic consequence of recourse to welfare benefits (**Article 14(3)**). Member States are not obliged to grant social assistance during this three-month period, save to workers, self-employed persons, and their families (**Article 24(2)**).

Elisabeta Dano and Florin Dano v Jobcenter Leipzig (Case C-333/13) EU:C:2014:2358

Facts: Ms Dano and her son, both Romanian nationals, resided in Germany living with Ms Dano's sister who provided for them. Ms Dano claimed unemployment benefits but this was refused. Ms Dano argued that the principle of non-discrimination in **Article 18 TFEU** prohibited Germany's domestic legislation excluding foreign nationals claiming social assistance where they enter the country to obtain such assistance or when the right of residence arises merely as a jobseeker.

Held: Ms Dano did not have sufficient resources and could not claim unemployment benefits on the basis of citizenship. **Directive 2004/38** provides that where the period of residence is in excess of three months but less than five years, as in this case, economically inactive persons must have sufficient resources (**Article 7** below). Furthermore, the Court held that the **Charter of Fundamental Rights** did not have a bearing on the case as when Germany set out in national law the conditions for granting such benefits, it was not implementing EU law. The Court is taking a strict line here on so called 'benefit tourism'.

Workers, the self-employed, and their families

The **TFEU** enshrines the primary free movement rights of economically active Union citizens in **Articles 45** (workers) and **49** (the self-employed). Under **Directive 2004/38** these persons have the right to reside in the host state for more than three months (**Article 7(1)(a)**). That right extends to family members who are Union citizens (**Article 7(1)(d)**) and to those who are not (**Article 7(2)**). The Directive also confirms the right of Union citizens to enter and remain in another Member State to seek work (**Article 14(4)(b)**), a right originally established by the Court of Justice (***Procureur du Roi v Royer (Case 48/75)***). These rights are considered in more detail below.

Persons with independent means, students, and their families

The Directive sets out a right of residence of more than three months for three other groups: persons with independent means (**Article 7(1)(b)**), students (**Article 7(1)(c)**), and their family members (**Article 7(1)(d)**).
p. 132 Persons with independent means and students must have sufficient ↵ resources for themselves and their families not to become a burden on the host state's social welfare system and have sickness insurance. Member States must not lay down a fixed amount which they regard as 'sufficient resources' but take account of an individual's personal situation (**Article 8(4)**). Students must simply make a declaration of sufficient resources (**Article 7(1)(c)**).

The non-discrimination right covers equal access to relevant courses including tuition and other course-related fees (***Gravier v City of Liège (Case 293/83)***). However, according to **Directive 2004/38**, Member States are not obliged to provide maintenance grants and student loans to persons other than workers, the self-

employed, and their families (**Article 24(2)**). This provision draws on the decisions in ***Lair v Universität Hannover (Case 39/86)*** and ***Brown v Secretary for State for Scotland (Case 197/86)***. Here, the Court of Justice restricted access to a maintenance grant to workers, the self-employed, persons who retain such status, and their families. However, the later ***Bidar*** judgment, handed down before **Directive 2004/38** came into effect, indicates that economically inactive persons may be entitled to student grants and loans provided they are lawfully resident and sufficiently integrated into the host state.

R v London Borough of Ealing & Secretary of State for Education, ex parte Bidar (Case C-209/03) [2005] ECR I-2119

Facts: Bidar, a French national, had come to the UK with his mother (who died soon after their arrival), completed his secondary education (whilst living with his grandmother), and started a course at University College, London. His student loan application was rejected on the ground that he was not settled in the UK.

Held: The Court of Justice held that, in view of developments since ***Lair*** and ***Brown***, notably the creation of Union citizenship, the Treaty right in [**Article 18 TFEU**] granted equality with nationals regarding student grants and loans, though a Member State would be justified in requiring a certain degree of integration into the state's society.

Subsequently, the Court of Justice found that a five-year residency condition imposed by the Dutch authorities was not excessive for the purposes of guaranteeing integration in these circumstances (***Förster v Hoofddirectie van de Informatie Beheer Groep (Cases C-158–157)***).

Family members

Directive 2004/38 grants entry and residence rights to the families of Union citizens exercising free movement rights as workers, self-employed persons, jobseekers, students, or persons with independent means (**Articles 5–7**). Family member rights are sometimes described as 'derivative' because they are not independent rights but derived from the Union citizen's primary rights. Family members who are Union citizens may themselves acquire independent EU rights.

'Family member'

'Family member' means, irrespective of nationality, the Union citizen's spouse and registered partner; direct descendants under 21 or those who are dependent, and those of the spouse or registered partner; and dependent direct relatives in the ascending line and those of the ↵ spouse or registered partner (**Article 2(2)**). According to case law, dependency results from a factual situation in which the Union citizen is actually providing support (***Centre Public d'Aide Sociale de Courcelles v Lebon (Case 316/85)***). In ***Jia (Case C-1/05)***, the Court of Justice ruled that the host Member State is required to assess dependency in the light of

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the financial and social conditions of the person in the country in which they were residing at the time when the application to join the EU citizen was made. Documentary evidence from the authorities of the country of origin will usually be the best form of proof.

Member States must also facilitate entry and residence for other specified individuals, irrespective of nationality: persons who in the state of origin were dependants or members of the Union citizen's household or need his/her personal care for serious health reasons and the partner with whom the Union citizen has a durable relationship (**Article 3(2)**).

'Family member' is defined more narrowly for students (**Article 7(4)**).

Spouses and partners

The legislation predating **Directive 2004/38** made no reference to 'partner', but only to 'spouse'. The Court of Justice stated in ***Netherlands State v Reed (Case 59/85)*** that 'spouse' was restricted to persons married to each other. Under **Directive 2004/38** 'family member' also includes:

> the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State. (**Article 2(2)(b)**)

Many EU countries now recognise same-sex marriages. The recent judgment in ***Coman*** was the Court's first ruling on same-sex marriages for the purposes of EU free movement law.

Coman Case C-673/16

Facts: Mr Coman, a Romanian citizen, had married his husband, a US citizen, in Belgium while residing there. He tried to return to Romania with his husband, but Romania refused residence to the latter, as it does not recognise same-sex marriage.

Held: the term 'spouse' within the meaning of the Directive is gender-neutral and may therefore cover the same-sex spouse of the EU citizen concerned (provided the marriage has taken place within an EU Member State).

Looking for extra marks?

Since Member States retain competence in the legal regulation of non-marital relationships, this provision will inevitably give rise to differences of treatment across the EU. Note the requirement of Member States to facilitate the entry of partners who fall within **Article 3(2(b)**.

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Marriages of convenience

Directive 2004/38 consolidates previous case law on marriages of convenience (***Secretary of State for the Home Department v Akrich (Case C-109/01)***). **Article 35** allows Member States to refuse, terminate, or withdraw rights in cases of abuse or fraud, such as marriages of convenience, provided such action is **proportionate**.

Death or departure of the Union citizen

Should the Union citizen die or leave the host state, the rights of family members holding Union citizenship are unaffected, though before acquiring permanent residency rights they must meet the **Article 7(1)** conditions (be workers, self-employed, students, have independent means, or be family members of a Union citizen holding such status) (**Article 12(1)**).

The position of non-EU family members is more precarious. If the Union citizen dies they can stay, provided they have lived with him/her in the host state for at least a year. Before acquiring a permanent residency right, their right remains subject to them being workers or self-employed; or having sufficient resources for themselves and their families and sickness insurance; or being family members of a person satisfying one of these requirements (**Article 12(2)**).

Non-EU family members have no right to stay if the Union citizen leaves the host state, unless they can rely on **Article 12(3)**. This provision consolidates previous case law: ***Baumbast v Secretary of State for the Home Department (Case C-413/99)***. It provides that, following the Union citizen's death or departure, his/her children in education in the host state, and the parent who has actual custody, irrespective of nationality, retain residency rights until the children's studies are completed (**Article 12(3)**).

Divorce

Separation has no effect on rights (***Diatta v Land Berlin (Case 267/83)***). Divorce, annulment of marriage, or termination of a registered partnership can have a significant impact. Again, the position of family members who hold Union citizenship is stronger than that of non-EU family members. The rights of the former are unaffected, though before acquiring permanent residency rights, they must meet the **Article 7(1)** conditions (**Article 13(1)**).

Non-EU family members can remain only in limited circumstances: the marriage/partnership has lasted at least three years, with one year in the host state; or the spouse/partner has custody of a Union citizen's children; or there are particularly difficult circumstances, such as being the victim of domestic violence; or where the spouse/partner has access rights to a child in the host state. Before acquiring a permanent residency right, their right to reside remains subject to them being workers or self-employed; or having sufficient resources for themselves and their families and sickness insurance; or being family members of a person satisfying one of these requirements (**Article 13(2)**).

Note the impact of recent cases on the interpretation of **Article 13**. In ***Singh v Minister for Justice and Equality (Case C-218/14)***, the Court of Justice held that the rights of a non-EU citizen family member would terminate when her EU citizen husband left the host Member State unless divorce proceedings had commenced before he left.

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In ***Secretary of State for the Home Department v NA***, the Court of Justice applied ***Singh*** in a case involving domestic violence and it has been noted that this could lead to harsh results.

Secretary of State for the Home Department v NA (Case C-115/15)

Facts: A Pakistani woman had been living with her German husband in the UK but left the family home due to domestic violence. Shortly afterwards, the husband left the UK before divorce proceedings had been commenced.

Held: The wife could not rely on the protection of Article 13 in these circumstances. Fortunately, she could rely on Article 12(3) (discussed above) to establish her continuing right of residence as she was the carer of her school-age children.

Looking for extra marks?

Although family members have rights 'irrespective of nationality', **Directive 2004/38** makes significant distinctions between EU and non-EU family members. Whilst the substance of their respective rights is generally the same, there are notable differences relating, in particular, to the right to remain following divorce or if the Union citizen dies or leaves the host state.

Right to take up employment

Irrespective of nationality, family members may take up employment or self-employment (**Article 23**).

Equal treatment

The right to equal treatment applies without limitation to family members of the economically active. For family members of other Union citizens (persons of independent means and students), their right to equal treatment is limited, as there is no entitlement to social assistance during the first three months of residence and no right to student grants or loans (**Article 24**).

Regulation 492/2011, Article 10 provides that workers' children have a right of access, under the same conditions as nationals of the host state, to the general educational, apprenticeship, and vocational training courses. This includes 'general measures intended to facilitate educational attendance', including grants (***Casagrande v Landeshauptstadt München (Case 9/74)***). As already noted, under **Article 12(3)**, children still in education in the host state may remain until their studies are completed and this includes a derivative right of residence for their parent or carer. In the recent case of ***Jobcenter Krefeld v JD (Case C-181/19)***, the Court clarified the right to equal access to social assistance for both the children and their parent or carers in these circumstances. The derogation from equal treatment in **Article 24(2) Directive 2004/38** will not apply.

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Administrative formalities

Member States are entitled to track population movements through administrative formalities and apply proportionate and non-discriminatory sanctions for non-compliance. This would include a requirement to report to the authorities within a reasonable period of time following arrival (***Criminal Proceedings against Lynne Watson and Alessandro Belmann (Case 118/75)***; ***Messner (Case C-265/88)***; **Directive 2004/38, Article 5**). For residence periods over three months, Union citizens may be required to register with the authorities (**Article 8**). Non-EU family members must apply for and be issued with a residence card (**Articles 9-11**). Note that such documents only evidence the right of residence and only proportionate and non-discriminatory sanctions may be imposed for non-compliance. Deportation would be a disproportionate sanction in these circumstances (***Procureur du Roi v Royer (Case 48/75)***).

Right of permanent residence

Union citizens who have resided in the host state legally and continuously for five years and non-EU family members who have resided with them in the host state for at least five years, acquire permanent residency rights. The right is unaffected by temporary absences of up to six months. Once acquired, the right is not subject to economic status and sufficient resources and can be lost only through absences exceeding two years (**Article 16**).

Certain people can enjoy a right of permanent residence before the completion of 5 years' residence for example, workers who reach retirement age whilst living in the host state (**Article 17**).

Family members relying on **Articles 12** or **13** for a right of residence will have to satisfy further conditions before qualifying for permanent residence rights.

Qualifying persons will be entitled to apply for a document certifying permanent residence (**Articles 19–21**).

Dias (Case C-352/09) confirms that only periods of lawful residence are taken into account in assessing the acquisition of the right to permanent residence.

In ***Ogieriakhi (Case C-244/13)***, the Court of Justice clarified that in the interpretation of Article 16(2), continuous periods of five years must be taken into account even when accumulated before the transposition of **Directive 2004/38**. In addition, separation of spouses during this period would not normally preclude the fulfilment of this condition.

Limitations

Union citizens' free movement rights are 'subject to the conditions and limitations' in the Treaties and secondary legislation (**Article 21 TFEU**). Member States may limit the rights of economically active EU migrants on grounds of public policy, public security, or public health (**Articles 45(3)**, **52 TFEU**). **Directive 2004/38** defines the scope of the limitations and confirms their applicability to all persons exercising rights of free movement under the Directive, for example family members of EU citizens. The limitations are considered in detail later in this Chapter. ↵

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Revision tip

Be prepared to identify who has rights under **Directive 2004/38** and what those detailed rights are. You may also be asked to deal with how those rights may be limited.

EU rights in the state of origin

The Court of Justice has held that EU free movement rights cannot be claimed against a home state unless the individual has already exercised free movement rights (***Morson and Jhanjan v Netherlands (Cases 35 & 36/82)***).

Such rights may be triggered where an individual returns to the home state following a period of economic activity in another Member State (***R v Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department (Case C-370/90)***).

To benefit from rights of re-entry, a spouse must originally have been lawfully resident in the state of re-entry. However, when assessing a claim, the authorities must have regard to the right to respect for human life under **Article 8 of the European Convention on Human Rights** (***Secretary of State for the Home Department v Akrich (Case C-109/01)***). As mentioned above, **Article 35 of Directive 2004/38** allows Member States to refuse, terminate, or withdraw rights in cases of abuse or fraud, including marriages of convenience.

Other situations have provided the necessary EU element, for instance return to the home state after time spent in another Member State as a student (***D'Hoop v Office national de l'emploi (Case C-224/98)***) and, in a claim by a non-EU national, her husband's exercise of the right to provide services under Article 49 EC (now **Article 56 TFEU**) (***Carpenter v Secretary of State for the Home Department (Case C-60/00)***).

Looking for extra marks?

Note the impact of case law on EU citizenship rights discussed earlier, for example ***Zhu and Chen***, which may mean that family members may exceptionally benefit from derivative rights of residence to ensure the 'genuine enjoyment' of the rights of EU citizens, even if these rights would not ordinarily be available.

Free movement of workers

Overview of the legislation

EU migrant workers have primary free movement rights under the **TFEU** both as Union citizens (**Article 21**) and as workers (**Article 45**).

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Article 45 TFEU: rights for workers

Article 45(1) contains the fundamental principle of free movement for workers. Free movement entails the abolition of any discrimination based on nationality between the nationals of the Member States as regards employment, remuneration, and other conditions of employment (**Article 45(2)**). It also entails the right to move freely and stay in another Member State for the purposes of employment and, subject to conditions laid down in secondary legislation, to remain after employment has ceased. The right to enter and remain is subject to limitations on grounds of public policy, public security or public health (**Article 45(3)**).

Secondary legislation

Directive 2004/38 defines the precise scope of workers' rights of entry and residence, of family members' rights, and also the limits on those rights. **Regulation 492/2011** elaborates on workers' primary right to non-discrimination on grounds of nationality, incorporating provisions concerning equal access to employment and equal treatment in employment.

Who is a 'worker'?

Worker status is of great importance because, if an individual is a worker, he or she has available the whole range of worker rights contained in the primary and secondary legislation. Whilst it is generally straightforward to establish worker status, there are a number of cases in which a claim to worker status has been challenged.

There is no Treaty definition of 'worker'. The Court of Justice has emphasised that the term may not be defined by national laws but has an EU meaning: ***Levin v Staatssecretaris van Justitie (Case 53/81)***. Clarification was provided in ***Lawrie-Blum v Land Baden-Württemberg (Case 66/85)***: '[the] essential feature of an

employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. Since worker rights relate to one of the fundamental freedoms of the EU, the Court of Justice has interpreted 'worker' broadly.

Part-time work

Levin v Staatssecretaris van Justitie (Case 53/81) [1982] ECR 1035

Facts: Levin, a British national, lived in the Netherlands where she worked part-time. Her income was small but she was supported financially by her husband, a non-EU national. The Dutch authorities refused her a residence permit, claiming that she was not a worker because her wage was lower than the nationally recognised minimum subsistence level.

Held: The Court of Justice held that, provided work is an 'effective and genuine' economic activity and not 'purely marginal and ancillary', a part-time worker is entitled to [EU] free movement rights as a worker. Additionally, a person's motives in seeking employment in another Member State are irrelevant.

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Kempf v Staatssecretaris van Justitie (Case 139/85) [1986] ECR 1741

Facts: Kempf, a German national living in the Netherlands, worked 12 hours per week as a music teacher. Like Levin, his earnings were below the minimum subsistence level but, unlike Levin, he relied on state benefits to supplement his income.

Held: The Court of Justice held that persons undertaking genuine and effective part-time employment cannot be excluded from the free movement rights accorded to workers merely because their income falls below the minimum subsistence level and is supplemented by social assistance.

Unpaid work

Even where no formal wages are paid, an individual may still be a 'worker'.

Steymann v Staatssecretaris van Justitie (Case 196/87) [1988] ECR 6159

Facts: After a short period working as a plumber in the Netherlands, Steymann, a German national, joined the Bhagwan Religious Community. As well as doing plumbing and general household work, he participated in the Community's business activities.

Held: The Court of Justice held that the fact that Steymann received no formal wages but only free accommodation and a minimal amount of money did not rule out his work as effective economic activity.

Can rehabilitation constitute 'work'?

The limits to the scope of 'worker' may be reached when the purpose of the employment is rehabilitation.

Bettray v Staatssecretaris van Justitie (Case 344/87) [1989] ECR 1621

Facts: Bettray, a German national, participated in a programme in the Netherlands aimed at reintegration into the workforce. The work undertaken was paid and supervised.

Held: Since the objective was rehabilitation, the work could not be regarded as 'effective and genuine economic activity' and therefore Bettray was not a worker for the purposes of EU law.

However, a person following a 'social reintegration programme' would be entitled to worker status if the work involved could be regarded as 'effective and genuine' economic activity.

Trojani v Centre public d'Aide Social de Bruxelles (Case C-456/02) [2004] ECR I-7574

Facts: Trojani, a French national, lived in a Salvation Army hostel in Belgium where, in return for board, lodging and pocket money, he worked for around 30 hours per week as part of a 'personal socio-occupational reintegration programme'.

p. 140 ↲ **Held:** The Court of Justice found that the benefits in kind and money received by Trojani were consideration for work for and under the direction of the hostel. The Court left the national court to decide whether that work was real and genuine, by ascertaining whether the services performed were part of the 'normal labour market'. This could involve consideration of the status and practices of the hostel, the content of the reintegration programme and the nature and detail of the work.

Retaining worker status

Article 7(3) of Directive 2004/38 provides that a Union citizen who is no longer working or self-employed may nevertheless retain worker or self-employed status. Economic status is retained if the individual is temporarily unemployed through illness or accident; or is involuntarily unemployed after working for over a year or on expiry of a fixed-term contract, if registered as a jobseeker; or embarks on vocational training. In the latter circumstance, that training must be related to the previous employment unless the individual is involuntarily unemployed. **Article 7(3)** is an important provision, since it guarantees continued worker rights.

The Court of Justice has expressly asserted that it would determine which former workers still qualified for access to benefits even though such persons were not covered in the Directive. In ***Saint Prix v Secretary of State for Work and Pensions (Case C-507/12)***, the Court ruled that female workers who were former workers at the time they gave birth still had access to benefits (provided they became workers again soon afterwards).

However, in ***Alimanovic (Case C-67/14)***, although the Court does not expressly overturn the ***Saint Prix*** judgment it appears to make it easier for Member States to justify refusal of benefits. The case concerns a Swedish woman and her daughter who had worked in Germany briefly before losing their jobs. The mother and daughter did not fall within **Article 7(3)** as former workers and so would need to be considered as first-time jobseekers (see below).

Revision tip

Can you discuss this case law confidently, for inclusion in an essay question? Would you be able to apply these cases to the 'characters' in a problem scenario?

Jobseekers

EU nationals are entitled to enter and remain in another Member State to seek work (***Procureur du Roi v Royer (Case 48/75)***). ***R v Immigration Appeal Tribunal, ex parte Antonissen (Case C-292/89)*** established that there is no right to remain indefinitely, though an individual would be entitled to remain if making genuine efforts to find work, with a real chance of being employed. **Directive 2004/38** provides protection from expulsion for jobseekers who satisfy these conditions, and their family members (**Article 14(4(b))**). According to **Article 24**, jobseekers are not entitled to social assistance in the host state. The case of ***Collins***, decided before the Directive came into force, seemed to be inconsistent.

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Collins v Secretary of State for Work and Pensions (Case C-138/02) [2004] ECR I-2703

Facts: Collins, who had dual Irish and American nationality, had come to the UK to look for work. His application for jobseeker's allowance was refused on the grounds that he was not habitually resident in the UK and was not a 'worker' under [EU] law.

Held: The Court of Justice acknowledged that in earlier decisions it had denied jobseeker's entitlement to financial benefits but referred to its more recent judgments on Union citizens' Treaty right to non-discrimination, under [**Article 18 TFEU**]. The Court held that the equality principle in [**Article 45(2) TFEU**] included a right to a financial benefit 'intended to facilitate access to employment in the labour market of a Member State'.

Nevertheless, a residence requirement attached to a jobseeker's allowance may be justified by proportionate and non-discriminatory objective factors. The required residency period must be no longer than is necessary for the authorities to be satisfied that the individual is genuinely seeking work.

Subsequently, the Court, exercising abroad interpretation of 'social assistance', has reiterated that the principle of equal treatment for Union citizens must include a financial benefit intended to facilitate access to the host state's labour market, though it would be legitimate for a Member State to grant the allowance only after establishing a real link between the jobseeker and the labour market (***Vatsouras & another v Arbeitsgemeinschaft Nürnberg 900 (Cases C-22 & 23/08)***).

Freedom of movement: right to enter and remain

Directive 2004/38 confirms and clarifies workers' free movement rights contained in **Article 45 TFEU**. It sets out the right of workers who are Union citizens to enter and reside in another Member State for more than three months (**Articles 5(1), 7(1)**) and the right of permanent residence after five years (**Article 16**). Family members, irrespective of nationality, accompanying or joining the Union citizen also have the right to enter and remain (**Articles 5(2), 7(1)(d)**, and **7(2)**) and the right to permanent residence after five years (**Article 16**).

Freedom from discrimination

Workers' rights to non-discrimination are enshrined in the **TFEU**. Freedom of movement entails the abolition of discrimination between workers of the Member States as regards employment, remuneration, and other conditions of employment (**Article 45(2)**). **Regulation 492/2011** clarifies the scope of the right, covering two main areas: eligibility for employment and equality of treatment in employment.

Regulation 492/2011, Section 1 (Articles 1–6): eligibility for employment

Any national of a Member State has the right to take up and pursue employment in another Member State with the same priority and under the same conditions as host state nationals (**Regulation 492/2011, Article 1**). The Regulation prohibits national provisions ↵ limiting applications or offers of employment or laying down special recruitment procedures, advertising restrictions, and other impediments (**Article 3**), or limiting by number or percentage the employment of EU migrant workers (**Article 4**). **Article 4** was invoked in ***French Merchant Seamen***.

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Commission v France (French Merchant Seamen) (Case 167/73) [1974] ECR 359

Ministerial orders issued under the French Code du Travail Maritime, 1926, imposed a ratio of three French to one non-French crew members on ships of the merchant fleet. By refusing to amend the relevant provision, France was in breach of the Treaty [**Article 45(2) TFEU**] and **Article 4** of what is now **492/2011**.

However, **Regulation 492/2011** permits language requirements, provided these are necessary 'by reason of the nature of the post to be filled' (**Article 3(1)**).

Groener v Minister for Education (Case 379/87) [1989] ECR 3967

Facts: Irish rules required lecturers in Irish vocational schools to be competent in the Irish language.

Held: Although the teaching post at issue did not entail the use of Irish in the classroom, the Court of Justice held that the requirement would be justified provided it formed part of national policy to promote the use of Irish as the first official language under the Irish Constitution.

However, a requirement to hold a particular language qualification would be unlawful unless it could be justified by factors unrelated to nationality and was proportionate (***Angonese v Cassa di Risparmio di Bolzano SpA (Case C-281/98)***).

Access to employment in the public service

Member States may restrict or deny access to employment in the public service on grounds of nationality (**Article 45(4) TFEU**). This provision applies only to access to employment. Discriminatory conditions of employment infringe the free movement provisions (***Sotgiu v Deutsche Bundespost (Case 152/73)***). 'Public service' is an EU concept. Its meaning is not to be determined by Member States (***Sotgiu***, ***Commission v Belgium***).

Commission v Belgium (Public Employees) (Case 149/79) [1980] ECR 3881

Facts: Under Belgian law, certain work for local authorities and on the railways, including jobs such as electrician, joiner, trainee driver, loader, platelayer, and shunter, was reserved to Belgian nationals. Belgium argued that entry to public office was a matter for Member States.

p. 143 ↵ **Held:** The Court of Justice disagreed, insisting on the uniform interpretation and application of [**Article 45(4)**] throughout the [EU] and defining 'public service' posts as those involving 'the exercise of power conferred by public law' where there was a 'responsibility for safeguarding the general interests of the State'. The posts in question fell outside the scope of [**Article 45(4)**].

Subsequently, various kinds of post have been excluded from **Article 45(4)**, including teachers and trainee teachers (***Lawrie-Blum v Land Baden-Württemberg (Case 66/85)***) and university foreign language assistants (***Allué and Coonan v Universita degli studi di Venezia (Case 33/88)***

Article 45(4) applies only where the activities are exercised on a regular basis and do not form only a minor part of the job (***Anker, Ras and Snoek v Germany (Case C-47/02)***).

Regulation 492/2011, Section 2 (Articles 7–9): employment and equality of treatment

The Regulation extends the non-discrimination principle to conditions of employment, in particular pay, dismissal, and, should the worker become unemployed, reinstatement and re-|employment. Workers are entitled to the same tax and social advantages and access to vocational training as national workers (**Article 7**), as well as to equality regarding membership of trade unions (**Article 8**) and housing, including home ownership (**Article 9**). 'Social and tax advantage' is interpreted broadly.

Cristini v SNCF (Case 32/75) [1975] ECR 1085

Facts: Cristini, an Italian national living in France and the widow of an Italian migrant worker, was refused a fare reduction card for large families, which her husband had previously claimed from French Railways (SNCF), on grounds of nationality. SNCF argued that the card was not a 'social advantage' because that term applied only to advantages attached to worker status.

Held: The Court of Justice disagreed. **Article 7** of Regulation 1612/68 [now **492/2011**] applied to all social and tax advantages, whether or not attached to the contract of employment.

'Social and tax advantage' includes any benefit available by virtue of worker status or residence on national territory, where the benefit facilitates free movement of workers, for instance a disabled adult's allowance (***Inzirillo v Caisse d'Allocations Familiales de l'Arondissement de Lyon (Case 63/76)***); a discretionary childbirth loan (***Reina v Landeskreditbank Baden-Württemberg (Case 65/81)***); and a guaranteed income for old people (***Castelli v ONPTS (Case 261/83)***).

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Direct and indirect discrimination

Discrimination is prohibited, whether direct or indirect. Direct discrimination, consisting of differentiation between nationals and non-nationals, is normally easily identified. Indirect discrimination is less obvious. Measures which appear, on their face, to treat nationals and non-nationals in the same way but in practice have a discriminatory effect are indirectly discriminatory.

Marsman v Rosskamp (Case 44/72) [172] ECR 1243

Facts: German legislation giving employment protection to workers who were injured at work applied to national workers irrespective of state of residence but only to those non-national workers living in Germany.

Held: The Court of Justice found the measure to be directly discriminatory.

Bosman (Case C-415/93)

In this case, the transfer system (under national football association rules) which required a football club wishing to engage a player, to pay a lump sum to his former club where his contract had come to an end, was held to fall foul of **Article 45 TFEU**.

Workers' families

An EU worker's free movement rights would have limited practical value if family members could not move with the worker. Family members' free movement rights (irrespective of nationality), first granted by Directive 68/360, are now contained in **Directive 2004/38**. These are derived rights, as they are entirely dependent on the worker's rights, though family members who are Union citizens have independent EU rights if they satisfy the necessary conditions.

Revision tip

Workers: make sure you understand the legislative framework: **Article 45 TFEU** (Treaty rights); **Directive 2004/38** (entry and residence); **Regulation 492/2011** (employment, equal treatment, and workers' families).

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Overview: limitations

TFEU

Rights subject to limitations of grounds of public policy, public security, or public health

Article 45(3) TFEU: workers
Article 52 TFEU: persons exercising the right of establishment
Article 62 TFEU: persons providing services

Directive 2004/38

Free movement of Union citizens subject to limitations on grounds of public policy, public security, or public health

Public policy and public security: Article 27

'Measures shall comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned'
'Previous criminal convictions shall not in themselves constitute grounds'
'The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'
'Justifications that are isolated from the particulars of the case or that rely on measures of general prevention shall not be accepted'

- a 'present' threat: *Orfanopoulos & Oliveri*
- personal conduct: *Van Duyn* (association with an organisation), *Calfa* (automatic expulsion)
- proportionality: *Orfanopoulos & Oliveri*
- general preventative measures: *Bonsignore* (deterrent measures)
- previous criminal convictions: *Bouchreau* (a 'present threat to the requirements of public policy', showing 'a propensity to act in the same way in the future')

Public health: Article 29

- diseases with epidemic potential as defined by WHO
- other infectious and contagious diseases if the subject of protection provisions in the host state
- diseases occurring after three months do not constitute grounds for expulsion

Partial restrictions: Article 22

- right of residence covers the whole territory
- partial restrictions acceptable only where they also apply to the host state's nationals
- *Rutili, Olazabal*

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Limitations on grounds of public policy, public security, or public health

Overview

As indicated throughout this chapter, free movement rights for Union citizens and family members are subject to various qualifications and limitations. Some of these have already been referred to, such as the provisions permitting Member States to restrict access to public service posts for migrant EU nationals on grounds of nationality. More particularly, **Articles 45(3)**, **52**, and **62 TFEU** allow Member States to restrict rights of entry and residence, respectively, of EU migrant workers, persons exercising the right of establishment, and those providing services, on grounds of public policy, public security, or public health.

The EU institutions and the EU Member States adopted various legislative measures to ensure that there was a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic and will review whether any future restrictions can be justified.

Directive 2004/38

The three grounds of limitation, originally contained in Directive 64/221, are now elaborated in **Directive 2004/38** as well as consolidating the pre-existing case law. The limitations, which relate only to entry and residence, apply to all categories of persons exercising rights under **Directive 2004/38**, including family members, students, and persons of independent means as well as the economically active. In view of the fundamental importance of free movement in the internal market, the Court of Justice interprets the limitations very restrictively.

Directive 2004/38 refers to 'measures' taken by Member States (**Article 27**), defined as 'any action which affects the right of persons … to enter and reside freely in the Member States under the same conditions as nationals of the host state' (***R v Bouchereau (Case 30/77)***).

Public policy and public security

Article 27 of Directive 2004/38 requires that measures taken on grounds of public policy or public security be proportionate and based exclusively on the personal conduct of the individual concerned. Here, no distinction is made between 'public policy' and 'public security', but 'public security' concerns tend to be of a more serious nature and involve more wide-ranging considerations. These grounds may not be invoked for economic reasons.

Originally, whilst insisting on a strict interpretation of 'public policy' or 'public security', the Court of Justice allowed an area of discretion to Member States, permitting them to take account of national needs. Nonetheless, the Court insisted that the scope of such restrictions must be subject to control by the EU institutions (***Van Duyn (Case 41/74)***; ***Rutili (Case 36/75)***). Later, in ***Bouchereau (Case 30/77)*** the Court moved to a narrower definition, now incorporated into **Directive 2004/38**: the conduct must represent a 'genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society' (**Article 27**).

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A 'present' threat

The personal conduct must represent a 'present' threat to the requirements of public policy or public security. The requirement must, as a general rule, be satisfied at the time of the expulsion, the national court taking account of matters demonstrating a diminution of the threat and occurring after the original decision, especially where a long time has elapsed (***Orfanopoulos and Oliveri (Cases C-482 & 493/01)***).

Personal conduct

Article 27 provides that measures justified on grounds of public policy or public security be based exclusively on the personal conduct of the individual. ***Van Duyn*** and ***Calfa*** addressed the scope of 'personal conduct'.

Van Duyn v Home Office (Case 41/74) [1974] ECR 1337

Facts: Yvonne van Duyn, a Dutch national, challenged the UK's refusal to allow her entry to work for the Church of Scientology, an organisation considered by the UK to be 'socially harmful'. Van Duyn maintained that the public policy ground did not apply, arguing that her association with the Church did not constitute 'personal conduct'.

Held: The Court of Justice held that present association with an organisation, reflecting participation in its activities and identification with its aims, constitutes personal conduct. In general, past association would not justify restrictions.

Criminal Proceedings against Donatella Calfa (Case C-348/96) [1999] ECR I-11

Facts: Ms Calfa, an Italian national, was convicted of drugs offences whilst on holiday in Crete, sentenced to three months' imprisonment, and, as required by national legislation applying to non-nationals, expelled from Greece for life.

Held: The Court of Justice emphasised that Member States may adopt against nationals of other Member States measures which they cannot apply to their own nationals, particularly on public policy grounds. However, automatic expulsion could not be justified on these grounds since automatic expulsion took no account of the offender's personal conduct.

Similar reasoning was applied in ***Orfanopoulos and Oliveri***, which concerned German legislation requiring automatic expulsion for drugs offences (***Orfanopoulos and Oliveri (Cases C-482 & 493/01)***). These principles are now incorporated into **Directive 2004/38**. Member States may not issue expulsion orders as a penalty or legal consequence of a custodial penalty, unless they conform to the conditions set out in **Articles 27** (proportionality, personal conduct, etc), **28** (protection against expulsion), and **29** (public health) (**Article 33**).

Proportionality

Restrictive measures must be proportionate to their legitimate aim. Expulsion would be a disproportionate penalty for purely administrative infringements (***R v Pieck (Case 157/79)***) and possibly also for more serious offences, as ***Orfanopoulos*** suggests. ↵

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Orfanopoulos and Oliveri v Land Baden-Württemberg (Cases C-482 & 493/01) [2004] ECR I-5257

Facts: Orfanopoulos, a Greek national, was living in Germany where he had worked intermittently. He was convicted of drugs offences and sentenced to imprisonment, followed by deportation. Oliveri was in a similar situation.

Held: The Court of Justice held that, in assessing the proportionality of the penalty, the national court must take account of a range of factors, including the nature and seriousness of the offence, the length of residence in the host state, the time that had elapsed since the offences were committed, and the offender's family circumstances. Proper regard must be had to fundamental rights, specifically to the right to family life guaranteed by **Article 8 of the European Convention on Human Rights**.

These principles are now set out in **Directive 2004/38**, which provides guidance on the matters to be considered before an expulsion order is made, including how long the individual has lived in the host state, their age, health, family, and economic situation, social and cultural integration, and links with the state of origin (**Article 28**).

Further protection is afforded to Union citizens, and their family members, with permanent rights of residence. They may be expelled only on 'serious' grounds of public policy or public security. Expulsion decisions taken against those who have resided in the host state for at least ten years or who are minors (unless justified in the best interests of the child) must be justified by 'imperative' grounds of public security. The meaning of 'imperative' is not defined in the Directive but in ***Tsakouridis (Case C-145/09)***, it was found capable of covering the fight against crime in connection with dealing in narcotics as part of an organised group.

General preventative measures

Directive 2004/38 precludes public policy and public security justifications that are 'isolated from the particulars of the case or that rely on considerations of general prevention' (**Article 27**). ***Bonsignore***, which predates the Directive, clarifies the meaning of 'considerations of general prevention'.

Bonsignore v Oberstadtdirektor of the City of Cologne (Case 67/74) [1975] ECR 297

Facts: The German authorities had ordered the deportation of Bonsignore, an Italian national, following his conviction for unlawful possession of a firearm and causing death by negligence. The national court considered that the only possible justification for deportation would be 'reasons of a general preventive nature', based on 'the deterrent effect' on other non-nationals.

Held: The Court of Justice held that such reasons do not justify restrictive measures.

Previous criminal convictions

Directive 2004/38 provides that previous criminal convictions shall not in themselves constitute grounds for measures taken on public policy or public security grounds (**Article 27**). ***Bouchereau*** provides guidance on previous convictions. ↵

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R v Bouchereau (Case 30/77) [1977] ECR 1999

Facts: Bouchereau, a French national working in England, was convicted of drugs offences. The magistrates proposed to recommend his deportation and sought clarification on whether previous convictions could be taken into account.

Held: The Court of Justice held that previous criminal convictions can only be taken into account when 'the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy'. This could only be the case where the individual showed 'a propensity to act in the same way in the future'.

Partial restrictions

Previous provisions allowed Member States to exclude or deport persons exercising EU free movement rights but it was less clear whether partial restrictions were permitted. ***Olazabal*** addressed this issue.

Rutili v Ministre de l'Intérieur (Case 36/75) [1975] ECR 1219

Facts: Rutili, an Italian national resident in France, was a well-known trade union activist. Taking the view that he was 'likely to disturb public policy' the French authorities prohibited him from living in four particular *départements*.

Held: The Court of Justice held that prohibitions on residence may be imposed only in respect of the whole of the national territory, unless nationals are subject to the same limitations. Otherwise, they amount to inequality of treatment and a breach of the Treaty (now **Article 18 TFEU**).

The approach was different in ***Olazabal***.

Ministre de l'Intérieur v Olazabal (Case C-100/01) [2002] ECR I-10981

Facts: Olazabal, a Spanish national of Basque origin, who had served a prison sentence in France following convictions for terrorism, was prohibited from residing in *départements* bordering Spain.

Held: The Court of Justice declared that where nationals of other Member States are liable to deportation from the host state they are also capable of being subject to less severe measures consisting of partial restrictions, even though the host state cannot apply such measures to its own nationals.

Under **Directive 2004/38** the right of residence covers the whole territory of a Member State. Partial restrictions may be imposed only where the same restrictions apply to the host state's own nationals (**Article 22**). In the light of its judgment in ***Olazabal***, it will be interesting to see how the Court of Justice interprets this provision in the future.

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Public health

The only diseases justifying restrictions on free movement are those with 'epidemic potential' (as defined by the World Health Organization) and other infectious or contagious diseases that are the subject of 'protection provisions' applying to the host state's nationals. Diseases occurring beyond completion of three months' residence do not justify expulsion. During that period, Member States may insist upon a medical examination, free of charge, but not as a matter of routine (**Article 29**).

Procedural rights

Important procedural safeguards supplement Union citizens' substantive rights, including: the right to be notified of decisions and the grounds on which decisions are based; the right of appeal; and the right to remain pending an appeal. Persons excluded on public policy or public security grounds may, after a reasonable period and in any event after three years, apply to have the order lifted on the ground that there has been a material change in the circumstances which justified the exclusion (**Articles 31–33**).

Revision tip

Be confident about use of key cases. Whilst some pre-date **Directive 2004/38**, they are still relevant to the interpretation of the limitation provisions. It is also important to take note of more recent case law in which the Court of Justice has indicated its current approach to the scope of relevant rights (and any limitations).

Implications of Brexit

Although the UK formally left the EU on 31 January 2020 during the 11-month transition period which concluded on 31 December 2020, the UK remained within the EU customs union and internal market, meaning that the free movement of persons provisions considered previously applied in their entirety. The rights of EU citizens and their families to reside and work in the UK and the rights of UK nationals and their families to reside and work in the EU will now no longer apply and a new immigration regime will be implemented.

However, and of great importance to many, under the EU Settlement Scheme (required under the terms of the Withdrawal Agreement), EU citizens who resided in the UK or who moved to the UK during the transition period could apply (by 31 June 2021, subject to permitted extensions) to remain in the UK. If successful they have been (or will be) granted either 'settled' status if they have resided in the UK for a period of five years in line with the 'permanent residency rights' discussed earlier, or pre-settled status for those with less than five years of living in the UK. You should watch out for future case law on the interpretation of such rights.

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Key cases

CASE	FACTS	PRINCIPLE
Baumbast v Secretary of State for the Home Department (Case C-413/99) [2002] ECR I-7091	A German national living in the UK challenged the refusal to renew his residence permit on the ground that he was no longer economically active in the UK.	Baumbast had sufficient means and adequate sickness insurance. He had a continued right of residence in the UK, arising by direct application of [**Article 21 TFEU**].
Bettray v Staatssecretaris van Justitie (Case 344/87) [1989] ECR 1621	Bettray participated in a drug-rehabilitation programme aimed at reintegrating people into the workforce.	Since the objective was rehabilitation, the work was not an 'effective and genuine economic activity'.
Bonsignore v Oberstadtdirektor of the City of Cologne (Case 67/74) [1975] ECR 297	The German authorities had ordered the deportation of Bonsignore, an Italian national, following his conviction for unlawful possession of a firearm and causing death by negligence.	'Reasons of a general preventive nature', based on 'the deterrent effect' on other non-nationals do not justify restrictive measures.
Commission v Belgium (Public Employees) (Case 149/79) [1980] ECR 3881	Belgian law reserved certain posts to Belgian nationals.	'Public service posts' defined as involving 'the exercise of power conferred by public law' where there is a 'responsibility for safeguarding the general interests of the state.'
Commission v France (French Merchant Seamen) (Case 167/73) [1974] ECR 359	French provisions imposed a ratio of three French to one non-French crew members on ships of the merchant fleet.	France was in breach of the Treaty [**Article 45(2) TFEU**] and **Article 4** of Regulation 1612/68 [now **Regulation 492/2011**].
Criminal Proceedings against Donatella Calfa (Case C-348/96) [1999] ECR I-11	Calfa, an Italian national, was convicted of drugs offences in Greece, sentenced to three months' imprisonment, and, as required by national legislation applying to non-nationals, expelled for life.	Member States may adopt against nationals of other Member States measures which they cannot apply to their own nationals, on public policy grounds. However, automatic expulsion cannot be justified, since it takes no account of the woffender's personal conduct.
Cristini v SNCF (Case 32/75) [1975] ECR 1085	Cristini, the Italian widow of an Italian migrant worker living in France, was refused a French Railways fare reduction card on grounds of nationality.	Regulation 1612/68 [now **Regulation 492/2011**] applies to all social and tax advantages, whether or not attached to an employment contract.

CASE	FACTS	PRINCIPLE
Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm) (Case C-34/09) [2011] ECR 1-1117	Non-EU citizen parents of EU citizens parents sought to take up residence as ascendants of Belgian nationals was refused.	**Article 20 TFEU** precluded national rules which would deprive the citizen of the substance of those rights.
p. 152 ↵ ***Groener v Minister for Education (Case 379/87) [1989] ECR 3967***	Irish rules required lecturers in Irish vocational schools to be competent in the Irish language.	The requirement would be justified under Regulation 1612/68 [now **Regulation 492/2011**] provided it formed part of national policy to promote the use of Irish as the first official language under the Irish Constitution.
Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1986] ECR 2121	The national court sought clarification of the meaning of 'worker'.	'[The] essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'
Levin v Staatssecretaris van Justitie (Case 53/81) [1982] ECR 1035	Levin, a British national, lived in the Netherlands, where she worked part-time.	Provided work is 'effective and genuine' and not 'purely marginal and ancillary', a part-time worker is entitled to EU free movement rights as a worker. A person's motives in seeking employment in another Member State are irrelevant.
Ministre de l'Intérieur v Olazabal (Case C-100/01) [2002] ECR I-10981	Olazabal, a Spanish national of Basque origin, who had served a prison sentence in France following convictions for terrorism, was prohibited from residing in *départements* bordering Spain.	Where nationals of other Member States are liable to deportation from the host state they are also capable of being subject to less severe measures consisting of partial restrictions, even though the host state cannot apply such measures to its own nationals.
Orfanopoulos and Oliveri v Land Baden-Württemberg (Cases C-482 & 493/01) [2004] ECR I-5257	Orfanopoulos, a Greek national, was living in Germany where he had worked intermittently. He was convicted of drugs offences and sentenced to a term of imprisonment, followed by deportation.	In assessing the proportionality of the penalty, the national court must take account of a range of factors, including the nature and seriousness of the offence, the length of residence in the host state, the time that had elapsed since the offences were committed, and the offender's family circumstances. Proper regard must be had to fundamental rights, specifically to the right to family life guaranteed by **Article 8 of the European Convention on Human Rights**.
Procureur du Roi v Royer (Case 48/75) [1975] ECR 497	Royer, a French national, sought the right to remain in Belgium as a jobseeker.	Jobseeker rights of entry and residence were established.

CASE	FACTS	PRINCIPLE
p. 153 ↵ ***R v Bouchereau (Case 30/77) [1977] ECR 1999***	A French national working in England was convicted of drugs offences. The magistrates proposed to recommend his deportation.	A previous criminal conviction can only be taken into account when 'the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy'. This could only be the case where the individual concerned showed 'a propensity to act in the same way in the future'.
Rutili v Ministre de l'Intérieur (Case 36/75) [1975] ECR 1219	Rutili, an Italian national resident in France, was a well-known trade union activist. The French authorities prohibited him from living in four particular *départements*.	Prohibitions on residence may be imposed only in respect of the whole of the national territory, unless nationals are subject to the same limitations. Otherwise, they amount to inequality of treatment and a breach of [**Article 18 TFEU**].
Steymann v Staatssecretaris van Justitie (Case 196/87) [1988] ECR 6159	Steymann participated in the Bhagwan Community's business activities but did not receive formal wages.	The fact that Steymann received no formal wages but only his 'keep' and pocket money did not rule out his work as an effective economic activity.
Trojani v Centre public d'aide social de Bruxelles (Case C-456/02) [2004] ECR I-7574	Trojani worked for around 30 hours per week as part of a Salvation Army 'personal socio-occupational reintegration programme'.	To decide whether the work was real and genuine, the national court must ascertain whether the services performed were part of the 'normal labour market'.
Van Duyn v Home Office (Case 41/74) [1974] ECR 1337	Van Duyn, a Dutch national who was refused entry to the UK on public policy grounds, maintained that her association with the Church of Scientology did not constitute 'personal conduct'.	Present association with an organization, reflecting a participation in its activities and identification with its aims, constitutes personal conduct. In general, past association would not justify restrictions.

Exam questions

Problem question

Sally, a German national, is 20 years old. Sally had never travelled outside Germany, where all her family and friends live, until last year when she decided to settle permanently in Spain. She has been living in Madrid for the past nine months.

Shortly after her arrival in Madrid, Sally applied for unskilled work in the kitchens of a state-run secondary school. She was invited for interview, but her application was unsuccessful because she failed a Spanish language test set at the
p. 154 interview. Eventually, Sally secured employment as a hotel ↵ chambermaid. However, after working in this job for a time, Sally began to feel very unhappy about her low wages and she became involved in criminal activity. She has just been convicted of robbery with violence and the Spanish court is considering ordering her expulsion from Spain on public policy grounds.

Advise Sally as to the application of EU law on the free movement of persons to each aspect of this situation.

Essay question

With reference to relevant legislation and the case law of the European Court of Justice, critically discuss the significance of the status of Union citizenship in relation to free movement rights.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer *<https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-6-outline-answers-to-essay-questions?options=showName>* to the essay question
- An outline answer *<https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-6-outline-answers-to-problem-questions?options=showName>* to the problem question
- Further reading *<https://iws.oupsupport.com/ebook/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-chapter-6-further-reading?options=showName>*
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