

## The Evolution and Expansion of EU Citizenship

The impact of the European Court of  
Justice

## EU Citizenship

### 1. Introduction

- With the growing powers of the EC the need was felt to bring the European institutions closer to the citizens
  - Four freedoms of movement of economic actors have direct effect (*C-26/62 Van Gend & Loos*)
  - Direct elections for the European Parliament in 1979
  - Symbols: flag, anthem, Europe day

## EU Citizenship

- The creation of the EU was a further step in the European integration
  - From EEC to EC: community is not solely concerned anymore with economic integration
  - The second and third pillar
  - Euro as another symbol
  - Citizenship: Articles 17-22 TEC (Articles 18-25 TFEU)
    - Citizens derive rights from the EU and are therefore actors, next to the institutions and Member States
    - Not limited to economic actors (four freedoms)
    - Importance of the ECJ case law

## EU Citizenship

### 2. Who is a citizen of the EU

- There is no EU nationality law or something similar: who is a citizen is determined by the nationality laws of the Member States
- Citizenship of the Union is complementary to the citizenship of the Member States
- ECJ has shown significant restraint in giving the notion of citizen or national of Member State a European dimension
- Nonetheless, indirectly the ECJ has influenced the personal scope of citizenship

## EU Citizenship

- *C-369/90 Micheletti*
  - As such not directly related to citizenship, but indirectly it has a huge impact
  - Facts:
    - Denist from Argentina, one of whose grandparents was Italian. According to Italian law, he has the Italian nationality
    - Micheletti travels to Spain, where his qualification to practice is officially recognised by the Spanish Ministry, he obtains a temporary residence permit, and then applies for a permanent one
    - Spain refuses: Spanish law provides that in case of double nationality, the nationality that has to be taken into account is the one determined by habitual residence, which is in Argentina

## EU Citizenship

- Decision of ECJ
  - It is for each Member State to lay down the conditions for acquisition of nationality
  - Other Member States have to unconditionally recognise this
  - Micheletti is thus an EU citizen
- *Case 200/02 Zhu and Chen*
  - Facts:
    - Chinese couple; Mr Chen is the director of a Chinese company, and for his job he often needs to travel to the UK
    - Mrs Chen cannot have second child because of China's one-child policy

## EU Citizenship

- Ms. Chen finds out that Irish citizenship rules entitle anyone born in Ireland to claim Irish nationality
- Ms. Chen goes to Belfast to have her baby, Catherine, born, Catherine receives only Irish nationality because China does not recognize dual nationality
- Ms. Chen moves to UK and wants to stay there, the UK refuses to grant long-term residence permit because of exploiting of EC law
- C-33/74 *Van Bunsbergen* and C-212/97 *Centros* ECJ recognizes that Member States can take measures to prevent EU citizens from invoking EU law on free movement, solely to be able to circumvent stricter national rules

## EU Citizenship

- Decision of ECJ
  - Baby Catherine has validly obtained the Irish nationality
  - Following C-369/90 *Micheletti* that must be recognised by the UK
  - The fact that Ms. Chen travelled to Belfast in order to bestow Irish nationality on her child is irrelevant
  - AG Tizzano problem lies not with EU law, but with flexible Irish legislation
- Consequence: Member States pressured Ireland to change its legislation only a couple of months before the final judgment

## EU Citizenship

- Conclusion:
  - Although it are the Member States that decide who is a national, member States through the case law of the ECJ have to respect the nationality legislation of other Member States
  - C-179/98 *Mesbah*: Member States have to exercise their competence concerning nationality taking into account the limits flowing from Community law; what are those limits?
  - C-135/08 *Rotmann*: Member States can remove nationality that has been acquired by deception; if that implies that the person is not anymore a citizen of the EU, this is acceptable if proportionate

## EU Citizenship

- 3 Rights and Duties of EU citizens
- Right to move and reside freely in the EU zone in accordance with EU law (Article 20 (2) (a) and Article 21 TFEU)
- Right to vote and stand as candidate in municipal and European elections in Member States other than own (Article 20 (2) (b) and Article 22 TFEU)
- Diplomatic protection: every citizen in territory of third country entitled to protection of any Member State on same conditions as nationals of that Member State (Article 20 (2) (c) and Article 23 TFEU)
- Right to petition European Parliament, apply to Ombudsman, write to any institution and have an answer in the same language (Article 20 (2) (d) and Article 24 TFEU)

## EU Citizenship

- Non discrimination on grounds of nationality (Article 18 TFEU) and right of equal treatment within scope of EU law (Article 19 TFEU)
- Right to citizens' initiative (Article 11 TEU and Article 24 TFEU)
- Duties?
  - No EU income tax, no EU national (military) service or duty to participate in the defence of the EU
  - Duty of EU citizens of non-discrimination? C-281/98 *Angonese* and C-438/05 *Viking*

## EU Citizenship

- A) Free movement and right to reside
- Free movement of persons was limited to economic actors in the broad sense
- C-413/99 *Baumbast and R.*: All citizens of the EU directly can enjoy the right to move and reside freely within EU, regardless of economic activity
- Growing tendency in the case law to a uniform interpretation of the free movement provisions of economic actors and of non-economic citizens

## EU Citizenship

- Restrictions (Directive 2004/38/EC):
  - Similar to free movement of persons: public policy, public security or public health
  - Duration of stay in the host Member State
    - Up to 3 months no problem if valid ID card or passport
    - More than 3 months
      - Workers or self-employed persons in the host Member State had already a free movement and residence right
      - All other EU citizens need to have sufficient resources and must be covered by comprehensive sickness insurance
    - More than 5 continuous years, right of permanent residence

## EU Citizenship

- However, those restrictions are not binding: Member States can have more favourable treatment: C-456/02 *Trojani*
  - Facts:
    - A French member of the Army of Salvation comes to Belgium and is accidentally given a residence permit by the Belgian authorities.
    - He falls completely without any source of income and applies for the Belgian minimum income subsistence
    - Belgium refuses, since Mr Trojani was not a worker and did neither legally reside on the Belgian territory nor has sufficient resources

## EU Citizenship

- Decision
  - ECJ agrees that Mr Trojani is not a worker and has no sufficient income
  - But since he accidentally obtained a residence permit, he should be given equal treatment
  - Belgium can decide that Mr Trojani does not fulfill the conditions anymore but this should not flow from the application of minimum income subsistence
- Even when Member States have restrictions in place, a proportionality test applies: C-413/99 *Baumbast and R*

## EU Citizenship

- Right to residence and free movement is not limited to EU citizens, but also includes their spouse, registered partner, descendants under 21 or dependants, dependent ascendants
- Case 200/02 *Zhu and Chen*:
  - Baby Catherine was EU citizen, but not the parents and parents do not depend on the baby
  - ECJ: a refusal to allow a parent, whether EU or non-EU national, a right of residence would deprive the child's right of residence of any effect

## EU Citizenship

- C-127/08 *Metock*
  - Facts:
    - Non-EU nationals had travelled to Ireland and had lodged an asylum application there, which was refused; they had never been in other Member State
    - In the meantime they had married EU citizens of other Member State than Ireland, but that were lawfully working and living in Ireland
    - Applied for residence card as a spouse, but this was denied

## EU Citizenship

- Decision
  - Previous case of C-109/01 *Akrich* denied that such persons could get residence permit: only when they had lawfully stayed in another Member State could they obtain the residence permit; Irish law followed this decision
  - ECJ overturns this case five years later: if an EU citizen would not have the right to be joined by his third country spouse in the host Member State, he would be discouraged from moving there, even if no prior lawful residence in another Member State

## EU Citizenship

- Right to freedom of movement and residence has also been interpreted to include nationals that are sanctioned by their own State for the exercise of this right: C-406/04 *De Cuyper* and C-224/98 *D'Hoop*
  - National measures that have an impact on the right of free movement of persons may be going against EU law
  - Nonetheless, those measure could be justified independent of nationality and if proportionate

## EU Citizenship

- Conclusion:
  - ECJ places strict requirements on the limitation of the free movement and residence of persons
  - Freedom of movement and residence in accordance with EU law does not entail that any restriction can be tolerated: some restrictions will be against EU law or if laid down in EU law unconstitutional
  - ECJ has broadened scope of application of residence right in order to safeguard family life

## EU Citizenship

- B) Non-discrimination on the basis of nationality within the scope of the Treaty
- Equal treatment is required as long as and only in so far as the situation falls within the scope of the Treaty
  - The exercise of the fundamental freedoms, such as the freedom to move and reside, falls within the scope of the Treaty
  - A citizen legally resident in the territory of another Member State falls within the scope of the Treaty and can therefore invoke Art. 18 TFEU the personal scope matters
  - No further link with EU law is necessary
- Non-discrimination can bring a whole range of national measures within the sphere of EU law

## EU Citizenship

- C-209/03 *Bidar*
  - Facts
    - French boy who lives with his grandmother in the UK and goes to secondary school there
    - He starts economics at University College London, and applies for a loan to cover maintenance costs
    - UK student regulations: two conditions: ordinarily resident in the UK for at least three years and being settled
    - Bidar, being a student from another Member State could never fulfil this condition of being "settled"
    - The UK authorities argue that they are not obliged under EU law to grant student loans to students coming from other Member States since student loans are a matter for the Member States as evidenced by previous case law

## EU Citizenship

- Decision
  - Due to the introduction of EU citizenship and rules on education, previous case law does not apply anymore
  - Student loans fall now within the scope of EU and should respect non-discrimination
  - UK regulations are discriminatory because it is much easier for UK students to satisfy the conditions
  - Objective considerations independent of nationality which pursue a legitimate aim
    - Legitimate aim: ensure that grants to students from other Member States become an unreasonable burden
    - Proportionate: no a sufficient degree of integration would suffice

## EU Citizenship

- C-158/07 *Förster*
  - Facts
    - Ms Förster was a German student who studied in the Netherlands
    - In the beginning of her stay she took up various kinds of paid employment and this enabled her to receive a maintenance grant in her capacity of worker
    - She quit paid employment and as a consequence of this she no longer received maintenance support
    - Under Dutch law she would only be entitled to such support as a student after having resided for an uninterrupted period of at least 5 years in the Netherlands

## EU Citizenship

- Decision
  - Article 12 is applicable to an EU student who moves to another Member State and claims entitlement to maintenance grants
  - 5 year requirement in accordance with Directive 2004/38/EC was appropriate to guarantee that the students are integrated
  - It was proportionate to this legitimate objective because EU legislator has deemed so

## EU Citizenship

- C-148/02 *Garcia Avello*
  - Facts
    - Couple living in Belgium, the husband is Spanish, his wife Belgian. They have two children, who are registered in Belgium under the name of their father, Garcia Avello
    - Belgian law only allows the surname of the father to be used
    - In Spain a child gets a double surname, which always consists of the first name of his father, in combination with the maiden name of his mother (i.e. the name would be Garcia-Weber)
    - Parents preferred the Spanish name, but a change was refused

## EU Citizenship

- Decision
  - Did the case fall within the scope of EC treaty?
    - Family lived in Belgium, the only link was their dual nationality
    - Nonetheless, ECJ deems this a sufficient link, so purely internal situation
  - Is there discrimination?
    - All Belgians were treated equally, whether they had a double nationality or not
    - Dual Belgian-Spanish nationality are in a situation wholly different from people with a single Belgian nationality, the reason being that they bear a different surname in different Member States

## EU Citizenship

- Is the discrimination objectively justified?
  - In Belgium, people would not understand why Mr. Garcia Avello's children bear another name than their father ⇔ Not true anymore due to increasing migration
  - The Danish government had argued that the prohibition of discrimination was aimed at facilitating integration ⇔ Different rules in different Member States, so not really required

## EU Citizenship

- Did the ECJ give preference to the Spanish system over the Belgium system? Why should Belgium in Belgium apply the Spanish rules to Belgian citizens resident in Belgium
  - Not what the ECJ meant. Member States rules on surnames must be flexible to accommodate different situations of the various Member States
  - Only a consistent refusal to any request for name change is discriminatory, but where to draw the line
- Case has been confirmed in recent C-353/06 *Grunkin and Paul* (but at least there the child was registered in another Member State)

## EU Citizenship

4. Should the case law of the ECJ be limited?
  - Through EU citizenship EU law will have a considerable impact on the policies of the Member States even if they are fully competent
  - Member States may not treat their nationals better than nationals from other member States and they may not sanction their own nationals for having exercised their free movement rights
  - Where is the line drawn? What with sensitive national measures that might hinder freedom of movement and residence (for instance: euthanasia, abortion, marriage)

## EU Citizenship

- First approach: exclude wholly internal situations
  - Traditionally part of the case law: EU law implies a certain transborder element
  - Unlike what commentators thought, citizenship has not removed the requirement of transborder element
  - Nevertheless, the link with EU is broadly interpreted: see C-148/02 *Garcia Avello*, C-406/04 *De Cuyper* and C-224/98 *D'Hoop*

## EU Citizenship

- Only in narrowly defined circumstances EU law will not be applicable: purely internal situations are not covered by EU law
  - Reverse discrimination is a matter of the Member States C-212/06, *Government of the French Community and Walloon Government v. Flemish Government*
  - However C-34/0 *Zambrano*
- General remark: how can the transborder element be squared with EU citizenship: should all citizens not be discriminated against? Yet, discrimination is linked to the right to freedom of movement; if one does not exercise that right, there can be no discrimination.

## EU Citizenship

- Second approach: a return to C-430/97 *Johannes?*
  - In that case the ECJ refused to apply the provisions on citizenship on a matter of divorce law because this was not covered by the EC Treaty
  - However, this may lead to abuses by Member States: they can hinder free movement and right to residence by discriminating non-nationals in areas where the EU has no competence

## EU Citizenship

- Third option: right of freedom and residence combined with non-discrimination as an optimization requirement
  - R. Alexy: rights are optimization requirements: they have to be realized as far as factually and legally possible
  - This means that rights in general are not absolute but need to be balanced by other principles, including the fundamental principles of public law

## EU Citizenship

- Since the EU is based on the principle of conferral, subsidiarity and proportionality, it should refrain in interfering in the competences that are still reserved Member States
  - ⇒ The competence of the Member States in a certain area should be a factor in deciding whether the right of free movement is violated
  - ⇒ The greater the competence the less likely this will be the case, but it is not excluded
- The advantage of this approach is that the ECJ can still look into the national measure, even if it is exclusively a competence of the Member State, but in a balanced manner, without always giving priority to EU law