CHAPTER 1 INTRODUCTION

'Citizenship of the Union is intended to be the fundamental status of nationals of the Member States'.[1]

Reconciling European Unions (hereinafter-EU) free movement rights with United Kingdoms national solidarity has heightened over the past decade due ten new countries joining the EU.[2] This has proven to undermine Eastern Europeans free movement rights flowing from their Citizenship status, which is one of the most significant rights afforded.[3] This essay will look at the legal rights of residence of Central and Eastern European nationals, (CEE[4])

[1] Case C-184/*99 Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 32
[2] F Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28(3) IJCLLIR 307
[3] Chalmers and Davies and Monti, *European Union Law* (4th edn, Cambridge University Press 2010) 447
[4] CEE countries consist of the following: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia who joined EU joined the EEC following enforcement of the Accession Treaty on 1st May 2004 (also

nationals in the United Kingdom and the circumstances in which those rights can be derogated from. 'Unfounded obstacles' [5] were put into place under the UK law as there was and still is an ongoing fear of an influx of 'cheap workforce' migrating to the United Kingdom, simply to take over British jobs or make use of the social welfare system that is offered to UK nationals. The barriers were put up, primarily out of fear that Citizens of the Union will use their right of free movement to migrate to states with high levels of social assistance.[6] Despite that Eastern Europeans were conferred the status of Citizens of the European Union and are allowed to reside freely within an EU host Member State, it has been revealed that they will be denied residence rights. One of the reasons for denying residency is when a Citizen is unable to show that they are 'self-sufficient' or when they

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referred to as EU10); whereas Romania and Bulgaria joined the EEC on 1st January 2007 (also referred to as EU2)

[5] P Larkin, 'The Limits to European Social Citizenship in the United Kingdom' (2005) 68(3) MLR 435, 446

[6] Chalmers (n 3) 449

become an ‘unreasonable burden’ on the host Member State’s[7] social welfare system.[8] Thus, recent UK case law suggests that having a ‘right to reside’, especially[9] within the UK implies that one needs to be ‘economically active’[10] by being employed in the host Member State, so as to contribute to the economy by paying the relevant taxes.[11] It has been argued that free movement conditions, even under EU law ‘may lead to the paradoxical conclusion that Citizens having exercised their right to free movement would have to meet the strict requirements’[12] whereas static

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[7] A host Member State is defined as ‘the Member State to which a Union Citizen moves in order to exercise his/her right of free movement and residence’ as per article 2(3) of Directive 2004/38EC

[8] Article 14 of Directive 2004/38EC

[9] Emphasis added

[10] M Dougan and E Spaventa, ‘Educating Rudy and the non-English patient: a double bill on residency rights under Article 18 EC’ (2003) 28(5) ELR 699

[11] K Puttick, ‘Paying their way? Contesting "Residence", self-sufficiency, and economic inactivity barriers to EEA nationals' social benefits: proportionality and discrimination’ (2011) 25(3) JIANL 280, 282

[12] A Wiesbrock, ‘Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano’ (2011) 12(11) GLR 2077, 2081

Citizens who remain in their home state would not undergo such unfavourable treatment The previous view is exacerbated especially, in various UK case law concerning Eastern Europeans, analysed in chapter four of this essay, which prove that the measures taken by the United Kingdom Courts to prevent economically inactive EU Citizens from residing within its territories are, in fact, 'discriminatory', and 'disproportionate'.

For the purposes of proving that the UK are contending with their community obligations through denying Eastern Europeans the right to reside within its territories, an analytical and objective stance will be taken.

i) Research question

Are the UK rules on depriving Eastern Europeans of social benefits compatible with EU law?

ii) Research purpose

The research question at hand will aid in the clarification of the ongoing hostility revolving

Eastern European nationals residing within the United Kingdom. It will also provide evidence for that UK law consists of 'unfounded' barriers that restrict free movement rights of Eastern Europeans.

iii) Significance of research question

A lot of Eastern Europeans are migrating in search for work by invoking their free movement rights through recently being conferred Citizenship status.

iv) Research objectives

- To outline the legal framework of free movement rights derived from the Treaty on the Functioning of the European Union[13] (hereinafter-TFEU) and the measures adopted to give these rights effect under secondary sources such as the Citizens Directive 2004/38 EC[14] (hereinafter-CRD)

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[13] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47

[14] The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77

- To analyse the residence rights of Citizens who are economically inactive EU law
- To prove that the United Kingdom laws directed towards limiting the free movement rights of EU Citizens are discriminatory and disproportionate and, especially towards Eastern Europeans.

v) Structure of the investigation

Chapter 1 will provide the reader with the general overview of the speculation revolving Eastern Europeans free movement rights and the transitional measures adopted by the United Kingdom to restrict free movement rights following the accession of the ten new Member states. The need for social protection of EU Citizens will be briefly mentioned followed by the historical development of free movement rights in the EU.

Chapter 2 will introduce the notion of Citizenship. The principle of proportionality and the Treaty

rights on non-discrimination between Citizens will be examined to further the argument that Eastern Europeans ought to be equally treated as Citizens from the 'older'[15] Member States. A general background of the beneficiaries of free movement rights will be introduced and also their rights under EU law to receive social assistance.

Chapter 3 provides the reader with the obstacles encountered in exercising the right to equal treatment and also when EU Citizens rights of residence may be denied. The focus will mainly remain on economically inactive EU Citizens. Notions of 'sufficient resources' and 'unreasonable burden' will be analytically examined through the embodiment of the 'real link test'.

Chapter 4 will introduce the UK law compatibility with EU law in relation to residence and social security rights. This chapter will mainly focus on

[15] Austria, Belgium, Denmark, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom (also referred to as 'EU10' countries)

UK legislation, following a critical evaluation of provisions enshrined in it.

Chapter 5 A critical evaluation of three judgements concerning Eastern European nationals will be the main focus of this chapter, followed by a conclusion and final remarks of UK laws in relation to adopting EU laws of residence and social benefits.

1.1 The speculation revolving Eastern Europeans' rights of residence in United Kingdom

The Treaty of Accession was marked by widespread speculation and resentment[16] on a political level in the UK as concerns heightened about the proposed harms they might generate to the UK welfare system. The UK Government feared an influx of cheap labour from Eastern Europe that would harm the labour market as evidenced by Gordon Brown's famous speech declaring that 'British Jobs [ought to

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[16] European Citizen Action Service, 'Who's afraid of the EU's latest enlargement? The Impact of Bulgaria and Romania joining the Union on Free Movement of Persons' (2008) Sixth Framework Research Programme Liberty and Security <http://www.libertysecurity.org/IMG/pdf_ECAS_REPORT_free_movement_in_2007.pdf> accessed 3 March 2015

be] for British workers'.[17] Furthermore, there were doubts that the enlargement would undermine the 'European Social Model'[18] which promotes the common objective of Member States to endorse economic growth and set high living standards and good working conditions for all its Citizens.

Despite the fact that in order to join the EU, Member States have to fulfil certain standards, economical too, the difference between the standards is vast. The graph below is taken from 2007 and indicates the statutory minimum wage in some EU countries.

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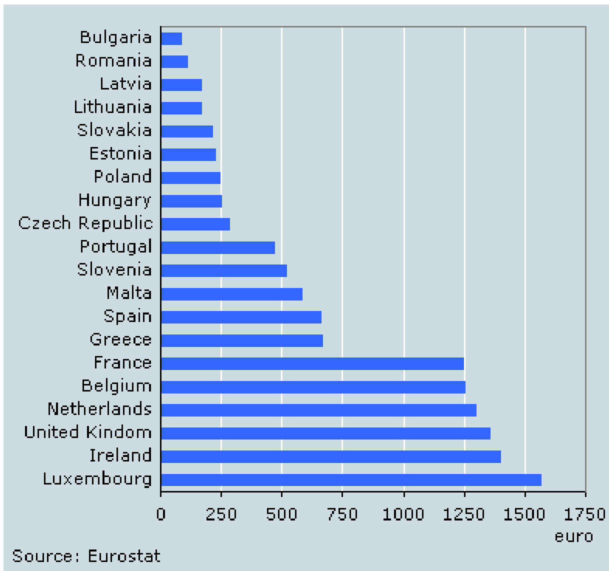
[17] P Goodman, 'Under this Government, we have what Gordon Brown called for during his – 'British jobs for British workers' (2013) Consevative Home <'http://www.conservativehome.com/thetorydiary/2013/02/by-paul-goodmanthe-most-convincing-explanation-of-why-the-economys-rickety-condition-is-marching-in-step-with-booming-emplo.html> accessed 15 March 2015

[18] M Jouen and C Papant, 'Social Europe in the throes of enlargement' (2005) Policy Papers Nº 15 Notre Europe Etudes & Recherches <http://www.institutdelors.eu/media/policypaper15-en-jouen-palpant-europesocialandenlargement.pdf?pdf=ok > accessed 3 March 2015



Graph I: Minimum wage in EU-countries (2007)

In Bulgaria, as indicated above, the monthly wage was 92 euros whereas in Luxembourg is was 1,570 euros a month. Moreover, the unemployment rate in Eastern Europe is higher, whereas the wage-costs and standards of living drastically lower in comparison to the rest old' EU Member States.[19] Thus, repercussions of opening up the borders from the east to the west may prove to be to be futile to

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[19] Ibid

the old' Member States economies. Furthermore, giving access to the UK labour market for the purposes of residing here raises two sides to the same coin. Firstly, Eastern Europeans may be exploited or, conversely may contribute to the economy in the capacity of workers due to the cheap labour that they provide. Alternatively, they may show up as 'benefit tourists'[20] in search for free benefits. In 2013, Prime Minister David Cameron stated that Prime Minister indicated that 'Bulgarians and Romanians will face new rules limiting their ability to claim benefits'[21] and told UK voters that he shared their concerns over EU migration.

1.2 Transitional measures adopted in the UK

Ten 'new' Central and Eastern European

[20] V Mitsilgas 'Free movement of workers, EU citizenship and the enlargement: the situation in the UK' (2007) 21(3) JIANL 223, 225

[21] B Smith, 'Eastern European immigrants 'overwhelming benefit UK economy' (2013) The Telegraph <http://www.telegraph.co.uk/news/uknews/immigration/10484225/Eastern-European-immigrants-overwhelming-benefit-UK-economy.html> accessed 7 March 2015

(hereinafter-CEE)[22] countries acceded the European Union in 2004 and 2007 by signing the Treaty of Accession. This entailed that Eastern European nationals became Citizens of the European Union which, among other rights, entitled them to reside freely within any Member State. As a result, the group of fifteen established ‘old’ EU Member States [23] were allowed to put into place transitional arrangements[24] restricting the new Member States’ Citizens from entering their country for up to seven years. The United Kingdom adopted an ‘open policy’[25] as compared to other EU Member States which meant that Eastern European nationals were required to register with the Worker Registration

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[22] Ibid (n 4) on for full list of countries
[23] See (n 15) for full list
[24] See Article 24, Act of Accession [2003] OJ L236/33 refers to a series of Annexes that contain the details of the transitional arrangements in respect of each accession Member State. For example, in relation to Poland see Annex XII [2003] OJ L236/875
[25] S Currie, ‘Challenging the UK rules on the rights of EU8 workers’ (2009) 31(1) JSWFL 47, 48

Scheme (WRS)[26], so as to legally reside within United Kingdom.[27] This in turn disentitled them from receiving ‘Special Non-contributory Benefits’ (hereinafter-SNCBs) unless they had been in continuous employment with the same employer for a period of twelve months.[28] The transitional measures illustrate that Eastern European nationals did not receive a Citizenship that was analogous to the ones conferred to the established ‘old’ western European Members States despite the fact that under EU law, discrimination between different categories of EU nationals is prohibited.[29]. The transitional measures put in place in the UK ended in relation to all Eastern European’s on 1st January 2014.[30] This essay will focus on post-2014 cases

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[26] The Accession (Immigration and Worker Authorisation) Regulations 2006, s 6(1)
[27] HM Revenue and Customs, ‘CBTM10070 - Residence and immigration: residence - right to reside in the UK’ (2015) <http://www.hmrc.gov.uk/manuals/cbtmanual/cbtm10070.htm> accessed 7 March 2015
[28] Ibid
[29] Part II (Articles 18-25) of the Treaty on the Functioning of the European Union (TFEU)
[30] Ibid (n 27)

involving Eastern European's where the WRS may be mentioned to illustrate the measures taken to prevent their rights of residence in the United Kingdom.

1.3 Social protection of EU Citizens

Oftentimes, there is a conflict between the host Member States social objectives and economic objectives by permitting persons to freely reside within their territories. Free movement of Citizens within the EU may come at the expense of a common Euro-solidarity.[31]It is crucial to identify which objective outweighs the other. The existence of derogations from Treaty rights imply that Member States, not at all costs, have to comply with their duties. It is questionable when the scales will weigh in favour of the claimants circumstances on one hand and on the other hand will weigh towards the UK governments need to safeguard its social

[31] C O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's 'real link' case law and national solidarity' (2008) 33(5) ELR 643

welfare system which will also yield a battleground for which the claimant will struggle. For instance, workers are almost always conferred the right of residence in Member States, which in turn contributes to the economic development of the host Member State, however, this in turn bears implications on the social security field. What would the outcome be if a Union Citizen loses their job whilst in the host Member State?

The rational answer would be that social assistance, such as income support or jobseekers allowance, should be available to an unemployed Citizen, as otherwise, it would place that Citizen in the most vulnerable position, unemployed and without security for survival. Hence, it has come to show that 'some groups, including single parents, carers, and older Citizens are more vulnerable to current UK approaches to determining if residence rights have been acquired and retained'.[32]

[32] K Puttick (n11) 284

This is despite that under EU law, Regulation 883/2004EC on the application of unified social security schemes throughout the Member States exists to protect vulnerable groups of Citizens and provide them with equal opportunities as the nationals of the host Member State.[33] It is highly possible that common social security solidarity within the EU may weaken the Member States' ability, and national parliament's sovereignty to regulate internal matters on grants of social security. Of course, Member States need to protect their economies from 'benefit tourism',[34]however should that come at the expense of undermining the community goals of social and economic solidarity set in The Treaty of Rome 1947 by 'raising the

[33] Article 4 of The European Parliament and Council Regulation 883/2004/EC of 29 April 2004 on the coordination of social security systems [2004] OJL 116
[34] E Guild and S Carrera and K Eisele, *Social benefits and migration: A Contested relationship and policy challenge in the EU* (Centre for European Policy Studies) (2013) 9

standard of living and closer relations between the States belonging to it'.[35]

Through ascertaining that that UK laws governing social security are incompatible with the EU law, it can be proven that, indeed Eastern Europeans are being denied their free movement rights and thereby which thereby devalues their Citizenship status. Despite the fact that the Transitional measures of 2004 are no longer in place the pattern of unfavourable treatment towards Eastern Europeans continues as will be evidenced by cases such as Zalewska[36], Kaczmarek[37] and Patmalniece.[38] In these cases three Eastern Europeans were denied social security and thereby their residence rights, despite the fact that their personal circumstances were such that they could not pursue their

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[35]Article 2 of The Treaty of Rome 1947
[36] *Zalewska v Department for Social Development* [2008] UKHL 67 [2009] 1 CMLR 24
[37] *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310 [2009] 2 CMLR 3
[38] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11 [2011] 1 WLR 783

employment in the UK. On the other hand, in Prix,[39] in which a preliminary ruling under 267 of TFEU was requested by the UK Courts to the CJEU the claimants residence rights were upheld because her personal circumstances were taken account of, 'UK practice, in the way claims and awards of social assistance are currently being decided, is likely to be out of kilter with what EU law expects, particularly in the way proportionality principles should inform decisions on 'residence' and support'.[40] Were the decisions concerning the Eastern Europeans proportionate? Equally, why were the measures taken concerning the three Eastern European claimants not proven to be discriminatory in relation to the personal circumstances of claimants?

1.4 Historical development of free movement rights

The internal market was formed through the Single European Act coming into force, as laid down in the

[39] Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* [2014] PTSR 1448

[40] K Puttick (n 11) 292

EEC Treaty Article 2 EC. The free movement of workers, together with the other freedoms including free movement of services, goods and capital have established the 'backbone' of the European Community. Thus, previously the free movement of persons was restricted to persons taking part in the Economic Market.[41] However, free movement for economically inactive persons was extended with the coming into force of Treaty of Maastricht[42] in 1993, which also established EU Citizenship where the right to move and reside freely played a crucial role in the development of the notion of European Citizenship. The rights granted to EU Citizens are subject to the limitations and conditions laid down in the Treaties and in the measures adopted to give

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[41] C Barnard, *The Substantive Law of the EU - The Four Freedoms* (4th edn, Oxford University Press 2010) 223

[42] The Treaty on European Union (TEU) was signed in Maastricht on 7 February 1992 and came into force on 1 November 1993

effect to these rights, predominantly covered by Directive 2004/38[43] (hereinafter CRD)

The concept of EU Citizenship plays a crucial role, beyond the economic freedoms, where no actual economic link between a Citizen and the host Member State can be formed. The 'market' aspect of Citizenship continues to be a cornerstone for the free movement rules,[44] as will be argued below. However, EU Citizenship still gives potential for those who cannot prove an economic link with the host Member State.

EU Citizenships importance was illustrated in one of the first cases establishing it

[EU Citizenship] constitutes a goal in itself and is inherent in the fact of being a citizen of the Union, and is not merely a parameter of the

[43] The European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77
[44] A Wiesbrock, 'Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano' (2011) 12(11) GLR 2077, 2081

common market, it does not merely have a different regulatory scope: it also, and primarily, differs in terms of the nature of the rights it bestows on individuals and the breadth of the guarantee that Community and national principles must accord it.' [45] However, the question still arises as to whether Citizenship, irrespective of the economic freedoms established in the internal market, bestows equal rights to those invoking Article 21 of TFEU to move and reside freely and, if so, are these rights equally comparable with those given to Member State nationals?

CHAPTER 2 BACKGROUND

2.1.1 Citizenship and free movement rights

European Union Citizenship, by 'putting flesh on the bones'[46] adds to the Member State nationals' rights. In order for a person to live and reside freely

[45] Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, Opinion of A.G. Cosmas, paras 86
[46] S O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 *ELR* 68, 68

within a host Member State they must first satisfy the criteria of being a Citizen of the European Union. The identity of the European Union Citizen is supplementary to national Citizenship[47] The Treaty on Functioning of the European Union lays down the main provision establishing EU Citizenship;

Article 20(1)

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

In order to reside freely, the above provision must be read together with the below provision, stating;

Article 21(1)

'Every Citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and

[47] Article 20 (1) of TFEU

conditions laid down in the Treaties and by the measures adopted to give them effect'. Thus, there must be a cross border-element involved in order for the Article 21 to be invoked. Activities that are purely internal are those 'which have no factor linking them with any of the situations governed by Community Law and which are confined in all relevant aspect within a single Member State'.[48] The provision does not have effect to situations which are wholly internal to a Member State[49] and thus,'any difference in treatment between those Union Citizens and those who have exercised their right of freedom of movement, as regards the entry and residence of their family members, does not therefore fall within the scope of Community [Union] law'. [50] Rights of free movement of EU Citizens and 'the measures adopted to give them effect' are predominantly covered by Directive

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[48] Case C-212/06 *Flemish Insurance* [2008] ECR I-1683, para 33
[49] Case C-175/78 *Saunders* [1979] ECR I- 1129, para 11
[50] Case C-127/08 *Metock v Minister for Justice* [2008] ECR I - 6241, para 78

2004/38EC [51] referred to as the 'Citizens Directive'. The Directive covers matters concerning;

a) the conditions in which Union Citizens and their families may exercise their right to move and reside freely within the twenty eight Member States

b) right of permanent residence

c) restrictions on the rights mentioned above on the grounds of public policy, public security or public health.[52]

The Directive is made up of Citizenship rights that the CJEU has established overtime. It should be noted that the effect of a Directive is that it will be binding on the Member State, yet the choice of the forms and methods in which that result is achieved will be left for the national authorities to determine.

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[51] This was implemented in the UK by the Immigration (EEA) Regulation 2006 (SI 2006/1003)
[52] Article 1 of Directive 2004/38EC

[53] This leaves the United Kingdom national authorities' with considerable leeway in giving effect to the rights under the Directive, which has proven to be an obstacle for economically inactive Citizens invoking their free movement rights. There are a vast amount of cases where UK national laws have intervened with the free movement rights of Citizens afforded by the Citizens Directive. EU Member States are required 'not to systematically' verify the conditions that have been fulfilled to grant residence rights.[54] This in turn implies that other factors, such as proportionality and personal circumstances must also be taken account of.

It is established that 'Article 20 TFEU precludes national measures which have the effect of depriving Citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Citizens of the Union'.[55] However, 'Clearly, the system by which EEA [EU]

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[53] Article 288 of the TFEU
[54] Article 14(2) of Directive 2004/38EC
[55] Case C-34/09 *Ruiz Zambrano* [2011], para 42

nationals and their family members acquire and retain residence rights is problematic in key respects.[56]

i) Equal treatment between EU Citizens based on non-discrimination

Part II (articles 18-25) of the TFEU is titled 'Non-discrimination and Citizenship of the Union' and asserts the discrimination on the grounds of nationality shall be prohibited in respect of all EU Citizens. When Articles 18 on discrimination (ex Article12 EC Treaty), Article 20 on Citizenship (ex Art. 18 EC Treaty) and Article 21 free movement are read together they establish equal treatment and non-discrimination towards citizens freely residing in host Member States. Conjunctively, they impose an obligation on the host Member State authorities to not take any discriminatory measures against a national belonging to another EU Member State, regardless of the fact that they are a worker or

[56] K Puttick (n 11) 292

economically inactive. In effect this means that the application of Article 18 concerning non-discrimination is triggered only when Union Citizens (personal scope) migrate so as to freely reside in another Member State (material scope) as per Article 21 of TFEU.

It should be clarified at this point that direct discrimination should be distinguished from indirect discrimination. Direct discrimination only occurs through explicitly restricting residence rights on the basis of nationality.[57] Indirect discrimination ensues when a measure or provision is neutral in its content, yet creates adverse effects in relation to non-nationals.[58]

In addition, when discriminatory measures are taken, they must be 'objectively justified'[59] in order for a non-national to be treated with the similar rights as a national of the host Member State. Thus,

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[57] Case C-209/03 *Bidar* [2005] ECR I-2119
[58] Ibid para 51
[59] Recital 23 of Directive 2004/38EC

the circumstances of non-national and national must also be objectively comparable in order for the migrant to ascertain equal-treatment.An example of the above can be drawn from the case of Martinez Sala[60] where a Spanish national was denied the right to receive child benefits due to her inability of produce a residence document, which was held to be discriminatory since the German authorities would not have needed ask a German national to produce a residence document. Where a person does have 'sufficient resources' and 'health insurance' to reside in the host Member State for a period exceeding three months, then the retention of residence rights must be subject to the proportionality principle. [61]

Furthermore, equal treatment is reiterated in CRD 24 stating that 'Union Citizens residing on the basis of this Directive in the territory of the host Member

[60] Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998]
[61] F Weiss and C Kaupa, *European Union Internal Market Law* (1st edn, Cambridge University Press 2014) 115

State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.'[62]

ii) Proportionality principle

The proportionality principle consists of three elements:

- National measure taken must secure the objective that it seeks to pursue[63]
- The measure cannot go beyond what is necessary to attain it i.e. there must be no other less restrictive measure that can be taken that would lead to the same result. [64]
- The measure taken must be in the public interest and has to outweigh the interest of the individual member who wants to freely

[62] Article 24 of Directive 2004/38EC
[63] Case C-406/04 *De Cuyper v Office national de l'emploi* [2006] para 42
[64] Ibid para 43

> live and reside within the host Member State [65]

Thus, in Collins[66] the CJEU concluded that a person cannot be denied the right to claim jobseekers allowance in the UK merely due to the fact that they are not habitually resident and the rejection must only be justified if it is based on other criteria, including proportionality, and not purely on the applicant's nationality [67] The judgement in, Collins has aided the UK Courts in adopting that there should be a 'genuine link' or 'real link' between the applicants level of integration with the UK when assessing whether someone is 'habitually resident' [68] outlined in detail in Chapter 4.

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[65] Case C-145/*09 Land Baden-Wurttemberg v Tsakouridis* [2010] ECR I-11979, para 50
[66] Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I -2703, para 30
[67] Ibid 40
[68] R White, 'Free movement, equal treatment, and Citizenship of the Union' (2005) 54(4) ICLQ 885, 897

2.2 Beneficiaries of free movement rights under EU Law

There is no statutory definition of residence, but rather residence rights are dependent on the legal status of the EU Citizen. EU Citizens and the family members[69] accompanying them who intend to stay in the host Member State for a period of up to three months[70] only need to hold a valid identity card or passport and are exempt from satisfying any other requirements. On the contrary, for stays longer than three months additional requirements are in place. The EU Citizen needs to satisfy one of the conditions outlined in the 'Citizens Directive' below. In Article 7(1) of the same directive one of the requirements to move and reside freely, for a period exceeding three months, yet less than five years, needs to be satisfied;

a) be a worker or self-employed person (economically active) or

[69] Article 6(2) of 2004/38EC
[70] Article 6(1) of Directive2004/38EC

b) have sufficient resources for themselves and their family members so that they do not become a burden on the social assistance system of the host Member State (self-sufficient) or
c) be a student in the host Member State and have comprehensive sickness insurance cover in the host Member State or be
d) a family member accompanying or joining a Union Citizen who satisfies the conditions referred to in points (a), (b) or (c).

Permanent residence is attained by EU Citizens through legally residing within the host Member State for a period of five years[71] and thus, they are no longer required to satisfy the criteria outlined above.

2.2.1 Workers and self-employed persons

Free movement of workers[72] within the Member States of the European Union has been long

[71] Article 16(1) of Directive2004/38EC
[72] Article 3(i) of Treaty of Rome 1947

established, since the Treaty of Rome 1947. However, it is now enshrined in the Treaty on the Functioning of the European Union (hereinafter-TFEU) and in its Article 45(2) stating that ‘abolition of any discrimination based on nationality between workers of the Member States as regards employment’, and enable a person ‘stay in a Member State for the purpose of employment’ as per 45(3)(c)[73] states:

One of the requirements to reside freely in an EU Member State is to become employed or be self-employed in the host Member State of which the migrant is not a national. Thus, any EU Citizen shall be “assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there_after having pursued such an activity’.[74]

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[73] Ex Article 39 TEC

[74] Case C-334/94 *Commission v France – Registration of Vessels* [1996] ECR I-1307, para 21

There is no statutory definition of a 'worker' under EU law, where the meaning and all that it entails must be sought in the CJEU judgements. The status of 'worker' is broad and will not be outlined in detail for the purposes of this essay. Of great importance is the fact that once the status of a worker is established, the rights flowing thereunder are extensive.

In short, in order to qualify as a worker exercising a free movement right under Article 45 of the TFEU, one must undertake 'effective and genuine work, under the direction of an employer, for which one receives remuneration'[75] What constitutes 'genuine work' has always troubled the Courts. In the case of Ninni-Orasche[76] it was stated that, the fact that the work has been carried in the host Member State for the short period of time of two and a half months is irrelevant to precluding one of the 'worker status'.

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[75] Case C-66/85 *Lawrie-Blum* [1986] ECR I-2121; see also Case C-196/87 *Steymann* [1988] ECR I-6159
[76] Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, para 32

In Genc[77], the 'worker' status was secured even where the hours of labour are limited and remuneration received is below the host Member states minimum subsistence wage. In Van Duyn[78] the CJEU held that Article 45 has direct effect and Member States are bound to recognise and uphold the rights of persons classified as 'workers'. However, where the Member State wishes to restrict the free movement of a workers they must 'take into account the personal conduct of the individual concerned [which may be considered] socially harmful.[79]Member States are open to determine what they consider as socially harmful which gives rise to value-diversity and uncertainty when interpreting EU law.

Supplementary to Article 45 of the TFEU is the EU Regulation 492/2011[80](it repeals the old legislation

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[77]Case C-14/09 *Genc v Land Berlin* Case [2010] 2 CMLR 44
[78] Case C-41/71 *Van Duyn v Home Office* [1971] ECR I -1337, 1352
[79] Ibid
[80] REGULATION (EU) No 492/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on

1612/68EC[81]) which ensures that workers in Member States who invoke free movement rights and leave their home state receive the same treatment[82] as the nationals of the host Member State. Article 7(2) of Regulation 492/2011, grants migrant workers the right to access the same social advantages as nationals, in order to claim access to income support. Once the 'worker' status is determined, the person may legally reside within the host Member State and the rights and benefits flowing thereunder cannot be denied. These rights include but are not limited to Access to housing[83] and social and tax advantages.[84]

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freedom of movement for workers within the Union (codification) (Text with EEA relevance) [2011] OJ L141

[81] The European Parliament and Council Regulation 1612/68 on freedom of movement for workers within the Community [1968] OJ L257/2

[82] Article 7(1) workers regulation 492/2011

[83] Article 9 of workers regulation 492/2011EC

[84] Ibid, Article 7(2)

A worker status will be upheld where a person can prove that they have previously had a 'sufficiently close connection' to the labour market[85]

Also, a Citizen will retain the status of a worker or self-employed if they meet the following conditions as stated under Article 7(3) of Directive 2004/38EC

(a) he/she is temporarily unable to work as a result of an illness or accident;

(b) he/she is involuntarily unemployed after having been employed for more than one year and has registered as a jobseeker;

(c) he/she is a jobseeker. In this case, the status of worker shall be retained for no less than six months;

d) he/she embarks on vocational training

An example of the UK Courts upholding the status of a worker under Article 7(3) of 2004/38 Directive

[85] Ibid

is in the case of Prix[86] but not in Zalewska,[87] even though both of the appellants in the cases were involuntarily unemployed as per Article 7(3)(b) of the Directive.

A brief outline of the case Prix is crucial following the approach of the Court to uphold the 'worker' status of the claimant. Ms Prix who is a French National had resided in the UK since July 2006, she was able to become employed shortly after she arrived up until August 2007. She undertook agency work for a couple of months and three months before she was due to give birth she resumed work and sought Income support. Her application for income support was rejected on the grounds that she lost her 'right to reside' in the United Kingdom. The Supreme Court requested for a preliminary ruling from the CJEU under Article 267 TFEU. The main question posed was whether;

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86 Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* [2014] PTSR 1448

87 Case Analysed in-depth in Chapter 5

Article 45 TFEU and Article 7 of Directive 2004/38, are to be interpreted as meaning that a woman who gives up work, or is seeking work, due to her physical constraints of the late stages of pregnancy retains the status of 'worker' within the meaning of those articles.[88]

The Court (First Chamber) replied by asserting:

Article 45 TFEU would permit the woman to retain the status of a worker, based on the facts of the case, provided she returns to work or finds another job within a reasonable period after the birth of her child

Furthermore, the Court emphasised that as per Article16(3) of the Citizens Directive, Prix had a right of residence and income Support.

Article 16(3) of the Directive states that 'Continuity of residence shall not be affected […] by one absence of a maximum of twelve

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[88] Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions* [2014] PTSR 1448, para 24

consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country'.

Thus, Prix retained the status of a worker.
The decision in Prix can be compared to the cases outlined in chapter four, on the basis of the similar facts, however, the outcomes have been drastically different.

Also, a worker may be subject to withdrawal from the host Member state if he or she becomes an 'unreasonable burden'[89] on the host Member State, once they give up work or start taking benefits.

The rights of free movement in the capacity of a self-employed person are the same as for a 'worker' as per Citizens Directive 2004/38 EC Article (7)(1)(a). The CJEU in Roux[90] established that it made no difference whether an economic activity

[89] Article 14 of Directive 2004/38EC
[90] Case C-363/89 *Danielle Roux v Belgian State* [1991] ECR I-273, 16

was classified as employed or self-employed and that 'the same legal protection' is afforded to both groups in relation to residence rights and therefore the classification of an economic activity is without significance.

2.2.2 Family members' and dependants' rights of residence

Family members under Article 2(2) of the Citizens directive are defined as

(a) the spouse;
(b) registered partner
(c) dependants of the union Citizen or spouse/partner under the age of 21 (eg. Children, grandchildren)
(d) direct relatives in the ascending line (eg. parents, grandparents etc) of the union Citizen or of the spouse/partner if they are dependants

Family members may not be expelled where 'serious health grounds strictly require the personal

care of the family member by the Union Citizen'.[91] If the right of residence is denied to the previous family member then the 'host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people'.[92] Family members, irrespective of their nationality who are accompanying the EU Citizens will enjoy equal treatment[93] with nationals, but not in respect of social assistance.

In the case of Ruiz Zambrano[94] the CJEU had to interpret Article 20 of TFEU to mean that expulsion will not be allowed under EU law when a host Member state deprives EU Citizens, who are dependants of their third country national (hereinafter-TCN)[95] parents, from receiving a work

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91 Article 3(2)(a) of 2004/38EC
92 Ibid
93 Ibid, Article 24
94 Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177
95 A TCN is someone who is not an EU Citizen

permit. Hence, 'if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, Citizens of the Union, having to leave the territory of the Union.' [96] Thus measures precluding the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen to an EU citizen will not be upheld by the CJEU.

2.2.3 Jobseekers' and Students' rights of residence

Citizens Directive retains the worker status and additionally all the rights of social assistance flowing thereunder to jobseekers provided that they are 'he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a

[96] Case C-34/09 *Ruiz Zambrano* [2011] ECR I-01177, para 44

job-seeker with the relevant employment office'.[97] They are also subject to equal treatment.[98] However, if they are voluntarily unemployed then the 'host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence […]nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans[…].'[99]

Whereas, they 'may not be expelled for as long as the Union Citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.[100]Thus, with regard to the above criteria of finding work, in Collins[101] it was established that jobseekers ought to have equal access to jobseekers allowance after they

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[97] Article 7(3)(b) of Directive 2004/38EC
[98] Article 45(2) of TFEU
[99] Article 24(2) of Directive 2004/38EC
[100] Ibid, Article 14(4)(b)
[101] Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I -2703

have completed their education so as to not deprive him with an opportunity for employment.[102]

In the case of Bidar[103] the CJEU held the condition of requiring students to have residence and be 'settled' in the United Kingdom as a condition for granting them a student loan for the purposes of maintenance was discriminatory. However, it was legitimate for a host Member State to grant assistance on the condition of demonstrating a certain degree of 'integration' into the society of the Member State. Mr Bidar had lawfully resided in the United Kingdom and his position was such that without being granted a loan it would have an adverse impact in his right of residence.

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[102] Ibid, para 63

[103] Case C-209/03 *R(Bidar) v Ealing London Borough Council* [2005] QB 812

2.2.4 Economically inactive Citizens

Baumbast,[104] a key case on Citizenship, established that persons do not necessarily have to be economically active, that is, be a worker or self-employed in order to exercise their directly effective free movement rights under 18 EC Treaty (now Article 20 of TFEU). In Baumbast[105]it was specifically stated that:

'A Citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a Citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC.'

This in turn implies that Citizens migrating from their home state to a host Member State may be eligible to apply for social benefits in the form of SNCB's which include, income support, income-based jobseekers allowance, state-pension

[104] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR 1-7091
[105] Ibid, para 94

credit, housing benefit, and council tax benefit, etc. When denying such benefits to a Citizen the host Member State needs to ensure that effect of the measures taken are not discriminatory against someone invoking their free movement rights. The host Member state must apply the principle of proportionality and also take into consideration all of the relevant personal circumstances of the applicant wishing to reside in the host Member State. Also, rights of residence are subject to withdrawal when the EU Citizen becomes an 'unreasonable burden' on the host Member States finances.

2.2.5 Conclusion

Now that it established who the beneficiaries of free movement rights are, we can conclude that a general Treaty right under EU law is that Citizens who are invoking their free movement rights shall not be discriminated on the basis of their nationality. The most extensive rights to social benefits are bestowed on EU Citizens who take part,

in the so called ‘economic market’. However, as there is not statutory definition of a worker Member States may fail to recognize a ‘genuine’ or ‘real link’ so as to bestow a person with ‘worker’ status, who will in turn be denied the social rights flowing thereunder. The real link criteria will be analysed in chapter three below.

CHAPTER 3. WITHDRAWAL OF RESIDENCY UNDER EU LAW

3.1 Sufficient resources criteria

Persons who are self-sufficient are able to establish that they have a ‘sufficient resources’ as per 7(b) of Citizens Directive so as to not become a burden on the host Member States social assistance system. Sufficient resources are vaguely defined in the Citizens Directive and do not take account of the drastic differences in the welfare standards across the Member States of the EU. A person from Eastern Europe, therefore may not be able to show that he or she has sufficient resources when residing

in a country such as the UK where the level of subsistence is drastically higher. This is a criticism in relation to the Citizens Directive which also leaves room for the host Member States to lay down their own levels of what they consider amounts to sufficient resources.

The Citizens Directive states:

'Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned.'[106]

The amount of sufficient resources, which are vaguely described 'shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance […]'.[107]

[106] Article 8(4) of Directive 2004/38EC
[107] Article 8(4) of Directive 2004/38EC

It should be noted that lack of sufficient resources alone will not suffice so at to refuse a right of residence for the purposes of preventing migrants from accessing social assistance.[108] Thus, expulsion cannot 'be the automatic consequence of a Union Citizens or his or her family member's recourse to the social assistance system of the host Member State'.[109]

Furthermore, expulsion may not be justified, as per Article 28 on two grounds, firstly on the grounds of public policy or public security and secondly for lack of sufficient resources. However, recital 23 of the same directive also states that an expulsion measure on the grounds of public policy or public security may 'seriously harm' Citizens who have 'genuinely integrated' into the host Member. If such a measure is resorted to , it must be accordance 'principle of proportionality to take account of the degree of integration of the persons concerned, the

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[108] Ibid, Article 14(3)
[109] Ibid

length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.' [110]

i) Unreasonable burden criteria

In order to withdraw residence rights, a Citizen residing in the host Member State must become an 'unreasonable burden'[111] or a threat to the public policy or public security. Since there is no constitutional definition of the term 'unreasonable burden', the EU Commission[112] has set out three factors that should be taken into account when examining whether someone has become a burden on the social assistance of the host Member State. They are as follows:

- Duration: length of the benefit being granted

[110] Recital 23 of Directive 2004/38EC
[111] Ibid, Article 14
[112] Ibid, Recital 16

- Personal circumstances: the level of integration between the EU Citizen and the host Member State
- Amount: Total aid that has been granted in and whether the Citizen has a history of relying on social aid.[113]

ii) Evaluation of 'reasonable' through the 'real link criteria'

The implication that the above test will have in relation to the UK Courts is that they must take into account of whether there is a level of integration or a genuine or real link between the UK and the EU Citizen wanting to reside within its boundaries. The real link is a product of EU Citizenship in terms of potential welfare scope, but it devolves actual eligibility decisions to Member States'.[114]

[113] P Minderhoud, 'Legislative Comment-Directive 2004/38 and access to social assistance benefits' [2011] 18(4) JSSL 153, 156

[114] C O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's 'real link' case law and national solidarity' (2008) 33(5) ELR 643

The test can be also found in the ‘Habitual Residence Test’ which is implemented in UK legislation. When a real link can be proven then, the social assistance rights flowing thereunder are available to an EU Citizen. This in turn implies that EU Citizens must show that their admission in the host Member State is dependent upon ‘a little more than just physical presence’.[115] It has been argued that through the ‘real link test’ Member States are able to uphold their sovereignty by making it a precondition for social assistance eligibility.

On the contrary, the test may also pave the way for value-diversity[116]where EU law is not equally applied in in all Member States since it is difficult to ascertain a ‘real link’ between a person invoking their free movement right in the host Member State.

These conditions may not always be sympathetic towards the EU Citizens personal circumstances and engender hurdles for a citizen to enjoy their free

[115] Ibid, 643
[116] Ibid,663

movement rights as established in Article 20 of TFEU. Can it be argued that the 'real link test' is just a glazed term for 'indirectly economic test?' Although, this cannot be determined easily, it should at this point be acknowledged that Member States are indeed free to determine the relationship between the state and the EU citizen invoking his free movement rights. However, one point can be expressed at this stage;

'Member States, when setting out the integration responsibilities of EU migrants, may give disproportionate weight to certain factors. An emphasis on social integration as the duty of the migrant, whether economically active or not, creates the danger of slipping into the 'MUD', the moral underclass discourse of social exclusion'[117]

On the other hand, the 'real link test' endows a bit of certainty when Member States need to ascertain the quo between a Citizens equal treatment and also

[117] Ibid, 663

circumvention of that treatment. Thus, in Grzelczyk [118] claimant's employment history whilst pursuing his education combined with lack of previous social assistance claims gave him a right of social assistance. Hence, work can be sufficient in establishing a real link with the host Member State. Also she states that employment and social integration constitute a form of mathematical rationality in finding an overarching economic link. One justification for the economic link is that 'non-contributory benefits, as financed from the public purse, are financed through tax, and as such taxpayers should be able to reap the benefits, unimpeded by residence requirements'.[119]

O'Brien[120] suggests that the hurdles for establishing a genuine link for a work seeker should be low

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[118] Case C-184/*99 Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 32
[119] Ibid, 652
[120] C O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's 'real link' case law and national solidarity' (2008) 33(5) ELR 643

because they are making themselves available for work in the labour market as suggested in Collins. Thus, ‘the criterion cannot be a monolithical one. Rather, in its application, there has to be room for considering other indications of integration, such as the individual circumstances of the applicant, and for taking into account the degree of solidarity requested’.[121]Furthermore one can argue that the ‘real link’ approach adds justice to UK laws. The significance of the test is that it enables the establishment of the reasonableness of a burden. The personal circumstances do not play a weighty role in the test, is that fair?

[121] Ibid, 655

3.2 Rights to social assistance under EU law

EU law imposes that persons travelling to a host Member State must have ‘sufficient resources or sickness cover’ so as to not become a ‘burden’ on the host Member States finances if they intend to reside for a period exceeding three months. However, in any cases economically inactive Citizens are able to reside freely in a host Member State and are also eligible to apply for ‘special non-contributory benefits’.[122] Recital 16 of 883/2004 specifically provides that ‘Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned.’ The aim of Regulation 883/2004 is to coordinate special non-contributory benefits so that European Union Citizens who invoke their free movement rights have their social security entitlements protected. However, EU law requires that certain objectives are upheld so as to ensure that the application of EU

[122] Recital 37 of 883/2004EC

law in different national systems does not harm persons who exercise their free movement rights.[123] Receiving such benefits 'should contribute towards improving their standard of living and conditions of employment'.[124] However, Social security regulations 883/2004EC does explicitly recognize that awards of social benefits are a matter of national law.[125] Furthermore, article 4 of the 883/2004EC directive provides that 'persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof'. Thus, it can be implied that a person moving to the host Member State will receive equal treatment.

The relevance of Article 18 TFEU together with Article 4 of 883/2004 is that the Court of Justice of the European Union (hereinafter-CJEU) oftentimes intervenes to uphold Treaty rights, specifically on

[123] Rectal 1 of 883/2004EC
[124] Ibid
[125] Ibid, Recital 24

non-discrimination which override the ‘sufficient resource’ criteria enshrined in Directive 2004/38EC. For example, in Trojani[126] the claimant, though not a worker in the context of Workers Directive 1612/68 (now repealed by 492/2011), was awarded the ‘minimex’ which is the minimum subsistence allowance, because he took up various jobs for about 30 hours per week for which he received board, lodging and some ‘pocket money’.[127] Trojani did not derive a right to receive social benefits under EU law since he was unable to establish self-sufficiency, however he was lawfully resident in the host Member State as he had resided there for a while, had a residence permit which the national ‘authorities’[128]had approved of, and thus he could not be denied benefits. It is the substance rather than the explicit form that enabled him to receive benefits. He was allowed to receive equal treatment

[126] Case C-456/02 *Trojani v Centre publique d'Aide sociale de Bruxelles* [2004] ECR I-7573
[127] Ibid para 37
[128] K Puttick (n 11) 284

under article 21 of TFEU where the Court accepted that a ‘quasi-constitutional requirement, may be interpreted and thereby particularized, but not annulled or undermined by secondary law.’[129]

In Vatsouras[130] students were allowed to receive jobseekers allowance in the host Member State as long as they were able to show that they were ‘genuinely’ seeking employment.

In the key case of Brey[131] it was established that national legislation which ‘automatically bars’[132] an economically inactive Citizen from receiving non-contributory benefits merely because due to not possessing ‘sufficient resources’ was declared as contravening with EU law.[133] Accordingly, the citizen must become an ‘unreasonable burden’[134] on

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[129] F Weiss and C Kaupa, *European Union Internal Market Law* (1st edn, Cambridge University Press 2014) 135
[130] Case C-22/08 *Vatsouras v ARGE Nürnberg* [2009] ECR I-04585
[131] Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] ECR 00000
[132] Ibid, para 77
[133] Ibid, para 80
[134] Article 14 of Directive 2004/38EC

the host Member States welfare system and in no case will expulsion become an automatic consequence.[135] Furthermore, the CJEU held that nothing in Regulation 883/2004, or in the Directive, allows a Member State from entitling SNCB based on the claimants legal right to reside[136] Thus, there must be individual examination of the burden which includes the The authorities granting such social assistance must ‘in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that [2004/38] directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.[137]So, what does the decision in Brey teach us? Citizens invoking their free movement

[135] Case C-184/*99 Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para *43*
[136] C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] paras 39
[137] Ibid, para 77

rights who have no right to reside under national law but have mitigating circumstances, ought not to be considered an unreasonable burden on the host Member State.

However, it is usually the case that the strict eligibility criteria[138] under social security regulation 883/2004EC applying to EU Citizens, together with the total strict eligibility criteria under directive 2004/38, makes benefit tourism' difficult in practice.[139] Where an EU Citizens migrates to a host Member state 'solely in order to obtain another Member State's social assistance'[140] will denied assistance.

3.3 Conclusion

The CJEU has asserted worker status can be ascertained when there is 'real link or an

[138] Strict conditions are regulated by Title III, Chapter 6, Articles 61-65 of Regulation 883/2004EC
[139] Case C-333/13 *Dano v Leipzig* [2014]
[140] Ibid, para 78

'economic' link for EU Citizens to be eligible for receiving social benefits However, this does not wholly preclude economically inactive EU Citizens from freely residing within a host Member State. Economically inactive Citizens will have the right to apply for SNCBs under 883/2004[141] so as to make them available to the labour market, if they are involuntarily unemployed and lack sufficient resources, provided that they too, can demonstrate a real link with the host Member State. Article 7(3) of the Citizens Directive specifically states that a worker status will be retained if a Citizen is involuntarily unemployed, after having been in employed for a year and be registered as a jobseeker. This criteria can be compared to the

[141] Recital 37 of Regulation 883/2004EC

transitional measure of registering for work in the UK under the Worker Registration Scheme in relation to Eastern European nationals. Yet, the UK Courts have indicated their unwillingness to grant social benefits to those contrary to statement in Collins that a 'the criterion cannot [for denying social benefits] be a monolithical one. Rather, in its application, there has to be room for considering other indications of integration, such as the individual circumstances of the applicant, and for taking into account the degree of solidarity requested'.[142]

[142] Lenaerts and Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice'
(2006) 2 Eur. Consititut. Law Rev. 101.

CHAPTER 4. UK LAW COMPATIBILITY WITH EU LAW

4.1 Economically inactive migrants under UK Law

Immigration (European Economic Area) Regulations 2006 implemented the Citizens Directive 2004/38EC into UK domestic law.[143]

The conditions[144] for becoming a resident in the United Kingdom in the 2006 Regulations are similarly defined to the ones laid down in 2004/38 Directive. Specifically, they state that a person who is 'qualified'[145] for the purposes of residing in the UK is primarily a person who has the 'worker' or

[143] K Puttick (n 11) 292

[144] Regulation 6(1) of Immigration (European Economic Area) Regulations 2006 'worker, self-employed, jobseeker, self-sufficient person or student'

[145] Model example is given in Income Support (General) Regulations 1987 21AA where a list of 'persons not from abroad'

self-employed status. Adopting the same wording as in the Citizens Directive, Article 13 of Immigration (European Economic Area) Regulations 2006, specifically states that persons who become a 'burden'[146] on the UK Social assistance system will 'cease' to have their rights of residence in the UK. The Immigration (European Economic Area) Regulations 2006 lacks the implementation of Article 24 of 2004/38EC on equal treatment between EU nationals. However, in relation to denying social aid during the first three months of staying in the UK or prior to getting permanent residence, the Social Security (Persons from Abroad) Amendment Regulations 2006 does implement Article 24(2) of the 2004/38EC

[146] Article 13(3)(b) of Immigration (European Economic Area) Regulations 2006

Directive, which in effect suggests that when nationals from Eastern Europe do enter the UK, they will be ineligible for receiving SNBC's if they become unemployed during the first 12 months of their stay here.

Furthermore, Accession (Immigration and Worker Registration) Regulations 2004, regulates the rights of entry, residence and access to the labour market [147] in relation to the ten new Accession States nationals in the UK (EU10). Under regulation 4(1) it is states that the regulation will derogate from Article 45 of TFEU and Articles 1 to 6 of workers regulation 492/2011EC, concerning abolition of restrictions on free movement of workers and their families, during the accession period. In addition, regulation 4(2) provides that a work seeker will not be able to reside in the UK, unless they are

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[147] Accession (Immigration and Worker Registration) Regulations 2004 (Introductory text)

self-sufficient when they arrive. Under Regulation 2(4) of Accession (Immigration and Worker Registration) Regulations 2004, an obligation for an Accession State national (national of any EU10 country) to re-register when becoming employed again with a new employer within the 12 month period has proven to place an additional restriction on A10 nationals.[148]

i) Evaluation of UK laws on residence: economically inactive citizens only a burden?

The fact that worker status is stated at the top of the list 'underlines successive governments' expectations that EEA nationals should be working or otherwise reciprocating for any support they receive and thereby 'contributing' to the UK economy.' [149] Furthermore, it has been contended that Eastern European nationals have limited residence rights during their early stages of their

[148] S Currie (n 25) 53
[149] K Puttick (n 11) 282

stay in the UK.[150] Economically inactive migrants such as jobseekers and students are prevented from attaining SNCBs in the UK since article 24(2) of the Citizens Directive denying them with rights to receive SNCBs, is implemented into domestic law. However, Article 24(1) of the Citizens Directive on equal treatment between EU nationals is not implemented into domestic law.[151] The fact that Eastern European migrants must be registered and are prevented from residing within the UK if they are not in continuous employment for 12 months seems to be legitimate. However, the real obstacle is in place when they are required to prove that they have sufficient resources so as to not become an unreasonable burden during the first twelve months of residing in the UK.[152] The fact that the provision on equal treatment under 24(1) of Citizens Directive is not implemented and only 24(2) is, suggests that

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[150] P Larkin, 'A policy of inconsistency and hypocrisy: United Kingdom social security policy and European Citizenship' (2010) 31(1) JSWFL 33, 35
[151] Ibid, 39
[152] Ibid, 37

the UK is exceedingly selective about which key provisions that it wants implement. Additionally, 'the Regulations […] entail severe hardship for A10 migrants with limited resources'. [153] Together, the two regulations combined have created a form of 'hierarchy'[154] among Eastern European nationals where they have to work continuously for a year. Eastern Europeans are required to directly participate in the labour market so as to gain the similar rights as British workers. It can be stated that 'there almost appears to be a spirit of contractualism inherent in the legislation […] suggesting that rights guaranteed under EU law must in some way be 'earned' to these nationals.' Furthermore, the waiting period plays a crucial role, especially where Eastern European are out of work within a year. Persons from Eastern Europe usually find employment through agencies and as a result may not remember to re-register each time when

[153] Ibid
[154] Ibid

they change employment. It is also difficult to ascertain whether the burden of registering should lie with the agency or the worker. Since they are in a new country they might not keep up with all the formalities that are required in order to work in the United Kingdom.[155]

4.2 Habitual Residence Test: an unfounded precondition for residence rights or a proportionate measure to protect national security?

Establishing 'habitual residence' has proven to be an obstacle in determining an economically inactive EU Citizens right of residence in the UK[156]. The Social Security (Persons from Abroad) Amendment Regulations 2006, implemented in the UK, regulates the persons who are eligible for receiving social benefits. An applicant wishing to obtain the 'right to reside' within the UK must satisfy that they are 'habitually resident' and if they fail in doing

[155] S Currie (n 25) 56
[156] P Larkin, (n150) 42

then that will strictly disqualify them from receiving social assistance for maintenance purposes. A 'person from abroad', is ineligible for accessing social assistance and is defined as someone who does not reside in the 'UK, Channel Islands, Isle of Man, or Republic of Ireland'. On the contrary, a person will be classified as not a person from abroad if he can satisfy conditions similar to the ones laid out in Directive 2004/38[157]

Factors that courts will take into account when determining 'Habitual residence' are as follows

- The nature of residence, for example length and continuity
- Purpose of wanting to reside in the UK, for example are genuinely intending on finding work here.

[157] For the full accurate list please see paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987

- Applicants intentions for the purpose of residing here[158]

Additionally, in the case of Nessa v Chief Adjudication Officer,[159] Lord Slynn mentioned that some of the factors that imply that one is habitually resident are as follows: 'Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country of residence or intended residence, and many other factors have to be taken into account'.

4.3 Proportionality of UK laws on residence

At a glance, it is clear that 'right to reside test' is discriminatory, since it can more easily be satisfied by a UK national, than an EU Citizen. Where no right of residence exists, the UK Courts, have been determined to justify expulsion,[160] of an EU Citizen

[158] P Minderhoud 'Legislative Comment-Directive 2004/38 and access to social assistance benefits' [2011] 18(4) JSSL 153, 156
[159] *Nessa v Chief Adjudication Officer* (1999) 4 All ER
[160] P Larkin, (n150) 37

as will be provided evidence for in chapter five. On the contrary, in the light that social security systems of the host state need to be protected, some share the view that;

'So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, i.e. moving to a Member State with a more congenial social security environment. And that is certainly not the intention of the EC Treaty, which to a considerable extent leaves responsibility for social policy in the hands of the Member States'.[161]

Thus, denying an EU citizen social benefits amount only to indirect discrimination, which is not prohibited where it is 'objectively justified'[162] and the considerations taken account of are 'independent of the nationality of the person

[161] Trojani para 18

[162] Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 [2011] 1 WLR 783, para 61

concerned'. As a result, provisions that do not let other EU nationals from 'exploiting' the social welfare system of the UK are 'legitimate reasons'[163] for imposing the right of habitually residence test. In the case of Trojani,[164] it was argued that it is a 'basic principle of Community law'[165] that persons who depend on social assistance will be taken care of in their own Member State. 'Therefore Article 7(1)(b)[on sufficient resources] seeks to prevent economically inactive Union Citizens from using the host Member State's welfare system to fund their means of subsistence'[166]

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[163] Patmalniece v Secretary of State for Work and Pensions [2011] UKSC 11 [2011] 1 WLR 783 para 46

[164] Case C-456/02 *Trojani v Centre publique d'Aide sociale de Bruxelles* [2004] ECR I-7573

[165] Case C-456/02 *Trojani v Centre publique d'Aide sociale de Bruxelles* [2004] ECR I-7573, para 71

[166] Case C-333/13 *Dano v Leipzig* [2014], para 76

4.3.1 EU Commission's 'notice'

The EU Commissions Notice[167] in relation to the UK expresses the view on the legality of the 'right to reside test'. The Commission has requested the UK to 'end discriminatory conditions on the right to reside as a worker which exclude from certain social benefits nationals from the A8 Accession States'. It further implies that the requirements set in the test are a breach of transitional arrangements on free movement, and of obliges the UK authorities to 'ensure equal treatment on the basis of nationality'. Many Scholars share the same concern contending that the 'Commission are right to be concerned about the operation of the right to reside, particularly given the scale of its impact on A8 nationals'.[168] Evidence can be drawn from data where in the first four years of the transitional

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[167] EU Commission Notice IP/10/*1418 Free Movement of Workers: Commission Requests UK to End Discrimination on other Nationals' Right to Reside as Workers* (Brussels: 28 October 2010)
[168] Puttick (n 11) 292

restriction on A8 nationals put up in May 2004, 76% of claims for tax-funded, income-related benefits and tax credits were prohibited on the basis of the right to reside and habitual residence test.[169] In another report, the EU Commission has described the implementation of the Directive 2004/38 by the UK courts as highly disappointing.[170] The report states that 'with regard to the rights of other family members under Article 3(2) is less satisfactory' where thirteen Member States, out of which one is the UK, have failed to transpose Article 3(2) correctly.

After all, Baumbast[171] established that economically inactive Citizens of the European Union may exercise their directly effective rights under 18 EC

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[169] *Accession Monitoring Report* 2004-2008 (Home Office/UKBA et al, 2008) p 23

[170] 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 10.12.09 COM (2008) 840 Final

[171] Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002]] ECR 1-7091

Treaty (now Article 20 of TFEU), and if there is a requirement that limits such freedom of movement then it must be waived. However, this case seems to have gone unnoticed by the UK courts.

However on the contrary, some Scholars share the view that restricting rights of residence to non-nationals is an indirectly discriminatory practice as nationals always will be able to fulfil the residence requirements of and non-nationals will too, provided that they satisfy certain conditions laid.[172]

4.4 Conclusion

Now having discussed the legality of the UK legislation on social benefits, what does this tell us about the legal status of persons who are invoking Article 20 of TFEU in search of work? Firstly, EU law does state that persons who are genuinely searching for work in another Member State of which the Citizen is not a national will be able to

[172] F Weiss and C Kaupa, *European Union Internal Market Law* (1st edn, Cambridge University Press 2014) 201

stay there for 6 months, if they can show that they have a genuine chance of being employed. At this point, it would not be wrong in stating that;

‘What the Government has done here is to open up the labour market relatively generously with one hand, while, by imposing an unnecessary and harsh sanction for failing to comply with a purely procedural requirement, it has, in many cases severely and arbitrarily undermined that generosity with other hand’.[173]

CHAPTER 5. UK MEASURES ASSESSED THROUGH CASE LAW

Three cases will be analysed in detail below where the outcomes of the UK laws on receiving social benefits have proven to be exceedingly harsh. It is vital to, firstly outline the facts of the cases

[173] Zalewska v Department for Social Development [2008] UKHL 67 [2009] 1 CMLR 24, para 69

followed by an in-depth analyses of the decisions of the Supreme Court.

5.1.1 Kaczmarek case

The Kaczmarek[174] case signifies that the measures taken by the UK courts to prevent social assistance to an EU Citizens who, ought to be allowed to receive it due to personal circumstances. The case can be compared to Prix[175] outlined in chapter 3.

The facts are as follows, Kaczmarek, a Polish national, arrived in the UK to pursue her studies in April 2002. She worked in a primary school on a part time basis from 17 June 2003 until 30 April 2004. She gave birth to a daughter on 5 October 2004 and took maternity leave. The child fell ill and as a result she could not return to work and was unable to afford childcare. As a result she applied for income support in May 2005, which was rejected, despite the fact that she was only intending

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[174] Kaczmarek v Secretary of State for Work and Pensions [2008] EWCA Civ 1310 [2009] 2 CMLR 3

[175] Case C-507/12 Jessy Saint Prix v Secretary of State for Work and Pensions [2014] PTSR 1448

on staying out of the labour market for a short while and she appealed to the Supreme Court, relying on article 12 and 18 of EC Treaty.

The Supreme Court dismissed her appeal on the basis that she had not 'resided' in the United Kingdom at the time that she applied for Income Support. She was considered a 'person from abroad' [176] and thus not 'qualified'[177] to attain Income support.

i) <u>Critical evaluation of decision in Kaczmarek</u>

Firstly, the personal circumstances of Kaczmarek were such that denying her of benefits would clearly prevent her of enjoying her Citizenship rights of free movement. Secondly, she was able to show a genuine link to UK labour market since she had been in employment for some time. Thirdly, the right to reside test has already been criticised, the

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[176] Section 17 of Schedule of the Income Support (General) Regulations 1987

[177] Section 5 of Immigration (European Economic Area) Regulations 2000.

commissions notice and thus is incompatible with EU law. Miss Kaczmarek was clearly involuntarily unemployed and therefore ought to have retained the status of a 'worker' as per 7(3) of the Citizens Directive. The CJEU in Prix stated that 'Article 45 TFEU would permit the woman to retain the status of a worker, based on the facts of the case, provided she returns to work or finds another job within a reasonable period after the birth of her child.' The CJEU in Prix, specifically emphasised that as per Article16(3) of the Citizens Directive, right of residence shall not be affected and thus income support will be granted for 'important reasons suchas pregnancy and childbirth[…]'[178] It is highly likely that the outcome of the case would have been different if the case was sent for a preliminary ruling under 267 of TFEU.

[178] Article 16(3) of Directive 2004/38EC

5.1.2 Zalewska case

The case of Zalewska[179] can also be compared to the similar Prix on the basis of the similar facts. It should be noted that the decision in the current case took place before the decision in Prix was taken by the CJEU.

Ms Zalewska, a polish national arrived in Northern Ireland in July 2004 and during the same month she took up employment and registered on the WRS. In January 2005 Ms Zalewska left to take up another employment through a recruitment agency, however, this time she did not register for WRS, despite that fact that under UK law[180] at that time required her to do so. In January her daughter and partner visited her for three months in Ireland. In April 2015 she was admitted in the Women's Aid Hospital after experiencing domestic violence abuse by her partner. She left her second employment and

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[179] Zalewska v Department for Social Development [2008] UKHL 67 [2009] 1 CMLR 24

[180] Regulation 2(4) of Accession (Immigration and Worker Registration) Regulations 2004

sought income support so as to provide for her daughter and herself. Her application was refused as Ms Zalewska lost her right to reside as she had not been in 12 months of continuous employment.[181] Ms Zalewska appealed to the House of Lords, basing her claim on two grounds.

Firstly, Article 7(2) of Regulation 492/2011, grants migrant workers the right to access the same social advantages as nationals, in order to claim access to income support, thus she could rely on the regulation. Secondly, the registration rules are incompatible with EU law as they do not comply with the principle of proportionality.

The Supreme Court held by a majority 3:2 that the registration requirement was compatible with EU Law. Lord Hope who gave the leading opinion stated that, firstly, the actual requirement to register is proportionate[182] basing his argument on the fact

[181] Section 5 of The Accession (Immigration and Worker Registration) Regulations 2004
[182] Zalewska v Department for Social Development [2008] UKHL 67 [2009] 1 CMLR 24 para 36

that an ‘‘influx’’ of migrants may prove unsettling to the UK’s social security system[183] and also, the fact the UK needs to monitor[184] the number of Eastern European nationals entering its territory with the help of the registration scheme. Secondly, the need to re-register may be proven to be disproportionate, however, the re-registration rule does not require that the personal circumstances of the claimant should be considered.

‘The right that the Accession Treaty gives to regulate access to the labour market during the accession period carries with it the right to ensure that the terms on which access is given are adhered to. Regulation of the right of access and monitoring its exercise are appropriate and necessary consequences of making that right available’[185]

It’s true that the Member States were allowed to set up measures to restrict labour market access to A8

[183] Ibid para 39
[184] Ibid para 44
[185] Ibid para 44

nationals, however was the outcome of the case fair?

i) Critical evaluation of decision in Zalewska

It is evident from Zalewska that she, being a non-national experienced a disadvantage in comparison to UK nationals and once examined the restrictions were purely 'founded on nationality'[186] and hence, would be 'directly discriminatory'[187] Despite the fact that Miss Zalewska had been involuntarily unemployed, she was unable to access income support by relying on Article 7(2) of Regulation 492/2011 and Article 45 of TFEU.

The aftermath of not being able to re-register was disproportionate especially towards Zalewska who had been in employment for over a year and counted as registered through her first employment registration. [188] The fact that her personal

[186]Zalewska v Department for Social Development [2008] UKHL 67 [2009] 1 CMLR 24 Para 79
[187] Ibid para 29
[188] Ibid para 49-56

circumstances, which were only temporary indicates the UK courts' unwillingness to grant residence rights to persons who are not economically active, contravening to EU law principle of non-discrimination. Moreover, she was she was a jobseeker during the time that she sought for income based allowance which shows that the decision of the majority was not proportionate.

'The sanction, of depriving a worker who had been employed here for 12 months of the social benefits to which she would normally be entitled as a result of having joined the UK workforce, is neither suitable nor necessary for the achievement of that limited aim'.[189]

It is rational to agree with Barroness Hale in that that 'overall, the manner in which Baroness Hale considers proportionality reflects a more nuanced, Community law-inspired application of the principle'[190].

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[189] Ibid para 48
[190] S Currie (n 25) 54

5.1.3 Patmalniece case

Ms Patmalniece, [191]a Latvian pensioner arrived in the UK in June 2000 as an asylum seeker as a result of fearing persecution in Latvia due to her Russian Origin. She had previously worked in Latvia for forty years and had a Latvian pension of only £50 a month to survive on. In 2005, she applied for State Pension Credits[192] which enables eligible pensioners to 'top up' or raise their income. Her claim was refused on the grounds that she did not have a 'right to reside'[193] in the United Kingdom. She appealed to the Supreme Court on the grounds that the right to reside requirement was directly discriminatory towards EEC nationals in comparison to UK nationals as all UK nationals could automatically satisfy the right to reside requirement.

[191] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783
[192] SI 2002/1792
[193] Ibid reg (4) that 'A person is not to be treated as not in Great Britain if he is - (a) a worker … (b) a self-employed person…' and is otherwise within the scope of the directive.

Before the Supreme Court, Lord Hope gave the leading judgement posing two main questions[194]

1. Did the habitual residence requirement in reg 2[195] of the 2002 Regulations give rise to direct discrimination or indirect discrimination for the purposes of seeking benefits?

2. If the discrimination was indirect, could it be objectively justified regardless of the claimant's nationality?

Lord Hope, in his judgement argued that the situation, together with the relevant legislation had to be considered as a whole. He took the example, in Bressol[196] where Belgian authorities introduced further conditions for French students so as to access the Belgian education system which did not

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[194] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11; [2011] 1 WLR 783 para 20
[195] Regulation 2 of 2002 states A person is to be treated as not in Great Britain if he is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland,
[196] Case C-73/08 *Bressol v Gouvernement de la Communaute Francaise* [2010] 3 CMLR 20

extend to its own nationals where such practice was held as being indirect discrimination.

It was thus held that direct discrimination towards Parmalniece had not occurred since she could satisfy the criteria of being habitually resident in the UK as she was required to pass the 'qualified gateway' of being a worker, self-employed etc. Thus, 'habitual residence' requirement was held to be a neutral provisions, and thus indirectly discriminatory with the effect of operating mainly to the detriment of nationals of other Member States.[197]

Baroness Hale, focused on the legitimacy of the measure taken to limit access of benefits for Patmalniece, which effectively, according to her, depended on the national laws.

Baronness Hale pointed out that firstly, the most logical approach should be to look at the rights of residence granted under EU law stating

[197] Ibid para 60-62

> If nationals of one Member State have the right to move to reside in another Member State under European Union law, it is logical to require that they also have the right to claim special non-contributory cash benefits there - in other words that the State in which they reside should be responsible for ensuring that they have the minimum means of subsistence to enable them to live there.[198]

However she went on to consider the rules of residence under UK law and concluded that 'it is logical that [the host] State should not have the responsibility for ensuring their minimum level of subsistence'.[199]

Baronness Hale further considered that, under EU law, a person invoking their free movement rights has to reside legally within the member state and mere physical presence is not a criteria to make available such access to lawful residency under UK

[198] Ibid para 104
[199] Ibid para 103

law. She drew the distinction from Trojani[200] where the claimant had a genuine link with the host Member State, was lawfully resident there and thus could claim social benefits. Therefore, if Patmalniece was able to demonstrate that she was lawfully resident, through demonstrating a genuine link with the UK labour market then that would suffice under both EU law and UK law and enable her claim to benefits under the same conditions as UK nationals.

i) Critical evaluation of decision in Patmalniece

Puttick takes the view that the majority decision in Patmalniece 'devalues' European Citizenship, especially since the decision denies her of the 'most basic support needed to secure dignity in old age which is readily available to most UK and Irish claimants, including those who may never have been in any kind of paid employment'[201]. The

[200] Case C-456/02 *Trojani v Centre publique d'Aide sociale de Bruxelles* [2004] ECR I-7573
[201] K Puttick (n 11) 292

decision of the Law Lords further lowers the standard of quality of life where the outcome shows what 'welcome' 'EU nationals can expect when they reside in other Member States after spending most of their adult life in employment in another EU State'[202]. However, it is recognised that the decision was lawful under which clearly shows how 'unfortunate' the outcome was 'against a backdrop of European initiatives aimed at combating the social exclusion of European 'elders', and 'exploring new ways to support active ageing'.[203]

CHAPTER 6. CONCLUSION

In all of the above cases the justification for denying rights of residence have been deemed to be necessary and proportionate as they are made to protect the State's public finances. Given the nature of the transitional measures on free movement rights 'there has been a tendency of the UK courts to fail to engage with a full and rigorous application

[202] K Puttick (n 11) 292
[203] K Puttick (n 11) 292

of Community law principles when adjudicating on issues relevant to EU8 [Central and Eastern European]migrants'.[204] The three cases analysed in chapter four provide enough evidence to argue that 'it is through the national context that Community law based rights must filter'[205]despite the fact that Treaty rights on non-discrimination are directly effective in the UK. Also, The free movement rights derived from ones Citizenship status, which are valued for transforming social and welfare rights of free movers are not 'an automatic process but, rather, depends on the national courts' interpretation and goodwill'.[206] Furthermore the judgments, 'overlook the relevance of the broader Community provisions on free movement which extend some protection to former workers'[207] It is established that under EU law, Article 45 gives social rights to EU Citizens regardless of the time

[204] S Currie (n 25) 56
[205] S Currie (n 25) 57
[206] S Currie (n 25) 57
[207] S Currie (n 25) 52

they spend in employment.[208] The hurdles set by the UK government have let to Eastern Europeans access the labour market with one hand and at the same time imposed 'unnecessary' sanctions for failing to follow procedural requirements with the other.

As mentioned above Habitual residence may be justified on the grounds of ensuring the claimant has a"real link" to the society from which he or she seek to claim benefits from. Yet, 'The legally resident criterion' is more ambiguous since it does not specify the degree of integration required from the migrant and, 'arguably it goes too far'[209].The UK needs to show 'financial solidarity' with EU Citizens residing within its territories, especially in relation to persons who are able to show a genuine link with the labour market yet, the decision in the

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[208] Case C-53/81 *Levin* [1982] ECR-I 1035
[209] S Currie '"Free" movers? The post-accession experience of accession-8 migrant workers in the UK' (2006) 31(2) ELR 207, 226

UK courts are inherently mechanical in their judgement process. When an EU Citizen is out of work, the rational consequence should be that social assistance, such as income Support or jobseekers allowance, should be available as otherwise, it would place that Citizen in the most vulnerable position. Specifically in relation to 'some groups, including single parents, carers, and older Citizens are more vulnerable to current UK approaches to determining if residence rights have been acquired and retained'.[210]

Regulation 883/2004EC on the application of unified social security schemes throughout the Member States is not correctly adopted to protect vulnerable groups of Citizens in the UK.[211] It is highly possible that common social security solidarity within the EU has not come at the expense of weakening the UK governments ability to circumvent residence rights and grants of social

[210] K Puttick (n 11) 284
[211] Article 4 of 883/2004EC

security. Of course, Member States need to protect their economies from 'benefit tourism', however in the United Kingdom that has evidently come at the expense of undermining the community goals of social and economic solidarity set in The Treaty of Rome 1947 by 'raising the standard of living and closer relations between the States belonging to it'. [212] Despite the fact that the Transitional measures of 2004 are no longer in place the pattern of unfavourable treatment towards Eastern Europeans continues as is evidenced by cases such as Zalewska, Kaczmarek and Patmalniece.

On the contrary some have stated that providing the same rights to non-nationals with social benefits under the same conditions as national 'would run counter to an objective of the directive [2004/38 EC] namely preventing Union Citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system

[212] Article 2 of The Treaty of Rome 1947

of the host Member State'.[213] To rebut the previous statement, the Citizens Directive does also provide that Citizens of the European Union are free to reside in any Member State where it must also 'take into account the personal situation of the person concerned' when assessing if a Citizen has sufficient resources and thus is able to reside with the host Member State. To expel them on the grounds of merely protecting the social assistance system would run counter to Article 21 of the TFEU. ' Citizens are not 'resources' employed to produce goods and services, but individuals bound to a political community and protected by fundamental rights […] when citizens move, they do so as human beings, not as robots. They fall in love'.[214] Furthermore, it would be apt to state at this point that 'UK practice, in the way claims and awards of social assistance are currently being

[213] Case C-333/13 *Dano v Leipzig* [2014], para 74
[214] Case C-34/09 *Ruiz Zambrano* [2011], Opion of AG Eleanor Sharpston para 127-129

decided, is likely to be out of kilter with what EU law expects, particularly in the way proportionality principles should inform decisions on 'residence' and support'.[215] Also even under EU law a Citizen has to show a level of integration or a 'real link', which the UK Courts more often than ignores. Although an economic link is a prerequisite to receiving social benefits, it also urges the host Member State to look at factors such as previous history of the claimant, for example if they have been working before or have a record of taking up social benefits. The evidence post –enlargement suggests that the UK has benefited from the presence of Central and Eastern European workers due to their tax and national security contributions.The Accession Monitoring Report,[216] for example, confirms Central and Eastern Europeans work in the labour market with ''hard-to-fill'' jobs which include factory and

[215] K Puttick (n 11) 292
[216] Accession Monitoring Report 2004-2008 (Home Office/UKBA et al, 2008

warehouse workers, kitchen and catering assistants, cleaners and labourers. By denying Eastern Europeans the rights and benefits that normally accrue to migrant workers after the employment relationship has expired under EU law, the UK government ‘fails to shoulder responsibility for their welfare should they later fall on hard times’.