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## The civil right to free movement: The beating right of EU citizenship?

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## 7. The civil right to free movement: the beating heart of European Union citizenship?

Marie-Pierre Granger<sup>1</sup>

### 1. Introduction

*'I move, therefore I am.'*

The right to move and reside freely in another member state is the best known right of European Union (EU) citizens.<sup>2</sup> It is, it seems, what makes EU citizenship tick. Much has been written on EU citizenship, but its real nature and potential for European integration remains a mystery. The purpose of this chapter is to contribute to a better understanding of the current concept and practice of EU citizenship. More particularly, it examines whether the right to free movement has mutated from an economic right for EU market actors into a genuine civil right of all EU citizens. The chapter first revisits the relationship between free movement and EU citizenship, and second critically analyses relevant EU legal provisions and their interpretation by the Court of Justice of the European Union (CJEU), as well as their implementation and application in selected member states.<sup>3</sup> The study reveals that EU citizenship is still primarily defined by economic mobility. Indeed, despite appeals to more substantial notions, EU citizenship remains centered on free movement. Moreover, despite a principled commitment to free movement in the Treaty on the Functioning of the EU (TFEU), EU legislation and case law impose demanding conditions on its exercise and allow for numerous restrictions, which make it more difficult for certain categories of EU citizens, the non-economically active, poorer and more marginalized, and those travelling with non-traditional and non-EU family members, to move and settle across the EU. Moreover, even when EU rules are generous, they are not always

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<sup>2</sup> European Commission, 'European Union Citizenship' (*Flashbarometer* No 365, February 2013) 27 <[http://ec.europa.eu/public\\_opinion/flash/fl\\_365\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf)> accessed 7 January 2018.

<sup>3</sup> This chapter draws on empirical country studies carried out in the context of the project bEUcitizen, 'Barriers towards EU Citizenship', Work Package 7, funded under EU Seventh Framework Programme for research, technological development and demonstration, Grant Agreement No 320294 <<http://beucitizen.eu/>> accessed 7 February 2018.

respected on the ground by national authorities, and EU institutions do not systematically enforce them. These conceptual and practical challenges call for reassessing the centrality of free movement in EU citizenship.

## 2. Free movement and EU citizenship: holding on to the umbilical cord?

In democratic countries, freedom of movement is a core right and privilege of citizens, which they derive from their citizenship status. In the EU, the sequence is reversed. It was the internal market free movement provisions that provided the basis for the development of the proto-concept of citizenship. Even today, as EU citizenship is formally detached from its mobility foundations, the ‘benefits’ of EU citizenship materialize mostly when EU citizens exercise their right to free movement.

In the original treaties, free movement was an ‘economic freedom’, not a ‘civil right’. It was granted to member states’ nationals as market actors, and not as EU citizens. Over the years, the CJEU<sup>4</sup> and the EU legislators<sup>5</sup> extended the right to free movement to particular categories of ‘non-economically active’ nationals of the member states, such as students, retirees or ‘play-boys’, and their close or dependent family members, on the condition that they were financially self-sufficient. In doing so, they gradually detached free movement from its market basis and sowed the seeds for the coming into being of EU citizenship.<sup>6</sup>

In 1992, when the Treaty of Maastricht formally introduced EU citizenship, it appeared to disconnect the concept from both its economic and mobility foundations. What is now Article 20 (1) TFEU indeed stated that ‘all’ nationals of the member states are EU citizens, and this irrespective of whether they are economically active or not, whether they move or not. Since Maastricht, it is EU citizenship, and no longer (or not only) the internal market, that ‘underpins’ the right to free movement.<sup>7</sup>

From the mid-1990s, non-economically active EU citizens started to invoke the Treaty’s new EU citizenship provision to secure residency rights and social benefits in their host states.<sup>8</sup> Case after case, the Court enhanced their position, in particular that of students and job-seekers, and made moving around Europe a more interesting and less risky enterprise for them and their families. It ruled, notably, that EU citizenship guaranteed them a right to reside and secured them access to some form of social assistance, when they had close enough links with the host state market or were sufficiently integrated in the host society.<sup>9</sup>

These moves clearly benefited (would-be) mobile EU citizens, but what about the ‘stay-homers’? Did EU citizenship offer anything to those who did not (wish to) move across the EU? The Court’s bold and oft-cited statement, in the *Grzelczyk* case (2001), that EU

<sup>4</sup> See cases C-281/89 *Angonese* EU:C:2000:296, [2000] ECR I-4139 and 186/87 *Cowan* EU:C:1989:47, [1989] ECR 195.

<sup>5</sup> Council Directive (EEC) 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity (‘Pensioners Directive’) [1990] OJ L 180/28–29; Council Directive (EEC) 90/366/EEC on the right of residence for students (‘Students Directive’) [1990] OJ L 180/30–31; Council Directive (EEC) 90/364 on the right of residence for nationals of Member States who do not enjoy this right under other provisions of Community law and for members of their families (‘Play-Boys Directive’) [1990] OJ L 180/26–27.

<sup>6</sup> Sioffra O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer 1997).

<sup>7</sup> Ottavio Marzocchi, ‘Fact sheet on the European Union – Free Movement of Persons’ (*European Parliament at Your Service*, March 2017) <[http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_2.1.3.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html)> accessed 7 January 2018.

<sup>8</sup> Starting with case C-85/96 *Martínez Sala* EU:C:1998:217, [1998] ECR I-2691.

<sup>9</sup> Cases C-138/02 *Collins* EU:C:2004:172, [2004] ECR I-2703, and C-22/08 and C-23/08 *Vatsouras* EU:C:2009:344, [2009] ECR I-4585, C-209/03 *Bidar* EU:C:2005:169, [2005] ECR I-2119.

citizenship is ‘destined to be the fundamental status of nationals of the member states’,<sup>10</sup> hinted that it could develop into a status relevant to all, and not just mobile individuals.

These ambitions were soon tempered by the EU legislator. In 2004, the EU ‘Citizens Directive’, which consolidated CJEU case law and replaced previous instruments, explicitly reconnected EU citizenship with mobility. It qualified the Court’s *Grzelczyk* formula and specified that EU citizenship ‘should be the fundamental status of the nationals of the Member States *when they exercise their right to free movement and residence*’.<sup>11</sup> This did not stop the Court on its expansion path. In *Rottmann*, the Court ruled that Article 20 TFEU protected EU citizens against a decision by their own state, which risked depriving them from their EU citizenship status.<sup>12</sup> The Court confirmed the move in *Zambrano*, when it ignored the limitation of the scope of the Citizens Directive to mobile EU citizens, and declared that Article 20 TFEU shielded EU citizens, irrespective of whether they have or not exercised their right to move, against national measures that would ‘deprive [them] of the genuine enjoyment of the substance of the rights conferred by virtue of their status as [EU] citizens’.<sup>13</sup> The decision had the potential to significantly flesh up the status of EU citizenship, to include protection against violation of rights beyond those listed in the Charter, notably those including in the EU Charter. However, in later cases, the CJEU, faced with resistance and accusations of competence creep, displayed greater caution and narrowly circumscribed the scope of the ruling to a protection against being forced to leave the EU territory.<sup>14</sup>

Beyond this minimum added value in extreme circumstances, EU citizenship is mostly relevant to mobile EU citizens. EU citizens’ main right is the right to free movement. The other important, and associated, right, the right not to be discriminated against based on nationality (Article 18 TFEU), kicks in after EU citizens have exercised their right to move under EU law, and so does the right to vote in local elections. Moreover, at both conceptual level and in practice, mobility is facilitated for economically active EU citizens. Furthermore, the EU Charter of Fundamental Rights (CFR) and general principles for the protection of civil, political, economic and social rights can only be invoked against EU acts and national measures which fall under the scope of the application of EU law (Article 51(1) CFR). This is, generally, easier to establish for mobile EU workers or service providers, who exercise their internal market rights, than for non-economically active EU citizens.<sup>15</sup> The umbilical cord between the internal market and EU citizenship has therefore not yet been severed.

### 3. No hiding place for the unfit? The scope and limits of the right to free movement of EU citizens and their families under EU law

<sup>10</sup> Case C-184/99 *Grzelczyk* EU:C:2001:458, [2001] ECR I-6193, para 31.

<sup>11</sup> Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158 (‘Citizens Directive’). Emphasis added.

<sup>12</sup> Case C-135/08 *Rottmann* EU:C:2010:104, [2010] I-1449.

<sup>13</sup> Case C-34/09 *Ruiz Zambrano* EU:C:2011:124, [2011] ECR I-1177, para 21 (emphasis added).

<sup>14</sup> Cases C-434/09 *McCarthy* EU:C:2011:277, [2011] ECR I-3375; C-256/11 *Dereci* EU:C:2011:734, [2011] ECR I-11304; C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354 (in this later case, the CJEU clarified that in assessing whether an expulsion measure would deprive EU minors of the substance of their EU citizenship rights, the authorities must take into account the child best interest and right to family life).

<sup>15</sup> Eleanor Spaventa, ‘The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures’ (European Parliament, *Study for the Petitions Committee*, Brussels, February 2016) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL\\_STU\(2016\)556930\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf)> accessed 7 February 2018.

EU law provides for an extensive right to free movement for EU citizens and their families. This is particularly remarkable, given that immigration is a sensitive policy area that belongs to a core domain of national sovereignty. Moreover, residency rights often give rise to social benefit claims, engaging notions of social solidarity and social policies that have remained the preserved competence of member states. It therefore comes as no surprise that EU citizens' mobility and residence rights are subject to certain limitations.

### 3.1 The EU citizens' right to move and reside in another EU member state – a disaggregated and conditional right

Articles 20 and 21(1) TFEU, which proclaim the right to freely move and reside within the territory of the member states, unambiguously specify that it is subject to the limitations and conditions laid down in the Treaties and implementing measures. The main legislative instrument is the 2004 Citizens Directive. Broadly speaking, the conditions of residence vary depending on the length of residence, and the EU citizen's economic status. Moreover, the right of move and reside can be restricted in case of 'bad' behavior. Various combinations along these dimensions provide for different mobility and residency rights under EU citizenship law, thus producing a highly disaggregated right of residence under EU law. The associated principle of equal treatment also allows for exceptions and limitations.

Crossing internal EU borders and visiting other member states is largely unproblematic on paper. EU citizens have the right to leave their country of origin, and are entitled to an identity card or a passport for this purpose.<sup>16</sup> Member states can nonetheless impose certain restrictions on their own nationals' exit on public policy or security grounds.<sup>17</sup> To enter another member state, EU citizens only need to present an official and valid proof of identity, such as a passport or identity card. The implementation of the Schengen Agreement further facilitates internal EU mobility, through the elimination of passport and other border checks between 22 EU member states and four states of the European Free Trade Agreement (EFTA).<sup>18</sup>

EU citizens may stay in another member state for less than three months without restrictions or formalities beyond the duty to identify themselves.<sup>19</sup> States may require them to report their presence, and can sanction failure with proportionate fines though.<sup>20</sup> Whilst visiting and spending short periods of time in other EU states is relatively straightforward for EU citizens, providing they behave and do not abuse their free movement rights,<sup>21</sup> settling in another member state for a longer duration is a more demanding operation. Member states may require EU citizens who (wish to) reside in the country for more than three months to register.<sup>22</sup> The conditions determining the right of residence of EU citizens (and their families) beyond three months depends on their economic status. First, workers, and those who retained that status,<sup>23</sup> have an automatic right to reside. The Court has adopted a broad notion of 'worker'

<sup>16</sup> Citizens Directive, art 4 (n 11).

<sup>17</sup> Citizens Directive, art 27 (n 11).

<sup>18</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/ 19.

<sup>19</sup> Citizens Directive, art 6 (n 11).

<sup>20</sup> Citizens Directive, art 4(5) (n 11).

<sup>21</sup> See below, text to n 34.

<sup>22</sup> Citizens Directive, art 8(1) (n 11).

<sup>23</sup> In case of sickness, maternity leave or involuntary unemployment after at least a one-year period of employment.

for the purpose of the free movement law,<sup>24</sup> which covers part-time workers<sup>25</sup> and persons on fixed-term contracts.<sup>26</sup> Second, workers who find themselves involuntarily unemployed after an employment period of less than a year, like first time job seekers, have the right to reside for six months, and longer if they are still looking for a job and have a ‘genuine chance’ of being engaged. Third, non-economically active EU citizens have a right to reside if they have comprehensive sickness insurance, and have sufficient resources to support themselves and their family so as not to become a ‘burden on the social assistance system’ of the host state.<sup>27</sup> In assessing whether resources are sufficient, member states must take account of the personal situation of the EU citizens and their families and must apply resources conditions in line with national social assistance requirements.<sup>28</sup> States can check that EU citizens continue to fulfil the conditions of residence under EU law, but cannot do so in a systematic manner.<sup>29</sup>

Those who have been lawfully residing in a host member state for at least five years acquire the EU right of permanent residence, which is no longer dependent on worker status or economic resources.<sup>30</sup> This permanent residence status is one of the major innovations of the Citizens Directive, and was meant to create a stronger sense of European identity and foster social integration.<sup>31</sup> The length of residence is calculated based on the fulfilment of the conditions of legal residence under EU law.<sup>32</sup> States may discount periods of imprisonment though.<sup>33</sup> The permanent residence status may be lost following an absence from the host country of more than two consecutive years.

Member states can restrict the free movement of EU citizens on serious health grounds,<sup>34</sup> as well as on public security or public policy grounds, where their ‘personal conduct’ represents ‘a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.<sup>35</sup> Member states may also adopt restrictive measures to prevent fraud or other forms of abuse of rights.<sup>36</sup> All restrictions, including expulsion measures, must be proportionate to, and comply with, procedural safeguards.<sup>37</sup> EU citizens who have permanent residence can only be expelled on ‘serious’ security policy and security grounds, while those who have lived in the host state for more than ten years or are minors only on ‘imperative’ grounds of public security.<sup>38</sup> The Directive prohibits restrictions on mobility and residence, which serves economic ends.<sup>39</sup> However, member states can deny entry and residence to non-economically active EU citizens who constitute an ‘unreasonable burden’ on

<sup>24</sup> Defined as a person who provides a service for or under the direction of someone else against remuneration, provided the activity is ‘genuine’ and ‘effective’ and not ‘marginal’ or ‘ancillary’ (Cases 66/85 *Lawrie-Blum* [1986] EU:C:1986:284, ECR 2121; C-53/81 *Levin* [1982] ECR 1035; C-316/13 *Fenoll* EU:C:2015:200).

<sup>25</sup> Case C-139/85 *Kempf* EU:C:1986:223 [1986] ECR 1741.

<sup>26</sup> Case C-413/01 *Ninni-Orasche* EU:C:1982:105, [2003] ECR I-12187.

<sup>27</sup> Students only have to declare having sufficient resources, see Citizens Directive, art 7 (n 11).

<sup>28</sup> Citizens Directive, art 8(4) (n 11).

<sup>29</sup> Citizens Directive, art 14(2) (n 11).

<sup>30</sup> Citizens Directive, art 16 of the Citizens Directive (n 11).

<sup>31</sup> Citizens Directive, Preamble para 17 (n 11).

<sup>32</sup> Joined cases C-424/10 *Ziolkowski* and C-425/10 *Szeja and Others* EU:C:2011:866, [2011] ECR I-14035.

<sup>33</sup> Case C-378/12 *Onuekwere* EU:C:2014:13.

<sup>34</sup> Citizens Directive, art 27(1) and 29 (n 11).

<sup>35</sup> Citizens Directive, art 27(2) (n 11).

<sup>36</sup> Citizens Directive, art 35 (n 11). The CJEU case law clarifies that in assessing abuse, the authorities must consider ‘first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it’ (case C-434/09 *MacCarthy*, para 54 (n 14); C-364/10 *Hungary v Slovakia* EU:C:2012:630, para 58, and C-456/12 *O. and B.* EU:C:2014:135 para 58).

<sup>37</sup> Citizens Directive, art 27-33 and 35 (n 11).

<sup>38</sup> Citizens Directive, art 28 (n 11).

<sup>39</sup> Citizens Directive, art 27 (n 11).

their social assistance system.<sup>40</sup> They cannot systematically expel them though.<sup>41</sup> Before taking an expulsion decision, member states must carry out an individual assessment of the EU citizen's situation, considering factors such as her length of residence, age, state of health, economic situation and family relationship, social and cultural integration and link with her country of origin.<sup>42</sup>

The conditions and limitations imposed by EU law on the exercise of the right to move and reside in another member state generally favor the better-offs and better educated, which undermines the core notion of equality between citizens. This disaggregated framework for EU free movement is replicated in relation to the free movement of their family members.

[sub-heading] The derived free movement and residence right of Third Country Nationals (TCN) family members of EU citizens – a privileged access to the EU territory?

EU internal market law grants mobility and residency rights to TCNs' family members of EU citizens who provide cross-border services,<sup>43</sup> or work in another EU state,<sup>44</sup> based on the idea that the refusal to grant such a right of residence would prevent EU citizens from effectively exercising those economic rights. The same logic applies in relation to the EU civil right to free movement. EU citizenship law grants 'derived rights' to the family members of mobile EU citizens. Furthermore, the CJEU introduced limited residency rights for TCN parents of dependent minor sedentary EU citizens.

TCN family members entry, residency and equal treatment rights align with those of their mobile EU citizen family member.<sup>45</sup> They may nonetheless be required to comply with certain formalities. For example, they may have to present a visa (unless they already have a EU residency card from another EU member state).<sup>46</sup> Visas, when required, should be issued free of charge through an accelerated procedure, and can be denied only on limited grounds.<sup>47</sup> A TCN joining a EU family member in a host state does not have to have lawfully resided in another member state.<sup>48</sup> Derived rights extend to TCN family members of 'returnees', that is to nationals who moved to another member state and then return to their home state, provided that residence in the other EU state was 'sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State'.<sup>49</sup>

EU law lists family members who 'automatically' enjoy derived rights.<sup>50</sup> These are: the spouse, the registered partner (when the host state's legislation treats registered partnerships as equivalent to marriage), children (under the age of 21), including that of the spouse or partner, and dependent ascendants or descendant above 21, and that of the spouse or partner. EU law further requires that member states 'facilitate' the entry and residence of 'other' family members, namely those who are dependent on the EU citizen or whose health requires the EU citizen's personal care, as well as the partner with whom the EU citizen has a 'durable relationship duly attested'.<sup>51</sup> The Directive instructs member states to take account of the extent

<sup>40</sup> Citizens Directive, art 7(1)b and 14(1) and (2) (n 11).

<sup>41</sup> Confirmed in C-140/12 *Brey* EU:C:2013:565.

<sup>42</sup> Citizens Directive, art 28(1) (n 11).

<sup>43</sup> art 56 TFEU. See case C-60/00 *Carpenter* EU:C:2002:434, [2002] ECR I-6279.

<sup>44</sup> Case C-457/12 *S.* EU:C:2014:136.

<sup>45</sup> art 21(1) TFEU; Citizens Directive, art 6(2) (n 11).

<sup>46</sup> Confirmed in case C-434/09 *McCarthy* (n 14).

<sup>47</sup> Citizens Directive, Article 4(1) and 5(2) (n 11).

<sup>48</sup> Case C-127/08 *Metock* EU:C:2008:449, [2008] ECR I-6241.

<sup>49</sup> art 41(1) TFEU. See cases C-370/90 *Surinder Singh* [1992] ECR I 4265; C-291/05 *R. N. G. Eind*. [2007] ECR I-10719; *O.* (n 36).

<sup>50</sup> Citizens Directive 2004/38, Article 2(2) (n 11).

<sup>51</sup> Citizens Directive, Article 3(2) (n 11).

of economic and physical dependence and family relationship.<sup>52</sup> The notions of ‘dependency’ or ‘durable relationship duly attested’ are not defined in the Directive. The CJEU clarified that dependency is ‘the result of a factual situation characterized by the fact that material support for the family member is provided by the holder of the right of residence’.<sup>53</sup> The relatives should not have to prove they have looked for work or other sources of income, and they cannot lose the derived residency right if they later work or generate independent income.<sup>54</sup> The Citizens Directive preserves the right of residence of EU citizens’ family members, including TCNs, in the case of separation, divorce or death of the EU citizen, although subject to certain conditions related notably to the length of the relationship and economic self-sufficiency of the TCN (former) family member.<sup>55</sup> The Directive also guarantees the residency rights of children in education, as well as that of the TCN parent who is the carer, irrespective of economic resources, following a family breakup,<sup>56</sup> and confers residency rights to (TCN) family members who are victims of domestic violence.<sup>57</sup>

Minor EU citizens are inevitably dependent on their (TCN) parents to exercise their free movement rights. The TCN parents therefore derive the necessary mobility and residency rights to ‘accompany’ their children in other member states.<sup>58</sup> Moreover, in *Zambrano*, the Court ruled that Article 20 TFEU conferred residency rights on TCN family members of dependent minor EU citizens who have never exercised their right to free movement, where otherwise they would be deprived of ‘the genuine enjoyment of the substance of the[ir] rights’ as EU citizens and be forced to leave the EU territory.<sup>59</sup> This derived right of residence of the TCN parent of a ‘sedentary’ EU child is retained even when the TCN parents have a criminal record, as long as they do not represent a genuine, present and sufficiently serious threat,<sup>60</sup> or when there is an EU parent who could potentially look after the child.<sup>61</sup> The Court appears particularly sensitive to the fate of the most vulnerable of all EU citizens, dependent children, placing their best interest at the center of consideration and providing significant protection to their right to family life.

### 3.2 Free movement – the special civil right of all EU citizens?

Free movement is a right, but not an exclusive privilege of EU citizen. In fact, it is not systematically granted as a right. Indeed, at the time of the Big Bang enlargement (2004), the old member states negotiated the right to impose temporary restrictions on the free movement of workers from Central and Eastern European Countries (CEEC), for a period of up to seven years.<sup>62</sup> This scheme did not concern self-employed and non-economically active CEEC nationals who had sufficient resources and health insurance, but limited the ability of ‘poorer’ CEEC workers to move West to take on jobs.

<sup>52</sup> Case C-83/11 *Rahman and Others* ECLI:EU:C:2012:519.

<sup>53</sup> Cases C-40/11 *Iida* ECLI:EU:C:2012:691 [55]; C-1/05 *Jia* [2007] ECR I-1 [36-7] and C-200/02 *Zhu and Chen* [2004] ECR I-9925 para 43.

<sup>54</sup> Case C-423/12 *Reyes* [2013] ECLI:EU:C:2013:719.

<sup>55</sup> Citizens Directive, art 12 and 13 (n 11).

<sup>56</sup> Citizens Directive, art 12(3) (n 11).

<sup>57</sup> Citizens Directive, art 13(1)c (n 11).

<sup>58</sup> See *Zhu and Chen* (n 53).

<sup>59</sup> See *Zambrano* (n 13); *McCarthy* (n 14); *Dereci* (n 14); *Iida* (n 53); C-356&357/11 *O and S* ECLI:EU:C:2012:776; C-87/12 *Ymeraga* ECLI:EU:C:2013:291; C-86/12 *Alokpa* ECLI:EU:C:2013:645. The right of residence seems to apply even when the TCN parents may not have to leave the EU and could go to another member state, see C-165/14 *Rendón Marín* ECLI:EU:C:2016:675.

<sup>60</sup> Case C-304/14 *CS* ECLI:EU:C:2016:674; *Rendón Marín* (n 59).

<sup>61</sup> *Chavez-Vilchez* (n 14).

<sup>62</sup> For a detailed analysis, see Samantha Currie, *Migration, Work and Citizenship in the Enlarged European Union* (Ashgate 2008)



Free movement and residence rights are, furthermore, granted to non-EU citizens, primarily based on their economic value.<sup>63</sup> Citizens from Switzerland,<sup>64</sup> Iceland, Norway, and Liechtenstein,<sup>65</sup> enjoy extensive mobility and residence rights, based on their state's participation in the internal market. Depending on the outcome of Brexit negotiations, British citizens may be able to retain their right to move and reside in the EU under a special agreement.<sup>66</sup> Moreover, the EU has adopted immigration measures which grant rights of access, movement, and residence to certain categories of TCNs, provided they are economically self-sufficient (eg Long Term Resident Directive).<sup>67</sup> These features reinforce the market rationale of EU free movement rights, and reduce the distinctive value of EU citizenship, although they make for a more 'inclusive' informal concept of EU citizenship.

To conclude on this review of the EU legal framework, the design of the EU citizenship mobility and residency scheme makes it easier for certain EU citizens and their families to exercise their right to move and reside in another member state. Whilst it allows (almost) all EU citizens to move across the EU borders, those who do not have regular work or do not have sufficient resources are not guaranteed a right to stay beyond a certain period, and will encounter difficulties gaining permanent residency rights. Those who misbehave (by breaking or abusing the law) may be denied entry or residency, and may even be expelled. Those who become a burden on society are also expected to leave, unless they have already contributed enough or are otherwise sufficiently integrated. Only after five years of lawful residence fulfilling the conditions of EU law do EU citizens and their families acquire more robust residency rights and full equal treatment. Economic status and resources are therefore strong constraints on the exercise of the right to free movement, thereby producing a 'class' of privileged mobile EU citizens.<sup>68</sup> What is more, despite some flexibility and the integration of the 'possibility' of family breakdowns, EU free movement rules are still primarily designed to fit a Western nuclear family model, formed in a relatively static context (parents and children all living together in one country). 'Modern families', those whose members are mobile or commute across EU borders for work or studies, decomposed and recomposed, with mixed nationalities and gender roles, do not fit well. Finally, the legal discrepancies between EU citizens' right to have their family members live with them in a host member state and restrictive national immigration laws which prevent nationals from enjoying the same protection of their right to family life lead to 'reverse discrimination' which can cause frustrations towards EU membership and mobile EU citizens. It may also tempt 'nationals' to (ab)use their free movement right to secure residency rights for their loved ones, or encourage TCNs to 'hook up' with mobile EU citizens in order to secure residency in the EU. The inequalities which underpin the EU free movement legal framework are further aggravated at the level of national implementation, as many member states (ab)use the leeway they have to restrict even more the mobility and residency rights of 'undesirable migrants'.

<sup>63</sup> For a more detailed analysis, see Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', in Daniel Thym and Margarite Zoetewij Turhan (eds.) *Degrees of Free Movement and Citizenship* (Brill-Nijhoff 2015).

<sup>64</sup> European Communities – Switzerland Agreement OJ [2002] L114/6.

<sup>65</sup> European Economic Area (EEA) Agreement OJ [1997] L1/1.

<sup>66</sup> Jon Henley, 'EU Citizenship Proposal could Guarantee Rights in Europe after Brexit' *The Guardian*, 9 November 2016, <<https://www.theguardian.com/world/2016/nov/09/eu-citizenship-proposal-could-guarantee-rights-in-europe-after-brexit>> accessed 7 February 2018.

<sup>67</sup> Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

<sup>68</sup> On this issue, see Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement' (2006) 53(4) CMLRev 937.

#### 4. Free movement of EU citizens ‘on the ground’: national implementation and the handling of ‘undesirable’ EU ‘migrants’ and their families

To fully appreciate the realities of EU citizenship, as a status primarily defined by mobility, it is essential to observe how national authorities implement and apply EU free movement rules, and examine whether these support or undermine EU citizens’ ability to exercise their core right. The analysis of national rules and practices, with a particular focus on Belgium, France, Hungary, the Netherlands and Spain, suggests that more often than not, member states’ authorities make it more difficult than it should be to cross an internal EU border and settle in another member state. Member states make use of the possibilities granted by the Directive to restrict the mobility and residency rights of ‘less desirable’ EU citizens, and in some cases, even go against the wording and spirit of EU citizenship rules in order to prevent them from coming or to force them to leave. These restrictive practices target primarily poorer EU citizens from CEEC or Southern Europe, in particular those from marginalized communities, and those who have TCN family members. They result from a combination of administrative habits rooted in stricter national immigration policies, forms of institutionalized racism, and concerns about the abuse of EU rights. Courts sometimes step in to correct the worst excesses, but remain generally supportive of restrictions.

##### 4.1 Restrictions on border crossing

Various restrictions are imposed on EU citizens wishing to leave their own member states, affecting particularly Muslim EU citizens of immigrant descent. Moreover, EU citizens, in particular poorer ones from CEEC or those travelling with TCN family members, face certain hurdles when entering another EU state.

Some restrictive national measures are guided by social investment and brain-drain concerns. For example, Hungary requires Hungarian students on a tuition fee-waiver to sign a contract in which they agree that they will not leave the country to work abroad for a period twice as long as their studies, or reimburse the cost of their education.<sup>69</sup>

Most restrictions are however based on security grounds. For example, France recently reintroduced a regime of authorization for minor French nationals to exit the territory without their parents, to stop teenagers from travelling to join terrorist groups in the Middle East without their parents’ knowledge.<sup>70</sup> Parents may also apply for an administrative order of ‘opposition to leave the territory’ or a judicial ‘prohibition to leave the French territory’ if they fear their children intend to do so.<sup>71</sup>

The rise of the terrorist threat across Europe and the phenomenon of ‘foreign fighters’ has led to further restrictions on the movement of nationals. Under a new anti-terrorist legislation adopted in 2014, the French Interior minister issued hundreds of administrative

<sup>69</sup> Orsolya Salat, ‘Country report: Hungary’, Annex VI to Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele *Exploring obstacles in exercising core EU citizenship rights* (bEUCitizen Deliverable 7.3, 5 September 2016) 163, 176 <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018.

<sup>70</sup> Article 49 of *Loi n°2016-731* (3 June 2016); *Décret n° 2016-1483 relatif à l'autorisation de sortie du territoire d'un mineur non accompagné par un titulaire de l'autorité parentale*, 2 Novembre 2016, NOR: INTD1623627D). It does not apply to French citizens residing abroad.

<sup>71</sup> Marie-Pierre Granger, ‘Country Report: France’, Annex IV to Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele *Exploring obstacles in exercising core EU citizenship rights* (bEUCitizen Deliverable 7.3, 5 September 2016) 103, 126 <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018.

prohibitions to leave the territory against French citizens, where there are serious suspicions that they are planning to travel to participate in terrorist activities or join terrorist groups.<sup>72</sup> Similar measures are in place in other member states, such as the Netherlands (since 2016),<sup>73</sup> Belgium or Denmark.<sup>74</sup> These are, in fact, now required under the new EU Directive on combatting terrorism.<sup>75</sup>

Moreover, security concerns have led to even more drastic restrictions on the movement of nationals. Under the state of emergency law, French citizens suspected of having links with terrorism can be placed by ministerial decision under *assignation à résidence* (house arrest). Their identification and travel documents may be taken away. Since the November 2015 Paris attacks, hundreds of French citizens, mostly Muslims, but also social and environmental activists, have been confined to their home.<sup>76</sup> The French Constitutional Council ruled that these measures are compatible with freedom of movement as protected under the French constitution.<sup>77</sup>

Member states generally recognize EU citizens' right of entry and short stay, but creates difficulties for their TCN family members, which can impede EU citizens' movement.<sup>78</sup> Moreover, states that offer some form of social assistance or benefits in the first months of residence tend to check for abusive use of free movement rights. For instance, French authorities are instructed to deny entry to or expel EU citizens who multiply short stays. These measures appear targeted particularly at Roma from Romania and Bulgaria.<sup>79</sup> Some countries have imposed re-entry bans against those who are found guilty of abuse or fraud.<sup>80</sup>

The massive influx of refugees and terrorist attacks in the recent years have led many EU states to use the possibility to reintroduce temporary border control within the Schengen area. These temporary measures are regularly renewed, turning into quasi-permanent derogations, which render EU citizens' moving across Europe more cumbersome again and call into question the European border-free project.<sup>81</sup>

<sup>72</sup> Granger (n 71) 127-8.

<sup>73</sup> *Tijdelijke regels inzake het opleggen van vrijheidsbeperkende maatregelen aan personen die een gevaar vormen voor de nationale veiligheid of die voornemens zijn zich aan te sluiten bij terroristische strijdgroepen en inzake het weigeren en intrekken van beschikkingen bij ernstig gevaar voor gebruik ervan voor terroristische activiteiten*, 16 May 2016, Article 3.

<sup>74</sup> Hanneke van Eijken and Pauline Phoa, 'General Report' in Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele *Exploring Obstacles in Exercising Core EU Citizenship Rights* (bEUCitizen Deliverable 7.3.5 September 2016) 1, 14-16 <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018.

<sup>75</sup> Directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism [2017] OJ L 88/6.

<sup>76</sup> Granger (n 71) 128-129. See also Amnesty International, 'Des mesures disproportionnées – l'ampleur grandissante des politiques sécuritaires dans les pays de l'Union Européenne est dangereuse' (2016) <[https://amnestyfr.cdn.prismic.io/amnestyfr%2Fd2f8ee9f-2ec3-4c3a-acea-02acc9cb3c10\\_eur\\_01\\_5342\\_2017\\_ext\\_fra-final.pdf](https://amnestyfr.cdn.prismic.io/amnestyfr%2Fd2f8ee9f-2ec3-4c3a-acea-02acc9cb3c10_eur_01_5342_2017_ext_fra-final.pdf)> accessed 7 February 2018.

<sup>77</sup> *Conseil Constitutionnel*, Decision 2015-527 QPC, 22 December 2015, *Credic D*.

<sup>78</sup> See below text at n 211ss.

<sup>79</sup> Granger (n 71), 115-116.

<sup>80</sup> Niamh Nic Shuibhne and Jo Shaw, 'General report on EU citizenship' in Ulla Neergard, Catherine Jacqueson, and Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges*, The XXXI FIDE Congress in Copenhagen, Congress Publications 2014, (Vol. 2, Copenhagen, DJOF Publishing 2014), 130.

<sup>81</sup> For all notified measures reintroducing temporarily border controls, see European Commission, 'Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 *et seq.* of the Schengen Borders Code' <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)> accessed 7 February 2018.

## 4.2 The strict assessment of residence conditions

Some member states engage in restrictive applications of EU residence rules, which make it particularly difficult for EU citizens in irregular and low wage jobs, or without work and significant resources, to settle in another member state.

### 4.2.1 Denial of worker status

Certain states make it relatively hard for people in irregular jobs, on atypical contracts or on low wages, to ‘qualify’ as workers or self-employed. France formally qualifies as workers those who earn less than the minimum income and claim compensatory minimum income allowance,<sup>82</sup> but in practice authorities often classify EU citizens on low income or in part-time jobs as inactive and therefore require them to fulfil economic resources and health insurance conditions. French courts try to rectify these administrative ‘errors’. In the case of workers, they reminded national authorities that they cannot check resources, even when EU citizens claim assistance.<sup>83</sup> Other states, like the United Kingdom, impose minimum earning-levels or hours to qualify as a ‘worker’. These measures exclude certain categories of workers from EU worker-status, in particular those on low income, insecure, ‘fringe’ or part-time jobs (eg zero-hours, on-call or agency/short-term contracts).<sup>84</sup> In countries where no time or wage thresholds apply, decisions across authorities can be inconsistent, and lead to the arbitrary denial of residency rights.<sup>85</sup>

The formal employment relation requirement removes any unpaid domestic work, undeclared (eg housekeeping, baby-sitting, fruit-picking, etc) or illegal (eg prostitution, clandestine workshops) jobs from the protective scope of EU law.<sup>86</sup> The classification of certain forms of practical training, such as apprenticeship, internship or fellowship (eg PhD studentship) is also problematic. In some countries, these are considered as employment, in others not, thus creating different residency and equal treatment entitlements for similar activities across different countries.<sup>87</sup> Retaining worker status (or self-employment) can also be tricky. French NGOs report that EU citizens who became unemployed or were enrolled on professional training programs were denied residency or access to benefit.<sup>88</sup>

EU migrants are more likely than nationals to be exploited and find themselves in irregular, low-paid or undeclared jobs,<sup>89</sup> and thus to be denied residence right based on worker’s status and the accompanied right to access social services and benefits.<sup>90</sup> Moreover,

<sup>82</sup> Granger (n 71) 118.

<sup>83</sup> See court decisions cited in Granger ‘France’ (n 71) 119.

<sup>84</sup> See O’Brien (n 68).

<sup>85</sup> See Charlotte O’Brien, Eleanor Spaventa, and Joyce De Coninck, ‘Comparative report 2015 – The Concept of Worker under Article 45 TFEU and Certain Non-standard Forms of Employment’ (European Commission, Brussels, May 2016), 8.

<sup>86</sup> See Louise Ackers, ‘Citizenship, Migration and Evaluation of Care in the European Union’ (2004) *Journal of Ethnic and Migration Studies* 373 <<https://doi.org/10.5281/zenodo.20306>> accessed on 7 February 2018.

<sup>87</sup> O’Brien et al (n 85) 9-10.

<sup>88</sup> Granger (n 71) 120.

<sup>89</sup> European Foundation for the Improvement of Living and Working Conditions, ‘Employment and working conditions of migrant workers’ (2007), <[www.eurofound.europa.eu/ef/sites/default/files/ef\\_files/docs/ewco/tn0701038s/tn0701038s.pdf](http://www.eurofound.europa.eu/ef/sites/default/files/ef_files/docs/ewco/tn0701038s/tn0701038s.pdf)> accessed on 7 February 2018.

<sup>90</sup> See O’Brien (n 68), O’Brien et al (n 85) 8. See also van Eijken and Phoa (n 74) 22; Bridget Anderson, Sarah Walker, and Isabel Shultes, ‘Citizenship and Work: Case Studies of Differential Inclusion and Exclusion’ (bEUCitizen Deliverable 10.3, 24 May 2016) <<https://doi.org/10.5281/zenodo.61788>> accessed 7 February 2018; Matteo Luppi, Rosanne Oomkens, Trudie Knijn and Bernhard Weicht, ‘Citizenship in the Context of Migrant

to prevent bogus ‘self-employment’, states often impose requirements related to registration, minimum turn-over or remuneration, to recognize self-employment status.<sup>91</sup> Finally, EU citizens continue to face barriers in accessing the job market (eg nationality requirement in non-exempted civil service jobs, registration refusals by employment agencies, private employers’ policy of non hiring foreigners, etc.), which undermines their ability to secure regular work and with it the automatic residence right.<sup>92</sup> Where EU citizens do not qualify as workers or self-employed, they must prove they are self-sufficient, which proves an insurmountable obstacle for many of them.

#### 4.2.2 Demanding economic resources thresholds and health insurance requirements

Member states scrutinize non-economic EU migrants who claim residence for more than three months to see whether they have sufficient resources and comprehensive health insurance. The trend is particularly pronounced in countries that perceive themselves under immigration pressure. Certain states apply demanding conditions of resources and strict comprehensive health insurance requirements, which seem to defy the spirit of EU free movement law.

The notion of economic self-sufficiency is controversial and contested.<sup>93</sup> In most countries, formal measures or guidelines define what constitutes ‘sufficient resources’, not always leaving enough discretion to consider applicants’ individual circumstances.<sup>94</sup> In others, the decision is largely left to civil servants’ discretion, which leads to inconsistencies.<sup>95</sup> National authorities appear to exercise even closer scrutiny over resources when the EU citizen is accompanied or joined by TCN family members.<sup>96</sup>

Across Europe, we witness significant variations as to what is regarded as ‘resources’. Some state authorities do not take into account income resulting from interim work,<sup>97</sup> others do. Some include only EU citizens’ personal income,<sup>98</sup> others also count financial support given by family members or third parties.<sup>99</sup> Some count social assistance in the calculation of resources, others exclude it.<sup>100</sup>

Care Work: Regimes, Rights & Recognition’ (bEUcitizen Deliverable 9.6, 8 May 2015) <<https://zenodo.org/record/20306>> accessed on 7 February 2018.

<sup>91</sup> O’Brien et al (n 85) 9; Granger (n 71) 119.

<sup>92</sup> Marta Ballesteros, Gillian Kelly, Nathalie Meurens, and Anna Perego, ‘Obstacles to the Right of Free Movement and Residence for EU citizens and their Families - Comparative Analysis’ (European Parliament, Brussels, September 2016), PE 571.375, 87-90 and 103.

<sup>93</sup> Nic Shuibhne and Shaw (n 80) 89.

<sup>94</sup> de Waele and Solis Santo (n 94) 56.

<sup>95</sup> Eg in Italy or Poland (Ballesteros et al ‘Obstacles’ (n 92) 37-38, 40-41); Spain (Javier A. Gonzales Vega, Davide de Pietri, and Raul I. Rodriguez Magdaleno ‘Country Report: Spain’ (Annex VII) in Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele, *Exploring Obstacles in Exercising Core EU Citizenship Rights* (bEUcitizen Deliverable 7.3.5 September 2016) 221, 236 and 247, <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018.

<sup>96</sup> Henri de Waele and Maria Teresa Solis Santo, ‘Report on Belgium’ (Annex II) in Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele *Exploring Obstacles in Exercising Core EU Citizenship Rights* (bEUcitizen Deliverable 7.3.5 September 2016) 44, 67 <<https://doi.org/10.5281/zenodo.61777>> accessed 7 February 2018; Granger ‘France’ (n 71) 116.

<sup>97</sup> Eg Belgium, see Serge Bodart, Sylvie Sarolea and Paul Vandercam (eds), *Droit des étrangers annoté 2015* (La Charte 2015) 248.

<sup>98</sup> De Waele and Solis Santo (n 94) 68 and 75.

<sup>99</sup> Administrative Appeal Court (Douai), 2<sup>nd</sup> ch., 3 June 2008, No 07DA01750, cited in Granger (71) 123.

<sup>100</sup> eg Alien Litigation Council, No 12.171 of 30 May 2008, discussed in Bodard et al 243 (n 97).

As to their ‘sufficient’ nature, many member states have introduced minimum amounts calculated in relation to a guaranteed minimal income.<sup>101</sup> For example, in Belgium, it is 120% of the minimum social income.<sup>102</sup> In Denmark, it is equal to the sum of benefits that Danish citizens would be able to receive under the Active Social Policy Act.<sup>103</sup> In France and Spain, it cannot exceed the minimum income below which people may claim social assistance.<sup>104</sup> These rules are sometimes apply very strictly. In Belgium, a pensioner receiving a small old age pension, claiming and receiving special complementary benefits in the host state, fell below the minimum income level, and therefore did not fulfil the sufficient resources condition necessary to secure a right to residence under EU law.<sup>105</sup> Some states actively chase EU citizens suspected of not meeting the residence conditions. In France, the authorities check students’ attendance record and study path to detect abuse and deny residence to EU citizens when they claim social assistance, such as housing benefits.<sup>106</sup> The United-Kingdom recently engaged in a policy of systematically checking and expelling EU citizens who were sleeping rough.<sup>107</sup>

There is little comparative quantitative data,<sup>108</sup> but existing reports suggest that the lack of sufficient resources constitutes the main ground for denying residency rights to EU citizens and their family. For example, many Spaniards are denied residence and even expelled from Belgium for not having sufficient resources.<sup>109</sup> Some have petitioned the European Parliament, but little seems to change on the ground, and Belgian courts have not shown great sympathy to their plight.<sup>110</sup> In France, Belgium, and Spain, Roma from Eastern European countries are denied residency on the ground of lack of resources or a fixed address.<sup>111</sup>

The right to permanent residence has generally been correctly transposed,<sup>112</sup> but the practical recognition of permanent resident status is problematic because of a strict application of the residency conditions and bureaucratic challenges.<sup>113</sup> Brexit provided a test-case, as it triggered a surge in applications for permanent residence from EU citizens living in the United-Kingdom. In the year following the Brexit referendum, the refusal rate was significant

<sup>101</sup> The concept of ‘unreasonable burden on the social assistance system’, which results in the denial of residency right, is usually assessed based on the length of residence and the amount of non-contributory social security benefits which the EU citizen receives. Groupe d’information et de soutien des immigrés (GISTI), ‘Entrée, Séjour et Eloignement. Ce que Change la Loi du 16 Juin 2011’ (*Les Cahiers Juridiques*, September 2011) 50, <[http://www.gisti.org/IMG/pdf/2011.-09\\_cj\\_entree\\_sejour\\_apres\\_loi\\_besson.pdf](http://www.gisti.org/IMG/pdf/2011.-09_cj_entree_sejour_apres_loi_besson.pdf)> accessed on 7 February 2018.

<sup>102</sup> Aliens Litigation Council No 41.638 of 16 April 2010, cited in De Waele and Solis Santo (n 94) 56, 60 and 75.

<sup>103</sup> Silvia Adamo ‘Country report Denmark’ (Annex III) in Silvia Adamo, Hanneke van Eijken, Javier A. Gonzales Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, Henri de Waele, *Exploring Obstacles in Exercising Core EU Citizenship Rights* (bEUcitizen Deliverable 7.3,5 September 2016) 81, 91 <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018. See also Nic Shuibhne and Shaw (n 80) 91-92; Ballesteros et al (n 92) 38.

<sup>104</sup> Vega et al (n 96) 236; Granger (n 71) 132.

<sup>105</sup> De Waele and Solis Santo (n 94) 71.

<sup>106</sup> Granger (n 71) 121.

<sup>107</sup> Stephanie Reynolds, ‘The UK can No Longer Remove EU citizens for Sleeping Rough - Why This Matters for Brexit’, 21 December 2017 <<http://livrepository.liverpool.ac.uk/id/eprint/3014612>> accessed on 7 February 2018.

<sup>108</sup> Ballesteros et al (n 92) 118-119.

<sup>109</sup> Pablo Simon, ‘¿Por qué expulsan a los españoles de Bélgica?’ (*Politikon*, 15 Februar 2014) <<http://politikon.es/2014/02/15/por-que-expulsan-a-los-espanoles-de-belgica/>> accessed 7 Febraury 2018.

<sup>110</sup> De Waele and Solis Santo (n 94) 72.

<sup>111</sup> Ballesteros et al (n 92) 100.

<sup>112</sup> Except France, Ballesteros et al (n 92) 33.

<sup>113</sup> Presented and discussed below, text under n 221.

(28%),<sup>114</sup> and only less than half (44%) of the appeals against refusal are successful.<sup>115</sup> The authorities denied permanent residence where EU citizens could not provide sufficient evidence of employment or sufficient resources throughout their stay in the UK, and had used the National Health Service whilst they did not work, whilst administrative guidance on the matter was lacking.<sup>116</sup> In France, NGOs report that the authorities regularly deny permanent residence to EU citizens in precarious employment (eg in the entertainment or leisure industry) or to older EU citizens who receive old-age solidarity allowances and are covered by the state health insurance. Often, these decisions were confirmed by the courts.<sup>117</sup> Moreover, criminal activities and sentences seriously reduce the chance of ever getting permanent residence, as some authorities, like the British one, do not count time spent in prison as period of lawful residence (others, like Denmark, do).<sup>118</sup> Some states further require that EU citizens fulfil security conditions (such as no involvement in terrorism, intelligence, drug trafficking or other criminal acts) before issuing permanent residence documentation.<sup>119</sup>

In conclusion, the analysis reveals that member states can make it particularly difficult for poorer EU citizens to secure residency rights. Some impose demanding resources and health insurance conditions on non-economically active EU citizens which can be difficult to match. Moreover, they sometimes fail to recognize worker status to those in more precarious, unpaid, or poorly paid employment, who then are required to fulfill resources conditions, which they cannot. What is more, if non-economically active EU citizens have claimed social assistance or benefits, they can be ‘disqualified’ for residence, as it is taken as suggesting that they do not have sufficient resources. Finally, acquiring permanent residence will be more challenging for those in more precarious situations and who have marginal life style, as they will inevitably struggle to provide relevant documentation.

#### 4.3 Stopping and expelling ‘undesirable’ EU ‘migrants’: extensive national applications of restrictive EU clauses

Member states have keenly transposed EU rules that allow them to deny residence or expel ‘undesirable’ EU citizens. National measures and practices are, however, not always in line with the limitations and safeguards imposed by the Directive.<sup>120</sup> National restrictive measures

<sup>114</sup> Jessica Elgot, ‘Rejections of EU Citizens Seeking UK residency’ (The Guardian, 2 February 2017), <<https://www.theguardian.com/uk-news/2017/feb/27/rejections-eu-citizens-seeking-uk-residency>> accessed 7 February 2018.

<sup>115</sup> Colin Yeo, ‘Waiting times and success rate of EEA appeals’ (Free Movement, 9 November 2016,) <<https://www.freemovement.org.uk/waiting-times-and-success-rate-for-eea-appeals/>> accessed 7 February 2018.

<sup>116</sup> See Lisa O’ Caroll, ‘Dutch Woman Resident in the UK for 30 years May Have to Leave after Brexit’ (The Guardian, 14 January 2017) < <https://www.theguardian.com/politics/2017/jan/14/dutchwoman-resident-in-uk-for-30-years-may-have-to-leave-after-brexit>> accessed on 7 February 2018. Eventually, after some media mobilization, the government dropped the requirement, see Technical Note, *EU Citizens Rights, Administrative Procedures in the UK*, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/657694/TECHNICAL\\_NOTE\\_CITIZENS\\_RIGHTS\\_-\\_ADMINISTRATIVE\\_PROCEDURES\\_IN\\_THE\\_UK.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657694/TECHNICAL_NOTE_CITIZENS_RIGHTS_-_ADMINISTRATIVE_PROCEDURES_IN_THE_UK.pdf)> accessed on 7 February 2018.

<sup>117</sup> Granger (n 71) 123.

<sup>118</sup> Nic Shuibhne and Shaw (n 80) 106. A UK court nonetheless confirmed that permanent citizenship cannot be lost just because of a criminal conviction - *Secretary of State for the Home Department v F V (Italy)* [2012] EWCA Civ 1199, cited in Nic Shuibhne and Shaw (n 80) 105.

<sup>119</sup> Nic Shuibhne and Shaw (n 80) 107. It is not clear whether these requirements apply to granting permanent residence under national law or under EU law.

<sup>120</sup> eg in Belgium, France, Ireland, Italy, Spain and the UK, see Ballesteros et al (n 92) 33.

are usually imposed on grounds of public policy and security, abuse or fraud.<sup>121</sup> Many, however, are driven by economic considerations, as EU citizens are assessed as constituting an unreasonable burden on the national social security system, or as ‘poverty-driven’ activities are qualified as crimes justifying expulsion, which runs contrary to the idea that restrictions to free movement should not be based on economic grounds. National courts have, on many occasions, stepped in to correct excesses of administrative zeal, but do not systematically stop the removal of poorer or marginalized EU citizens. There is little empirical data available on the patterns or grounds on which either denials of residency or expulsions are based, but NGO reports help identify the key problems.<sup>122</sup>

First, some member states make an extensive use of EU restrictive clauses to remove EU citizens that they describe as security threats. The French authorities use a special administrative measure, the ‘order to leave the French territory’, to expel more expeditiously ‘undesirable’ EU citizens,<sup>123</sup> on the basis that they constitute a ‘genuine, present and sufficiently serious threat against the fundamental interest of the French society’.<sup>124</sup> Individuals are required to leave immediately, or are given a one month delay. Those requested to leave without delay, as well as those who did not leave ‘voluntarily’, can be placed in administrative detention or under house arrest, as the authorities organize the removal. The measure is widely used to expel EU citizens with previous criminal convictions, even minor ones, and those who are simply suspected of crimes.<sup>125</sup> They seem particularly targeted at Eastern European Roma.<sup>126</sup> Italy and Spain seem to engage in similar practices.<sup>127</sup> National courts modulate the intensity of their review of expulsion measures, depending on the nature (and perhaps also the authors) of the ‘crimes’. French courts, for example, regularly confirm orders against EU citizens for acts such as shop-lifting, social security fraud, theft or attempted theft, fraudulent begging or abuse of elderly people (activities, incidentally, often labelled as ‘gypsy’ crimes), thus revealing latent forms of institutional racism. They however overturn orders for acts that signal a particular vulnerability of the perpetrator (eg soliciting, prostitution, illegal occupation or possession and use of drugs),<sup>128</sup>. ‘White’ crimes appear to generate more leniency. Spanish courts overruled expulsion decisions against anti-globalization activists,<sup>129</sup> for drink driving and mild drug related crime.<sup>130</sup> The structure of legal reasoning and habits of judicial deference in immigration matters appear to tip the balance in favor of expulsion. In Denmark, courts start by assessing whether under domestic law expulsion is founded before verifying whether it complies with the conditions laid down in EU law,<sup>131</sup> with little consideration for individual circumstances.<sup>132</sup> In the Netherlands, courts apparently check that expulsion decisions comply

<sup>121</sup> In Hungary though, EU citizens who are HIV positive can, apparently, be denied residency on public health grounds. See Kees Groenendijk, Elspeth Guild, Ryszard Cholewinski, Helen Oosterom-Staples, Paul Minderhoud, Sandra Mantu and Bjarney Fridriksdottir, ‘European Report on the Free Movement of Workers in Europe 2012-2013’ (Brussels, European Commission, 2014) 29.

<sup>122</sup> Ballesteros et al (n 92) 118-22.

<sup>123</sup> See cases summarized in Granger (n 71) 141.

<sup>124</sup> Article L.511-3.1 CEDESA, cited in Granger (n 71) 138.

<sup>125</sup> Ballesteros et al (n 92) 47.

<sup>126</sup> Granger (n 71) 143-4. See also Ballesteros et al (n 92) 103; Petition to the European Parliament, 25 February 2015, <<http://www.aedh.eu/plugins/fckeditor/userfiles/file/EN%20petition%20EN.pdf>> accessed on 7 February 2018.

<sup>127</sup> Vega et al (n 96) 245-6.

<sup>128</sup> See cases in Granger (n 71) 145.

<sup>129</sup> Vega et al (n 96) 245.

<sup>130</sup> Vega et al (n 96) 245; Salat (n 69) 188.

<sup>131</sup> Catherine Jacqueson, ‘Denmark’ in Ulla Neergaard, Catherine Jacqueson, and Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges*, The XXXI FIDE Congress in Copenhagen, Congress Publications 2014, (Vol. 2, Copenhagen, DJOF Publishing 2014) 453, 463.

<sup>132</sup> Jacqueson (n 131) 464, 465.



with the requirement to consider personal circumstances, and do not disproportionately interfere with fundamental rights.<sup>133</sup> Yet, in practice, they rarely overturn an expulsion order.<sup>134</sup>

Second, states make use of the Directive's abuse clause to refuse entry or residency rights to, or even expel, EU citizens and their families. The United-Kingdom, invoking the abuse clause, launched a policy of checking and expelling EU citizens found sleeping rough. Supported by NGOs and a legal clinic, Eastern European EU citizens, targeted by the measure, challenged it before the High Court, which, quite remarkably given the Brexit context, ruled it contrary to EU law.<sup>135</sup> France regularly issues orders to leave the territory to Roma from Romania and Bulgaria, who are accused of extending short stays in order to stay in the country without fulfilling the residency conditions (ie work or sufficient resources), and this even when the EU citizen is not claiming any social benefits or assistance.<sup>136</sup> Courts have sometimes overturned those decisions, in particular where there was no evidence of any intent to abuse or where there was limited or no reliance on social assistance, but confirmed measures of expulsion against EU citizens who benefited from social assistance measures (eg a family hosted in a shelter).<sup>137</sup>

The reasons motivating denial of residency rights or expulsion are commonly blurred together.<sup>138</sup> Some EU citizens are thus denied residence or expelled on public policy grounds such as squatting, begging or prostitution, even though these are not always criminalized under national law. Poorer and unemployed EU citizens who find themselves 'short of cash' end up in a Catch 22 situation, if they wish to remain in the host state but cannot find declared and regular work. They either find irregular ways of making money, and could be denied residence for lack of resources or expelled on public policy grounds; or they claim benefits, which are likely to be denied and can give ground to removal on the unreasonable burden/abuse ground.<sup>139</sup> Whilst the Treaty prohibits restrictive measures on economic grounds, EU citizens are de facto denied residence or expelled on grounds which are economic in nature: either on the basis of the public policy clause for poverty-related activities (such as begging, stealing food, squatting) or on grounds of abuse (multiplying short-stays, benefit claims, sleeping rough). There is evidence of systematic administrative efforts to deport poor EU citizens in a number of Western European countries.<sup>140</sup> Over the last few years, for example, an annual 10,000 to 15,000 Eastern Europeans, mostly Roma, are removed from France.<sup>141</sup>

#### 4.4 Restrictions on the derived rights of TCN family members

The 'derived' movement and residency rights of TCN partners of EU citizens suffer from implementation problems, notably (excessively) narrow interpretations of family relationship, dependency or resources conditions. Moreover, states, perhaps encouraged by the CJEU, strictly circumscribed the scope of the *Zambrano* right of residence for the parents of non-

<sup>133</sup> Hanneke van Eijken and Pauline Phoa, 'Country Report: The Netherlands' in Silvia Adamo, Hanneke van Eijken, Javier A. González Vega, Marie-Pierre Granger, Davide de Pietri, Pauline Phoa, Raul I. Rodriguez Magdaleno, Orsolya Salat, Maria Teresa Solis Santo, and Henri de Waele, *Exploring Obstacles in Exercising Core EU Citizenship Rights* (bEUcitizen Deliverable 7.3,5 September 2016) 192, 213, <<https://doi.org/10.5281/zenodo.61777>> accessed on 7 February 2018.

<sup>134</sup> Jurian Langer and Annette Schrauwen 'The Netherlands' in Ulla Neergaard, Catherine Jacqueson, and Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges*, The XXXI FIDE Congress in Copenhagen, Congress Publications 2014, (Vol. 2, Copenhagen, DJOF Publishing 2014) 695, 704.

<sup>135</sup> *Gunars Gureckis and others v Secretary of State for the Home Department* [2017] EWHC 3298 (Admin)

<sup>136</sup> Granger (n 71) 147-148.

<sup>137</sup> Granger (n 71) 148-149.

<sup>138</sup> Nic Shuibhne and Shaw (n 80) 90.

<sup>139</sup> eg in Sweden, Denmark or France, see Nic Shuibhne and Shaw (n 80) 90.

<sup>140</sup> eg Denmark, the United Kingdom or France, see Nic Shuibhne and Shaw (n 80) 90; on France see Granger (n 71) 151-2.

<sup>141</sup> Granger (n 71) 151.

mobile EU citizens. Most difficulties seem to occur in countries which have tough(er) immigration policies, as rules and practices are not systematically adjusted to the more generous EU requirements,<sup>142</sup> and their nationals and family members are more tempted to (ab)use EU free movement rules to circumvent restrictive national immigration or family rules.

The derived rights of TCN spouse and children of mobile EU citizens are normally formally recognized, although ambiguities persists in relation to same-sex spouse, pending CJEU clarification.<sup>143</sup> National rules are usually not explicit on the matter, with the consequences that authorities in countries in which same sex marriages are not allowed sometimes deny entry and residence to TCN same sex spouse of EU citizens.<sup>144</sup> In France, a ministerial circular (which predates the recognition into French law of same-sex marriage), instructs authorities to consider the rights of residence of a same sex spouse not as a spouse but as ‘other family members’ with whom the EU citizen has a lasting and family link.<sup>145</sup>

The automatic residency rights granted to the spouse and dependent children and parents should be extended to registered partners in countries in which these are considered equivalent to marriage. Sometimes it is made clear, like in Belgium,<sup>146</sup> but not always. In France, for example, the relevant rules do not mention the automatic right of residence of registered partners.<sup>147</sup> French courts, however, confirmed that registered partnership is equivalent to marriage, and that registered partners have an automatic right of residence as ‘family members’.<sup>148</sup> Still, a decade later, the French public information website does not mention registered partners as family members who are entitled to an EU residence right.<sup>149</sup> Other states have, for their part, unilaterally extended the automatic residency right to a broader range of family members, to include non-registered cohabiting partners.<sup>150</sup> Countries that do not provide for same sex partnership generally accept to validate the EU mobility rights of registered partners of EU citizens (Slovakia, Poland) or facilitate their entry and residence as ‘other’ family members (Bulgaria, Latvia, Lithuania, and Romania).<sup>151</sup>

The derived rights of ‘other’ family members are often not explicitly recognized or are defined in a restrictive manner. It results in the exclusion of certain family relationships from the scope of EU free movement rules, in particular those which fall outside the more ‘conventional’ family models (such as unregistered partners, recomposed families, non-nuclear family relations, couples or families living across borders, etc.). For them, numerous difficulties arise. First of all, states sometimes fail to explicitly mention the possibility of facilitated entry for other family members. Second, they adopt different, and often narrow, conceptions of the qualification requirements.<sup>152</sup> In France, for example, the right to facilitated entry or residence for ‘other’ family members has not been transposed in legislative

<sup>142</sup> Jo Shaw and Nina Miller, ‘When Legal Worlds Collide: An Exploration of what Happens when EU Free Movement Law Meets UK Immigration Law’ (2003) 38(2) ELRev 137.

<sup>143</sup> According to Advocate General Wathelet, it should be interpreted as included same sex spouse, AG Opinion in C-673/16 *Coman and others* ECLI:EU:C:2018:2.

<sup>144</sup> Nic Shuibhne and Shaw (n 80) 83-85; Ballesteros et al (n 92) 95-7.

<sup>145</sup> *Circulaire sur le droit de séjour des citoyens européens et suisses ainsi que des membres de leur famille* (10 Septembre 2010) <[http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir\\_32884.pdf](http://circulaire.legifrance.gouv.fr/pdf/2011/04/cir_32884.pdf)> accessed on 7 February 2018.

<sup>146</sup> Art 40bis(2) of Law of 15 October 2015, cited in Waele and Solis Santo ‘Belgium’ (n 94) 62.

<sup>147</sup> Granger (n 71) 133.

<sup>148</sup> Administrative Court (Paris), 12 November 2008, No 0811281, cited in Granger (n 71) 133.

<sup>149</sup> Service Public (France), *Carte de Séjour Membre de la Famille d’un Citoyen Européen/Suisse* <<https://www.service-public.fr/particuliers/vosdroits/F19315>> accessed on 7 February 2018.

<sup>150</sup> Nic Shuibhne and Shaw (n 80) 7.

<sup>151</sup> Ballesteros et al (n 92) 96-7.

<sup>152</sup> Ballesteros et al (n 92) 32.

measures,<sup>153</sup> and is not mentioned on the public service website.<sup>154</sup> The only reference to it is in a ministerial guidance note to the attention of civil servants (and not EU citizens).<sup>155</sup> Similarly, the Hungarian immigration portal only mentions that ‘the competent authority may grant the right of residence to persons on the grounds of family reunification [sic], who are dependents or members of the household of an EEA national ...’, suggesting administrative discretion and making no reference to a facilitated procedure.<sup>156</sup>

There are, furthermore, discrepancies in the way national authorities interpret and apply the notion of ‘durable duly attested relationship’. In some countries, the emphasis is on the length of the relationship (Belgium, Ireland and United-Kingdom), in others on the ‘community of life’ (Spain, France, Hungary, or the Netherlands).<sup>157</sup> For example, in the UK, which follows its own immigration guidelines, it means a ‘long-term’ relationship of at least two years, where the partners intend to live permanently together, are not blood relatives and are not engaged in other relationship.<sup>158</sup> In Belgium, which relies on a mixed approach, partners must show that they are in a lasting, stable and duly established relationship with the EU citizen, are above 21 years old, do not have another lasting relationship with another person, and are not linked by a degree of consanguinity that prohibits marriage between them. More precisely, a relationship is deemed ‘durable’ where the two parties have lived together for at least one year, or have met three times amounting to 45 days in the past two years, or have a child together.<sup>159</sup> In Spain, couples need to show one year of common life or have common children.<sup>160</sup> France normally requires five years of common life in case of unregistered partners,<sup>161</sup> but the time conditions are applied in a flexible manner, paying attention to other elements, such as common children, or a joint mortgage.<sup>162</sup> In the Netherlands, the TCN partner and EU citizen must prove they lived at the same address through common address registration in the Netherlands or joint utility bills in other member states, but since 2013, other factors may also be taken into account.<sup>163</sup> In Hungary, TCNs partner must prove that they have been a member of the household of the EU citizen for one year and met the conditions of residence exceeding 90 days within a 180 period in the country from which they are arriving,<sup>164</sup> which seems contrary to the CJEU caselaw. Having common children does not seem to make a difference.<sup>165</sup> In some countries, like Italy, the applicable rules and guidelines do not provide any criteria, and national authorities have a wide discretion resulting in inconsistent applications.<sup>166</sup>

<sup>153</sup> Art L121.1 CEDESA only mentions the right of residence of ‘family members’ (i.e. spouse, dependent ascendants and descendants).

<sup>154</sup> Service Public, *Européen en France: Séjour de Moins de 3 Mois* (27 Septembre 2016) <<https://www.service-public.fr/particuliers/vosdroits/F13512>>, *Carte de Séjour ‘Membre de la Famille d’un Citoyen Européen/Suisse’* <<https://www.service-public.fr/particuliers/vosdroits/F19315>>, both accessed on 7 February 2018.

<sup>155</sup> *Circulaire* (n 145).

<sup>156</sup> See Hungarian Immigration and Asylum Office, *Residence card for Third Country National Family Member of EEA Citizen*, <[http://www.bmbah.hu/index.php?option=com\\_k2&view=item&layout=item&id=56&Itemid=810&lang=en#](http://www.bmbah.hu/index.php?option=com_k2&view=item&layout=item&id=56&Itemid=810&lang=en#)> accessed on 7 February 2018.

<sup>157</sup> Ballesteros et al (n 92) 43.

<sup>158</sup> UK Government, *Who are an EEA national’s extended family members?*

<<https://www.gov.uk/government/publications/eea-family-permits-eun02/eea-family-permit-eun02#eun27-who-are-an-eea-nationals-extended-family-members>> accessed on 7 February 2018.

<sup>159</sup> Law of 15 October 2015, art 40bis(2).

<sup>160</sup> Royal Decree 987/2015, 30 October 2015, modifying Royal Decree 240/2007, 16 February 2007, discussed in Vega et al (n 96) 241.

<sup>161</sup> Ballesteros et al (n 92) 43 ; Granger (n 71) 133.

<sup>162</sup> *Circulaire* (n 145).

<sup>163</sup> Nic Shuibhne and Shaw (n 80) 80-1.

<sup>164</sup> Nic Shuibhne and Shaw (n 80) 79; Salat (n 69) 181 and 189,.

<sup>165</sup> In Hungary, paternity over a common child is not sufficient (Kfv.II.37.566/2011/6).

<sup>166</sup> Ballesteros et al (n 92) 43.

In a similar vein, there are different understandings of who counts as ‘dependent family members’ or sick relatives who need the ‘care’ of the EU citizen, for the purpose of the EU facilitated entry and residence. There are important divergences across and within member states concerning the substantive criteria of dependence, and who qualifies as family members for that purpose, as well as on the period and processes through which these can be established.<sup>167</sup> Hungary, for example, requires individuals to show ‘one year’ of dependence.<sup>168</sup> In Denmark, the TCN parent of the EU citizen must prove ‘economic dependence’ on the EU citizen in both the home and host country.<sup>169</sup> In Spain and in Belgium, the EU citizen must show irrefutably that she personally takes care of the TCN relative.<sup>170</sup>

States also apply strictly resources conditions, where applicable.<sup>171</sup> In Belgium, the EU citizen sponsor must have a stable and sufficient income, which results in TCN family members being denied residence where the EU citizen family members draws complementary income from social assistance funds (such as old age income, medical assistance)<sup>172</sup> or from third parties.<sup>173</sup>

To avoid reverse discrimination and prevent circumvention strategies through the returnee avenue, many member states (Belgium, Cyprus, Greece, Italy, Hungary, Poland, Portugal, Slovenia, Spain, and Sweden) have chosen to extend (some of) the more generous EU rules to the TCNs family members of their own nationals.<sup>174</sup> In Hungary, the rights of family members of Hungarian nationals have been aligned with those of EU citizens.<sup>175</sup> Spain formally maintains different sets of rules in relation to the residency rights of TCN relatives based on dependence between nationals and EU citizens, but Spanish courts have interpreted the residency rights of dependent relatives of nationals in the light of EU law.<sup>176</sup> Belgian law now also grants the TCN spouse, partners or children of Belgian citizens the same residence rights as those of migrant EU citizens,<sup>177</sup> but still excludes ascendants of adult Belgian citizens, as well as extended family members.<sup>178</sup>

In countries which have maintained restrictive immigration rules in relation to family members of nationals, such as the Netherlands, Denmark, the United Kingdom and Belgium (to some extent),<sup>179</sup> TCNs family members of nationals face tougher requirements to obtain residence permits than those of mobile EU citizens.<sup>180</sup> Those with children who have the nationality of the state of residence sought to invoke *Zambrano* to secure residence right. The member states concerned reacted promptly to address such tactics. Belgium, for example, passed legislation which restricted the granting of citizenship based on *ius soli* for children born in Belgium to non-EU parents so as to limit the occurrence of a *Zambrano*-type

<sup>167</sup> Problems have been identified in most countries, Ballesteros et al (n 92) 41-2.

<sup>168</sup> Nic Shuibhne and Shaw (n 80) 79; Salat (n 69) 181 and 189.

<sup>169</sup> Adamo (n 103) 94.

<sup>170</sup> Article 47 (10) Of Law of 15 December 180, as amended by Law of 19 March 2014. See Vega et al (n 96) 241.

<sup>171</sup> eg Denmark, see Nic Shuibhne and Shaw (n 80) 107.

<sup>172</sup> Aliens Litigation Council No 12.171, 30 May 2008, Aliens Litigation Council No 103.432, 23 May 2013 (cited in de Waele and Solis Santo (n 94) 67).

<sup>173</sup> Decision No 9227, 20 November 2012.

<sup>174</sup> van Eijken and Phoa (n 74) 26. See also Nic Shuibhne and Shaw (n 80) 73-4, Vega et al (n 96) 239.

<sup>175</sup> Eva Lukacs and Tamas Molnar, ‘Hungary’ in Ulla Neergaard, Catherine Jacqueson, and Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges*, The XXXI FIDE Congress in Copenhagen, Congress Publications 2014, (Vol. 2, Copenhagen, DJOF Publishing 2014) 603, 604.

<sup>176</sup> JSC, *Contensionso Administrativo*, Section 3, 20 October 2011, cited in Vega et al (n 96) 241.

<sup>177</sup> Law of 8 July 2011 amending Article 40 of Law of 15 December 1980, cited in Elisabeth Derricks, Karima Sbai, Maïté van Regemorter, *Le droit des Etrangers - Chronique de Jurisprudence 2007-2010* (Brussels, Larcier, 2013) 194.

<sup>178</sup> van Eijken and Phoa (n 74) 66-7.

<sup>179</sup> van Eijken and Phoa (n 133) 192; Adamo (n 103) 96.

<sup>180</sup> Adamo (n 103) 94-5.

scenario.<sup>181</sup> Furthermore, national authorities strictly delimited the scope of the *Zambrano* ruling. They considered that it applied only to ‘dependent minor’ EU citizens, and not to other dependent family members;<sup>182</sup> that it concerned only situations where the child is ‘habitually resident’ in the home state;<sup>183</sup> and that the minor EU citizen must be dependent’ on the TCN parent as the ‘sole’ carer. A few examples serve to illustrate this narrow application of *Zambrano*, which are likely to be contrary to EU caselaw.<sup>184</sup> In Denmark, the authorities denied residence to the TCN parent where the other EU parent could (potentially) care for the EU minor. Consequently, the Pakistani wife of a Danish citizen and mother of their Danish children, who had lived in Denmark for seven years, could be deported to Pakistan, as it would not prevent the kids from staying in Denmark.<sup>185</sup> In the Netherlands, immigration authorities, supported by courts, adopted a similar approach.<sup>186</sup> They refused to grant residency to a TCN parent, even though the Dutch parent, who could care for the child was mentally disabled, or where the children were placed in foster homes, because the Dutch mother could not (temporarily) take care of them.<sup>187</sup> However, they granted residency to the Turkish mother of a Dutch child, as the Dutch father was serving a life-sentence and could therefore not take care of the child,<sup>188</sup> and a Dutch court upheld the right of residence of a mother of a Dutch child, even though she had been convicted of drug smuggling and (mild) domestic violence against the husband.<sup>189</sup> A case concerning the denial of residency right by the Dutch authorities to the TCN parent of a Dutch child was brought before the ECtHR, which found it in violation of the right to family life.<sup>190</sup> The decision apparently had little effect on the interpretation of the *Zambrano* right of residence by Dutch authorities or courts, despite new guidelines requiring to take better account of the right to family life.<sup>191</sup> In France, where parents of French nationals have residency rights under French law, *Zambrano* was mostly invoked against expulsions on public order or security grounds of TCN parents or spouses of French citizens. In these cases, the courts have looked closely at the ‘dependency’ and ‘habitual residence’ of the child on the TCN parent, and endorsed expulsion where these conditions were not fulfilled, with apparently little concern for the right to family life.<sup>192</sup> In other countries however, *Zambrano*-type situations have been addressed in a manner more in line with the spirit of EU case law. In Spain, for example, courts, through a combined reliance on the effectiveness of EU law, and the best interests of the child and the right to family life protected under the EU Charter and the ECHR, concluded in favor of the residency rights, when the TCN parent exercised parental rights, and even where (s)he had criminal records.<sup>193</sup>

<sup>181</sup> New art 10 of the Code of Belgian nationality, cited in de Waele and Solis Santo (n 94) 71. See also Nathan Cambien, ‘The Impact of Union citizenship on Member States’ immigration Laws. Some potential perverse side-effects resulting from the recent ECJ case law’ (16 December 2012) 19 <<http://dx.doi.org/10.2139/ssrn.2189492>> accessed on 7 February 2018.

<sup>182</sup> de Waele and Solis Santo (n 94) 58; van Eijken and Phoa (n 74) 23; Adamo (n 103) 93.

<sup>183</sup> *Zambrano* cannot be relied on by a TCN parent who wants to move with, or join, her child in the child’s country of nationality. See van Eijken and Phoa (n 74) 23; Granger (n 71) 130-1; Adamo (n 103) 93-4.

<sup>184</sup> *Chavez-Vilchez* (n 14).

<sup>185</sup> *Ugeskrift for Retsvaesen* U. 2015.10690 discussed in (n 103) 93-2.

<sup>186</sup> Supreme Court 14 February 2014, ECLI:NL:HR:2014:277 and Council of State, 8 August 2013, ECLI:NL:RVS:2013:725, cited in van Eijken and Phoa (n 133) 205.

<sup>187</sup> See van Eijken and Phoa (n 133) 205.

<sup>188</sup> District Court (The Hague, residence Utrecht), 26 July 2012, ECLI:NL:RBSGR:2012:BX2769 [9], in van Eijken and Phoa, ‘The Netherlands’ (n 133) 205-6.

<sup>189</sup> District court (The Hague, residence Amsterdam), 7 September 2011, ECLI:NL:RBSGR:2011:BT2711, cited in van Eijken and Phoa (n 133) 214.

<sup>190</sup> *Jeunesse v the Netherlands*, app No 12738/10 (ECtHR, 3 October 2014).

<sup>191</sup> van Eijken and Phoa (n 133) 209-10.

<sup>192</sup> See courts’ decisions cited in Granger (n 71) 130.

<sup>193</sup> See cases cited in Vega et al (n 96) 237-9.

In states which have restrictive immigration policies, nationals have also sought to secure EU residency rights for their TCN family members on a ‘returnee’ basis. The practice, which goes under the label of ‘Singh Route’ in the UK,<sup>194</sup> or the ‘Belgian Route’ in the Netherlands, consists in moving abroad temporarily, so as to benefit from the more favorable EU regime upon return to the EU citizen’s state of nationality. The authorities carefully scrutinize the genuine nature of the family relationship and the actual time spent abroad before recognizing a right of residence under EU law to returnees’ family members.<sup>195</sup> These issues were raised in preliminary reference proceedings from Dutch courts. The CJEU decision confirmed that states can require that the TCNs bring proof of a sustained family life and impose a minimum and continuous period of residence in the other EU member state before confirming the residency rights of TCN family members.<sup>196</sup> In Spain, a Royal Decree limited the application of derived rights to TCN family members of Spanish returnees, but the Spanish Supreme Court struck it down.<sup>197</sup> States who grant more easily residence rights to their nationals’ family member had less problems granting derived rights to TCN family members of returnees.<sup>198</sup>

EU citizens that move within the EU with TCN family members appear to face significant obstacles compared to those traveling alone or with EU family members, in particular where the family relationship are not formally recognized and do not follow conventional ‘Western’ family models. Whilst EU citizenship rules are primarily aimed at guaranteeing the effective exercise of their mobility rights by EU citizens, they have important repercussions on national immigration rules. In many member states, rules related to the rights to reside of TCN family members of nationals have been, traditionally, more restrictive than those applicable under the Citizen Directive, creating problematic reverse discrimination. Some states have chosen align their own immigration rules with the EU more generous regime, but others did not.<sup>199</sup> Where they have not, EU law has sometimes been instrumentalized to go around restrictive national immigration policies.

#### 4.5 Procedural, bureaucratic and other practical barriers

In addition to substantive legal obstacles, outlined above, EU citizens and their family are sometimes denied procedural guarantees and face bureaucratic and practical challenges which may prevent them from fully exercising their mobility and residency rights.

As it turns out, member states do not always respect procedural guarantees when denying EU citizens free movement or equal treatment rights, or ordering expulsions or removals. For example, the UK did not transpose the Directive’s provisions on procedural safeguards.<sup>200</sup> In France, the administrative removal procedure provides for only limited safeguards, in contrast with the common law expulsion procedure.<sup>201</sup> Notably, the ‘order to leave the territory’, commonly issued together with denial of a certificate of residence, does not

<sup>194</sup> Free movement, ‘The Surinder Singh Immigration Route (updated)’ (31 January 2017) <<https://www.freemovement.org.uk/surinder-singh-immigration-route/>> accessed on 7 February 2018.

<sup>195</sup> Adamo (n 103) 94.

<sup>196</sup> They led to the CJEU decision in *O.* (n 36).

<sup>197</sup> *JSD, Contencioso administrativo*, Section 5, 1 June 2010, cited in Vega et al (n 96) 239-40.

<sup>198</sup> Granger (n 71) 135-6.

<sup>199</sup> For a useful map, see Nic Shuibhne and Shaw (n 80) 74.

<sup>200</sup> Ballesteros et al (n 92) 37.

<sup>201</sup> Granger (n 71) 140, 146 ; GISTI, *Les Droits des citoyens et citoyennes de l’Union européenne et de leur famille* (5th ed, Les cahiers juridiques, October 2014 ) 40.



guarantee EU citizens the possibility to state their views specifically on the expulsion decision.<sup>202</sup> The French supreme court confirmed the practice.<sup>203</sup>

Even where their rights are formally recognized, EU citizens and their families on the move often have to jump through various administrative hurdles, which can impair their actual ability to move and settle across borders. Burdensome reporting requirements, excessive documentation requests, abusive or intrusive evidence-gathering, prohibitive fees, or long delays seem to be relatively common place.<sup>204</sup>

Certain member states impose reporting requirements on short term visitors within short delays, which can trigger hefty fines in case of failure (eg Croatia, Lithuania, Romania).<sup>205</sup> In Belgium, if EU citizens fail to notify their place of residence (unless they are staying in tourist accommodation), they may be fined 200 EUR.<sup>206</sup> In Italy, if EU citizens do not report their presence, the authorities assume that they have resided in Italy for more than three months, with implications for their residency status.<sup>207</sup>

Registration requirements, and the challenges which accompany the issuance of official documentation, can make it difficult for EU citizens to obtain the certificate confirming their right to reside beyond three months, which is often essential to access various services. A recent study reveals that EU citizens and their families face various administrative difficulties in obtaining residence certificates or permits in many of the member states (excessive documentation requirements, unjustified refusals, absence of, or incorrect, information, long delays, etc.).<sup>208</sup>

The burden of proof and documentation requirements to establish that the conditions of residence are fulfilled seem to be challenging in most member states. EU citizens may be asked for formal ‘administrative documents’ supporting their claims, which may not exist in other national contexts or which can be difficult to obtain in relation to informal sources of income, or may even prove intrusive.<sup>209</sup> In Hungary, for example, the authorities insist on documentation including the mother’s maiden name, information which is not usually mentioned in documents issued in other member states.<sup>210</sup> EU citizens also struggle to provide the proof of address necessary to be registered, since many landlords, not declaring rents, refuse to provide a formal rental contract or accommodation agreement.<sup>211</sup> In many countries, job-seekers are asked for substantial proofs that they are still looking for a job and have a genuine chance of being engaged to be entitled to reside. In Belgium, they must prove they are registered in one of the unemployment offices.<sup>212</sup> In the United-Kingdom, they must provide compelling evidence of ‘employability’.<sup>213</sup> In France, they must show they have ‘qualifications’ which are in demand on the job market, or a ‘promise’ of employment within briefest delays.<sup>214</sup> The time frame can be also an issue. In Belgium, EU citizens have three

<sup>202</sup> Granger (n 71) 146.

<sup>203</sup> Council of State, 4 June 2014, No 370515 in Granger (n 71) 156.

<sup>204</sup> Ballesteros et al ‘Obstacles’ (n 92).

<sup>205</sup> Nic Shuibhne and Shaw (n 80) 83; Ballesteros et al (n 92) 53.

<sup>206</sup> Article 5 of Law of 15 December 1980, cited in de Waele Solis Santo ‘Belgium’ (n 94) 54-55. See also CIRE, ‘Le droit de séjour des citoyens européens en Belgique’ (April 2014), 5, <<https://www.cire.be/publications/analyses/le-droit-de-sejour-des-citoyens-europeens-en-belgique> > accessed 7 February 2018.

<sup>207</sup> See *Polizia di Stato*, ‘EU citizens’ <<http://www.poliziadistato.it/articolo/10930>> accessed 7 February 2018. For Belgium, Law of 15 December 1980, art 5 and Royal Decree, 27 April 2007.

<sup>208</sup> Ballesteros et al (n 92) 61-7.

<sup>209</sup> Granger (n 71) 123.

<sup>210</sup> Salat (n 69) 184.

<sup>211</sup> Salat (n 69) 175.

<sup>212</sup> de Waele Solis Santo (n 94) 56.

<sup>213</sup> Ballesteros et al ‘Obstacles’ (n 92) 46.

<sup>214</sup> GISTI (n 202) 17.

months to provide the relevant documentation certifying sufficient resources. They can get an additional month delay, but after that, they can be ordered to leave the territory.<sup>215</sup> There have been reports of abusive questioning by the French police of CEEC Roma during illegal camps evacuation, which serve as a basis for issuing relevant orders to leave the territory.<sup>216</sup>

Many EU citizens encounter special difficulties when seeking documentation certifying permanent residence status. Some member states ask non-economically active EU citizens for long lists of documents covering the whole five years of lawful residence under EU law. French ministerial instructions consider that the mandatory EU certificate of registration is not a sufficient proof of lawful residence under EU law, and require various additional documents issued by public and private bodies, depending on the EU citizen category.<sup>217</sup> EU citizens applying for permanent citizenship in the United-Kingdom were asked to fill an 85 page form, and submit extensive documentation (work contract, rental contract, utility bills, tax returns, bank statements, mortgage documents, letters from the authorities, medical visits documents, police reports in case of lost documents, etc.).<sup>218</sup>

Numerous practical problems also arise in relation to the request and issuance of visa and residence permits for TCN family members. First, the lack of information in a language other than the language of the country can be problematic.<sup>219</sup> Second, the free accelerated procedure for entry visa is not systematically mentioned,<sup>220</sup> and is often denied, resulting in TCN family members facing delays in order to get visas, or even have to pay for them.<sup>221</sup> In many member states, TCN family members are confronted with extensive, and sometimes abusive, documentation requirements (travel bookings, proof of return flights, proof of accommodation, health insurance, hotel booking, minimum cash amounts, travel insurance, accommodation receipts, etc.) in order to obtain a visa.<sup>222</sup> Moreover, authorities often reject visa applications on invalid grounds or without a proper justification.<sup>223</sup>

The same goes in relation to residency application. In Hungary, civil servants would find an important age difference in an EU citizen - TCN couple suspicious, and deny a residence permit on those grounds.<sup>224</sup> Many member states request extensive evidence supporting the existence of a genuine and durable relationship. Applicants must produce documentation establishing common life, or a common address, or joint bank account or mortgages.<sup>225</sup> In Belgian, for example, applicants must prove the family link with official and persuasive documentation.<sup>226</sup> Hungary requires evidence showing strong economic and physical ties between the TCN and the EU citizen.<sup>227</sup> Similar challenges arise in relation to proving dependence. Italian authorities require EU citizens to provide administrative

<sup>215</sup> de Waele Solis Santo (n 94) 57.

<sup>216</sup> *Roms – Acces au droit* <<http://www.droitsdesroms.org/>>, accessed on 7 February 2018, cited Granger (n 71) 147.

<sup>217</sup> Granger (n 71) 123.

<sup>218</sup> UK government, *UK residence for EU citizens*, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/505032/EEA\\_PR\\_\\_03-16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505032/EEA_PR__03-16.pdf)> accessed 7 February 2018. Recent guidelines adopted in the context of Brexit negotiations, however pledge to streamline the procedure and lift the evidentiary burden (see UK government, *Technical note*, n 115).

<sup>219</sup> Ballesteros et al (n 92) 58.

<sup>220</sup> eg France, Germany, and Ireland. Ballesteros et al (n 92) 32.

<sup>221</sup> Ballesteros et al (n 92) 54-6.

<sup>222</sup> Ballesteros et al (n 92) 57; Granger (n 71) 116; GISTI (n 202) 12.

<sup>223</sup> Ballesteros et al (n 92) 56.

<sup>224</sup> Salat (n 69) 189.

<sup>225</sup> Nic Shuibhne and Shaw (n 80) 80-1.

<sup>226</sup> de Waele and Solis Santo (n 94) 64.

<sup>227</sup> Nic Shuibhne and Shaw (n 80) 79-81; Salat (n 69) 181 and 189.



documents certifying dependence which does not exist in other member states.<sup>228</sup> The Netherlands consider that a mere declaration that the national parent cannot take care of the child is not enough to prove the dependence of the EU child on the TCN parent.<sup>229</sup>

National authorities appear particularly concerned that non-EU citizens may be tempted to forge a family relationship with an EU citizen only for the purpose of benefiting from EU derived residency right. Many have adopted measures and practices which seek to deter, detect and sanction purposely ‘fabricated relationships’, such as marriages of convenience, false paternity claims or fake adoptions.<sup>230</sup> These ‘investigations’ sometimes verge on intrusion into privacy.<sup>231</sup> In the Netherlands, the derived right of TCN family members of ‘returnees’ are treated with suspicion, and the immigration office requires extensive proof of the relationship or family life abroad supported by a range of documents, and proof of exercise of the right to free movement.<sup>232</sup> The same patterns have been observed in Denmark, which starts from a premise of fraudulent behavior rather than the exercise of free movement rights, and requires TCNs and returnees EU citizens to submit extensive documentation, address documents, housing contracts, school registration, etc.<sup>233</sup> Reports also suggests that despite correct formal implementation, habits die hard and cases of refusal of residency documents to same-sex partners have been reported in Poland and Slovakia.<sup>234</sup> Countries also impose strict delays for applying for residency cards, and charge significant fines for those who do not respect them (eg France).<sup>235</sup>

The exercise of the EU right to free movement and residence, even when granted on paper, is not always easy in practice. Most of the problems concern the recognition of entry and residency rights to TCN family members of EU citizens, in particular that of unmarried partners, or other close relatives, as well as the right of movement and residence of Eastern European citizens, in particular Roma.<sup>236</sup> These problems remain, despite monitoring activities by EU institutions, private litigation, and various supportive initiatives.

## 5. Ensuring compliance with EU free movement rules – are the EU institutions doing enough?

EU institutions have been monitoring the implementation and application of the EU free movement rules in general, and the Citizens Directive in particular. Moreover, citizens, sometimes supported by NGOs, have called upon the EU institutions, in particular the Commission, but also the European Parliament, or other EU supported mechanisms (such as SOLVIT, Europe Direct) for assistance in securing their rights. Some, usually supported by civil society organizations, have litigated before national courts to enforce their rights. However, the European Commission or European Parliament do not always follow up, and national courts sometimes condone dubious state practices, as noted throughout this chapter.

Since 2006, the Commission has started 85 procedures against member states concerning the transposition or implementation of the Citizens Directive. 18 are still active,

<sup>228</sup> Citizens without Borders ‘Citizens without Borders, Free Movement and Residence in the European Union: a Challenge for European Citizenship’ (31 May 2013) 34 <[http://www.meltingpot.org/IMG/pdf/citizien\\_inglese.pdf](http://www.meltingpot.org/IMG/pdf/citizien_inglese.pdf)> accessed 7 February 2018.

<sup>229</sup> van Eijken and Phoa (n 133) 206 and 208.

<sup>230</sup> Ballesteros et al (n 92) 109-11. On Belgium, see de Waele and Solis Santo (n 94) 74; Groenendijk et al (n 121) 56.

<sup>231</sup> eg Belgium, see de Waele and Solis Santo (n 94) 75.

<sup>232</sup> van Eijken and Phoa (n 133) 217.

<sup>233</sup> Adamo (n 103) 98-9.

<sup>234</sup> Ballesteros et al (n 92) 99.

<sup>235</sup> Granger (n 71) 135.

<sup>236</sup> Nic Shuibhne and Shaw (n 80) 69-85.

which were all started between 2011-2013.<sup>237</sup> In its first report on the application of the Directive, in 2008, the Commission deplored the deficient transposition and faulty applications of the Directive, concerning in particular restrictions on grounds of public policy or public security or abuse and fraud, as well as obstructions to the residency rights of TCN family members.<sup>238</sup> Since then, realizing that most of the challenges arose at the level of administrative implementation and application, the Commission's activities have focused on offering guidance to both national administrations and EU citizens, through awareness-raising, information, assistance and training. In 2009, it issued guidance for a better implementation and application of the Directive.<sup>239</sup> In 2013, it released a communication which delineated with greater clarity the rights and 'obligations' of EU citizens.<sup>240</sup> It also issued specific instructions on combatting abuse of free movement rights and marriages of convenience,<sup>241</sup> and EU social security coordination rules, and supported the exchange of good practice.<sup>242</sup> The Commission's latest report, taking stock of 2015 surveys, and building on the latest EU Citizenship report,<sup>243</sup> proposed new measures to promote the effective enjoyment of EU mobility and residency rights, through e-training tools for national civil servants, or online tools for EU citizens to identify assistance structures, but also reminds that rights come with 'duties' (called 'responsibilities'), which EU citizens must be aware of and respect.<sup>244</sup>

The adoption in 2014 of a new Directive on measures facilitating the exercise of workers' free movement rights may go some way in improving the mobility of workers (but not that of economically inactive EU citizens).<sup>245</sup> It specifically provides for new means of redress for workers against discriminatory practices, including conciliation and mediation, and for defense bodies to be set up in each member states, with the task of providing independent assistance to EU workers and acting as a contact point with a view to cooperating and sharing relevant information.

The European Parliament, as the EU institution directly representing EU citizens, pays close attention to the realization of EU citizens' free movement rights. In 2009, it

<sup>237</sup> European Commission, Infringement Proceedings, Search Form, <[http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/index.cfm?lang\\_code=EN&r\\_dossier=&decision\\_date\\_from=&decision\\_date\\_to=&DG=JUST&title=Directive+2004%2F38&submit=Search](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&decision_date_from=&decision_date_to=&DG=JUST&title=Directive+2004%2F38&submit=Search)> accessed 7 February 2018.

<sup>238</sup> European Commission, *Report from the Commission to the European Parliament and the Council on the Application of 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* (Brussels, 10 December 2008 COM(2008) 840 final).

<sup>239</sup> European Commission, *Communication from the Commission to the European Parliament and the Council on Guidance for Better Transposition and Application of 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* (Brussels, 2 July 2009, COM(2009) 313 final).

<sup>240</sup> European Commission, *Free Movement of EU Citizens and their Families: Five Actions to Make a Difference* (COM(2013) 837 final).

<sup>241</sup> European Commission, *Communication from the Commission to the European Parliament and the Council Helping National authorities Fight Abuses of the Right to Free Movement: Handbook on Addressing the Issue of Alleged Marriages of Convenience between EU citizens and non-EU Nationals in the Context of EU Law on Free Movement of EU Citizens* (Brussels, 26 September 2014, COM(2014) 604 final).

<sup>242</sup> EC (n 241)

<sup>243</sup> EU Commission, *Report by the European Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee on the regions under Article 25 TFEU on Progress towards Effective EU Citizenship 2013-2016* (Brussels, 24 January 2017, COM(2017) 32 final).

<sup>244</sup> EU Commission, *EU Citizenship report 2017 – Strengthening EU Citizenship Rights in a Union of Democratic Change* (Brussels 2017).

<sup>245</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L 128/8.

commissioned a comparative study, and criticized the passivity of the Commission in the enforcement of EU citizens' mobility rights.<sup>246</sup>

It remains that the EU institutions have failed to act in the face of gross violations of EU free movement rights. For example, despite being repeatedly alerted by NGOs to the likely abusive expulsion by France of CEEC Roma, neither the Commission nor the EP came up with an effective response.<sup>247</sup> Evidence collected in comparative studies, and revealed throughout this chapter, show that national courts sometimes manage to curb and sanction abusive executive measures and administrative practices, but they are not always willing to. In any case, they only address the tip of the iceberg, as very few citizens are willing or able to go all the way to a court to enforce their rights, when faced with administrative opposition, let alone adverse legislation. They often give up before, unless they receive some forms of encouragement or support from NGOs or other public interest organizations, such as equality bodies, ombudsperson, citizens advice bureau, or other support structure.

## 6. Conclusions: Free movement and EU citizenship, any divorce in sight?

The advent of EU citizenship has added further complexity to the already complex regulation of human mobility in Europe. It created an additional layer of norms and governance mechanisms, and new categories of insiders and outsiders with different mobility, residency and equality rights attached. EU free movement law opened opportunities for some EU citizens and their families, at least those who can (temporarily) relocate in another member state. It provides them with enhanced career opportunities, but also with family rights they would not have under national law. These have, sometimes, led to progressive adjustments of national immigration rules or family law.

Yet, rather than a right of all EU citizens, free movement is the privilege of a few. It also comes with certain duties, which are easier to fulfil by some than others. It benefits a very small minority of generally wealthier and better educated mobile EU citizens.<sup>248</sup> Those who are less privileged (unemployed or in irregular and low-income jobs, with little economic resources) face numerous obstacles when they try to move and settle in another member state, and even more so if they have non-EU family members. The rules and practice of free movement in the EU therefore contribute to create a 'class citizenship'.<sup>249</sup> On one hand, the wealthier and educated upper or middle class 'expatriates', who reap the full benefits of EU citizenship and mobility; on the other hand, the poor and less educated (non-) working class who either cannot move and therefore have little to gain from EU citizenship, or try to move 'out of poverty', but without any kind of social support or safety net should things not work out or go wrong.<sup>250</sup> The EU mobility framework also fits better traditional forms of family life, and makes mobility tricky for less conventional families.

The dependence of EU citizenship on mobility means that, in practice, it concerns a very small fraction of EU citizens, primarily the less than three per cent who live in a member

<sup>246</sup> European Parliament, 'Comparative Study on the Application of 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' (Brussels, 2009, PE 410.650) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI\\_ET\(2009\)410650\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/410650/IPOL-JURI_ET(2009)410650_EN.pdf)> accessed 7 February 2018.

<sup>247</sup> Granger (n 71) 144.

<sup>248</sup> Marie-Pierre Granger, 'Revisiting the Foundations of European Union Citizenship: Making it Relevant to All European Union citizens', (bEUCitizen Policy Brief, 2016) <<http://beucitizen.eu/wp-content/uploads/2016-12-31-POLICY-BRIEF-WP7-Granger-FINAL.pdf>>.

<sup>249</sup> O'Brien (n 68).

<sup>250</sup> See Martin Seeleib-Kaiser, Cecilia Bruchelius, and Elaine Chase, 'The social rights of the EU migrant citizen – a comparative perspective' (bEUCitizen, Deliverable 6.1, 29 April 2015). <<https://doi.org/10.5281/zenodo.20295>> accessed on 7 February 2018.

state other than their own.<sup>251</sup> It appears to bring little to the vast majority of the EU population, who may even come to view it as a threat. Following the 2004 Big Bang enlargement, nationals from poorer and less developed CEEC emigrated in large numbers to the richer Western and Northern European countries, mainly to pursue job opportunities that were lacking back home or higher income. As the economic crisis unfolded, and the labor market and welfare benefits contracted, these EU ‘migrants’ have been accused of ‘stealing’ the jobs and benefits of nationals, fueling resentment, which was further amplified by perceived cultural and linguistic differences. It generated negative feelings towards the EU mobility framework, accused of allowing poorer EU countries to export their unemployment and failed welfare policies. The climate further deteriorated as the EU faced more migration related challenges, with a mass influx of refugees from war-torn regions, and irregular economic migrants from poverty stricken countries. Recurrent terrorist attacks on the European soil, which appear facilitated by the absence of internal EU borders, and the accompanying rise of anti-migrant, anti-Muslim and anti-EU political forces, do not help in restoring faith in free movement as the core tenet of EU citizenship.

The Brexit referendum campaign catalyzed these fears. As the UK prepares to leave the EU, the future relationship between the EU and the United Kingdom is under negotiation, and one of the central issue on the table is the fate of EU citizens who have exercised their EU citizenship right to free movement (the three millions EU citizens who live in the UK, and more than one million British citizens who reside in other EU states).<sup>252</sup> Brexit has triggered a renewed interest in EU citizenship, and the right to free movement is clearly put forward as the core, and also most problematic, component. However, from the perspective of those who live in countries which are slowly drifting into ‘illiberal democracies,’ the core appeal of EU citizenship may lie not in the right to move abroad, but to be protected at home against unemployment, poverty, authoritarianism or human rights violations.<sup>253</sup> The central importance of mobility in the EU citizenship regime could be attenuated to make more room for other constitutive elements, such as shared values and principles. The contours of this refocused regime would, of course, require careful definition, to preserve member states’ competences and identities, and respect democratic requirements, whilst preserving a certain European way of life.

<sup>251</sup> See ‘Archives: EU citizenship – statistics on cross-border activities (April 2013)’ <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:EU\\_citizenship\\_-\\_statistics\\_on\\_cross-border\\_activities](http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:EU_citizenship_-_statistics_on_cross-border_activities)> accessed 15 June 2017.

<sup>252</sup> BBC, ‘Brexit, The rights of EU citizens in the UK and of Britons in the EU’ (BBC, 8 December 2018) <<http://www.bbc.com/news/uk-politics-42279408>> accessed 7 February 2018.

<sup>253</sup> See Justin Spike, ‘Hungarian youths want to move abroad’ (*Budapest beacon Blog*, 14 February 2017) <http://budapestbeacon.com/news-in-brief/survey-one-third-hungarian-youth-want-move-abroad/44606> accessed 7 February 2018.