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A New Method of Interpretation Linked to European Citizenship: the *Förster* Case

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Summary

European Citizenship, aged 17, is now a teenager. Created by the Maastricht treaty in 1993, it has moved in an unexpected direction thanks to an original approach by the European Court of Justice (ECJ). Following the first step with the *Martinez Sala* case, it enshrines today a whole corpus of law linked to Articles 17 and 18 EC. Through a comment of the *Förster* case, I describe the evolution of this new status. It must be located in the field of European and national social laws, defined and compared to other existing freedoms such as the freedom of movement of workers or pensioners. Its application shows an original, complex method on interpretation which opens the road for a new extension of EC law.

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Introduction

European citizenship is growing up fast. It is now 17 years old. As a teenager, it is still searching for its boundaries. Created in 1992 by the Maastricht Treaty, it has developed beyond expectations thanks to the European Court of Justice. (LaTorre 1998; Dougan & Spaventa 2005; Jacqueson 2002) Following the first step of the *Martinez Sala* case (Case C-85/96, *Martínez Sala / Freistaat Bayern*, [1998] ERC I-2691; See Albors-Llorens, 1998, p. 461), it has become one of the most prolific areas of case law based on Articles 17 and 18 EC. European citizenship seems to be extending in unforeseen directions and poses the eternal question of the balance between EC competences and national sovereignty (Shuibhne 2009). I argue that this new status is not only sometimes in contradiction with other existing statuses, but also that the new method of interpretation of the European Court of justice (ECJ) relies on undetermined concepts which might open the door to new extensions of EU law.

These two tendencies appear specifically in a recent case: the *Förster* case (Case C-158/07, *Förster*, [2008] ECR I-8507). Decided by the grand chamber of the Court on18 November 2008, it throws some light on these issues. Its importance is also shown by the high number of observations submitted by Member States. Written observations were presented by the Dutch, Belgian, German, Finnish, Austrian, Swedish and British governments and by the European Commission (see paragraph 60 of the Advocate General's opinion). Whilst this case does not radically transform the existing law, it is notable for not following the opinion of the Advocate General Mazak. It clarifies the conditions of eligibility for non-contributory benefits to a migrant European citizen. It explains the idea of integration in the host Member State through the concept of residence.

The case concerned a young German national who had settled in the Netherlands in 2000 in order to enrol for training as a primary school teacher and to obtain a bachelor's degree. During her studies, she had various kinds of paid employment such as a paid work placement in a Dutch special school at the end of 2002 and a post as a social worker in 2002 and 2003. Irrespective of whether she was employed, she received a maintenance grant when she moved to the Netherlands in 2000 under Article 7, paragraph 2 of Regulation 1612/68 because she was considered an EC worker within the meaning of Article 39 EC.

The institution in charge of the allowances subsequently realised that the claimant had not been a worker for six months and decided that she should not have received the scholarship. It gave two reasons for this refusal: first, she was not, during these six months, an EC worker, second, she had not been in any way integrated into Dutch society according to the principles set out in the *Bidar* case (Case C-209/03, *Bidar*, [2005] ERC I-2119). The question which then came to court was whether the claimant could receive the grant. The interest in this case lies in the diversity of the legal bases proposed: the Court had to make a choice between Article 7 of Regulation 1251/70, Directive 93/96 and Articles 18 and 12 EC. It chose to rely on several of these grounds to apply the concept of European citizenship and the non-discrimination principle in an original way in order to identify a forbidden restriction and justify it. It concluded that access to a national grant can be made conditional on integration of

the applicant in the host Member State and that this could be proved by residence that lasted longer than five years.

European citizenship raises many questions. First, its multiplicity of meanings is surprising (Closa 1992; Shaw 1998; Chiti 2007). Its use in diverse contexts creates doubts about its validity. One might think, for example, of the new concept of active citizenship, a new concept launched by the European Commission in a communication about European policies and the European Pact for youth and the promotion of European citizenship (COM (2005) 206 final, SEC(2005) 693). Equally there is the concept of a citizenship of access to education and national public services as evidenced by, for instance, the communication of the Commission of the 5 July 2007 entitled 'towards a European Charter of Rights of the Consumers of Energy', a text adopted by the European Parliament on the 19 June 2008 (see P6_TA-PROV(2008)0306 A6-0202/2008, point A), which aims to protect the citizens' rights to public services and specially the most vulnerable ones with a risk of "energy poverty". There is even the concept of a political citizenship which is sometimes open to non-citizens (see case C-145/04, *Spain / United Kingdom*, [2006] ERC I-7917.7917 and Case C-300/04, *Eman et Sevinger*, [2006] ERC I-8055; See Baubock 1994). European citizenship has a special impact in the social field. (Cousins 2007; Somek 2007; Benlolo Carabot 2007) In this area the case law is progressively creating a real status with associated rights. I will focus on this new status. First, I will identify and define it by comparison to other existing statuses. Then, I will critically analyse its concrete application which leads to an analysis of the notions of integration and residence.

Between Uniformity and Non-existence: the Status Linked to European Citizenship

A careful observer will notice two developments: first, the absence of a coherent concept of European citizenship is striking as it is clear that several categories of citizens exist. One would expect that European citizenship would be a single status applicable to all the nationals of the Member States. This is what Article 18 EC, which states that all European citizens have a single right to move and reside in the EC area, and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States seems to imply. However, the *Förster* case indicates the contrary. On one hand you have the worker and the former worker and on the other the economically inactive persons and students. Still, these distinctions are slowly being erased, leading to a mix-up of the categories and the identification of a real status of the European citizen. In other words, the progressive creation of the status of European citizenship raises questions about the usefulness of other existing statuses.

A new European citizenship status

The European citizen has a status attached to their citizenship. This was created in the *Martinez Sala* case and repeated in dozens of other cases. "[I]t is settled case-law that a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law" (Paragraph 36 of the *Förster* case; Case C-85/96. See also *Martínez Sala / Freistaat Bayern*, [1998] ERC I-2691, paragraph 63, and case C-209/03, *Bidar*, [2005] ERC I-2119, paragraph 32). Thus we see a new judicial technique which consists in the application of Article 12 EC as soon as the status of citizenship is recognised. Two conditions must be fulfilled: the matter must fall within the *ratione materiae* and the *ratione personae* of EC law. For the *ratione personae* the only condition is that a person be a European citizen. As Article

17 EC states, one must possess the nationality of a Member State. However, it is more difficult to determine what the *ratione materiae* condition will mean in practice.

A first analysis indicates that it is sufficient that an area of law falls in the field of EC law, broadly understood. More precisely, this expression includes not only the competences listed in the Treaty, but also those identified by secondary law and even by case law. For instance, education is a shared competence of the Treaty and can accordingly be at the basis of an ECJ case (For instance, see case C-147/03, *Commission v. Austria*, [2005] ERC I-5969) even though the Treaty strongly affirms the preeminent role of the Member States. The first paragraph of Article 149 EC, which will become Article 165 FEU after the ratification of the Lisbon Treaty states that

> the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

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This analysis gives all citizens benefits which were once restricted to workers. A good example is the extension of Regulation 1612/68 which normally confines social advantages to workers. But, in the *Martinez Sala* case, the Court considered that the inclusion of social advantages within the material scope of secondary law is a good enough reason to grant them not only to workers but also to all European citizens. This decision is difficult to justify as the interpretation proposed in the *Martinez Sala* case does not consist in checking whether a Regulation is applicable according to its scope as defined in the text of the Regulation, but rather in adopting a broader method based on citizenship. Thus, the Court checks whether a claimant is a European citizen (*ratione personae*) and if his allowance is covered by EC law (*ratione materiae*). This method extends significantly the field of application of EC law but potentially excludes non-citizens.

These two consequences have appeared in the recent case law. First, the number of cases judged in light of citizenship is growing every day. For instance, the *Grunkin* case, also decided by the Grand Chamber, is about the family names of migrant European citizens Case C-353/06, *Grunkin et Paul*, [2008] ERC I-7639). This case follows Case C-148/02, *Garcia Avello*, [2003] ERC I-11613 in which, for the first time, the Court considered the question of family names of children of migrant European citizens. Another case concerns war allowances, matters explicitly excluded from the scope of Regulation 1408/71 (Case C-192/05, *Tas-Hagen et Tas*, [2006] ERC I-10451, see also case C-499/06, *Nerkowska*, to be published. Repeated in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *OJ L 166, 30.4.2004, p. 1–123*, Article 3 paragraph 50).

Secondly, the exclusion of non-citizens remains a consequence of this case law, although one can notice a discrete evolution towards the inclusion of some third country nationals. In the *Metock* case, the Court gives a broad interpretation of the notion of family members within the meaning of Directive 2004/38 (Case C-127/08, *Metock e.a.*, [2008] ERC I-6241). In this case, the Court analysed a family link with a European citizen in order to obtain secondary rights by Directive 2004/38 and used a liberal interpretation judging that a couple recently

married can have the Directive applied to them. It is the exercise of the freedom of movement according to Article 18 EC (see paragraph 37), and, more precisely, the movement from one Member State to in order to study (paragraph 38) which puts the claimant in a situation where he can invoke EC law. It is a surprise to see that the Court does not quote the *Grzelczyk* case (case C-184/99, *Grzelczyk*, [2001] ERC I-6193) but only case C-224/98, *D'Hoop*, [2002] ERC I-6191 and case C-209/03, *Bidar*, [2005] ERC I-2119. The material scope is confused with the exercise of the third condition of the starting of a case which is the condition of crossing a border. This has led to the question whether this condition had disappeared, but it seems that it still exists.(see case C-224/98, *D'Hoop*, [2002] ERC I-6191 for an even more extensive interpretation the Grunkin case). These broad new criteria must be compared to the existing statuses of EC law.

A status superimposed upon other existing statuses

European citizenship covers many different statuses. Examples are the student in the *Förster* case, the indigent in the *Trojani* case (Case C-456/02, *Trojani*, [2004] ERC I-7573), and the worker in the *Collins* case (Case C-413/01, *Ninni-Orasche*, [2003] ERC I-1318). The existence of these three categories shows that there is no unity to the notion of citizenship. Nevertheless, the concept of citizenship is of interest because of its new subsidiary status. When a citizen is not a worker they can still invoke the status linked to citizenship. In the *Förster* case, the claimant tried to argue that she was a worker in the sense of Article 39 EC and get a scholarship as a result of the application of Article 7 of Regulation 1612/68. In the absence of such recognition the national Court proposed to rely on Regulation 1251/70 concerning former workers. Finally, her student status was considered in itself.

The worker

The concept of the European worker is still distinguished from that of European citizenship. Comparing Article 39 EC, relating to the freedom of movement of workers, with Article 18 EC, about the same freedom given to citizens, highlights the point of such a distinction. The aim is to favour economic migrants over the inactive. This is also why Regulation 1612/68, which only applies to workers, was retained even after the general simplification proposed by Directive 2004/38.

In the *Förster* case, the Court chose not to answer the question as to whether the claimant was a worker. This came as a surprise, especially in the light of the opinion of the Advocate General who proposed recognition that the claimant had all the characteristics of a worker (point 62 of the opinion of the Advocate General). His reasoning was based on an extensive interpretation of European citizenship. Because European workers and citizens should from now on be considered together, the notion of "worker" should be interpreted broadly. The Court had already gone down this road by judging that a person who goes back to studying after having worked can still be considered a worker under two alternative conditions: there must be continuity between the job and the studies (Case C-413/01, *Ninni-Orasche*, [2003] ERC I-13187) or the loss of the job and the following unemployment must not be voluntary (point 62 of the opinion of the Advocate General). In this case, the Advocate General put forward the second position, explaining that working conditions are now harder and that one should not expect to keep the same job one's whole life, and that workers should be ready to have new jobs and retrain more often than in the past. This argument is part of the Lisbon strategy and is found in a recent report of the Commission (Fifth Report of the European Commission on Union Citizenship, 15 February 2008 (1st May 2004-30 June 2007),

COM(2008) 85 final, SEC(2008) 19). On this argument the status of a worker should thus also be taken into account when they do not have a job or when they are studying. The worker can be unemployed, looking for a job or studying. The notion of worker is better understood through the notion of citizenship. This argument was not accepted by the Court. This is surprising as the Court had started to evolve in this direction in the *Collins* case (Case C-138/02, *Collins*, [2004] ERC I-2703). In this case, which was about a scholarship refused by the United Kingdom to an Irish-American national, the Court had proposed to redefine the notion of worker by judging that it is altered by the introduction of European citizenship. It should therefore include people looking for a job and moving to another Member State in order to do so. This s not contradicted by the present case, but it is limited by it. A person looking for a job can be considered as a worker, but a student does not have the same advantage The same direction of argument had also been identified in the *Martinez Sala* case where it was not clear whether the claimant had been working. (Case C-85/96, *Martínez Sala / Freistaat Bayern*, [1998] ERC I-2691). The Court required the national court to decide whether Ms Martinez Sala was a worker and if her activity was real and effective (Case C-456/02, *Trojani*, [2004] ERC I-7573).

The question of the relationship between the status of worker and student was raised by the Advocate General in the *Förster* case. He cited a recent case, *Payir*, in which the Court had judged that a Turkish national could not be, at the same time, a student and a worker (Case C-294/06, *Payir e.a.*, [2008] ERC I-203 about Article 6, paragraph 1, of the decision 1/80 of the association council CEE - Turkey, 19 septembre 1980). More precisely, the question posed in the preliminary reference was whether a Turkish student could be considered as a worker and was thus prevented from accessing the European job market (Case C-294/06, *Payir e.a.*, [2008] ERC I-203 about Article 6, paragraph 1, of the decision 1/80 of the association council CEE - Turkey, 19 September 1980 para 34). The Court answered in the negative. The status of worker was held to be autonomous and prevails over that of citizen because it gives stronger rights. It appears therefore that a distinction must be drawn between the two statuses and that European citizenship cannot be considered as a new "basis of judgment", (Martin 2007) but as a distinct basis opening rights different from the ones granted on the basis of Article 39 EC.

The worker should be distinguished from the citizen even though the two statuses contain some similar rights. (Van der Mei 2005, p. 203) The borderline between the two is even more blurred when considering former workers.

The former worker

Ms. Förster proposed to use Regulation 1251/70. This Regulation gives the worker who has stopped their professional activity a right to stay permanently in the territory of a Member State where the worker had a job and the right to equality of treatment in comparison to nationals. Several conditions about age or invalidity are imposed on the application of this Regulation. But because the claimant did not fulfil these conditions, the application of the Regulation was quickly dismissed. Yet, the Court could have decided not to adopt such a strict application of the Regulation. This idea comes as a surprise as it seems normal to apply the conditions imposed by a text. But it should be noted that the Court has changed its approach since it interpreted the concept of European citizenship in its judgments. The Court could have chosen a more flexible analysis in the Förster case as it did in the *Martinez Sala* case Case C-85/96, *Martínez Sala / Freistaat Bayern*, [1998] ERC I-2691), in the *Grzelczyk* case (Case C-184/99, *Grzelczyk*, [2001] ERC I-6193), and in some others (for instance, case C-224/98, *D'Hoop*, [2002] ERC I-6191 and case C-209/03, *Bidar*, [2005] ERC I-2119). In

these cases, the Court had given social advantages, benefits and allowances just because they were mentioned in Regulation 1612/68 even though this text was not applicable. More precisely, because Regulation 1612/68 included the benefits in the material scope of the Treaty, the Court held that it could extract them from this Regulation in order to give them to European citizens who were not mentioned by this same Regulation.

This different approach can probably be explained by the desire of the Court to innovate. Because it was limited by the existing interpretative tools it turned to newly available ones. As these were few and because the European context was not very favourable to such an extension, it turned to European citizenship in order to interpret the secondary law *a contrario*. Now that European citizenship has been recognised and that secondary law gives it a reality (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158, 30.4.2004, p. 77–123*), the Court might consider reverting to more traditional methods. This might be what it did when it refused to apply Regulation 1251/70 and logically concluded that it cannot be applied. However, this will not prevent it from applying a very original reasoning when it comes to students.

The student

Whereas the European Court of Justice refused to apply Regulation 1251/70, it decided to apply Directive 93/96 relating to the freedom of movement of students even though a strict analysis would have prevented its application.

Given that it is difficult to decide whether this Directive should be applied, several arguments were proposed in order to link Directive 93/96 and Article 18 EC. First, an interpretation justifying the existence of Directive 93/96 has been proposed by the Dutch and Belgian governments (Point 99 of the opinion of the Advocate General). According to them, there should be a distinction between the persons whose main aim is studying and those who first go to live in a Member State and subsequently decide to study there. The first category would be governed by Directive 93/96 which prevents them from invoking Article 12 EC. The second category can obtain a scholarship under Article 12 EC relating to the right of equal treatment on grounds of nationality. This solution is not very effective as it creates discrimination between the two types of students with the paradoxical result that people who decided later to become students would have more rights to a benefit than those going to the country in order to study. This solution was not adopted by the Court, but it is interesting because it gives to Directive 93/96 a *raison d'être*.

The Advocate General next proposed to oppose the *lex specialis* and the *lex superior* to conclude that the Treaty should prevail over the secondary legislation, namely Directive 93/96 (Point 118 of the opinion of the Advocate General). But this argument bends the classical principles of EC law where two traditional distinctions usually coexist: the *lex specialis* prevails over the *lex generalis* and the *lex superior* prevails over the *lex inferior*. The first leads to the conclusion that Directive 93/96 prevails over the Treaty (as it provides an interpretation of it) whereas the second leads to the contrary as the Treaty is hierarchically superior. In this case, the first hypothesis should be applied, leading to a conclusion opposed to that of the Advocate General.

Finally, the Court recalled the conditions of Directive 93/96 as having enough resources, health insurance and enrolment in an educational establishment. It concluded that it was applicable. "The situation of a student who is lawfully resident in another Member State thereby falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining a maintenance grant", (paragraph 41 of the case; see also case C-209/03, *Bidar*, [2005] ERC I-2119, paragraph 42). It went on to say that this Directive does not create a right to payment, but it does not forbid it either. The Court could then consider the award of a scholarship to the claimant.

The Court does not explain that this Directive could be interpreted as preventing a national of a Member State who cannot sustain himself from staying in the host Member State of which he becomes dependant. One could then consider that one of the aforementioned three conditions is not fulfilled, and that the Directive is therefore not applicable. The Court could have chosen to declare that this Directive is no longer applicable, but the constitutional notion of the separation of powers probably prevents it from doing so. However, the clarity of the reasoning is damaged by this detour. Another possibility is that this Directive is not applicable to this precise case, but is still valid in other cases. More precisely, it gives a right to reside, but no right to a grant. As this right is already provided for in the Treaty, the value of the Directive then becomes limited. It is even more limited if one considers that the Court does not only mention the Directive in order not to apply it, but also goes on to turn to the application of Article 18 EC and European citizenship, showing how there can be a juxtaposition of the statuses of student and citizen. There also could have been a possibility to use the status of a non-active citizen and Directive 90/364, (see point 95 of the opinion of the Advocate General):

> Although the Commission in principle concurs with Ms Förster, it explained at the hearing that Directive 93/96 precludes a person who derives his right of residence only from that Directive and no other provision of Community law from relying successfully on Article 12 EC to claim study finance, as is also apparent from *Bidar*. (case C-209/03, *Bidar*, [2005] ERC I-2119). By contrast, an economically inactive citizen of the Union who has been lawfully resident in the host Member State for a certain period of time, within the meaning of Directive 90/364, or who possesses a residence permit, can successfully invoke Article 12 EC.

Thus the method of the Court has evolved to apply a status, European citizenship, is interesting. It creates a new approach which questions the existing texts and it elaborates new criteria. As the European citizenship concept is extended it must be framed within new limits.

Between integration and residence: the reality of European citizenship

According to Advocate General Sharpston,

> as regards, more particularly, social assistance benefits, the Court has breathed life into [the] status [of citizenship] in cases such as Martínez Sala, Trojani and Bidar by holding that a citizen of the Union who is not economically active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit. (Point 53 of the opinion of the Advocate General; Case C-353/06, *Grunkin et Paul*, [2008] ERC I-7639)

This status must be given a reality. The analysis of the reasoning of the Court in the *Förster* case shows a radical change of approach.

If the method seems classical, its consequences are very original. The application of the non-discrimination principle on grounds of nationality is broadly applied and must be limited by an extensive interpretation of the justification of the EC law restriction.

The reasoning of the Court: the application of the non-discrimination principle on grounds of nationality (Article 12 EC)

The Court has chosen a three stage method: first, it identifies discrimination, then it determines whether it is justified and, finally, it applies the principle of proportionality. What is different is that, while at this last stage, it discovers a new justification and assesses another example of discrimination, which should have been the first element of the analysis.

The identification of discrimination

The application of the principle of non-discrimination on grounds of nationality is very broad. For instance, a citizen in the situation of Ms. Förster can invoke Article 12 EC as soon as EC law is applicable (Point 110 of the Advocate-General's opinion). The identification of different treatment is quite straightforward in this case: the Member State treats the claimant and its nationals in a different way by refusing to give her the allowance without conditions when it does give these allowances to its nationals without conditions. The Court does not explain if the restriction is discriminatory and if the discrimination is direct or indirect. It is quite likely that it is an indirect discrimination as the state imposes a condition of integration without linking it specifically to the nationality of the claimant. One might however consider that the restriction is non-discriminatory as the comparability of the situations of the students can be questioned. National students who move to another country and national students who do not move to another country are in different situations because the migrant students always have to prove that their stay is legal. This analysis would imply separating the recognition of European citizenship (Article 17 EC) from the application of the principle of non-discrimination on grounds of nationality (Articles 12 EC). The Court does not make this choice and decides to assimilate the situations of different nationals. The principle of non-discrimination implies thus that, as soon as the situations are considered to be similar, they should be treated in the same way. Having identified discrimination, the Court assesses whether it is justified.

A justification

Even though it is not made explicit by the Court, the justification of the restriction appears to be, safeguarding the financial stability of social assistance systems in the host Member State. The Court referred to the Bidar case observing

> that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State (paragraph 48 of the *Förster* case, see also paragraph 56 of the *Bidar* case)

The Court stated that it is "legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State" (paragraph 49 of the Forster case, paragraph 57 of the Bidar case). Several objectives have already been recognised in order to justify restrictions to the freedom of movement of citizens. In the *Grzelczyk* and *Collins* cases, it was the need to "ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question" (Case C-138/02, *Collins*, [2004] ERC I-2703, paragraph 67). Even though it was not explicitly recognised by the Court, it is likely that the real justification is actually not this one, but the certainty that the claimant will "avoid becoming a burden on the social assistance system of the host Member State during their period of residence" (Case C-184/99, *Grzelczyk*, [2001] ERC I-6193, paragraph 38), and thus the protection of the national social protection system. A certain degree of integration can be demanded:

> it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State. (Case C-209/03, *Bidar*, [2005] ERC I-2119, paragraph 57, case C-184/99, *Grzelczyk*, [2001] ERC I-6193, paragraph 44. See Dougan 2008)

There is also the need to regulate the professional and family situation of the unemployed citizen (Case C-406/04, *De Cuyper*, [2006] ERC I-6947, paragraph 31 et seq) and the limitation of the solidarity of the members of a society (See paragraph 35 of case C-192/05, *Tas-Hagen et Tas*, [2006] ERC I- 10451). This last justification could subsume all the others, (Jaume 2007, O'Brien 2008) its broad aim could be applied to all occasions.

It appears that economic justifications can be applied to non-economic questions. This seems completely new as, until now, economic justifications were unsuccessful. Today, an economic justification, the financial stability of the host Member State's social welfare system, can be recognised thanks to the impact of European citizenship. It is even sometimes applied to economic freedoms. For instance, in the Schwarz and Morgan cases citizenship was identified in the field of freedom of services (See Case C-76/05, *Schwarz et Gootjes – Schwarz*, [2007] ERC I-6849 and case C-11/06, *Morgan*, [2007] ERC I-9161). Will this lead to a new definition of the reasons of general interest? In any case, the traditional conditions for the application of a justification are its necessity and proportionality, but these are going to find a new meaning through new criteria such as that of residence.

The renewal of the condition of proportionality

The different objectives protected by the state in order to avoid the application of the principle of non-discrimination are implemented by a criteria of residence. In several cases, its practical rendering corresponds to the requirement to have lived for a while in the host Member State. For instance, in the *De Cuyper* case, the unemployed citizen who wants to be given his unemployment benefit has to remain on Belgian territory (Case C-406/04, *De Cuyper*, [2006] ERC I-694). It has been argued that this judgement was unfair because the unemployed citizen had to stay in the national territory in order to get his allowance so that the employment services could check his availability even though, in this very case, he was allowed to stop working until his retirement (see Jaume 2007 and Dwyer 2001). In the *Bidar* case, the Court decided that a requirement of three years' residence is not proportionate to the

objective which is to ensure that the student has a strong enough link with the host Member State (Case C-209/03, *Bidar*, [2005] ERC I-2119, see Dougan 2008). Finally, in the *Förster* case, it is a condition of residence of five years which is recognised as an appropriate condition.

More precisely, it is at the application of the proportionality test of the objectives justifying the discrimination that a new condition is introduced: that of residence. The Advocate General explained that

> the five-year residence requirement, as applied by the Netherlands Government, cannot as a consequence be regarded as being discriminatory as such, since it can be assumed that the nationals of the host Member State, who have as a rule lived in that country all their lives, satisfy the criterion of a certain degree of integration. (Point 96 of the opinion of the Advocate General)

Notwithstanding the incoherence of this proposition, a new method of analysis appears. It is considered that the condition of residence is proportionate because it is not discriminatory in the light of Article 12 EC. Several comments must be made: first, one was not supposed to apply the test of proportionality to the condition of residence, but to the integration of the citizen, which could be different. Second, the analysis of the equality of Article 12 EC has already taken place in the first step and should not reappear at this point.

This is where one reaches the third step in the Court's analysis. First, it looked for discrimination, then for whether it was justified. Now, it turns to a new condition created by assessing the proportionality of the justification.

Residence as a condition of integration

The condition of residence

Three elements can be taken into account in order to decide whether a citizen is integrated in a Member State or not. The first is obtaining a job or a paid traineeship in the country. A second is physical presence in the country (Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, [2004] ERC I-5257). and the third is the residence.

In the *Förster* case, according to the national authority, there is no integration in the sense of the *Bidar* case. This integration can be shown to be a condition of residence of five years in the Member State. The national court asked the question whether a condition of integration could be the duration of a stay in the country, and if so what its duration should be.

The answer to this question divided the Advocate General and the Court. The Advocate General considers that five years is too long. He would prefer three years (Point 133 of the opinion of the Advocate General). The Court held that five years is and appropriate duration and that the integration of the claimant can be shown by such a condition (paragraph 96). This decision is surprising. One should recall that the claimant was studying in that country, had lived there for more than three years and had worked there on several occasions. This case seems very similar to *Grzelczyk* in which a student had been working during the three first year of his studies and had asked for a grant only during the fourth year of study. The Court had considered that he was integrated and that he had proved his will to earn to provide for his

own resources. But, as this case was the first one, it raised more questions than answers. Moreover, the permitting a condition of five years residence reduces the substance of the right to move in order to study as most studies last between three and five years. It is thus only when a student would have finished their studies that they could ask for a scholarship. However, they would not be given this because they would not be a student anymore. This paradoxical situation shows the inappropriateness of a condition based on five years of residence. However, new criteria must be defined. Residence can be useful as a condition for the allocation of non-contributory benefits but its duration must then be reconsidered.

Another criticism comes from the fact that the criteria of residence is used at the beginning and at the end of the reasoning of the Court. Whereas residence used to be used, in the secondary legislation (see for instance Directive 93/96) in order to decide whether EC law could be applied, before the identification of discrimination, it is now used at the stage of applying the proportionality test to the justification. The Court manages to get out of the limits created by secondary legislation thanks to a very original method.

The last thing to notice is that integration and residence are not necessarily linked. For instance, it is possible that a national does not live in his state of origin. The point of the European Community is to break the association between nationality and residence. These cases happen more and more often. Many examples are given every day by the ECJ (For instance, Case C-406/04, *De Cuyper*, [2006] ERC I-6947 and case C-192/05, *Tas-Hagen et Tas*, [2006] ERC I- 10451). One might also wonder whether a person who has a sufficient link with their Member State can nonetheless constitute an unreasonable burden for this same country. The criteria is not clear yet even though it seems clearer and clearer that residence is going to have a role to play in association with Directive 2004/38.

The implications of Directive 2004/38

Even if one cannot conclude that the *a posteriori* interest of all these cases is lost given that very few citizens will manage to get allowances in very restricted conditions, it is still interesting to wonder about the real effect of the case. The *Grzelczyk* case had created a new right for the European citizen, but the *Förster* case comes as a confirmation of the *Bidar* case and makes clear that the degree of restriction of this right can make it very difficult, and perhaps almost impossible, to obtain. One should not conclude that the right to benefits does not exist anymore. It is limited to persons who have lived for more than five years in the host Member State. This approach is similar to the one proposed in Directive 2004/38, Article 16 paragraph 1, which gives to European citizens who have legally resided for five years in a Member State, the right to reside permanently in this state and the right to equality of treatment with the nationals of this state. It adds at Article 24 paragraph 2 relating to equality of treatment that

> by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

Finally Article 37 gives the Member States the possibility of using criteria more favourable than that of five years of residence as per Article 24 paragraph 2 even though it recognises that they do not have to.

The objective of the *Förster* case was to apply Directive 2004/38. It was a way for the judge to conform to the will of the legislator. The Court could have returned to the application of the former Directives, especially Directive 93/96, which has been repeated in Directive 2004/38. The choice made might reflect an awakening of consciousness of the Court about the displeasure of the Member States. The point of this new system is to create new rights for the citizen but it goes with a more or less conscious rebalancing of the competences between Member States and the European Union.

At a time when the Directive is no longer the privileged tool of the European Community, the ECJ is trying to deepen the *acquis communautaire*. Its case law might lead to a rethink of the balance of the coordination of the social security systems. As it already appears, a migrant citizen can ask for benefits from a host Member State if he has lived long enough in this country. The social security systems might have to be transformed. The principle of equality already tends to harmonise the conditions of allowance of these benefits (Dougan 2009; Barnard 2005). Is it likely that, in the near future, in order to give more power to the principle of non-discrimination, Member States might decide to impose a single condition of residence on all the claimants of scholarships? If we are still far from this harmonisation, the new method gives new competences to the EC without the participation of the legislator or the Member States. One will have to wait and see the final shape of this new corpus of rules to understand the EC objectives and its consequences. The upcoming birthday of European citizenship and its attainment of adulthood might be an occasion to define its boundaries more clearly.

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