INTEREULAWEAST

European and International Law Master Programme Development in Eastern Europe

Co-funded by the
Tempus Programme
of the European Union

Handbook on Citizenship of the Union

by Prof. Dr. Rajko Knez
Faculty of Law
University of Maribor, Slovenia
rajko.knez@um.si

October 2016

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This publication is the outcome of the project
InterEULawEast
ref.no.544117-TEMPUS-1-2013-1-HR-TEMPUS-JPCR
of its partner in the project University of Maribor Faculty of Law

Author: Prof. Dr. Rajko KNEZ

Manuscript: October 2016

Publisher: University of Maribor Faculty of Law, Mladinska 9, 2000 Maribor

Published:
This handbook is accessible in e-version only on the web page of the project
http://www.efzg.unizg.hr/default.aspx
and web pages of the same project by project partners,
including University of Maribor Faculty of Law
(*http://www.pf.um.si/sl/projekti-in-znanstveno-delo/7855-intereulaweast*)
from October 2016 on

ISBN: 978-961-6399-86-9

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I. Foreword

This handbook is dealing with European citizenship (Citizenship of the Union). Rules on European citizenship became mature in late 80's of the previous century. Since than, a huge body of jurisprudence was adopted by the Court of justice of the EU (CJEU). There are only little provisions in this respect in the Treaty on Functioning the European union (TFEU), and basically, there is only one sentence that is reason to a workload of the CJEU. This is Art. 20 and the sentence of a point 2.a) defining that the European citizens have right to move and reside freely within the Union. It is obvious from this sentence that European citizenship is not only rule per se, but it effects other rights, like living together with family dependences, partners, same sex marriage partners, obtaining social rights to be able to live in certain Member State, … In other words, European citizenship is the source of derivative rights for other persons, including and foremost, the third country nationals (TCN). They can benefit from European citizenship. Citizenship of the Union is intended to be the fundamental status of nationals of the Member States, and it produces effets also to other person via derivative rights.

Basically, the European citizenship is a source of rights, not obligations. Although it does not reflect in any passport, its effect is broad; I dare to say it is much broader than anticipated at the beginning. Namely, it effects rights which are in the competence of Member States alone (like social rights). Member States, which are requested to use non-discriminatory principle to award social rights to all EU citizens and their dependents and family members, are therefore faced with the situation, where multiplication of the beneficiary presents real threat to national budget and as a corollary to this they are decreasing social rights or trying to find paths to make a distinction between own nationals and TCN.

This handbook addresses different question, considering the huge diversity of impacts of European citizenship, by using jurisprudence of CJEU and made-up cases. The handbook is not a study book. It is therefore advisable to study European Union citizenship rules in different books and to use a handbook as a tool to deepen the knowledge and to discuss questions of the applicability of rules, to learn the skills on applicability, to get an overview on areas of law affected by the European union citizenship and its multiply affects.

Prof. Dr. Rajko Knez

II. European citizenship in general

A. General on free movements (freedoms) and citizenship

Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the TFEU and to the measures adopted to give it effect. The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the TFEU. Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence.

"Free movements" is a legal term which encompasses all kind of movements, notwithstanding whether it applies to persons (legal or natural), objects or services. It is a part not only of the internal market, but also of the EU as such, meaning that economic activity is not always at stake. *Legal causes of actions (legal bases)* regarding rights on free movements of persons are contained in several documents. Many of them are capable of the direct effect and are directly applicable at national level at *national authorities*.[1]

Situations involving the exercise of the right to move and reside freely in other Member States, are guaranteed by the Treaty provisions concerning European citizenship. The status of citizen of the European Union is destined to be the fundamental status of nationals of all the Member States, conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality. Since the introduction of the Union citizenship by the Treaty on European Union, which entered force on 1 November 1993, conditions for a citizen of the Union to live in a Member State other than the State of which he is a national, are minimised and they can rely on the prohibition of all discrimination on grounds of nationality.

However, not all rights derived from EU law prevail and derogate national law. This statement is *prima facie* contrary to the nature of EU law and its primate; however, in cases where rights under EU law (like European citizenship) are additional to rights of the national legal orders, national law still retains the competences and importance. This is perhaps why the overall picture of application of the rules on European citizenship is not always clear, neither are the court decisions and argumentations always clear and congruent. However, the Court of the EU plays an important role in defining the scope and *substantive* application of the European citizenship and its relation to other freedoms?

Since the introduction of the Union citizenship the CJEU has adopted numerous of bold and impostant decisions. Many of them have been codified in the *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[2]

Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the CJEU.

[1] What exactly is meant by »national authorities«?

[2] And it amended 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. Official Journal of the European Union L 158 of 30.4.2004.

Discuss first some basic questions? If necessary consult proper literature!

1. How many freedoms can one find in the TFEU?

2. Are European citizenship and all freedoms interconnected?

3. Is the European Citizenship a metaphor or source of rights?

4. Is it the free movement the fundamental rights in the EU and hence without obstacles, i.e. unconditional? Which legal sources are relevant?

5. Are rights on free movements which apply to persons transferable or a source of derivation?

There are certain peculiarities which apply to free movement of persons and cannot be attributed to free movements of goods or capital.
Try to define (bellow) which are these particularities and add reasons:

a) legal persons are not treated in legal terms as are natural persons;
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b) rights which are attributed to individual can be a source of a derivation to other (some) persons too; i.e. rights can be multiplied not only in case of nuclear family members
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c) free movement of persons rules are also part of the ECHR; this is not the case with goods and capital
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d) all third country nationals (TCN) could be subject to family reunification rules
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B. General rules on free movement of persons

Economic non-active and economy active

1. This is the first limb of diversification. Long has the EU (EC) shape the rules only for economic active persons...
   Why do think was this so:

2. When has the EU start to recognize the rights of the free movements to economic non-active persons? Who are economic non-active persons?

Family reunification

1. What is the purpose to regulate family reunification? Where you can find rules on reunification?

2. Does the EU has a competence to regulate family law, i.e. rules applicable to relations among parents, children, relatives etc?

3. In the case *Diatta* (267/83) the CJEU ruled that marriage shall be taken into account even in cases where spouses do not leave together. The dir. 2004/38 requires that the family members must be accompanying or joining a Union citizen. Do you think that the directive is changing the CJEU case law? Is this at all possible?

4. Is there any international law which is applicable to family relations?

5. The directive 2003/86 on the right to family reunification is not applicable to members of the family of a Union citizen. Why do you think this is a solution given by the directive?

6. Discuss this statement:

"The family structure has changed. The traditional, married couple with children ethos as the basis for the legal definition of the family no longer reflects the reality. We can now in fact make reference to a patch-work of family types. The migration of these family types in Europe is a growing phenomenon bolstered by both primary and secondary community law. We shall examine in the near future the extent to which the family structure is protected and challenged at the supranational level, and, in particular, the extent to which different, non-traditional family units are given legal recognition when they migrate." (Loïc Azoulai)

7. Discuss this statement:

"In the last few decades Europe has seen a substantial change in family structure and demographics. The traditional, nuclear married couple with children ethos as the basis for the legal definition of the family no longer reflects reality. At the same time, processes of Europeanisation have necessitated a rethinking of family definitions and family-related rights. Feminists have long decried the gendered division of care work which assigns fathers the role of breadwinners rather than caregivers. Legal practices that conflate fatherhood with providing financially for children—be it the focus on paternal financial support in child custody litigation, or maternal-focused postpartum leaves from paid employment—have been criticized for their flawed assumptions about fathers' abilities, obligations and, increasingly, experiences. Yet, a decade into the 21st century, the bulk of caregiving duties is still performed by women, despite such criticism and the policy changes that it has informed. At the same time, there is a growing mobilization on the parts of fathers involved in the care of children claiming equal rights. Also, advances in reproductive technologies and the substantial rate of divorce and remarriage have created a pressure to allow a more nuanced legal definition of fatherhood, which could better address the intricate realities of contemporary families. This session will seek to explore the intersection of these two efforts to reveal how the debate over the essence of fatherhood informs the legal and societal understandings of fathers' role as caregivers, the efforts to change these understandings through legal policies, and their ultimate success and failure." (Tali Schaefer)

C. *European citizenship – equality, non-dscirmination*

Justification for equality of treatment between nationals and non-nationals residing in the Member States is based on the legal status of Union citizens, which is guaranteed to a national of any Member State living in another Member State. A refusal by the authorities of a Member State to grant to a citizen of the European Union a benefit which was granted to all persons lawfully resident in the territory of that Member State constitus discrimination directly based on nationality.

One among first cases of the CJEU, which decides the need of equal treatment of the EU citizens is Martines Sala (below)

Case work:
Martinez Sala v Freistaat Bayern, Case C-85/96, 12 May 1998

> *Facts: the applicant was a Spanish citizen and was legally resident in Germany. The German authorities allowed her to continue to reside in Germany but refused to issue her a residence permit and to grant her a child-raising allowance because she did not possess a proper residence permit.*
>
> *Complaint: relying on (ex) Article 6 of the EC Treaty, the applicant claimed the refusal by the German authorities to grant her a permit of residence and the child raising allowance was discrimination on grounds of nationality.*

Read the case and answer the following questions:

- Accoridng to the CJEU the claimant was not in possession of a document which nationals of that same State were not required to have in order to obtain certan right. Which document was that?

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- What is reasoning of the court for the decision? Do you think that the court realized at that time, that it will also have to "open the door" for derivative rights?

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Case work:

C-135/08 Janko Rottmann v Freistaat Bayern, judgment of 2 March 2010[3]

The CJEU asserts the relevance of European Union law, and in particular the status conferred on nationals of the Member States by the rules on citizenship of the Union, as a parameter for legitimacy of the nationality withdrawal decisions taken by the authorities of the Member States.

Mr Rottmann, an Austrian national by birth, acquired German nationality by naturalisation. However, the Land of Bavaria decided to withdraw this naturalisation with retroactive effect because it was obtained fraudulently, since Mr Rottmann had not disclosed the fact that he was the subject of judicial investigation in Austria. Per Austrian law, Mr Rottmann's naturalisation in Germany had the effect of loss of his Austrian nationality, without the withdrawal of his naturalisation in Germany implying that he automatically recovers Austrian nationality. On appeal on a point of law against the judgment issued by the court of second instance in the dispute between Mr Rottmann and the Land of Bavaria, the German Federal Administrative Court referred questions to the Court of Justice on the application of European Union law, in particular to ascertain whether Article 20 of the TFEU allows a decision to withdraw naturalisation to have the effect of the loss of citizenship of the Union for the person concerned who would thereby be rendered stateless.

That decision is, moreover, in keeping with the general principle of international law. Concerning the examination of the criterion of proportionality, it is for the national court to taken into consideration the potential consequences that such a decision entails for the person concerned and, if relevant, for his family, with regard to the loss of the rights inherent in citizenship of the Union. In this respect, it is necessary to establish, in particular, whether this decision is justified in relation to the gravity of the offence committed, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.

Read the judgement and answer the following questions?

- Can the EU legal order demand from Member States to do anything necessary not to generate any stateless person? Does the situation of a citizen of the Union becoming stateless as a result of withdrawal of his nationality nevertheless come within the ambit of European Union law?

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[3] http://ec.europa.eu/dgs/legal_service/arrets/08c135_en.pdf (15.6.2016)

- If a national legislator does not regulate a possibility for stateless person to obtain citizenship, is it possible that administrative authorities or courts act in a way to prevent any stateless person?

- We have seen that citizenship of the Union is a source of rights which effect also national measures of sole competence of Member States, like social rights. In another word, the EU law, rules on citizenship of the Union, is opening the doors to applicability of national rules and the Member States can not close these doors. Moreover, there should be now difference regarding the applicability of these rules to non-citizens of the EU, even no difference among own and foreign nationals. The question is, although the citizenship of the Union can not force the Member States to regulate the aquisition of the national citizenship according to EU wishes, how is than possible to affect social rights?

- Compare case Micheleti (C-369/90) with case Rottman! In case Micheletti the CJEU stated: "[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality". Do you find any similarity with Rottman case? Wwhat is the basic rule adopted by the CJEU in case Micheletti? Do you see any striking point in this rule?

Read this well articulated article and make comments:[4]

EU Law Analysis

Expert insight into EU law developments

TUESDAY, 28 JANUARY 2014

Want to be an EU citizen? Show me the money!

Steve Peers

Give me your rich, your bored,
Your pampered mistresses shopping duty-free,
The randy playboys through our open doors.
Send these, the chinless, party-goers to me,
Come flash your cash inside our finest stores!

We can only imagine whether Emma Lazarus, the author of the famous poem inscribed on the Statute of Liberty, would indeed have adapted her poem thus, in light of the sale of Maltese nationality (and hence, citizenship of the European Union) circa 2014. However, putting parody aside, are there any constraints deriving from EU law on Member States' rules on the acquisition of EU citizenship, and if so, what are they?

The starting point is the judgment in *Micheletti*, in which the Court of Justice of the European Union (CJEU) stated that "[u]nder international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality' (emphasis added).

[4] http://eulawanalysis.blogspot.si/2014/01/want-to-be-eu-citizen-show-me-money.html (14.5.2016)

What limits are set by the phrase 'having due regard to Community law'? In *Kaur*, the CJEU ruled that the United Kingdom was free to refuse to grant full British nationality to one of its quasi-citizens holding a special form of ex-colonial legal status, mainly because these rules were among the 'conditions of accession' of the UK to the Communities in 1973. 'Furthermore', the UK's declaration to this effect did not deprive anyone 'of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person'.

However, in *Rottmann*, the Court ruled that there were some constraints upon Member States' rules upon the loss of their nationality, deriving from the existence of EU citizenship. The Court began by quoting the Council of Europe's Convention on Nationality, Article 3:

'1. Each State shall determine under its own law who are its nationals. 2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.'

So international law (although Malta has signed, but not ratified, this Convention) gives States the power to determine who their citizens are, and requires other States to accept that decision in principle, with caveats (as regards the latter rule) about international law. If we could end our analysis here, the answer to the question posed above would be simple: Malta could sell its nationality.

But the answer is not simple, because, as a matter of EU law, the rules of public international law on nationality are not fully applicable. First of all, in Micheletti and subsequently (see *Chen and Zhu*), the CJEU stated that EU law establishes a rule of pure mutual recognition of Member States' nationalities. In other words, the international law exceptions set out in Article 3(2) of the Council of Europe Convention do not apply. It must follow that, since Member States are obliged to recognise each other's nationalities, they have at least some interest in what other Member States' rules on nationality are – limiting the application of Article 3(1) of that Convention.

Let's return to *Rottmann*. In its judgment, the CJEU then mentioned declarations and decisions of Member States to the effect that the acquisition and loss of nationality was purely a matter for national law. But the Court then stated baldly that: 'Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter'. EU law applied to a national decision on the loss of Member State nationality, because it caused the person concerned to lose his status as an EU citizen.

The Court then distinguished *Kaur*, as it concerned a person who had never had EU citizenship, rather than someone (like Mr. Rottmann) who had it and lost it. It then indicated that EU law could accept the idea that nationality of a Member State could be lost due to deception, subject to the principle of proportionality. Finally, it hurled this hot potato back to the national courts, which were left to apply these principles to the facts of this case.

What can we derive from *Rottmann*? While the case concerned the loss of EU citizenship, we cannot conclude necessarily that EU law has nothing to do with its acquisition. The crucial words 'in particular' indicate that EU law might impact upon that topic too. While *Kaur* did concern the acquisition of nationality, it can be distinguished from the Maltese case because it concerned the refusal of nationality, not the grant of it. While refusal of nationality does not impact directly upon other Member States, the grant of that nationality (and therefore EU citizenship) does.

Having said that, *Rottmann* does indicate that prima facie EU law does not set very tight constraints on Member States' nationality laws. But the outright sale of citizenship arguably bursts through even this loose corset. While the Court of Justice might be willing to accept extensive variants of the *jus soli* and *jus sanguinis* principles fro acquiring the nationality of a Member State, would it be willing to accept the principle of *jus argentum*? We cannot be certain until the Court of Justice is seized of the question; but we can hardly be sure that it would.

*For an alternative view, see Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price', at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385340

Barnard & Peers: chapter 13

Posted by Steve Peers at 00:29

D. *Ratione materiae of rights and Union citizenship per se?*

Ratione materiae is a very relevant question – which *res facti* and rules of the EU law and national law are comprehended by the rules on EU citizenship? Namely, when it comes to the question of free movement and freedom of residing in member States, it is important to realise that this is a question of r*atione materiae* of the EU and national law.

Namely, all these questions which make free movement of people possible or which make them possible to be installed or lto ive in certain Member State, are in close relation to the European citizenship. Most of the time, this will be link to different kind of social rights, but it is not necessary to limit *ratione materie* to social rights.

Namely, we have seen in jurisprudence, this is also a question of personal (surname) name, access to the court, access to the educational programes, etc. To define exactly what does it mean *ratione materia*, one has to find a casual relation in free movements or in the right to live in the Member States other than the state of the national citizenship.

Below you can find different cases, also made up cases, in which you can practice *ratione materiae* issue. The CJEU does usually not use the words "cause" or "casual relationship", but this is basically at stake. If certain right is necessary for the performance of the Union citizenship or to so say to make it real and affective in practice, then such a right would be a ratione materiaa of the European citizenship.

It means that this right is influence by the European citizenship. Therefore, European citizenship is not a legal institute *per se* but it is link to some other rights and we can not list the as a definitive list or as definitive number of them, but it is up from case to case to a ascertain them.

The above might be summarized also as follows:

- Rights linked to fundamental freedoms or rights that may be gathered from the TFEU:

- like: education (Gerzelczyk), student loans (Bidar), child-raising allowance (Martinez Sala), rules governing the surname (C-148/02, Garcia Avello), rights deriving from the resident right of a children (C-200/02, Zhu-Chen), tide-over allowance (D'Hoop), … the list is not conclusive

- and in addition, these rights must be in close and real link /genuine link/ to host MS and integration level (however the CJEU does not always look for that … case Zhu-Chen ... or it is broadly interpreted: C-11 in 12/06, Morgan, Bucher)

Case work:

Parents would like to obtain a passport for his child. They all moved back as a family from Denmark to Germany after had been living there for couple of years. The child was born in Denmark. There he got two surnames as it is common there. However, German authorities hesitate to enter into the register a child, otherwise a German citizen, with double-barrelled surname composed of the surnames of both the father and mother. German law does not allow double-barrelled surname. The application was finally refused.

Would you:

a) suggest an appeal
b) apply private international law to the case
c) apply TFEU (which provisions)
d) apply secondary law (what source)
e) suggest that matters like the law of the personal names are not part of the EU law
f) ask for preliminary ruling procedure
g) propose to change the surname to be in line with the German law
h) submit the case to competent inspector office
i) submit the case to the EU Commission
j) maintain that there is no interstate element
k) submit the case to Constitutional Court
l) submit the case to ECtHR

Discuss possible answers!

Case work:

Study the case *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (C-184/99). It is about students residing in a member state other than their own and the question whether they are entitled to receive a minimum subsistence allowance on the same conditions as nationals of the host state.*

Mr Grzelczyk, a French national, undertook a course of studies in physical education at the Catholic University of Louvain-la-Neuve. During the first three years of his course, he defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities. The fourth year of his studies being the most demanding, Mr Grzelczyk applied to the Public Social Assistance Centre for Ottignies-Louvain-la-Neuve ("the CPAS") for payment of the minimum subsistence allowance, or "minimex", for the year 1998/1999. He was initially granted the allowance.

Mr Grzelczyk's entitlement to the minimex was then withdrawn with effect from 1 January 1999, the competent minister basing his decision to stop payment on the fact that Mr Grzelczyk was a student.
When the benefit was introduced in 1974, entitlement was reserved to adults of Belgian nationality, residing in Belgium and not in possession of adequate resources. In 1987 entitlement was extended to include, amongst others, persons to whom the 1968 Community regulation on the freedom of movement of workers within the Community applied.

Mr Grzelczyk brought an action before the competent Belgian court challenging the CPAS's decision of 29 January 1999 to stop payment of the minimex.

The Labour Tribunal, Nivelles, referred a question to the Court of Justice of the European Communities concerning the compatibility of the Belgian law with Community law, that is, with the Treaty and, more specifically, the principles of European citizenship and non-discrimination enshrined in the Treaty. Was it contrary to Community law for entitlement to a non-contributory social benefit to be made conditional, in the case of nationals of other Member States (in this case France), upon their being regarded as workers, given that that condition did not apply to nationals of the host Member State (in this case Belgium)?

- What was the decision of the CJEU? Why? How the court argumented its decision?

- What does the decision mean from the viewpoint of ratione materiae? Why is the students subsitence allowance (minimex) part of the ratione materiae of the citizenship? Is this indeed necessary? Do you agree with the court reasoning?

E. *Expulsions, extradictions of Union citizens*

One area which influences also criminal national law is a question od expulsion of Union citizens. Also, a discrimination is possible. For instance, national citizens cannot be extradicted or only under strict conditions. Dir. 2004/38 includes provisions which protect EU citizens against the expulsion. Case law of the CJEU is followed.

Dir. 2004/38... Arts.: 28-33.

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Case work:

Do you think expulsion is possible in a case, where for instance a Romanian citizen is begging on the street in Wien? His begging is obtrusive and he was several times arrested by the police. He has no permit for a permanent or a short period (limited) residence in Austria.

To this respect see also case *Jipa*, C-33/07 (below)

Case work:

Mr Jipa left Romania to travel to Belgium. On account of his "illegal residence" in Belgium, he was repatriated to Romania under the terms of an Agreement between Belgium, Luxembourg and the Netherlands, on the one hand, and Romania, on the other, on the readmission of persons who were in an illegal situation. The Romanian Minister for Administration and Home Affairs applied to the referring court for a measure prohibiting Mr Jipa from travelling to Belgium for a period of up to three years, in accordance with a Romanian Law on the conditions for the free movement of Romanian citizens abroad.

The referring court asked whether Art. 18 EC and Art. 27 of Directive 2004/38 precluded national legislation that allowed the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he had previously been repatriated from the latter Member State on account of his "illegal residence" there.

The Court of Justice held that, as a Romanian national, Mr Jipa enjoyed the status of a citizen of the Union under Art. 17(1) EC and might therefore rely on the rights pertaining to that status, including against his Member State of origin, and in particular the right conferred by Art. 18 EC to move and reside freely within the territory of the Member States. The Court held that the right of freedom of movement included both the right for citizens of the European Union to enter a Member State other than the one of origin and the right to leave the State of origin.

Read carefully case Jipa and try to answer the following:

- However, the right of free movement of Union citizens is conditional and might be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect. Is there any such limitation possible in this case, taking into accunt Directive 2004/38?

- Are conditions mentioned in the previous question interpreted strictly, narrowly or broadly?

- Can the scope of limitations be determined unilaterally by each Member State without any control by the EU institutions?

- Can the fact that a citizen of the Union had been subject to a measure repatriating him from the territory of another Member State, where he was residing illegally, be taken into account by his Member State of origin for the purpose of restricting that citizen's right of free movement? Which circumstanes needs to be taken into account – objectice or subjective (like his personal conduct)?

Compare Case Jipa with this one:
In Case C-249/11 Byankov (judgment of 4 October 2012), the Court ruled on the question whether the provisions of the FEU Treaty on citizenship and Directive 2004/38 preclude a Bulgarian provision under which a debtor who fails to pay an unsecured private debt may be prohibited from leaving the territory. The Court held that, even if the view could reasonably be taken that some idea of safeguarding the requirements of public policy underlies the objective of protecting creditors pursued by such a provision, it cannot be ruled out that a measure prohibiting a person from leaving the territory that is adopted on the basis of that provision pursues an exclusively economic objective. However, Article 27(1) of Directive 2004/38 expressly excludes the possibility of a Member State invoking grounds of public policy to serve economic ends. Furthermore, as regards the proportionality of such a provision, the Court pointed out that there exists within European Union law a body of legal rules that are capable of protecting creditors without necessarily restricting the debtor's freedom of movement. The Court also held that European Union law precludes a national provision under which an administrative procedure that has resulted in the adoption of a prohibition on leaving the territory, which has become final and has not been contested before the courts, may be reopened, in the event of the prohibition being clearly contrary to European Union law, only within one month of the prohibition being imposed and only at the initiative of certain bodies, in spite of the fact that such a prohibition produces legal effects with regard to its addressee. A prohibition of that kind is the antithesis of the freedom conferred by Union citizenship to move and reside within the territory of the Member States.

- How do you comment the comparison?

III. European citizenship and issues related to marriage, family relations and same sex couples

The EU citizenship rules are closely connected with family rights, rights steaming from the marriages, also same sex partnerships. Namely, the rules on EU citizenship are not applicable only for the individual in question, but they are also subject to derivation, meaning that rights acquired by the individual due to the EU citizenship can be transferred also to another person or, that the EU citizenship would be meaningless if the other person is not taken into account (for instance if somebody is allowed to move freely within the EU or has a right to stay in certain Member State, but his spouse would not have the same right, they could not be leaving together and hence the EU citizenship right to stay would be non-affective). Of course, this would not be an issue if this spouse is also the EU citizen, but if her or she is a third country national (TCN) then, the only possibility to live together is to obtain derivative right from EU citizenship of the partner and such a right would enable him or her to stay in the Member State. It means, that the EU citizenship is not only the right *per se* but it influences rather substantively also other rights, some of them also being a subject of the ECHR (like Art. 8, the right to private and family life).

It is therefore why number of cases which relate to EU citizenship involves rights of other persons, family dependences, like spouses, children, etc.

At the same time, it is not only that only the dependences would acquire derivative rights, like children from parents, but it is also *vice versa*. Also parents can obtain derivative rights from their children, in case that children are EU citizens and parents are not.

See in this regard Zhu & Chen v Secretary of State for the Home Department case (C-200/02) - below.

Case work:

Ms Chen, a Chinese national travelled to Belfast in order to give birth to her daughter Catherine on the island of Ireland (i.e. in Northern Ireland or the Republic). The child was immediately registered as an Irish citizen as provided for under the Irish Constitution as it then stood. The family wished to reside in the UK but was refused permission to do so by the Home Office. To the Chinese government the child was an Irish national. As a foreigner she could apply to stay in the country of her parents for not more than 30 days at a time and then only with the permission of the authorities. The expulsion of Ms. Chen from the UK would therefore lead to the separation of mother and daughter.

The Court held that denying Ms. Chen the right to reside in the UK to be with her daughter, who enjoyed such a right, would be "manifestly" contrary to her daughter's interests and would be contrary to Article 8 of the European Convention on Human Rights on the right to respect for family life. Ms Chen had to be able to invoke a right of residence deriving from that of her young child because the contrary would result in entirely depriving her daughter's right to reside in the UK of any effectiveness.[5]

- Read the case and find the legal rules – parts of the judgement which contains rule applicable to the European citizenship and with the erga omens effect?

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[5] See http://emn.ie/cat_search_detail.jsp?clog=6&itemID=157&item_name= (10.3.2016)

Case work:

The judgment in Singh and Others (C-218/14, EU:C:2015:476), delivered on 16 July 2015 by the Grand Chamber, concerns the conditions under which third-country nationals who are family members of a Union citizen may retain a right of residence in the event of divorce. The main proceedings concerned three third-country nationals who, following marriage to Union citizens residing and working in Ireland, acquired a right of residence in Ireland, under Article 7(2) of Directive 2004/38 (7), as spouses accompanying or joining a Union citizen in the host Member State. The marriages lasted at least three years, including at least one year in the host Member State, but in each case the spouse having citizenship of the Union eventually left Ireland before initiating divorce proceedings. In that context, the Court was asked whether the right of residence in Ireland of the three foreign spouses might be retained on the basis of Article 13(2) of Directive 2004/38.

Read the judgement and try to answerr:

- Do nationals of third countries who are family members of a Union citizen have right to claim the right of residence in the host Member State in which the Union citizen resides.

- If the Union citizen leaves the Member State in which his spouse who is a third-country national resides, for the purposes of settling in another Member State or a third country, before divorce proceedings, are the conditions laid down in Article 7(2) of Directive 2004/38 still met.

- Thus, is it true that when the Union citizen leaves, the derived right of residence of the third-country national ceases before the divorce proceedings and therefore cannot be retained on the basis of Article 13(2)(a) of that directive?

- What is necessary in order for a third-country national to retain his right of residence on the basis of that provision?

Case work:

In the judgment in McCarthy and Others (C-202/13), delivered on 18 December 2014, the Grand Chamber of the Court held that both Article 35 of Directive 2004/38 10 and Article 1 of Protocol No 20 annexed to the EU Treaty preclude a Member State from requiring, in pursuit of an objective of general prevention, nationals of third States who hold a 'Residence card of a

family member of a Union citizen' issued by the authorities of another Member State to be in possession of an entry permit in order to be able to enter its territory.

Ms McCarthy Rodriguez, a Colombian national, lives in Spain with her husband, Mr McCarthy, who has British and Irish nationality. In order to be able to enter the United Kingdom, Ms McCarthy Rodriguez was required under the applicable national legislation to apply beforehand for a family entry permit, a condition which in the view of the referring court might not be compatible with EU law.

Questions:

- Are the couple 'beneficiaries' of Directive 2004/38? Is Ms McCarthy Rodriguez a subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of that Union citizen's Member State of origin.

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- As regards Article 35 of Directive 2004/38, which provides that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that directive in the case of abuse of rights or fraud: is it the measures adopted on the basis of that provision subject to the procedural safeguards provided for in the directive and is it that it must be based on an individual examination of the particular case (case bny case approach)?

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- What kind of proof are necessary to proof an abuse? Is it the fact that a Member State is faced with a high number of cases of abuse of rights or fraud justifiably for the adoption of a measure founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself?

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Case work:

In the judgment in Alimanovic (C-67/14) of 15 September 2015, the Court, sitting as the Grand Chamber, determined that EU law does not preclude legislation of a Member State under which nationals of other Member States who are job-seekers are excluded from entitlement to certain 'special non-contributory cash benefits', which also constitute 'social assistance', after six months from the end of their last employment, although those benefits are granted to nationals of that Member State who are in the same situation. In the main proceedings, the dispute centred on the German authorities' refusal to grant the members of a family of Swedish nationals, some of whom had worked for around 11 months in Germany, subsistence allowances for the long-term unemployed and social allowances for beneficiaries unfit to work.

The Court observed at the outset that the benefits at issue in the main proceedings are special non-contributory cash benefits within the meaning of Article 70(2) of Regulation No 883/2004, and 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, since their predominant function is to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity. As regards the grant of those benefits, the Court, referring to the judgment in Dano (C-333/13), first of all observed that a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

Accordingly, the Court stated that, in order to determine whether social assistance may be refused on the basis of the derogation laid down in Article 24(2) of Directive 2004/38, it is necessary to determine whether the principle of equal treatment of Union citizens who have a right of residence in the territory of the host Member State under that directive and nationals of that Member State, referred to in Article 24(1), is applicable. It is therefore necessary to determine whether the Union citizen concerned is lawfully resident on the territory of the host Member State. In the case in point, two provisions of Directive 2004/38 could confer on the applicants in the main proceedings a right of residence in the host Member State, namely Article 7(3)(c), which provides that the status of worker may be retained for no less than six months by a citizen who is in duly recorded involuntary unemployment after completing a fixed-term contract and has registered as a job-seeker with the relevant employment office, and Article 14(4)(b), which provides that a Union citizen who enters the territory of the host Member State in order to seek employment may not be expelled from that Member State for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged.

Questions:

- Do the applicants enyoed the status provided for in Article 7 of Directive 2004/38 when they were refused entitlement to the benefits at issue and that, can they rely on Article 14(4)(b) of that directive to establish a right of residence, the host Member State?

- Could they rely on the derogation in Article 24(2) of that directive, which provides that the host Member State is not to 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)?

- Importantly does Directive 2004/38 require a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social security system – as a whole? What does this answer brings to the Member States?

Case work:

Mr Kulenović, a Bosnian citizen, was deported from Slovenia to Bosnia. He returned in Slovenia illegally and married a Slovene citizen while unlawfully in the State. He applied for leave to remain, but was refused and deported to Austria, where his spouse was established at that time. His spouse subsequently took up a position in Slovenia, and Mr Kulenović applied to Slovenia for leave to enter as the spouse of a person settled there. Mr and Mrs Kulenović stated to Slovene authorities that they intended to return to Slovenia because they had heard

about EU rights. The competent authorities refused the application, finding that the move to Austria was deliberately designed to manufacture a right of residence, and to evade immigration law. Mr Kulenović appealed against this refusal, stating that Slovenia cannot refuse a spouse who is a national of a non-member country the right to enter Slovenia.

Case work:

Derivative rights and "cross-border element"

Mr. and Mrs. Ramos are Columbian nationals who had come to Slovenia and applied for asylum in 2011 and 2012 respectively. Their applications were denied. Two of the Ramos' children were born in Slovenia in 2012 and 2013 and were granted Slovenian nationality in order to avoid that they would otherwise become stateless. Brazilian law does not automatically recognize Brazilian nationality of children born abroad to Brazilian national parents, unless these take specific actions. At various points in time, Slovenian authorities had rejected Mr. and Mrs. Ramos' applications for residence permits and had denied Mr. Ramos unemployment benefits on grounds that he had been employed without a work permit. Mr. Ramos challenged these decisions issued by the competent authorities arguing that he enjoys a right to residence and access to employment directly by virtue of the EU Treaty or, at the very least, that he enjoys the derived right of residence.

- What argumets can you put forward for Mr. and Mrs. Ramos and what for the state authorities?

- How will the case develop – under which procedural rules and where?

Compare the case with the comments bellow! How would you answer the author of the text?

> *Case Zambrano:*[6] *In a judgment just out, Zambrano v ONEm , case C-34/00 the European Court of Justice seems to have held that the parents of a child who is a national of a Member State must be granted the right to work and the right of residence in that Member State in order to protect the right of the child to live in Europe. This is an astonishing proposition and represents a massive extension of the principle in the Chen case.*
>
> *The facts were that a Colombian couple claimed asylum in Belgium and were refused but never removed. They had two children in Belgium, both of whom were Belgian citizens. The father worked for a time but this was illegal work and after a raid on his employer he was sacked. He attempted and failed to claim unemployment benefits.*
>
> *The questions for the Court were whether this factual situation gave rise to a right to work and/or a right to reside for the parents in order to protect the rights of the children. The Court has answered these questions in the affirmative, it seems. At paragraph 45 the CJEU concludes as follows:*

[6] Accessible https://www.freemovement.org.uk/zambrano-case/ (2.10.2016)

"…Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

Despite the reference in this paragraph to European Union citizens, the facts of the case were that the children were Belgian and lived in Belgium: there was no question of direct interference with free movement rights to move between other EU countries. In Chen the child was living in the UK but was an Irish national and had independent means of support not involving the parent working in the UK. Zambrano extends the principle to, for example, a British child living in Britain and with no independent means of support.

In contrast the Tribunal and Court of Appeal in the UK (see W (China) v Secretary of State for the Home Department [2006] EWCA Civ 1494) have held that Chen cannot be used to 'create' a right a work that did not previously exist independently.

Your tasks:

- Study the Zambrano case and make analyses how the CJEU approaches to the question of cross-border element. Do you think that the court did not acknowledge this issue? Can we understand that the Zambrano case allows the application of the rules on the EU citizenship without any cross-border element? Does it mean, for example, that any British citizen has a right of residence in Britain under EU law. Why would such a person then need to make use of the UK immigration rules for family members? Why not make use of EU law family rules instead? No need for maintenance and accommodation and so on...

- Compare this case with the Hungarian case where the plaintiff was in criminal procedure because of five red star on his cap (Case C-328/04, *Criminal proceedings against Attila Vajnai* and subsequent case of ECHR Vajnai v. Hungary7 - 33629/06)!

[7] Facts: Section 269/B of the Criminal Code made it a criminal offence to disseminate, use in public or exhibit certain symbols that were deemed "totalitarian". These included the red star. The constitutionality of that provision was upheld by the Constitutional Court in a decision in 2000 in which it noted that allowing the unrestricted, open and public use of such symbols would seriously offend all persons committed to democracy and in particular those who had been persecuted by Nazism and Communism. Accordingly, the historical experience of Hungary and the danger the symbols represented to its constitutional values convincingly, objectively and reasonably justified their prohibition and the use of the criminal law to combat them.

At the material time the applicant was the Vice-President of the Workers' Party (Munkáspárt), a registered left-wing political party. In 2003 he was convicted of using a totalitarian symbol for wearing a red star on his jacket at an authorised demonstration in the centre of Budapest he was attending as a speaker. Sentencing was deferred for a probationary one-year period.

Law: The applicant's conviction amounted to interference with his right to freedom of expression that was "prescribed by law" and pursued the legitimate aims of preventing disorder and protecting the rights of others. When – as in the applicant's case – freedom of expression was exercised as political speech, limitations were only justified if there was a clear, pressing and specific social need. In view of the multiple meanings of the red star, a blanket ban was too broad as it was not exclusively associated with totalitarian ideas. Accordingly, as with offending words, a careful examination of the context in which it was used was required. The applicant had worn the symbol at a lawfully organised, peaceful demonstration in his capacity as the vice-president of a registered, left-wing, political party, with no known intention of defying the rule of law. The Government had not cited any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. The containment of a mere speculative danger, as a preventive measure for the protection of democracy, could not be seen as a "pressing social need" and various other offences existed in Hungarian law to prevent public disturbances. Moreover, the ban was indiscriminate. Merely wearing the red star could lead to a criminal sanction and no proof was required that its display amounted to totalitarian propaganda. While the Court accepted that the display of a symbol which had been ubiquitous during the reign of the Communist regimes might create unease among past victims and their relatives, such sentiments, however understandable, could not alone set the limits of freedom of expression. Almost two decades had gone by since the transition to pluralism in Hungary, which was now a Member State of the European Union and had proved itself to be a stable democracy. Accordingly, the applicant's conviction could not be considered to have responded to a "pressing social need".

Wednesday, 9 July 2008

Red Star Judgment

The symbol of the red star was at the core of a dispute on which the European Court of Human Rights decided yesterday. In its judgment in the case of Vajnai v. Hungary it found a violation of the freedom of expression (Art. 10 ECHR).

Attila Vajnai was the vice-president of the left-wing Workers'Party. In 2004 he was convicted - under a law prohibiting the displaying of totalitarian symbols in public - for wearing a red star on his jacket during a demonstration. The European Court held that the conviction was an interference with Vajnai's right to freedom of expression. Although the Court accepted that the conviction was provided by law and had the legitimate aim of the prevention of disorder and the protection of the rights of others, it concluded that the interference was not "necessary in a democratic society". Hungary referred to the dangers of Communism as a form of totalitarian government. The Court, however, considered that twenty years after the fall of Communism in Hungary there was no "real and present danger" of its restoration. The margin of appreciation for the state was small in this case, because the case concerned an expression of political speech. In a key passage (para. 52) on the red star, the Court held:

> The Court is mindful of the fact that the well-known mass violations of human rights committed under Communism discredited the symbolic value of the red star. However, in the Court's view, it cannot be understood as representing exclusively Communist totalitarian rule, as the Government have implicitly conceded. It is clear that this star also still symbolises the international workers' movement, struggling for a fairer society, as well certain lawful political parties active in different Member States.

Thus the ban in the Hungarian law was too broad and indiscriminate. Vajnai had worn the star, morevoer, in a peaceful demonstration and his party had no totalitarian ambitions. Nor had Hungary shown that the use of the star had triggered any danger of disorder. There was therefor no "pressing social need" for the interference.

In a revealing *obiter dictum* (para. 57) the Court warned of the dangers of turning public feelings into law - a passage which may resurface more often in future judgments and is certainly is *very* relevant in many other topical situations in many European countries:

> The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.

The case also found its way to the European Court of Justice (ECJ). The Hungarian regional Court considered that EU law was possibly involved and asked the ECJ for a preliminary ruling on the question whether the criminal sanctions for using the symbols involved were discriminatory, since many other EU member states did not prohibit them. The ECJ, however, held in an order on 6 October 2006 (case C-328/04) that it had no jurisdiction since the question fell outside of the scope of Community law.

Case work:

Compare the Zambrano case with this one: In Case C-434/09 McCarthy (judgment of 5 May 2011), the Court was given the opportunity to determine whether the provisions concerning citizenship of the Union are applicable to the situation of a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State. The Court first concluded that Article 3(1) of Directive 2004/38 on the right to move and reside freely is not applicable to such a Union citizen. That finding cannot be influenced by the fact that the citizen concerned is also a national of a Member State other than that where he resides. The fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement. Secondly, the Court held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States. The fact that a citizen, in addition to being a national of the Member State in which he resides, is also a national of another Member State is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU, as that situation exhibits no factor linking it with any of the situations governed by European Union law and is confined in all relevant respects within a single Member State.

Do you find any comparison to the Zambrano case?

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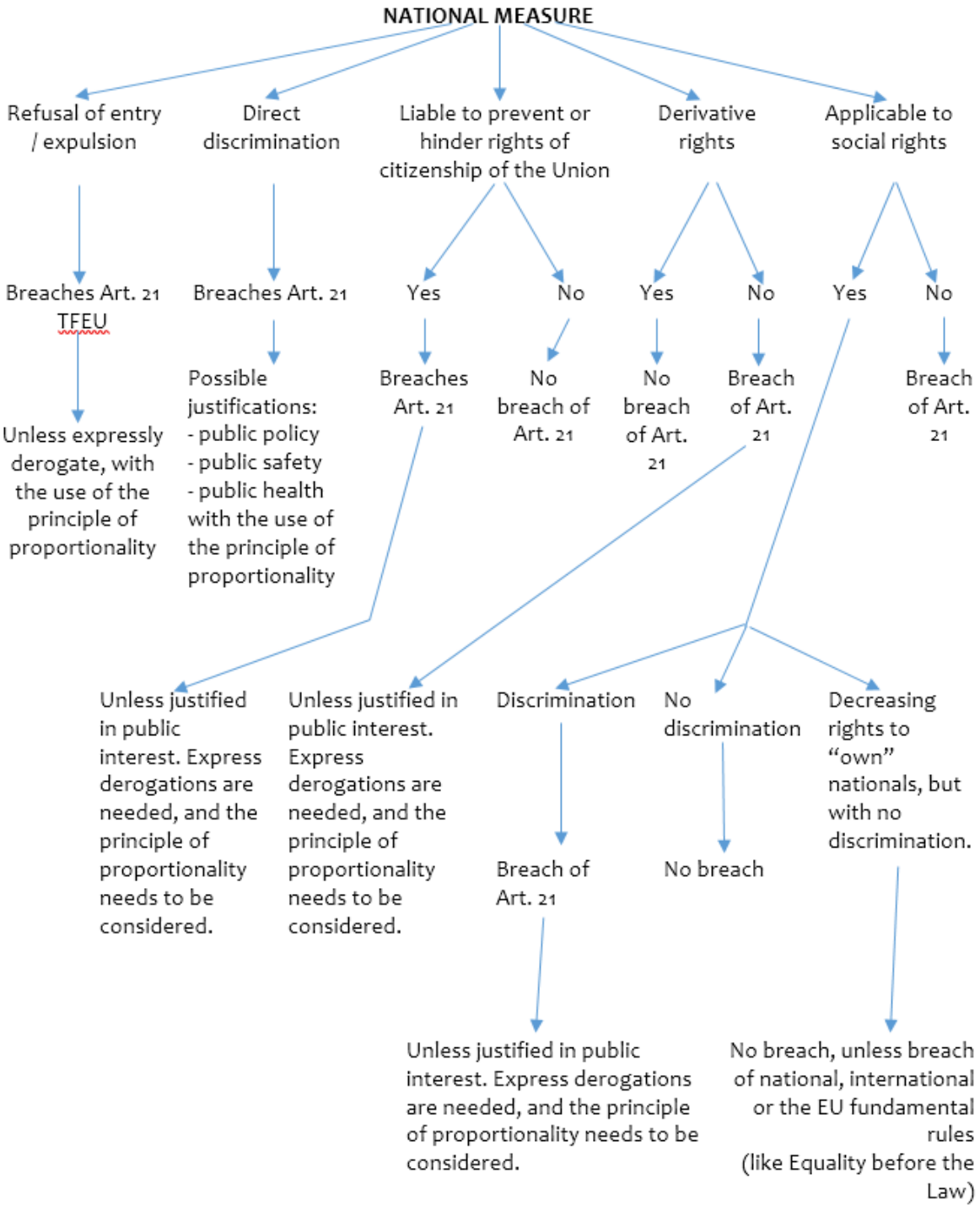
Case work:

Make another comparison to Case C-256/11 Dereci and Others

The question arising in this case was whether the provisions concerning citizenship of the Union enable a third country national to reside on the territory of a Member State in the case where that third country national wishes to reside with a family member who is a Union citizen, is resident in that Member State and a national of that Member State, has never exercised his right to free movement and is not maintained by the third country national.

Read the case and compare it to Zambrano and McCarthy cases. What can you establish?

IV. Table – rules applicable to European Citizenship



Discuss the above table and insert case law applicable to each square or text.
Use also the knowledge of the cases from this handbook.

V. Advanced case discussions

1) Kadi cases

Kadi II: Fundamental Rights; International Terrorism and relationship between EU legal order and ECHR

Bellow is a description of Case Kadi II and prior development (Kadi I). The description concentrates to the procedure and the facts.

Case Kadi I. and II. is about the relationship between international – EU legal order and, on the other hand, the relationship between two of them towards national legal orders. This is not an easy issue. Nowadays, a monistic and vertical approach is adopted by CJEU, meaning that it is a EU law alone that decides, whether certain international role will form part of EU law or not. In this respect, the citizenship of the Union is also touched upon. Namely, as we have seen in previous chapters, the EU citizenship is closely connected to social rights, a status of the individual, etc. These are also questions of the ECHR. It means that by facing this questions, national authorities and national judges will have to use both, the EU legal order and the international legal order (like ECHR) at the same time, simultaneously. Below are some questions that deal with these situations. Your taks would be to accurately read both judgements (references bellow) and answer the questions.

Facts:[8] *In its judgment in Kadi II (18 July 2013), the Court of Justice of the European Union (Grand Chamber) sought to ascertain the content of procedural rights of suspected terrorists and strike a balance between the imperative need to combat international terrorism and the protection of fundamental rights and freedoms of suspected terrorists.*

Mr Kadi's assets and other economic resources had been frozen pursuant to Council Regulation (EC) No 881/2002, an EU legislative measure designed to implement a United Nations Security Council resolution on the freezing of assets of the organisations, entities and persons identified by the United Nations Sanctions Committee as associated with Osama bin Laden, the Al-Qaeda and the Taliban. No evidence justifying the restrictive measures imposed on him had been communicated to Mr Kadi.

Following the European Court of Justice's judgment in Kadi I according to which Mr Kadi's rights of defence, effective judicial protection and property had been infringed, the European Commission communicated to Mr Kadi the summary of reasons provided by the United Nations Sanctions Committee and gave him the opportunity to comment. Neither the Commission nor Mr Kadi was put in possession of evidence other than this summary of reasons. The Commission subsequently adopted Regulation No 1190/2008, which maintained Mr Kadi's listing as a person whose assets are to be frozen.

In Case T-85/09 Kadi v Commission [2010] ECR II-5177 (Kadi II), the General Court annulled Regulation No 1190/2008. The European Commission, the Council of the European Union and the United Kingdom subsequently appealed to the Court seeking to have the General Court's judgment set aside.

In Kadi II, the Court held on appeal that if the competent European Union authority finds itself unable to produce before the Courts of the European Union all information and evidence substantiating the reasons relied on against the individual, it is then the duty of the Court to base its decision solely on the material which has been disclosed to it. If that material is

[8] Menelaos Markakis 23rd August 2013, acessible: http://ohrh.law.ox.ac.uk/kadi-ii-fundamental-rights-and-international-terrorism/ (10.10.2016)

insufficient to allow a finding that a reason is well founded, the Court shall disregard that reason as a possible basis for the contested decision (para. 123).

Questions:

- Do you think that the right to private life (Art. 8 ECHR) is closely connected to the EU citizenship and derivative rights?

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- Can nationals of certain Member State (domestic nationals) be treated less favourably than nationals of any other Member State (reverse discrimination) according to EU law and at the same time according to ECHR?

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- Does the international legal order, i.e. ECHR, request the Member States to issue the citizenship to a child, born in certain Member State, if the child can not get the citizenship as a derivative right from their parents? How would you argument the answer from your own perspective?

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- The *ius soli* principle is not part of EU law since the EU law is not regulating rules on awarding citizenship of the Member States. The EU law has no such competence. Is it possible that the international law request such an obligation to states?

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2) "Erased individulas" – Slovene issue
From the EU Commission's report on EU citizenship...

> In particular, the Commission is aware of questions related to persons belonging to the Russian-speaking minority in **Estonia and Latvia** who are considered to be "**non-citizens**" and to the situation of "**erased persons**" in **Slovenia**. Another issue which has been raised concerns **the extension of citizenship to nationals of another country** on the basis, inter alia, of their membership of an ethnic community.

What is it about? The eight applicants had previously been citizens of both the former Yugoslavia and one of its constituent republics other than Slovenia. They had acquired permanent residence in Slovenia, but, following its independence, had either not requested Slovenian citizenship or had had their application refused. On 26 February 1992, pursuant to the newly enacted Aliens Act, their names were deleted from the Register of Permanent Residents and they became aliens without a residence permit. Some 25,000 other people were in the same situation. According to the applicants, none of them were ever notified of the decision to deregister them and they only discovered at a later stage that they had become aliens, when they attempted to renew their identity documents. The erasure of their names from the register had serious and enduring negative consequences: some of the applicants became stateless, while others were evicted from their apartments, could not work or travel, lost all their personal possessions and lived for years in shelters and parks. Still others were detained and deported from Slovenia. In 1999 the Constitutional Court declared unconstitutional certain provisions of the Aliens Act, as well as the automatic "erasure" from the register, after finding that under the impugned legislation, citizens of former Yugoslavia had been in a less favourable legal position than other aliens who had lived in Slovenia since before its independence, in that there was no legal instrument regulating the transition of their legal status to the status of aliens living in Slovenia. Following the Constitutional Court's decision, a new law was adopted to regulate the situation of the "erased". In a decision of 2003 the Constitutional Court declared certain provisions of the new law unconstitutional, in particular since they failed to grant the "erased" retroactive permanent residence permits or to regulate the situation of those who had been deported.

- Can the Commission do anything about it (ex officie or ex non officie)?

- Can the applicatns use any other legal path? Is this a question for the applicants / plaintiffs or for teh court(s)?

VI. Conlusion

1) Fundamentals

- The idea from late 70' became mature with the Maastricht treaty of 1991 (1993)
- Being national of the MS(non-MS) - C-369/90, *Micheletti…* …
- Arts. 20-25 of the TFEU define citizenship of the union, but … they are **not unconditional**
- The role of the principle of **equal treatment** (Art. 18 TFEU)… however, even this principle is not without exemptions
- *Citizenship of the Union* comprehends four basic rights:
    - Right to vote in municipal and elections to EP (Art. 22);
    - Diplomatic protection (Art. 23);
    - Right to petition (Art. 24);
    - Right to move and reside freely in all EU countries... subject to limitations (Art. 21)
        - **Rights of non-financial nature…** (like C-274/96, *Bickel & Franz*, C-148/02, *Garcia Avello…*)
        - **Rights of financial nature …** (like C-85/96, *Martinez Sala)*

Discuss all above points!
Below are some discussion's guidelines in form of questions:

2) **Right to move and reside freely**

- linked to: being legal in the MS (*like Martinez Sala*) or even having *genuine marriage* (like *Akrich*, C-109/01, C-127/08 *Metock*)
- Interstate element!
  - Cases C-148/02, Garcia Avello, C-328/04 Vajnai Atilla, C-96/06 Grunkin et Paul… now C-353/06)
- Expulsion (case law reflexs in the dir. 2004/38)…
- Economically inactive persons (like students)… *C-209/03, Bidar*
- right to (permanent) residence in MS (also for *FM* and *TCN*, dir. 2004/38)… the role of the *residence permit*
  - Case C-200/02, Zhu and Chen (inverse derivation)
  - Condition: not to cause "financial burden" – case *C-413/99,* Baumbast

(exception: C-310/08, Ibrahim)

  - Condition: ratione materiae TFEU (C-148/02, Garcia Avello)
  - No movement shopping (C-109/01, Akrich)

Discuss the above points! Add comments to all points. This task shall be

- Is the citizenship of the EU indeed developed in a way people want?
- Derivate rights... the way to changing the social structure of the EU
- ...is the court the one that makes the door wide open?

Quite some of cases in this handbook relate to derivative rights and you can learn quite "severe" consequences for Member States. The notion "severe" is perhaps too strong, but not if we consider what happened in spring 2016. The United Kingdom voted to leave EU. Among important reasons for this step is also EU politic towards free movement of persons, especially emigrations and the obligation of Member States, to include TCN into the framework of the derivative rights.

After few months after the historical pole it is even more clear that the tension of the United Kingdom to step back from emigration policy is in the foreground of the UK decision to leave the EU. Below is a news from *EUobserver* in which is clearly stated that the UK would like to be part of the internal market with respect to freedoms, not including free movement of persons. Namely, it is a huge difference between the free movement of persons and other freedoms. Only the first one, including the union citizenship, includes derivative rights and any anticipation to how many people certain derivative rights can apply is not possible. This is not the case with respect to free movement of goods, at all.
First of all, in free movement of goods there is no derivative rights, secondly, free movement of goods is not connected at all to social rights and public expenditures – it is vice versa, other rights of the internal market, except EU citizenhip, brings to Member States trade, taxes, and hence inflow to the state budget, while social benefits demand, on contrary, the budget expenditure.

Read carefully this *EUobserver* news (below) and compare it with the cases Alimanović (above, *C-67/14*) and Dano *(C-333/13)*, then answer the following:

- Do you think that cases Dano and Alimanović are more in line with UK streamline and do you think they difer from previous judgments relating social rights and derivative rights?

- Do you think that the CJEU adopted too broad approach by interpreting European citizenship and derivative rights at the beginning and in late 1900's or all the way up to the case Dano and Alimanović?

- Would it be possible, with the approach of a more strict and narrow interpretation of EU citizenship, to slow down free movement of persons development, especially TCNs? Would this be propper path to preserve more unity among Member States, with respect to immigration policy? Which international rules do we have to consider when answer this question?

- Lastly, do you think that the path and the effect of derivative rights can be blamed for existence and perhaps even future possible crises in the EU, incontetment of Member States towards immigration policy (like Hungary, Poland, …)? Do you also think whether it is possible to blame derivative rights for growing unsatisfactory attitude of Member States towards the EU?

British PM sticks to red line on EU migrants

May with EU Council leader Donald Tusk in Brussels on Friday (Photo: consilium.europa.eu)

By **ANDREW RETTMAN AND ESZTER ZALAN**

BRUSSELS, 21. OCT, 19:14

British prime minister Theresa May has repeated that the UK wants free trade but not free immigration with the EU, while also speaking warmly of "friends, allies" in Europe.

Speaking to press after her EU summit debut, she said: "The UK will be a fully sovereign and independent country, free to take its own decisions on a whole host of different issues, such as how we choose to control immigration, but we still want to trade freely in goods and services in Europe".

"The UK remains committed to trading freely with our European neighbours", she said.

The position was the same one she recently outlined at her Conservative Party's conference in England, but her tone, after her first-ever EU meeting, was more cordial.

She noted that the future EU deal must "work for the interests of both sides".

She called for "mature, cooperative" EU-UK relations and a "smooth" departure.

She also muted her previous criticism of the EU27 for having met alone to discuss EU reforms, saying on Friday that they needed a "process" to handle Brexit.

She said the UK would play a "full and productive role" in the EU Council until it departs, and that it was "enthusiastic about cooperation with our friends and allies after we leave".

She noted that she had made strong interventions in Thursday and Friday's talks on EU migration policy, on the need to pressure Russia on Syria, and on backing a Canada-EU free trade treaty.

"I was not backwards in coming forwards", she said.

Those interventions stood in contrast to her Brexit presentation, which lasted just five minutes at 1AM on Friday.

Recalling the five-minute Brexit chat, Enda Kenny, the Irish leader said on Friday that May did not say "anything new, but the fact that the referendum had taken place, and there was now an acceptance of that."

He added that May said "she herself had campaigned to stay [in the EU], but as prime minister now was wanting to see that this [Brexit] was implemented in ful".

Viktor Orban, the Hungarian leader, said of May's EU debut: "I had a positive reaction to what the prime minister had said, her experience was impressive, it was a clear and honest briefing, she could be a good partner during the Brexit negotiations".

He said Hungary felt close to the UK and wanted close relations after Brexit, but he warned that "not everybody belongs to this club".

May on Friday also met European Commission chief Jean-Claude Juncker for lunch.

Juncker had previously said the UK cannot keep single market access if it does not let in EU migrants.

May's office said she told him the UK wanted a "bespoke" EU deal that allowed "controls on the numbers of people who come to Britain from Europe".

When asked about meeting May, Juncker shrugged and said "Pfff!" in what may have been a calculated insult.

The EU summit also struggled, and ultimately failed, to get the Belgian region of Wallonia to agree to a Canada free-trade pact called Ceta.

The UK exit talks are expected to start at the end of March next.

Speaking for Malta, which will help manage the negotiations as the EU presidency at the time, prime minister Joseph Muscat said the Ceta mess was a bad omen for Brexit.

"To my mind, if there are all these problems to have a simple trade agreement with Canada, just imagine [getting] an agreement with the United Kingdom", he said.

Casework:
Does this case involves rights of the citizenship of the Union and derivative rights:

Syrian refugee in Germany with 4 wives, 22 kids sparks social media fuss over welfare

Published time: 24 Oct, 2016 18:04 Get short URL

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A Syrian refugee who claims social benefits in Germany with his four wives and 22 children has sparked debates on social media, after the German press brought his story into spotlight.

The man in question, Ghazia A. (the surname is not disclosed) fled Syria in 2015 and headed to Germany via Turkey, accompanied by his four wives and 23 children.

According to Muslim tradition, a man is allowed to have up to four wives as long as he can support them financially. However, Germany does not officially recognize polygamy.

Ghazia had to choose one of the women as an *"official"* wife in order for him and the rest of the family to claim social benefits, the German magazine BILD reported. He opted for his *"main"* wife Twasif and five children, while the other three women have been officially called his *"partners"* by the authorities.

The man now lives in the community of Montabaur in the German state of Rhineland-Palatinate. His other three wives had to split the remaining children between them and were moved by the authorities into various neighboring communities, while one of the daughters married and is currently living in Saudi Arabia, BILD noted.

Reacting to the case, a German financial manager released his calculation of what the German state is paying to the entire family annually. On the website of the Employers' Association he estimated that the refugees are getting roughly 360,000 Euro per year. There is no official confirmation on the numbers yet.

"I am practically always on my way to be with my family – yet I would gladly like to work," the Syrian refugee told BILD. Back in his home country the man used to earn enough money with his car sharing and car service business to cover the expanses of his large family, the magazine said.

Some people on social media assumed the case is a reflection of a new reality in Germany. *"The new reality in the big canton – nice Friday to you all. My neighbor has 4 women and 23 children,"* one message said.

Another one claimed that the "the Syrian with 4 women and 23 children is now being sold to us as a new normality."

According to Guido Göbel, a local official in the community of Montabaur, covering the financial expenses for the Syrian family is not easy. However, he said that the case is an *"exemption,"* Rhein-Zeitung reported.

Germany welcomed some one million refugees in 2015, according to official estimates. The influx of immigrants slowed down in 2016, however.

VII. Appendix - Rules on Citizenship of the Union (excerpt from the TFEU)

CITIZENSHIP

PART TWO
NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

ARTICLE 18

No nationality discrimination

- rules laid down in law

X**
Within the scope of application of **the Treaties**, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, may adopt rules designed to prohibit such discrimination.

ARTICLE 19

No general discrimination

Measures against discrimination

Unanimity in the Council, EP must now give consent

U***1. Without prejudice to the other provisions of **the Treaties** and within the limits of the powers conferred by it upon the **Union**, the Council, acting unanimously **in accordance with a special legislative procedure** and **after obtaining the consent** of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Incentive measures, no harmonisation, by qualified majority and ordinary legislative procedure

X** 2. By way of derogation from paragraph 1, **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt Union** incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

ARTICLE 20

Union Citizenship

Double citizenship: national and Union, "additional"

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall **be additional to** and not replace national citizenship.

Union citizens' rights and duties:

2. Citizens of the Union shall enjoy the rights and be subject to the duties **provided for in the Treaties. They shall have, inter alia:**

- free movement and residence in the Union territory

(a) the right to move and reside freely within the territory of the Member States;

- voting and standing for all local and EP elections

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

- protection under all Member States' diplomatic authorities

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

- petition right to EP and Ombudsman

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Free movement and settlement

ARTICLE 21

"move and reside freely"

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in **the Treaties** and by the measures adopted to give it effect.

If the Union cannot reach goals of 20 TFU, powers can be extended by qualified majority

*X*** 2. If action by the Union should prove necessary to attain this objective and **the Treaties have** not provided the necessary powers, **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure**, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

Unanimity for:
- passports
- identity cards
- residence permits
- social security

U* **3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.**

Election rights

ARTICLE 22

*U**

Unanimity in the Council

EP consulted

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously **in accordance with a special legislative procedure** and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

National derogations

2. Without prejudice to Article 233 and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council**, in accordance with a special legislative procedure** and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Diplomatic protection

ARTICLE 23

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall **adopt the necessary provisions and** start the international negotiations required to secure this protection.

New: European law by qualified majority in the Council, and the EP consulted

X* **The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.**

Citizens' rights

ARTICLE 24

Citizens' initiative (Art. 11 TEU)

X*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.**

Petition rights

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227.

Ombudsman

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

Languages

Every citizen of the Union may write to any of the **institutions, bodies, offices or agencies** referred to in this Article or in Article 13 of the **Treaty on European Union** in one of the languages mentioned in Article 55(1) of the **Treaty on European Union** and have an answer in the same language.

Report on Union Citizenship	ARTICLE 25
Report on development every third year	The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this part. This report shall take account of the development of the Union.
New citizens' rights: Unanimity in Council, now EP's consent; national approval by ratification	*U*** On this basis, and without prejudice to the other provisions of **the Treaties**, the Council, acting unanimously **in accordance with a special legislative procedure** and after **obtaining the consent of the European Parliament**, may adopt provisions to strengthen or to add to **the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.**