

REVISITING FREE MOVEMENT OF WORKERS

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INTRODUCTION

Gordon Slynn was Advocate General at the Court of Justice of the European Communities¹ from 1981 to 1988 and a judge at the Court from 1988 to 1992. The single collegiate judgments of the Court of Justice² mean that we have to discern judicial attitudes and approaches, as far as we can, from extra-judicial writings. But Advocates General speak for themselves, and we have seven years of Opinions from Advocate General Slynn during a highly formative period in the development of Community law on which to draw.³

To a certain extent, some aspects of the free movement of workers now play second fiddle to issues concerning the content and impact of the introduction of citizenship of the Union. Nevertheless, a sharp distinction is still drawn between those who are economically active and those who are not. The former are citizens of the Union with the strongest transnational rights, while the latter, when they move from the Member State of their nationality to another Member State, can be seen as potential burdens on public funds and as unwelcome intruders. For these reasons, defining who is a worker and examining the benefits of having and retaining this worker status remain as important today as they were in the late 1980s when some seminal case law of the

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1. The Court of Justice of the European Communities is referred to in this article as “the Luxembourg Court.”

2. See MARGARET HORSPOOL & MATTHEW HUMPHREYS, *EUROPEAN UNION LAW* 103 (2006).

3. Of particular relevance to this Article are the Opinions in the following cases: *Commission v. Belgium*, Case 293/85, [1988] E.C.R. 305; *Barra v. Belgium & City of Liège*, Case 309/85, [1988] E.C.R. 355; *Blaizot v. Univ. of Liège*, Case 24/86, [1988] E.C.R. 379; *Lair v. Universität Hannover*, Case 197/86, [1988] E.C.R. 3161; *Brown v. Sec’y of State for Scotland*, Case 197/86, [1988] E.C.R. 3205; *Belgium v. Humbel*, Case 263/86, [1988] E.C.R. 5365; *Kempf v. Staatssecretaris van Justitie*, Case 139/85, [1986] E.C.R. 1741; *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593; *Levin v. Staatssecretaris van Justitie*, Case 53/81, [1982] E.C.R. 1035; and *Morson & Jhanjan v. The Netherlands*, Joined Cases 35 & 36/82, [1982] E.C.R. 3723.

Court of Justice was established. In many of those cases, Gordon Slynn was the Advocate General.

The advent of formal recognition of Union citizenship in the Treaty of Maastricht⁴ has not obviated the need to consider the range of rights that flow from such citizenship when an individual is in a Member State other than that of his 'nationality. These rights still, though to a lesser extent than before, turn on economic activity, or a close link to economic activity. That makes citizenship of the Union, at least to some extent, an incomplete form of citizenship.

I. DEFINING WHO IS A WORKER

In one of its early decisions, *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*,⁵ the Luxembourg Court ruled that the definition "worker" was not dependent on any national classification of workers and self-employed people, but was a Community law concept. It also recognized that persons could retain their status as workers though not actually employed, as, for example, when they were ill, or had retired from employment.⁶ *Levin v. Staatssecretaris van Justitie* gave further substance to the definition of workers.⁷ In *Levin*, Gordon Slynn was Advocate General. The case concerned a British national living in the Netherlands with her South African husband.⁸ She had worked regularly as a chambermaid in various hotels in Amsterdam, and was refused a residence permit, for which Community law provided.⁹ When she asked for the decision

4. Treaty on European Union, Jul. 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht Treaty].

5. See *Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, Case 75/63, [1964] E.C.R. 177.

6. The latter point was explicitly covered by Article 48(3) (d) of the EEC Treaty. See Treaty Establishing the European Economic Community art. 48(3) (d), at 72, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. Subsequently it was covered by Article 39(3) (d) of the Consolidated Version of the Treaty Establishing the European Community [EC Treaty]. Consolidated Version of the Treaty Establishing the European Community, art. 39(3)(d), 2006 O.J. C 321 E/37, at 29 [hereinafter EC Treaty]. Now, following the entry into force of the Treaty of Lisbon, it is covered by Article 45(3)(d) of the Treaty on the Functioning of the European Union (TFEU). Consolidated Version of the Treaty on the Functioning of the European Union art. 45(3)(d), 2008 O.J. C 115/47, at 51 [hereinafter TFEU].

7. See *Levin v. Staatssecretaris van Justitie*, Case 53/81, [1982] E.C.R. 1035.

8. Opinion of Advocate General Slynn, *Levin v. Staatssecretaris van Justitie*, Case 53/81, [1982] E.C.R. 1054, 1055.

9. At the time, Council Directive No. 68/360 required "abolition of restrictions on the movement and residence of nationals in Member States and their families . . ." Opinion of Advocate General Slynn, *Levin*, [1982] E.C.R. 1054, 1057 (referring to Council Directive No. 68/360, art. 4, 1968 O.J. Eng. Spec. Ed., at 485).

to be reconsidered, she was working part-time as a chambermaid for around 20 hours a week.¹⁰ Reconsideration, however, did not result in the granting of a permit. Advocate General Slynn was of the opinion that, under Articles 2 and 3 of the European Economic Community (“EEC”) Treaty,¹¹ a person must be engaged in “an activity of an economic nature” to be considered a worker.¹² There was nothing in the scheme of the EEC Treaty which required the interpretation of worker to be restricted to a person who earns a particular wage or works for a certain number of hours per week. Nor is the presence or lack of private means to top up the earnings to a certain level a relevant issue. For the Advocate General, however, the person must be moving to another Member State for the purpose of the employment, though there is no requirement to show that that purpose is the dominant purpose. The Advocate General proposed that the Court answer the referred questions in the following terms:

1. A national of one Member State who, on the territory of another Member State undertakes paid work under a contract of employment, qualifies as a “worker” within the meaning of Article 48 of the EEC Treaty and its implementing legislation, and is entitled accordingly to be issued with a residence permit of the kind mentioned in Article 4 of Council Directive 68/360 even though such employment is so limited in extent as to yield an income lower than that which is regarded in that State as the minimum necessary to enable the costs of subsistence to be met.

...

3. The right of such a national to admission into and residence in the Member State pursuant to Article 48 and its implementing legislation is dependent on its being shown that the work in the Member State is a genuine and substantial purpose of such national although it need not be the chief purpose.¹³

The Court ruled that one’s motivation for moving was only relevant insofar as the person was moving to pursue “an effective and genuine activity” as an employed person.¹⁴ The Court also ruled that “the exceptions to effective and genuine activities were those ‘activities on such a small scale as to be regarded as purely marginal and ancillary.’”¹⁵ This requirement might be regarded as

10. *Id.* at 1055.

11. *Id.* at 1058.

12. *Id.*

13. *Id.* at 1061–62.

14. *Levin*, [1982] E.C.R. 1035, ¶¶ 21–22.

15. *Id.* ¶ 17.

a sufficiency test regarding the nature of the work being undertaken.

The Luxembourg Court then added a formal test to the sufficiency test in the *Lawrie-Blum* case.¹⁶ To determine that a person is employed for the purposes of what is now Article 45 of the Treaty on the Functioning of the European Union (“TFEU”), the Court must answer three questions affirmatively:¹⁷

Is the person obliged to work for another?

Is the work done for monetary reward, or payment in kind?¹⁸

Is the person subject to the direction and control of another?

The broad scope of the test established in the *Levin* case resulted in a later reference in the *Kempf* case.¹⁹ Levin had argued that the couple had private means which enabled them to meet their living expenses.²⁰ In *Kempf*, the question was whether a person would be a worker under Community law if his or her earnings, which were below subsistence level, needed to be topped up by public assistance.²¹ Again, Gordon Slynn was the Advocate General.²² He had no doubt that there should be no restriction imposed on acquiring worker status under the EEC Treaty by the mere fact that the person was dependent upon a financial top-up from social security benefits to reach what the Member State regarded as a subsistence income.²³ He did, however, concede that recourse to public funds could be taken into account in determining whether the work being undertaken was “purely marginal and ancillary” rather than “genuine and effective” work.²⁴ The Court in *Kempf* followed the Opinion of the Advocate General.²⁵

The decisions in the *Levin* and *Kempf* cases remain key authorities on the definition of who is a worker under what is now Article 45 TFEU.²⁶ In the *Kempf* case, the Court said:

16. See *Lawrie-Blum v. Land Baden-Württemberg*, Case 66/85, [1986] E.C.R. 2121.

17. TFEU, *supra* note 6, art. 45, 2008 O.J. C 115, at 65.

18. The exchange of work for payment in kind was established in *Steymann v. Staatssecretaris van Justitie*. *Steymann v. Staatssecretaris van Justitie*, Case 196/87, [1988] E.C.R. 6159.

19. *Kempf v. Staatssecretaris van Justitie*, Case 139/85, [1986] E.C.R. 1741.

20. See Opinion of Advocate General Slynn, *Levin*, [1982] E.C.R. 1054, 1055–56.

21. See *Kempf*, [1986] E.C.R. at 1741.

22. Opinion of Advocate General Slynn, *Kempf v. Staatssecretaris van Justitie*, Case 139/85, [1986] E.C.R. 1742, 1742.

23. See *id.* at 1744.

24. *Id.*

25. See *Kempf*, [1986] E.C.R. at 1746.

26. TFEU, *supra* note 6, art. 45, 2008 O.J. C 115; See, e.g., *Petersen v. Arbeitsmarktservice Niederösterreich*, Case C-228/07, [2008] E.C.R. I-6989; *Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr & Kunst*, Case C-413/01, [2003] E.C.R. I-13187; and *Raulin v. Neth. Ministry of Educ. & Sci.*, Case C-357/89, [1992] E.C.R. I-1027.

The Court has consistently held that freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms ‘worker’ and ‘activity as an employed person’ defining the sphere of application of those freedoms must be given a broad interpretation in that regard, whereas exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly.²⁷

Similar statements and references to the *Levin* case can be found in more modern authorities.²⁸

II. THE BENEFITS OF WORKER STATUS

The benefits of establishing worker status under Article 45 TFEU²⁹ are manifold. They include freedom from immigration control, considerable protection against deportation, a right to remain in the Member State of residence upon finishing work either as a result of retirement or disablement, entitlement to equality of treatment with nationals of the Member State of residence, equal entitlement with nationals to social and tax advantages widely interpreted, rights to bring other members of your family to join you, and a right to reasoned decisions affecting any of these listed rights.³⁰

Some of the enumerated rights are more generous than those accorded to workers within the Member State of residence. This gave rise to claims that if Community law provided such rights, then national law should be obliged to grant similar rights to nationals of that Member State who had not exercised their rights to move to another Member State under Community law. Once again the Advocate General in one of the seminal cases was Gordon Slynn.³¹ The *Morson and Jhanjan* case³² concerned the claims of the mothers of two Dutch nationals of Surinamese origin, who were living and working in the Netherlands, to secure resident permits. The mothers did not have Dutch nationality. *Morson and Jhanjan* applied for residence permits under the Community law

27. *Kempf*, [1986] E.C.R. 1741, ¶ 13.

28. *See supra* note 26.

29. TFEU, *supra* note 6, art. 45, 2008 O.J. C 115.

30. For an elaboration of these rights, see ROBIN C.A. WHITE, WORKERS, ESTABLISHMENT AND SERVICES IN THE EUROPEAN UNION 138–88 (2004); *see also* Council Regulation No. 1612/68, O.J. Eng. Spec. Ed. 1968, at 475; Council Directive No. 2004/38, 2004 O.J. L 229/35, corrected version in 2005 O.J. L 197/34 [hereinafter Citizenship Directive].

31. Opinion of Advocate General Slynn, Joined Cases 35 & 36/82, *Morson & Jhanjan v. The Netherlands*, [1982] E.C.R. 3738, 3742.

32. *Morson & Jhanjan v. The Netherlands*, Joined Cases 35 & 36/82, [1982] E.C.R. 3723.

provisions as the mothers of workers of Dutch nationality in order to enable them to stay in the Netherlands following a visit to see their children.³³ The Dutch immigration authorities took the view that Community law did not apply, since the Dutch nationals had never exercised their rights to move and work in another Member State.³⁴ The provisions of the relevant secondary legislation were, it was argued, for the benefit of those exercising their rights of free movement, and were designed to avoid obstacles to such movement.³⁵ The problem arose because the provisions of the Community law rules were more generous than the national immigration rules on bringing parents from other countries to join their children as their dependants. The Advocate General noted that there was nothing to prevent individuals pleading rights arising under Community law against the Member State of which they are a national, but the claims must be ones arising because Community law is engaged. Here, that was not the case. He concluded:

In the present case there is no suggestion or indication that the workers in question have ever exercised or sought or intended to assert their rights under the Treaty. They have not been employed in another Member State. Accordingly it seems to me that their relatives cannot say that they have any rights under Community law to install themselves with their children.³⁶

The Court came to the same conclusion in its judgment, though it drafted its ruling in slightly different terms.³⁷ The line of cases in which the Court has ruled that a Member State is free to treat its own nationals less favorably than is required by Community law to treat similarly situated nationals of other Member States has been labeled “reverse discrimination” cases.³⁸ It applies where a matter is wholly internal to a Member State. The Court of Justice has, however, not needed much persuading to determine that a situation is one in which there is a factor linking a person with a situation governed by Community law.³⁹ The issue of reverse discrimination will be further discussed in Part IV.B..

Retaining worker status after having been employed carries a passport to equal treatment with nationals in relation to a whole

33. *Morson*, [1982] E.C.R. at 3723, ¶ 2.

34. *See id.* ¶ 18.

35. *See id.* ¶ 15.

36. Opinion of Advocate General Slynn, *Morson*, [1982] E.C.R. 3738, 3742.

37. *See Morson*, [1982] E.C.R. at 3736.

38. *Id.* at 3729.

39. *See generally* EEC Treaty, *supra* note 6. For a detailed discussion of the question of reverse discrimination, see ALINA TRYFONIDOU, *REVERSE DISCRIMINATION IN EC LAW* (2009).

raft of potential benefits. One battleground has been entitlement to financial support to meet living expenses as a student. Gordon Slynn was Advocate General in the *Gravier* case,⁴⁰ which established that Community competence in this area was limited. There was a common approach to vocational training, and the prohibition of discrimination on grounds of nationality contained in Article 7 of the EEC Treaty meant that tuition fees charged to students pursuing vocational training must be the same for nationals of all the Member States.⁴¹ It was subsequently established in *Humbel*⁴² that a course year of secondary education could be part of vocational training if it could be said to be part of an overall body of instruction leading to qualification for a particular profession, trade, or employment, but that state-provided education was not a service within what was then Article 49 of the EEC Treaty.⁴³

A series of cases in 1988, in which the Advocate General was Gordon Slynn, took up the issue of access to financial support for studies as an entitlement arising under Community law. The starting point was the judgment in *Gravier*, which meant that those arguing for a Community law entitlement to financial support for their studies could not simply rely on the prohibition of discrimination in matters within the scope of the Treaty as the basis for their claim. The *Gravier* case had established that equality of access to vocational training required equal treatment of all nationals of the Member States only in relation to tuition fees; any system of educational grants fell outside the scope of Community law per se.⁴⁴ In both *Lair*⁴⁵ and *Brown*⁴⁶, the individuals were arguing that they were workers who had ceased work in order to undertake vocational training.⁴⁷ In such circumstances, they argued, they continued to qualify as workers under the EEC Treaty and were entitled to financial support for their studies since this

40. *Gravier v. City of Liège*, Case 293/83, [1985] E.C.R. 593.

41. See EEC Treaty, *supra* note 6, art. 7, at 46; see also *Barra v. Belgium & City of Liège*, Case 309/85, [1988] E.C.R. 355; *Blaizot v. Univ. of Liège*, Case 24/86, [1988] E.C.R. 379 (elaborating on the concept of vocational training); *Commission v. Belgium*, Case 293/85, [1988] E.C.R. 305 (disagreeing with Advocate General Slynn on the admissibility of an enforcement action against Belgium concerning tuition fees).

42. *Belgium v. Humbel*, Case 263/86, [1988] E.C.R. 5365. The Advocate General in this case was again Gordon Slynn.

43. See EEC Treaty, *supra* note 6, art. 49, at 56 (subsequently Article 9 EEC, and now Article 56 TFEU).

44. This remained the case until the judgment in *Bidar v. London Borough of Ealing & Sec'y of State for Educ. & Skills*, Case C-209/03, [2005] E.C.R. I-2119.

45. *Lair v. Universität Hannover*, Case 39/86, [1988] E.C.R. 3161.

46. *Brown v. Sec'y of State for Scot.*, Case 197/86, [1988] E.C.R. 3205.

47. See *Lair*, [1988] E.C.R. 3161; *Brown*, [1988] E.C.R. 3205.

was a benefit falling within Article 7 of Regulation 1612/68.⁴⁸ The situations of the two claimants, however, were different. Sylvie Lair was a French national who had been living in Germany since at least the start of 1979.⁴⁹ She had been employed there for two-and-a-half years, but thereafter had a sporadic record of employment, unemployment, and retraining. In 1984 she started a degree course in Romance and Germanic languages and literature at the University of Hanover. She applied for an educational grant, which the University refused to award on the grounds that, as a non-German national, she had not been engaged in full-time employment in Germany for at least five years.⁵⁰ The Advocate General concluded that the facts before him indicated that Sylvie Lair was someone who had gone to and was in Germany as a “genuine worker economically integrated into the host State.”⁵¹ The crucial question was whether she had ceased to be a worker for the purposes of Community law when she started her university course. Advocate General Slynn interpreted Article 7(3) of Regulation 1612/68 to mean that a person who ceases work and undertakes what the provision described as “training in vocational training schools and retaining centres” did not thereby lose their worker status.⁵² But Article 7(2) is also relevant in providing for equal access to “social and tax advantages.”⁵³ The Advocate General reached an important conclusion:

The question is thus whether the training sought here is in a vocational training school. I have come to the conclusion that “vocational training” can take place in a university. . . . If that is right a university in my view is pro tanto a vocational training school and I see no valid reason to apply Article 7(3) to only some institutions of education where vocational training is given. There is no magic in the word “school”: within a university the word is not uncommonly found as being a part of the university as in “law school” or “medical school”.⁵⁴

Consequently, he was able to conclude:

A national of one Member State who moves to another Member State and takes up employment in the capacity of a

48. *See id.*; *see also* Council Regulation No. 1612/68, *supra* note 30, O.J. Eng. Spec. Ed. 1968, at 475.

49. *See Lair*, [1988] E.C.R. 3161, ¶ 3.

50. *See id.*

51. Opinion of Advocate General Slynn, *Lair v. Universität Hannover*, Case 39/86, [1988] E.C.R. 3179, 3184.

52. *See id.*

53. Council Regulation No. 1612/68, *supra* note 30, O.J. Eng. Spec. Ed. 1968, at 475.

54. Opinion of Advocate General Slynn, *Lair*, [1988] E.C.R. 3179, 3186.

worker is entitled to an award of an educational grant for maintenance subject to the same criteria and on the same terms as national workers: (a) in respect of general education as a social advantage under Article 7(2) of Regulation No 1612/68; (b) in respect of training in vocational schools under Article 7(3) of that regulation.⁵⁵

The Court largely followed this reasoning in concluding that (a) an educational grant to enable a person to pursue university studies leading to a professional qualification is a social advantage within Article 7(2) of Regulation 1612/68; (b) a person who has been a worker who undertakes university studies leading to a professional qualification is to be regarded as retaining worker status and is entitled to equal treatment with nationals in access to such educational grants, provided that there is a link between the previous occupational activity and the studies in question; and (c) a Member State cannot make access to benefits falling within Article 7(2) of Regulation 1612/68 conditional upon a minimum period of prior occupational activity on the territory of that Member State.⁵⁶

Stephen Brown's circumstances were somewhat different. He had a French mother and a British father, and held both French and British nationalities.⁵⁷ In 1965, the family moved to France, where Stephen had been educated.⁵⁸ In 1983 he secured a place at the University of Cambridge to read electrical engineering on a degree course starting in the autumn of 1984.⁵⁹ Stephen worked in employment described as "pre-university industrial training," which included a twelve week inductory course followed by work as an employee of the participating firm.⁶⁰ Stephen's participation in this scheme was patently a success, since he was awarded a sponsorship by the employer.⁶¹ This entitled him to a sum of money each term, as well as paid employment in university vacations to increase his industrial experience.⁶² The University of Cambridge did not require its incoming students to have undertaken industrial experience prior to the start of the course, but there was a required eight week industrial placement which formed part of the course at the end of the second year of studies.⁶³ Stephen applied for an educational grant to the Scottish Education

55. *Id.* at 3189.

56. *See Lair*, [1988] E.C.R. 3161, 3202-03.

57. Opinion of Advocate General Slynn, *Brown v. Sec'y of State for Scotland*, Case 197/86, [1988] E.C.R. 3205.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Department, which refused to award the grant because Stephen did not meet the conditions of entitlement.⁶⁴ First, he had not been ordinarily resident in the British Isles for three years ending on August 31, 1984.⁶⁵ Second, although he had been resident in another Member State for the requisite period, he could not meet both of the following conditions: (a) he had not been employed in Scotland for nine of the twelve months prior to August 31, 1984, and (b) he was not seeking the educational grant in respect of a course at a vocational training establishment.⁶⁶ There was a further condition that, in such cases, the applicant must have entered the United Kingdom wholly or mainly for the purpose of taking up or seeking employment.⁶⁷ Third, although he had been resident in another Member State and was the child of nationals of a Member State, neither of his parents was employed in Scotland on the qualifying date, in this case June 30, 1984, nor had they been employed in Scotland for an aggregate period of one year in the three years prior to June 30, 1984.⁶⁸ Brown challenged the refusal to award an educational grant.⁶⁹ In response to questions raised by the Scottish court, the Advocate General first concluded that the Cambridge degree program constituted vocational training under Community law in that it formed an integral part of the overall training required for recognition as a chartered engineer.⁷⁰ The core question was whether the industrial experience Brown had undertaken, which took the form of employment prior to his studies, enabled him to secure access to an educational grant as a worker. The Advocate General identified the central question as:

In my opinion for the purposes of applying for a student grant under Article 7 [of Regulation 1612/68] he must show that he does so genuinely in his capacity as a worker and he must be in the Member State in such capacity and for the purpose of being a worker.⁷¹

The Advocate General then gave a strong steer to the national court by noting that a person undertaking employment linked to industrial experience primarily to better prepare themselves for a degree program is not someone whose presence in the host

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 3232.

Member State is for the primary purpose of employment. The work is “ancillary to the course of study.”⁷²

Once again the Court largely followed the opinion of its Advocate General.

A common thread which runs through the Opinions of Advocate General Slynn in the cases considered in this Article is the purpose of the activities undertaken by the person seeking to rely upon Community law to secure some entitlement arising under Community law. This enabled him to draw a distinction in drafting his opinions in *Lair* and *Brown*. Sylvie Lair had achieved economic integration into the host Member State through her pattern of employment, whereas Stephen Brown had not. He was simply preparing himself effectively for a Cambridge degree program. The distinction can be a narrow one; one might say that Sylvie Lair was an economic mover, whereas Stephen Brown was a student mover. As we shall see, such distinctions continue to hold significance in an era in which the umbrella of citizenship of the Union covers all nationals of the Member States. However, amendments to the EC Treaty coupled with the advent of citizenship have produced a situation in which the Court, in its 2005 *Bidar*,⁷³ ruled that financial support for studies did now fall within the scope of the EC Treaty.⁷⁴

III. THE ADVENT OF CITIZENSHIP

Articles 8 to 8c of the EEC Treaty as amended by the Treaty of Maastricht contained provisions formally establishing citizenship of the Union.⁷⁵ Prior to this, many scholars argued for the need for a model of citizenship to make the benefits for individuals of participation in the European integration project more apparent.⁷⁶ The provisions inserted by the Treaty of Maastricht subsequently became Articles 17 to 22 of the Treaty Establishing the European Community, and are now Articles 20 to 25 of the Treaty on the Functioning of the European Union.⁷⁷

72. *Id.*

73. *Bidar v. London Borough of Ealing & Sec’y of State for Educ. & Skills*, Case C-209/03, [2005] E.C.R. I-2119, ¶ 31.

74. For a discussion of the case, see Oxana Golynger, *Student Loans: The European Concept of Social Justice According to Bidar*, 31 EUR. L. REV. 390 (2006).

75. Maastricht Treaty, *supra* note 4, art. 8–8c, 1992 O.J. C 191/1, at 7.

76. See SIOFRA O’LEARY, *THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP, FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP* 3–31 (1996); see also MASSIMO CONDINANZI, ALESSANDRA LANG AND BRUNO NASCIBENE, *CITIZENSHIP OF THE UNION AND FREEDOM OF MOVEMENT OF PERSONS* 1 (2008); Francis Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13 EUR. L.J. 591 (2007).

77. EC Treaty, *supra* note 6, arts. 17–22, 2006 O.J. C 321 E, at 49–51; TFEU, *supra* note 6, arts. 20–25, 2008 O.J. C. 115, at 56–58.

One of the most significant cases in recent years on the free movement of persons is the *Baumbast* case.⁷⁸ The case concerned two families, but exposition of the circumstances of one of them is sufficient for understanding how the Luxembourg Court developed its case law. Mr. Baumbast was a German national and his wife was a Colombian national.⁷⁹ They had two daughters.⁸⁰ Mr. Baumbast had been a worker employed in the United Kingdom.⁸¹ He followed this employment with a period of self-employment, and held a five-year residence permit under the Community secondary legislation in operation at the time.⁸² When his self-employment came to an end, he obtained employment with a German company, but his work was abroad in China and Lesotho.⁸³ The family continued to live in the United Kingdom, where his daughters went to school.⁸⁴ The family had never claimed any social security benefits in the United Kingdom, and had comprehensive medical insurance in Germany, where they travelled from time to time for medical treatment.⁸⁵ The Secretary of State refused to renew Mr. Baumbast's residence permit, and refused the applications of his wife and children for indefinite leave to remain in the United Kingdom.⁸⁶ The Baumbasts appealed these decisions to the Immigration Adjudicator for the United Kingdom who found that Mr. Baumbast did not have a right of residence as a worker; however, the children had a separate right of residence and Mrs. Baumbast had a right to stay with them so long as they exercised their rights.⁸⁷ Mr. Baumbast challenged the decisions, and questions were referred to the Luxembourg Court.⁸⁸ The Court used the concepts of citizenship of the Union and the rights set out in Article 18 of the EC Treaty (now TFEU Article 21) to fill gaps in the Treaty rules and provisions in the secondary legislation of the right to free movement.⁸⁹ The Court said:

A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence

78. *Baumbast v. Sec'y of State for the Home Dep't*, Case C-413/99, [2002] E.C.R. I-7091.

79. *Id.* ¶ 16.

80. *Id.*

81. *Id.* ¶ 18.

82. *Id.*

83. *Id.*

84. *Id.* ¶ 19.

85. *Id.*

86. *Id.* ¶ 20.

87. *Id.* ¶ 21.

88. *Id.* ¶¶ 21–22.

89. *See id.* ¶¶ 92–94.

by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality.⁹⁰

The Luxembourg Court has increasingly given a constitutional significance to the economic, political, social, and other rights contained in the Treaty provisions on citizenship. The current mantra of the Luxembourg Court is as follows:

[In accordance with settled case-law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for⁹¹

There are a number of key rights attaching to citizenship of the Union. Article 18 of the EC Treaty (now TFEU Article 21) states the right “to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.”⁹² TFEU Article 22 grants extended political rights to stand for and vote in municipal elections in the Member State of residence, and in elections to the European Parliament.⁹³ TFEU Article 23 pools the resources of the Member States to enable diplomatic and consular protection to be afforded by the representation of any Member State where the Member State of the person’s nationality has no diplomatic or consular representation in the country

90. *Id.* ¶ 94. The constitutional significance of the requirement to test national conditions against the requirement of proportionality is explored in Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUR. L. REV. 613 (2006).

91. *Gottwald v. Bezirkshauptmannschaft Bregenz*, Case C-103/08, [2009] E.C.R. ___, [2010] C.M.L.R. 25, ¶ 23; *see Bidar v. London Borough of Ealing & Sec’y of State for Educ. & Skills*, Case C-209/03, [2005] E.C.R. I-2119, ¶ 31; *Schempp v. Finanzamt München V*, Case C-403/03, [2005] E.C.R. 6421, ¶ 15; *Orfanopoulos & Oliveri v. Land Baden-Württemberg*, Joined Cases C-482/01 & C-493/01, [2004] E.C.R. I-5257, ¶ 65; *Garcia Avello v. Belgium*, Case C-148/02, [2003] E.C.R. 11613, ¶ 22; and *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, Case C-184/99, [2001] E.C.R. I-6193, ¶ 31.

92. EC Treaty, *supra* note 4, art. 18, 2006 O.J. C 321, at 49; TFEU, *supra* note 6, art. 21, 2008 O.J. C. 115, at 57. The qualifying words ensure that the rights of free movement are not an addition to the rights to be found elsewhere in the Treaty and in secondary legislation of the Community.

93. TFEU, *supra* note 6, art. 22, 2008 O.J. C. 115, at 57.

concerned.⁹⁴ TFEU Article 24 extends the complaint mechanisms available to citizens of the Union in relation to matters falling within the scope of the Union treaties.⁹⁵

The advent of citizenship of the Union coupled with developments in the case law of the Luxembourg Court resulted in the recasting of a whole raft of secondary legislation concerning the free movement of persons into a single Directive.⁹⁶ The Citizenship Directive is at one level a consolidating measure, but is arguably much more than that in its tone and in some of its provisions, such as the introduction of a new right of permanent residence. The Citizenship Directive repeals and reenacts the provisions of nine directives and amends Regulation 1612/68.⁹⁷ The existing piecemeal approach to the regulation of rights of entry and residence has been recast in a single instrument. In addition, the Commission has repealed a Commission regulation. The debate is whether the measure goes beyond consolidation and the introduction of the new right of permanent residence. It can certainly be regarded as presenting the rights of free movement which attach to citizenship of the Union in a more obviously constitutional framework than the secondary legislation it replaces. When the Citizenship Directive is read with the Treaty provisions on citizenship and with Regulation 1612/68 and Regulation 1408/71 on the coordination of social security schemes,⁹⁸ there is a comprehensive set of rights attaching to citizenship of the Union.

Under the Citizenship Directive, rights of movement are set out, which vary dependent upon the activities and degree of integration of the citizen; there is a new right of permanent residence which arises after a continuous period of residence lasting five years in whatever capacity in another Member State; there is a reduction on the bureaucracy surrounding movement; there are tighter controls on the powers to deport a national of another Member State, and there are clearer rights to equality of treatment.⁹⁹ Not everything is as clear as it should be, however. A

94. *Id.* at 58.

95. TFEU, *supra* note 6, art. 24, 2008 O.J. C. 115, at 58; EC Treaty, *supra* note 4, art. 21, 2006 O.J. C 321, at 45.

96. Citizenship Directive, *supra* note 30, 2005 O.J. L 197/34.

97. *Id.* at 34.

98. Regulation No. 1408/71, L 149/2 (1971), amended by O.J. L 28/4 (1997) (the latest official consolidation of its provisions, the regulation has been amended on a number of subsequent occasions, and is due to be replaced by Regulation No. 883/2004, O.J. L 166/1, corrected version in O.J. L 200/1 (2004), as amended, with effect from May 1, 2010) (subsequent citations will be to full text, English version, at O.J. L 28/4 (1997), unless cited article has been substantively revised).

99. Citizenship Directive, *supra* note 30, arts. 16, 24, 28, 2004 O.J. L 229/35, at 43, 45–46.

report in December 2008 by the Commission to the European Parliament and Council indicated that no Member State had fully transposed the requirements of the Directive, and that there was no single provision of the Directive which had been fully implemented in all the Member States.¹⁰⁰ Some of this would seem to be the result of ambiguities in the drafting of the Directive, and some the result of a lack of full social solidarity among the Member States in securing in national law the rights set out in the Directive. In some cases, it would seem that Member States have simply viewed the Citizenship Directive as an immigration measure, when it clearly goes beyond that. The complexity of transposing the requirements of the Citizenship Directive into the national legal orders of the Member States can be illustrated by developments in the context of entitlement to social security benefits in the United Kingdom. For a number of income-related benefits, a condition of entitlement is that the person claiming the benefit has a “right to reside” in the United Kingdom. The term is not defined in the relevant secondary legislation in the national legal order, and it is readily conceded by the Department for Work and Pensions before those courts and tribunal in which the issue arises that the “right to reside” may flow from entitlements under European Union law.¹⁰¹ The focus is then on the United Kingdom

100. See Commission of the European Communities, *The application of Directive 2004/38/EC on the right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States: Report from the Commission to the European Parliament and the Council*, COM (2008) 840/3, at 3; see also SERGIO CARRERA & ANAÍS FAURE ATGER, *IMPLEMENTATION OF DIRECTIVE 2004/38 IN THE CONTEXT OF EU ENLARGEMENT: A PROLIFERATION OF DIFFERENT FORMS OF CITIZENSHIP?* 1–5 (2009).

101. See DEP’T OF WORK AND PENSIONS, *Pension Credit, Income Support, Income Based Employment and Support Allowance and Income-based Jobseeker’s Allowance*, <http://www.dwp.gov.uk/international/benefits/pension-credit-income-support> (last visited Jun.29, 2010). 102. See *Sec’y of State for Work & Pensions v. Lassal*, [2009] EWCA (Civ) 157 (temporal aspects of acquiring permanent residence under the Citizenship Directive); *Sec’y of State for Work & Pensions v. Dias*, [2009] EWCA (Civ) 807 (aspects of the interpretation of the Citizenship Directive and its relationship with the repealed provisions); *London Borough of Harrow v. Ibrahim & Sec’y of State for the Home Dept.*, [2008] EWCA (Civ) 386; *Teixeira v. London Borough of Lambeth*, [2008] EWCA (Civ) 1088 (the right to reside in order to care for children under the *Baumbast* case); and *McCarthy v. Sec’y of State for the Home Dept.*, [2008] EWCA (Civ) 641 (reference referred to in the *Dias* case; the interpretation of the words “resided legally” in the Citizenship Directive). The Luxembourg references are *London Borough of Harrow v. Ibrahim & Sec’y of State for the Home Dept.*, Case C-310/08 (ECJ Feb. 23, 2010) (not yet reported); *Teixeira v. London Borough of Lambeth & Sec’y of State for the Home Dept.*, Case C-480/08 (ECJ Feb. 23, 2010) (not yet reported); *Opinion of Advocate General Trstenjak*, *Sec’y of State for Work & Pensions v. Lassal*, Case C-162/09 (ECJ, delivered May 11, 2010) (Court decision not yet issued); *McCarthy v. Sec’y of State for the Home Dept.*, Case C-434/09, (pending case); and *Sec’y of State for Work & Pensions v. Dias*, Case C-325/09 (pending case).

regulations which seek to implement the Citizenship Directive, and on the proper interpretation of some of the case law of the Luxembourg Court. The result has been at least five references to the Luxembourg Court on the interpretation and application of European Union law.¹⁰²

There is considerable discussion in the literature on whether there has been a move from a “market citizen,” that is, one whose rights flow from economic activity, to a “social citizen,” whose citizenship is largely independent of engagement in a particular activity in order to secure rights.¹⁰³ Dougan observes of the case-law developments:

Most commentators seem agreed that the Court has embarked on what is (in effect) an exercise in social engineering: economically inactive migrant Union citizens are entitled to claim membership of the national solidaristic community, based on nothing more than the common bond of Union citizenship, albeit subject to the idea that such individuals cannot become an unreasonable burden upon the public purse.¹⁰⁴

Thus, we may conclude that there are two routes to securing equality of treatment with nationals of the host Member State prior

102. See Sec’y of State for Work & Pensions v. Lassal, [2009] EWCA (Civ) 157 (temporal aspects of acquiring permanent residence under the Citizenship Directive); Sec’y of State for Work & Pensions v. Dias, [2009] EWCA (Civ) 807 (aspects of the interpretation of the Citizenship Directive and its relationship with the repealed provisions); London Borough of Harrow v. Ibrahim & Sec’y of State for the Home Dept., [2008] EWCA (Civ) 386; Teixeira v. London Borough of Lambeth, [2008] EWCA (Civ) 1088 (the right to reside in order to care for children under the *Baumbast* case); and McCarthy v. Sec’y of State for the Home Dept., [2008] EWCA (Civ) 641 (reference referred to in the *Dias* case; the interpretation of the words “resided legally” in the Citizenship Directive). The Luxembourg references are London Borough of Harrow v. Ibrahim & Sec’y of State for the Home Dept., Case C-310/08 (ECJ Feb. 23, 2010) (not yet reported); Teixeira v. London Borough of Lambeth & Sec’y of State for the Home Dept., Case C-480/08 (ECJ Feb. 23, 2010) (not yet reported); Opinion of Advocate General Trstenjak, Sec’y of State for Work & Pensions v. Lassal, Case C-162/09 (ECJ, delivered May 11, 2010) (Court decision not yet issued); McCarthy v. Sec’y of State for the Home Dept., Case C-434/09, (pending case); and Sec’y of State for Work & Pensions v. Dias, Case C-325/09 (pending case).

103. See, e.g., ELSPETH GUILD, LEGAL ELEMENTS OF EUROPEAN IDENTITY: EU CITIZENSHIP AND MIGRATION LAW (2005); JO SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION (2007); Samantha Besson & André Uttinger, *Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora’s Box*, 13 EUR. L.J. 573, 573–90 (2007); Michael Dougan, *The Constitutional Dimension to Case Law on Union Citizenship*, 31 EUR. L. REV. 613, 613–41 (2006); Michelle Everson, *The Legacy of the Market Citizen*, in NEW LEGAL DYNAMICS OF THE EUROPEAN UNION 73–90 (Jo Shaw and Gillian More eds., 1995); Kay Hailbronner, *Union Citizenship and Access to Social Benefits*, 42 COMMON MKT. L. REV. 1245–67 (2005); Christine Jacqueson, *Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship*, 27 EUR. L. REV. 260–81 (2002).

104. Dougan, *supra* note 110, at 622.

to the acquisition of permanent residence in the host Member State. The first route is to establish that the beneficiary is economically active, or is deemed to continue to be economically active, as, for example, when people move from employment to vocational training connected with that employment which will enhance their job prospects. In such cases, that is enough to passport the person to the benefits for which the Citizenship Directive provides. The alternative route is to establish a sufficient degree of social integration in the host Member State that, regardless of any link with economic activity, the principle of social solidarity requires that person to be treated equally with nationals of the host Member State.¹⁰⁵ Those are two radically different routes to the securing of rights under European Union law.

IV. CONSEQUENTIAL ISSUES

A. *The Continuing Significance of the Free Movement of Workers*

Despite the constitutionalizing effect of judgments of the Luxembourg Court both in relation to rights of free movement flowing from economic activity and solely as an incident of citizenship of the Union, the freedom from immigration control enjoyed by nationals of the Member States is essentially conditional until a right of permanent residence is acquired after five years of continuous and lawful residence.¹⁰⁶ The right to permanent residence can, however, be lost as a result of absence from the host Member State for a period exceeding two consecutive years.¹⁰⁷ Under the Citizenship Directive, the right to enter and reside has three distinct phases: (a) the initial three months; (b) residence for more than three months; and (c) acquisition of a right of permanent residence.¹⁰⁸

The right to enter and reside for up to three months is unconditional, but during this time, the migrant has very little entitlement to assistance from the host Member State. Under Article 7 of the Citizenship Directive, residence for more than three months is conditional on the person establishing that he or she is (1) a worker or self-employed person, (2) a person of

105. For a somewhat pessimistic view of these developments, see generally Michael Dougan, *The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Citizenship and the Relevance of the Treaty of Lisbon* in INTEGRATING WELFARE FUNCTIONS INTO EU LAW—FROM ROME TO LISBON 147–87 (Ulla Neergaard, Ruth Nielsen, and Lynn Roseberry eds., 2009).

106. This exposition focuses on the right of the person moving to enter and reside, but there are also extensive rights for family members to accompany the “primary” mover.

107. Citizenship Directive, *supra* note 30, art. 16(4), 2005 O.J. L 197/34, at 43.

108. *Id.* arts. 6, 7, 16, 2005 O.J. L 197/34, at 39, 40, 43.

independent means with comprehensive sickness insurance coverage in the host Member State, or (3) a student with comprehensive sickness insurance coverage in the host Member State and a realistic expectation that he or she has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State.¹⁰⁹

Article 24 of the Citizenship Directive contains the expression of the principle of equal treatment found in Article 18 TFEU¹¹⁰ by providing that “all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.”¹¹¹ However, there is a derogation from this requirement in Article 24(2) of the Citizenship Directive which provides that the principle of equal treatment does not extend to an entitlement to social assistance within the first three months of residence, nor to an entitlement to financial assistance for studies until the person has acquired permanent residence.¹¹² This leaves a lengthy period between the three months’ residence and the acquisition of permanent residence during which entitlement to equal treatment is unclear. Such entitlement would appear to arise only when a person’s residence falls within the specific requirements of Article 7 of the Citizenship Directive.¹¹³ For those whose residence is initially based upon being a worker this brings sharply into play the circumstances in which worker status is lost, but the person wishes to remain resident in the host Member State.

Article 7(3) of the Citizenship Directive deals with some common situations. First, temporary inability to work as a result of illness or accident does not result in the loss of worker status.¹¹⁴ Second, involuntary unemployment arising after a person has been employed for at least a year, where it is “duly recorded,” and where the person has registered as a job-seeker with an employment office, does not result in the loss of worker status.¹¹⁵ Third, worker status is extended for at least six months when a person is involuntarily unemployed on the ending of fixed-term employment, or during the first twelve months of employment. Furthermore, the unemployment must be “duly recorded” and the

109. *Id.* art. 7, 2005 O.J. L 197/34, at 40.

110. TFEU, *supra* note 6, art. 18, 2008 O.J. C 115/47, at 56; EC Treaty, *supra* note 6, art. 12, 2006 O.J. C 321 E, at 43.

111. Citizenship Directive, *supra* note 30, art. 24, 2005 O.J. L 197/34, at 45.

112. Citizenship Directive, *supra* note 30, art. 7, 2005 O.J. L 197/34, at 39–40.

113. *Id.*, art. 7(3)(b), 2005 O.J. L 197/34, at 39.

114. *Id.* art. 7(3)(a), 2005 O.J. L 197/34, at 39.

115. *Id.* art. 7(3)(b), 2005 O.J. L 197/34, at 39.

person registered as a job-seeker with an employment office.¹¹⁶ Finally, worker status is retained where the person embarks on vocational training, provided that the training is related to the previous employment.¹¹⁷ The proviso does not apply if the vocational training follows involuntary unemployment;¹¹⁸ presumably, the rationale is that the person is training for alternative employment. Difficulties can arise in Member States like the United Kingdom where there is no obvious procedure directly linked to recording unemployment as being involuntary.¹¹⁹

All this indicates that worker status is central to a person's right to continue to reside in a Member State other than that of his or her own nationality. That, in turn, means that the European Union law definitions of employment retain a centrality in European Union law which casts back to the authorities of the Luxembourg Court established when Gordon Slynn was Advocate General. There have, of course, been glosses and additions to the case law in the period since the late 1980s, but the foundations had already been laid by then. In all the talk of the constitutionalizing effect of the case law which has touched on citizenship of the Union, it should not be forgotten that the free movement of workers is part of one of the four fundamental freedoms¹²⁰ which form the foundations of the internal market at the heart of the Treaty on the Function of the European Union.¹²¹

B. Reverse Discrimination

Reference has been made earlier in this Article to the principle of "reverse discrimination" under which European Union rights do not accrue unless there is some factor linking the situation to one contemplated by the Union treaties.¹²² The result has been that, where the matters in dispute arise wholly within a particular Member State, no reliance can be placed upon European Union rights where they are greater than those accorded in the national legal order. Has this principle been affected by the introduction of

116. *Id.* art. (7)(c), 2005 O.J. L 197/34, at 40.

117. *Id.* art. 7(3)(d), 2005 O.J. L 197/34, at 40.

118. *Id.*

119. Whether a person is voluntarily or involuntarily unemployed can be an issue in relation to the conditions of entitlement to a United Kingdom unemployment benefit, but the issue arises in the context of considering a claim for benefit and not as a matter of recording the circumstances in which the person became unemployed.

120. The four fundamental freedoms are the free movement of goods, persons, services, and capital.

121. *See* Jörn Petersen v. Arbeitsmarktservice Niederösterreich, Case C-228/07, [2008] E.C.R. I-6989, ¶¶ 43–51.

122. *See supra* notes 38–39 and accompanying text.

citizenship of the Union? After all, if all nationals of the Member States are thereby citizens of the Union, why should one not be able to rely upon European Union rights merely by virtue of holding that European Union citizenship? The simple answer was given by the Luxembourg Court In the *Schempp* case, the Luxembourg Court provided a simple answer to this question:

However, it also follows from the case-law that citizenship of the Union, established by Article 17 EC, is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23, and *Garcia Avello*, paragraph 26).¹²³

So simple a statement disguises the way in which the Luxembourg Court now determines whether a situation is “wholly internal” to a Member State. *Schempp* concerned a German national who lived in Germany.¹²⁴ He was complaining about the tax treatment of maintenance payments he made to his ex-wife who, at the material time, lived in Austria.¹²⁵ The Luxembourg Court concluded that these circumstances meant that *Schempp*’s complaint about the German tax treatment of his maintenance payments was not a matter wholly internal to Germany. Because his ex-wife had exercised her rights to move to another Member State, the implications for the tax treatment of maintenance payments was enough to extend the matter beyond being purely internal to Germany.¹²⁶

C. *Interdependencies and Inter-Relationships*

The development of rights attaching to citizenship of the Union raises questions of the interdependency of national citizenship and Union citizenship. While it is logical to suggest that citizenship of the Union enables such citizens to take a bundle of European Union law rights into Member States of which they are not nationals, the treaty basis for citizenship of the Union provides for certain restrictions on such rights.¹²⁷ It subjects them to the conditions laid down in the Treaty and to provisions in the

123. *Schempp v. Finanzamt München V*, Case C-403/03, [2005] E.C.R. I-3171, ¶ 20.

124. *Id.* ¶ 7.

125. *Id.* ¶¶ 8–10.

126. *See id.* ¶ 22–25 For examples of cases where the connection to European Union law was accepted in the particular factual situations before the Luxembourg Court, and which might not have been so decided prior to the introduction of citizenship of the Union, see *Zhu & Chen v. Sec’y of State for the Home Dept.*, Case C-200/02, [2004] E.C.R. I-9925; *Garcia Avello v. Belgium* Case C-148/02, [2003] E.C.R. I-11,613 ¶¶ 26–29,

127. TFEU, *supra* note 6, art. 20, 2008 O.J. C 115/47, at 57.

secondary legislation of the European Union. Besson and Utzinger pertinently observe:

This reservation refers in particular to the legitimate interest of Member States to require social and financial coverage before granting the permission to reside legally, in order to protect their public resources. By analogy, these inherent Treaty-based limitations apply to all other EU citizenship rights, which by definition are rights granted by the Treaty and hence are limited according to the Treaty. This has, *per se*, always been an object of concern since it subjects EU citizenship rights to limitations one may accept in relation to fundamental economic freedoms but not pertaining to other social and political citizenship rights.¹²⁸

There is also an important inter-relationship between the reliance on economic activity both to move and to secure certain rights in the host Member State and the reliance on the citizenship route to enter and reside in another Member State. For the economically active, there is a presumption that they will not be a burden on the host Member State, but in certain circumstances that eventuality may arise during that grey period between residence beyond three months and the acquisition of permanent residence. Their economic activity opens up access to benefits which are not available for a “citizenship migrant,” including access to income-related benefits. It is for this reason that the free movement of workers, as part of one of the four fundamental freedoms, remains as significant today as it was when Gordon Slynn, as Advocate General, suggested solutions to the Luxembourg Court on basic questions relating to the interpretation of what was then Article 48 of the EEC Treaty.

CONCLUSION

Despite the introduction of citizenship of the Union and its significant influence on the case law dealing with rights to enter and reside in a Member State other than that of a person’s own nationality, there still exists a system of rights which is markedly hierarchical. European Union migration law, like many national migration laws, favors the well-off over those of more limited means. However, the ability to move as an economically active migrant free from immigration control now offers the opportunity to secure permanent residence in another Member State with guarantees of equal treatment in every respect with nationals of the host Member State. Not requiring a work permit or any other form

128. Besson & Utzinger, *supra* note 103, at 587.

of permission to enter and reside as a worker, and to remain as a worker (even when not actually working) provides distinct benefits that should not be dismissed. But the hierarchical nature of the rights contained in the Citizenship Directive makes the definition of who is a worker, and when that status is retained, still of considerable importance in European Union law. These issues from time to time bring national legal orders into conflict with European Union law. The current battleground relates to various benefits which would be available to nationals in similar situations, but which are denied to nationals of other Member States on the grounds that they have lost a favored status under the European Union rules, and must now fall back on their own resources rather than those of the State. This, in turn, suggests that levels of social solidarity among the Member States are still relatively undeveloped. Member States still view themselves as having a higher responsibility to look after their own nationals than nationals of other Member States who fall on hard times while resident in the host Member State.