
EU LAW

The Free Movement of Persons



Free movement of persons

- One of the four 'fundamental freedoms of the internal market'
 - In 1957 – right of movement for 'workers' – Article 45 TFEU
 - Caselaw and secondary legislation expanded scope of the right – eg. defined ancilliary rights, extended right to family members, 'work-seekers' and even non-workers
 - 1993 Treaty of Maastricht– creation of status of 'Union Citizenship' – Articles 20 – 25 TFEU
 - Today – Union Citizenship 'should be the fundamental status of national of the MSs when they exercise their right of movement and residence' (recital 3 Citizen's Rights Directive 2004/38 - origin)
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FMOP – Key legal sources

- **Article 45 TFEU Free movement of workers**
 - **Articles 20 & 21 TFEU – EU Citizenship**
 - **Citizen's Rights Directive (CRD) 2004/38**
 - **Regulation 1612/68 FM for workers (employment)**
 - **EU Charter of Fundamental Rights (arts 39-46)**
 - **PLUS Court of Justice cases**
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Article 45 TFEU - workers

- Para. 1 –
 - ‘Freedom of movement for workers shall be secured within the Union.’
- Para. 2 –
 - FM shall entail the abolition of any discrimination based on nationality between workers as regards employment, pay and work conditions
- Para. 3 –
 - scope of right including limitations– on grounds of public policy, public security, public health (Art 27-33 CRD)
- Para. 4 –
 - Exemption for employment in the public service

DE of Article 45 TFEU confirmed in **Angonese** C-350/96

Economic nexus

- To fall within Article 45 TFEU the migrant must be engaging in an economic activity – they must be a ‘worker’ – i.e. factors of production
 - Soon became clear that this policy area, which directly benefits *human beings*, must have implications beyond the economics of market integration
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Breaking the economic nexus

- CJEU broad interpretations of Treaty provisions and secondary legislation
 - Definition of “worker”
 - *Levin 53/81* ‘services performed for and under the direction of another for remuneration. Activity must be ‘effective and genuine’ and not ‘purely marginal or ancillary’
 - *Steynmann 196/87*
 - *Kempf 139/85*
 - Includes right to enter and remain for a reasonable period of time to seek work - *Antonissen C-292/89* (Now see Article 7(3)(b) & (c) CRD)
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Breaking the economic nexus

- A range of ‘ancillary’ rights – in order to remove disadvantages associated with exercising FM rights in order to work
 - Right of entry and residence for **family members**
 - Family members may non-MS nationals (ie TCNs)
 - Family rights = ‘derivative’/ ‘dependent’
 - (See CRD Articles 2(2), 3(2), 6(2), 5(2), 7(1)(d), 12, 13, 16(1) and (2))
 - General right to equal treatment (Article 24 CRD)
 - Right to employment conditions, to receive social advantages and education and vocational training under the same terms and conditions as host-state nationals
 - (See Regulation 1612/68)
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Breaking the economic nexus

- Not just 'workers' and their families who can benefit from EU free movement rights
 - In early 1990s 3 directives adopted offering residency rights to certain categories of person
 - Directive 90/365 –retired workers
 - Directive 93/96 – students
 - Directive 90/364 – all others (the 'playboy directive')
 - To benefit from this - no need to be a worker/economically active but must be economically self-sufficient
 - These directives now consolidated into CRD – See Article 7
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Treaty Articles on EU citizenship

- Concept 'constitutionalised' by Treaty of Maastricht 1992
 - Article 20 TFEU–
 - (1) 'Citizenship of the Union is hereby established, Every person holding the nationality of a MS shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
 - (2) EU citizens shall enjoy the rights and be subject to the duties provided for in the Treaties. There follows a non-exhaustive list of rights.
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Treaty Articles on EU citizenship

- Article 21 TFEU -
 - (1) 'Every citizen of the Union shall have the right to move and reside freely within the territory of the MS, subject to the limitations and conditions laid down in the Treaties and by the measure adopted to give them effect.'
 - (2) and (3) legal basis provisions
 - Direct effect of Article 21 TFEU confirmed in *Baumbast* C-413/99
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Citizen's Rights Directive (CRD) 2004/38

- ❑ Consolidates most legislation (only Regulation 1612/68 remains) and case law up to point of adoption and adds new dimensions (eg. definition of family member, permanent residence status)
 - ❑ Continues to distinguish different categories of recipient of rights (eg most importantly those who are economically active or independent and those who are not)
 - ❑ Directive beset by poor and incorrect implementation by MS
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Citizen's Rights Directive (CRD) 2004/38

- **What does it do? (material scope)**
 - Lays down conditions governing exercise of right to FM and residence in another MS by EU citizens and their family members (including right of permanent residence) AND the limits placed on these rights (Article 1 CRD)

 - **Who does it benefit? (personal scope)**
 - Union citizens who move to and reside in a MS other than that of which they are a national and their family members (Article 2 & 3 for definitions and beneficiaries)
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CRD – Right of Exit, Entry and Residence

- Art 4 – Right of exit, Art 5 – Right of Entry
- Art 6 – 18 - Right of residence
 - Art 6 - for **up to 3 months** - any EU Citizen and family member - simply must not become an unreasonable burden on the social assistance system of the host state (Art 14(1))
 - Art 7 - Right of residence for **more than 3 months** – if EU citizen
 - is worker/self employed or
 - has sufficient resources plus comprehensive sickness insurance or
 - enrolled as student, have sufficient resources and have comprehensive sickness insurance
or
 - is a family member accompanying or joining an EU citizen and meet self sufficiency conditions

CRD – Right of Exit, Entry and Residence (cont'd)

- Art 16 - Right of **permanent residence**
 - Union citizens who have resided legally for a continuous period of five years in the host MS shall have the right of permanent residence. ie no longer need to satisfy Art 7 requirements



CRD- restriction on scope of rights

- **Restrictions on right of entry and residence and associated safeguards: -**
 - Articles 27 – 33 Public policy, public security or public health
Art 28: three different levels of protection against expulsion on these grounds.
 - Less than 5 years (ie no permanent residence) the decision must consider all factors before making an expulsion order
 - More than five years, consider all factors and there must be *serious* grounds
 - More than ten years, consider all factors and there must be *imperative* grounds. *Tsakdouridis*, C-145/09 *P.I.* C-348/09
 - Conditions and limits which states may impose on these rights must be interpreted in a **proportionate** manner which does not unduly restrict their exercise.
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CRD- restriction on scope of rights contd.

- Art 35 limits in the event of 'abuse of rights'

MSs may refuse, terminate or withdraw any rights in the case of abuse of rights.

CRD – Personal scope – Who is an EU Citizen?

- EU Citizens are defined as Member State nationals (Art 20 TFEU and Art 2(1) CRD)
 - Nationality is determined according to the domestic law of the Member State concerned (*Kaur* (C-192/99), *Micheletti* (C-369/90) and *Chen* (C-200/02))
 - Long thought that determination of nationality was a matter exclusively for national law. But see case of *Rottman* (C-135/08)
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CRD – Personal scope - Who is a family member?

- Art 2 ‘family member’: the spouse, registered partner, direct descendants under 21 years or who are dependent, and those of the spouse or partner, the dependent direct relatives in the ascending line and those of the spouse or partner.
 - Art 3 ‘other family members’: beyond those in Art 2 include those who are dependent on the EU citizen or are a member of their household or where serious health grounds strictly require personal care of the EU citizen. Or the partner with whom the EU citizen is in a durable relationship.
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CRD – Personal scope - Who is a family member? (cont'd)

- Irrespective of nationality. 'TCN' third country national family members.
 - C-127/08 Metock – Citizen's rights must not be interpreted restrictively. Court prohibited national law making the right of residence of family members subject to prior lawful residence in another MS.
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Regulation 1612/68 on FM of workers

- Eligibility for employment in another MS (Arts. 1-6)
- Employment and equality of treatment (Arts. 7-9)
 - Pay, dismissal, conditions, access to training
 - Social and tax advantages (art 7(2) and 7(3))
 - Membership of trade unions
 - Housing
- Equal access of migrant workers' children to state education in the host state (Art. 12)

Ibrahim and Teixeira C-310/08 and C-480/08

What potential?

- Mere codification of pre-existing rights? (market citizenship? Community of individuals?)
 - CRD important legislative intervention to consolidate and expand and limit scope and content of FM rights for EU citizens
 - CJEU– crucial role in developing the concept of EU citizenship and EU citizenship crucial in developing concept of free movement!
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What potential? (cont'd)

- EU citizenship as 'fundamental status' of MS nationals – *Grzelczyk* (C-184/99)
 - CJEU has interpreted Article 21 in order to create rights for citizens
 - When they are in other MSs (in combination with the Article 18 principle)– irrespective of any economic nexus – *Martinez Sala*
 - When they have not moved from their state of nationality - *Zambrano*
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Some key case-law

□ Erosion of the “wholly internal” rule

- General position – individuals must move in order to engage EU free movement rights. EU provisions do not apply to situations ‘wholly internal to a MS’
 - *Surinder Singh* C-370/90– EU law can be invoked by nationals against their own MS when they are exercising or have exercised their rights of free movement
 - Erosion of wholly internal rule – takes increasingly little to trigger application of EU law –
 - C-60/00 Carpenter
 - C-200/02 Chen
 - C-148/02 Garcia Avello
 - C-34/09 Zambrano
 - C- 434/09 McCarthy
 - C- 256/11 Dereci
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Some key caselaw

- Non-workers/non economically active
 - *C-85/96 Martinez Sala* – right to claim social advantages on same basis as host- state national

Work-seekers

- *C-224/98 D'Hoop*
 - *C-138/02 Collins* – right to claim social security benefit
 - *C-258/04 Ioannidis*
 - *C-22 and 23/08 Vatsouras*
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Incremental approach?

- Caselaw does not suggest that all migrant EU citizens have immediate right to claim all benefits in the MS on the same terms as nationals
 - Incremental approach based on length of residence and category of claimant - also reflected in Directive 2004/38
 - Possible to discern a link between length of **residence**, degree of **integration** in host state and degree of **solidarity** owed by MS to EU citizens
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Themes for revision....

- Impact of EU citizenship on right to free movement – breaking the economic nexus
 - Limits to right to free movement
 - Family members and free movement rights
 - Rights of Third Country Nationals (TCNs) to EU free movement
 - Students and free movement
 - Application of the principle of non-discrimination on grounds of nationality in the free movement of persons
 - Erosion of wholly internal rule
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