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Shifting Political Ambitions and Persistent Economic Considerations in the Free Movement Framework

5.1 Economic Considerations Limiting Residence Rights

The regulation of residence and movement of EU migrants was subject to many changes during the period under examination. During the early 1990s, the Commission highlighted that the citizenship provisions shaped a political link between Member States nationals and the EU with the purpose of fostering a sense of identity with the EU.[1] In this regard, the Commission emphasized that the rights EU migrants already enjoyed under Community law were now 'fundamentally altered'.[2] It suggested that Articles 8 and 8a EC Treaty combined could directly generate entry and residence rights for EU nationals, even though they were supplementary and could not replace the more specific legal bases for residence found in the Treaties.[3] The relevant Treaty bases, however, restricted residence to people engaged in economic activity.[4] As a result, during the first years after the introduction of the EU citizen status, residence rights for EU migrants continued to be regulated by sectoral Directives which predated the adoption of the citizenship status in primary law. This section analyses the relevant secondary law framework and different suggestions to amend it, before turning to the case-law of the

[1] Communication, Report from the Commission on Citizenship of the Union, COM(93) 702 final.

[2] Second report from the Commission on Citizenship of the Union [1994–1996], COM(97) 230 final.

[3] Ibid, 14.

[4] In the meantime, a framework was put in place for self-employed and retired workers: Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24; Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] OJ L 172/14; Directive 75/34/EEC concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.

period in Section 5.2. The analysis shows the tension behind the ambition to create a shared political identity and the economic unsustainability of extending social rights without limitations to all EU migrants.

The first time the Commission tried to disconnect residence rights under secondary law from economic activity was in 1979. The proposal was put forward under Article 3(c) of the EEC Treaty, which provided for the abolition of obstacles to free movement of persons, in the context of the first discussion on more political aspirations for the Union.[5] The attribution of residence rights under the relevant initiative would allow Member States to require proof of sufficient resources as a condition for residence.[6] This proposal was on the table for almost a decade, during which time the Council avoided discussing the matter.[7] From archival material, it appears that Member States could not reach an agreement on the parts of the proposal that could pose risks to their national economies. Among the points of contestation were the requirement of resources for students, the difference between insurance systems of Member States, and the legal basis and scope of application of the Directive.[8] The attribution of a general residence right to all EU migrants could pose risks to national economies, especially because of the various social rights such migrants would enjoy in the different social security and social assistance systems of the Member States. Such a generalization carried the risk of making the EU free movement system economically unsustainable.[9]

In parallel, the case-law of the Court on Regulation 1612/68 substantially extended the categories of EU migrants falling under the scope of free movement as workers, as well as the rights they were to enjoy under

[5] Proposal for a Directive on a right of residence for nationals of Member States in the territory of another Member State, COM(79)215 final [1979] OJ C 207/14.

[6] Recital 4, Article 4(2) the proposed Directive.

[7] There were several amendments following comments by the Parliament and the ECOSOC. See Amended proposal for a Directive on a right of residence for nationals of Member States in the territory of another Member State, COM(80)358 final [1980] OJ C 188/7; Amending of the proposal for a Directive on a right of residence for nationals of Member States in the territory of another Member State, COM(80)649 final [1980] OJ C 292/3; Amended Proposal for a Directive on a Right of residence for nationals of Member States in the territory of another Member State, COM(85)292 final [1985] OJ C 171/8.

[8] HAEU, CM2/1988-00024/001, 1237ème session du Conseil (marché intérieur), Bruxelles, 03.05.1988, Droit de séjour, 5932/88 (Presse 53) Communication á la presse.

[9] See Catherine Barnard and Emilija Leinarte, 'The Creation of European Citizenship: Constitutional Miracle or Myopia?' (2022) 24 Cambridge Yearbook of European Legal Studies 24, who argue that in the initial political discussions on EU citizenship, the practical extension of rights under equal treatment was not envisioned.

secondary law.[10] Due to this, in 1988 the Commission proposed an amendment to Regulation 1612/68 and Directive 68/360 aimed at extending their provisions on equal treatment and family reunification, thereby promoting the social objectives of the Community.[11] The Council could not reach an agreement on the matter.[12] The Commission presented another proposal in 1998, framed in terms of promoting competitiveness and the economic objectives of the Union.[13] Still, the Council failed to discuss the relevant proposal.

With the impetus created by the Single European Act, the Commission presented three sectoral proposals in order to extend residence rights to students, retired persons, and others not engaged in economic activity. For the Commission, the extension of residence rights should be viewed in light of Article 8A EC Treaty, which established a general right of residence to the Member States nationals.[14] During the negotiation of these instruments, Member States were concerned that an unrestricted extension of residence rights would lead to migration flows solely driven by financial considerations due to the lack of harmonization of social security and social assistance systems.[15] To avoid the perceived negative economic impact of such type of migration, a principle was put forward, which still determines the residence rights of EU migrants – that is, that whoever wishes to reside in a country other than their own should not constitute an unreasonable burden on the public finances of the host

[10] See Section 2.2.

[11] Proposal for a Regulation amending Regulation 1612/68 on Freedom of Movement for workers within the Community, COM(88)815 final, Revised Version [1989] OJ C 100/6; Proposal for a Directive amending Directive 68/360/EE on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, COM(88)815 final, Revised Version [1989] OJ C 100/8.

[12] Communication from the Commission, Free movement of workers: achieving the full benefits and potential, COM(2002)0694 final. There is no information available on whether this proposal was ever discussed by the Council.

[13] Proposal for Regulation amending Regulation 1612/68 on freedom of movement for workers within the Community, COM(98)0394 final [1998] OJ C 344/9, Recitals 3 and 10; Proposal for a Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, COM(98)0394 final [1998] OJ C 344/12.

[14] Report from the Commission on the implementation of Directives 90/364, 90/365 and 93/96, COM(99)0127 final.

[15] Proposal for a Directive on the right of residence, COM(89)275 final [1989] OJ C 191/5 mentioning the concerns expressed by the ad hoc Committee on a People's Europe in its report to the European Council in Brussels on 29 and 30 March 1985.

country.[16] In line with this, the relevant Directives provided for the attribution of residence rights to EU migrants who could demonstrate sufficient resources and insurance, so as not to become a burden for the social security systems of the Member States.[17] These texts continued to regulate residence rights of EU migrants until the adoption of Directive 2004/38, while Regulation 1612/68 was not amended but rather codified to incorporate amendments caused to it by other instruments over the years.[18] At this stage, it should be noted that there was no single Community view on how to proceed with EU migrants' rights even under the changed institutional setting, especially because of the need to safeguard the economic and social sustainability of the EU.

The political aspirations were reflected in Treaty changes and various soft-law instruments, but the Council was not able to agree on how migration rights could be generalized without risks to national economies. The overview of the proposals by the Commission and their deflection by the Council are indicative of the constant motivation to safeguard the economic objective of growth. The Council preferred to negotiate different instruments for different categories of movement while maintaining safeguard clauses in all of them. Contribution to the economy could no longer be set as the reason behind attribution of rights to EU migrants. The aspiration to shape a true political community would not justify that. However, this political aspiration was matched with the constant historical aspiration of the EU project to promote

[16] HAEU, CM2/1989-00062/001, 1352ème session du Conseil (marché intérieur), Luxembourg, 10.10.1989, Projet de Procès-verbal, 9170/89 restreint.

[17] Article 1, Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/2; Article 1, Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L 180/28; Directive 90/366/EEC of 28 June 1990 on the right of residence for students [1990] OJ L 180/30 annulled by Case C-250/90, *Parliament v Council*, ECLI:EU:C:1992:294 and reproduced in Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L 317/59, which adapted the text to comply with the appropriate legal basis.

[18] By Regulation 312/76 of 9 February 1976 amending the provisions relating to the trade union rights of workers contained in Regulation 1612/68 on freedom of movement for workers within the Community [1976] OJ L 39/2; Regulation 2434/92 of 27 July 1992 amending Part II of Regulation 1612/68 on freedom of movement for workers within the Community [1992] OJ L 245/1 and eventually Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 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 [2004] OJ L 158/77.

growth and progress. This growth and progress could be guaranteed by excluding from the attribution of rights those EU migrants who could negatively affect growth. Relatedly, we see the goal of economic sustainability as conveyed in the primary law objective of harmonious and balanced development of economic activities behind the limitation of the rights of EU migrants. In Section 5.2, we will see how the Court approached the relevant limitations in the case-law by extensive invocation of primary law.

5.2 The Judicial Aspiration to Overcome the Economic Foundations

During the period under review, the Court consistently invoked the broad framing of primary law to consolidate the rights of EU migrants beyond the limits prescribed in secondary law analysed in Section 5.1. This was celebrated in scholarship as an indication of the potential of EU citizenship as an independent status, disconnected from statist limitations.[19] In the relevant case-law, the Court did not invalidate the limitations prescribed in secondary law. Rather, while acknowledging the economic considerations that preclude the unlimited enjoyment of rights by EU migrants, it tried to expand protection by focusing on how such limits should be reviewed in light of the social and political objectives of primary law that established the legal status of EU citizenship.

First, in *Martínez Sala*, the Court suggested that EU migrants lawfully residing in a Member State should enjoy equal treatment on access to family benefits. The Court could not establish if Martínez Sala fell under the category of worker or self-employed and, hence, whether she enjoyed an EU law residence right.[20] Despite this, the Court held that when an EU migrant lawfully resided in another Member State, their situation fell within the scope of EU law by virtue of the provisions on EU citizenship.[21] This is regardless of whether the legal basis of their residence rights is from EU or national law. As a result, EU migrants lawfully resident in another Member State could rely on equal treatment under

[19] Jo Shaw, 'View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the Fiftieth Anniversary of the Rome Treaty* (Hart 2010).

[20] Case C-85/96, *Martínez Sala*, ECLI:EU:C:1998:217, paras 34, 45.

[21] Ibid, para 61.

Article 6 of the EC Treaty in order to claim family benefits and were not limited to enjoying such rights only as social advantages under secondary law on free movement of workers.[22]

The Court went even further in *Baumbast*, where it held that EU migrants could rely directly on Article 18(1) EC Treaty as a basis for residence rights in a Member State. In that case, Baumbast did not satisfy the conditions of secondary law to claim a right of residence due to lack of comprehensive insurance,[23] even though he did have sufficient resources. The Court suggested that residence rights under secondary law can be limited due to legitimate interests of Member States. Such a legitimate interest would be avoiding the negative economic effects of migration by not granting residence rights to EU migrants who became an unreasonable burden in light of Recital 4 of Directive 90/364.[24] The Court further held that the limitations imposed due to such legitimate interests should comply with the principle of proportionality and should be subject to judicial review for compliance with the rights attributed to individuals under Article 18 EC.[25]

The Court evaluated the limitation to the residence rights of Baumbast as a limitation based on the legitimate interests of Member States. However, this limitation was based on the requirements of EU secondary law and should rather be perceived as a consideration of the EU legislature, in light of the attempt to minimize the effects of free movement to the project of growth. Since sufficiency of resources does not appear as an exception to the free movement rule, but rather as the condition behind the attribution of free movement rights under secondary law, it is problematic to suggest that judicial review refers to the compliance of state action and the legitimate interests of Member States with primary law. Rather, the Court could have considered whether such limitations, as expressed in the Directive conditioning the right to reside, are in compliance with primary law, and whether secondary law should be reviewed against primary law in light of the objectives it seeks to pursue.

In any case, at this stage of evolution of the case-law, scholars suggested that this approach was employed by the Court to consolidate the rights of EU migrants in line with the Maastricht Treaty and to limit the restrictions of the residence Directives adopted before the establishment

[22] Ibid, para 63.
[23] Case C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493, paras 80, 88.
[24] Ibid, para 91.
[25] Ibid, paras 85–86, 91.

of the citizenship status.[26] The Court carried on with similar interpretations in *Grzelczyk* concerning the rights of residence of a student who claimed a subsistence benefit as a former worker.[27] In this case, the Court developed a formula, which has been repeated in the case-law and quoted in literature with great hopes.[28] Therein the Court held that

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[29]

This quote has been seen as setting the backdrop against which the rights of EU migrants should be developed, in line with a new fundamental status, disentangled from economic considerations.[30] This decoupling of economic considerations and migrant movement in the EU does not appear throughout the rest of the judgment, where the Court repeated that Member States could withdraw the residence permit of an EU migrant if they found that, in having recourse to social assistance, the said migrant no longer had sufficient resources, which is the precondition of their residence right.[31] The greater protection for EU migrants in this case actually lay in the fact that the Court suggested that expulsion measures could not be an automatic consequence of having recourse to social assistance.[32] By shaping a system in a way which limits the rights of residence to holders of sufficient resources, while also providing access to social assistance under equal treatment conditions, the economic and social objectives of primary law are channelled into secondary law. As the Court held,

[26] Christian Timmermans, '*Martínez Sala* and *Baumbast* Revisited' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the Fiftieth Anniversary of the Rome Treaty* (Hart 2010); For a critique, see Agustín José Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

[27] Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458.

[28] Perhaps as many as the 'civis europeaus sum' in the Opinion of AG Jacobs in Case C-168/91, *Konstantinidis*, ECLI:EU:C:1992:504.

[29] C-184/99, *Grzelczyk*, para 31.

[30] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 The Modern Law Review 233; Shaw (n 19).

[31] C-184/99, *Grzelczyk*, para 42.

[32] Ibid, para 43.

> Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.[33]

Jesse and Carter have rightly suggested that, in this finding, the Court introduced a distinction between reasonable and unreasonable burden, with the latter capable of breaking the bond of financial solidarity between a host state and a migrant.[34] *Trojani* and *Bidar* followed a similar inconsistent line.[35]

In *Trojani*, which concerned the claim of a French national to subsistence benefit in Belgium, the Court confirmed that EU migrants could claim a general residence right under the Treaty citizenship provisions. But at the same time, the Court found that such right to residence could not be established for Trojani, for want of sufficient resources under secondary law.[36] Contrary to *Baumbast*, where the EU migrant had sufficient resources and family members with him in the UK, and only lacked comprehensive health insurance, Trojani had none of these. Thus, failure to recognize a residence right was not found to be disproportionate in light of the objective of the Directive to avoid EU migrants becoming a burden.[37] The Court then repeated the approach of *Martínez Sala*, where it had held that residence under national law is sufficient to claim equal access to social benefits under Article 12 EC.[38]

Essentially, the Court made a differentiation between EU residence rights, which could be limited for economic reasons, and social rights

[33] Ibid, para 44.
[34] Moritz Jesse and Daniel Carter, 'Life after the "Dano-Trilogy": Legal Certainty, Choices and Limitations in EU Citizenship Case Law' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress, Social Justice, Brexit and Other Challenges*, vol 16 (Brill Nijhoff 2020) with reference to Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 ELJ 623 and Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017).
[35] C-456/02, *Trojani*, ECLI:EU:C:2004:488; Case C-209/03, *Bidar*, ECLI:EU:C:2005:169.
[36] C-456/02, *Trojani*, para 36.
[37] Ibid.
[38] Ibid, paras 39–44.

stemming from EU citizenship, once a migrant finds themselves in a host state. Member States can deny residence to economically inactive EU migrants who do not possess sufficient resources, in order to protect their national welfare systems from collapse. However, if they recognize a right of residence under national law, by virtue of this lawfulness of residence, EU nationals need to be protected under equal treatment provisions, furthering the objectives of social cohesion in the Member States. In this balancing of economic considerations as a limit to residence and social considerations behind treatment in the host state, the Court acknowledged the discretion of Member States to remove EU migrants who had recourse to the social assistance system; however, such removal should not be the automatic consequence of having recourse to the social assistance system.[39]

Bidar continued down the path of this case-law. Bidar was a student, lawfully resident in the UK, where he completed his secondary education and claimed assistance for the tuition fees of his university education. The Court found that the student enjoyed a right of residence on the basis of Article 18 EC and Directive 90/364, even though he did not have sufficient resources and did not fulfil the conditions of secondary law.[40] In order to qualify how the balancing act should take place between granting social assistance under equal treatment and preserving the public finances of Member States, the Court came up with the criterion of integration. Specifically, it stated that Member States can legitimately grant assistance covering maintenance costs to students who have demonstrated a certain degree of integration in the host state.[41] In so doing, the Court attempted to ground its expansionist protection of EU citizens' right in the fact that they were already part of the host societies. It further tried to dissociate access to such benefits from market participation by differentiating from the criterion it applied to the case-law on jobseekers.[42]

Specifically, in cases regarding jobseekers who did not have residence rights under EU law and claimed benefits, the Court had suggested the existence of a genuine link between the applicant and the geographical market in question as a condition to be taken into account in order to examine whether the denial of access to such benefits would be

[39] Ibid, para 45.
[40] C-209/03, *Bidar*, para 36.
[41] Ibid, para 57.
[42] Ibid, para 58 with reference to Case C-224/98, *D'Hoop*, ECLI:EU:C:2002:432, para 38, and Case C-138/02, *Collins*, ECLI:EU:C:2004:172, para 67.

discriminatory for EU migrants under primary law.[43] In the relevant case-law, it is true, as Jesse and Carter have suggested, that

> On paper, these formulas recognized the legitimate interest of Member States to protect the financial sustainability of their welfare system. However, in practice they strengthened the position of individual applicants vis-à-vis the State, again arguably circumventing conditions contained in applicable secondary legislation.[44]

Looking at the legislative and case-law developments of the relevant period, the ambition to reshape the rights of migrants under EU law is clear. The Council was hesitant to operationalize a general residence right without safeguards for national economies, despite the Commission proposals on the table. At the same time, the Court went much further in consolidating the protection of EU migrants under primary law. Besides *Baumbast*, the Court did not go as far as accepting an EU residence right stemming directly from the Treaties without regard to the conditions of secondary law. Nevertheless, it did use primary law as a ground for review of Member State action, limiting the grounds that could allow removal of EU migrants from a Member State.

At the same time, it extended the application of equal treatment provisions to all EU migrants who had lawful residence in Member States, regardless of whether that residence stemmed from EU or national law. Next to the Court, the Commission had the ambition that 'Union citizens should, *mutatis mutandis*, be able to move between Member States on similar terms as nationals of a Member State moving around or changing their place of residence or job in their own country'.[45] While such an evolution of migrants' rights eventually materialized as regards entry and residence, this is only the case for a short period of time.[46] Security of residence and family reunification are not generally applicable to all EU migrants. Rather, economic considerations dictate their limitation only to those who have sufficient resources not to become a burden on the public finances of the host states.

[43] C-138/02, *Collins*, and Case C-22/08 and C-23/08, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, ECLI:EU:C:2009:344, para 38.

[44] Jesse and Carter (n 34) 141.

[45] Proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)0257 final [2001] OJ C 270E/150, Section 1.3; Communication on the follow-up to the recommendations of the High-level panel on the free movement of persons, COM(98)403 final.

[46] Right to residence up to three months under Article 6, Directive 2004/38.

In this way, the economic objectives of the Treaty are pursued by ensuring that free movement rights are not unlimited. Relatedly, economic sustainability dictates the limitation of EU migrants' rights. The challenges in setting up a system of residence and social rights for EU migrants and the different views of institutional actors accurately reflect the development of a legal framework with due regard to a balance between different objectives of the EU project. In this framework, we see the intention to support the economy by promoting mobility of EU migrants who can positively affect growth (via their work). In parallel to this, the ambition of closer political integration and social cohesion necessitates rights for those who do not negatively impact economic growth (those not being unreasonable burden). Having shown in this chapter that the development of EU migrants' rights is closely connected to a continuous balancing of the economic and social objectives of EU law, and thus to economic and social sustainability, Chapter 6 will investigate how similar objectives played out in relation to TCN migrants.