

Debate on European Citizenship “Preparing Cinderella”

Facultés Saint Louis, Brussels
24 May 2006,

“...European citizenship is an EU Treaty provision which resembles Cinderella before she went to the ball. With the crisis over the Constitutional Treaty and the uncertain status of the Charter of fundamental rights, many people might be forgiven for thinking that she and her prince will never find each other. However “Union citizenship has become an established term (whether we like it or not) in community and habitual language use, which can no longer be brushed aside.....”

This seminar aimed to show that despite appearances, European citizenship is developing as a concept on a twin track approach:

- Case law of the European Court of Justice

The European Court of Justice “has repeatedly emphasised that Union citizenship is destined to be the fundamental status of nationals of member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.” (Case C-209/03 Bidar). At the seminar, the recent cases in the Courts relating to residence rights were discussed.

- The European citizenship directive

This Directive on the rights of citizens of the Union and their families to move and reside freely within the Union should have been transposed into national legislation by 30 April 2006. Directive 2004/38/EC brings together nine existing directives for different categories of the population, thus providing legal recognition of the European citizen. It effectively abolishes short-term residence, removing red tape for young people moving around Europe. It seeks to clarify both the rights and obligations of citizens and public authorities.

This seminar attracted 100 participants, including, NGOs and representatives of regions. The programme is attached. It was co-organised by ECAS and Freshfields, Bruckhaus Deringer as a satellite event for the conference and general Assembly of the European Foundation Centre (EFC). Europe and the citizen was the main theme of the EFC conference held also in Brussels from 25 to 27 May.

In opening the seminar, the Chair, Vanessa Turner, pointed out that the European Courts have handed down judgements dealing with a vast array of areas affecting citizens as individuals. In addition, and particularly under article 18 (right of citizens to move and reside freely) Directive 2004 138/EC codifies the complex corpus of legislation and a number of judgements of the Court and is according to Commissioner Frattini “a clear expression of EU citizenship.” She made three points:

- In a difficult climate with the EU concerned rightly about the gap between the European Institutions and the citizen, the court shows that it is possible to place the citizen at the centre using in addition to Article 18, Article 12 EC of the EC treaty which prohibits discrimination on the grounds of nationality and also by means of a broad approach to the sphere of application of the treaty. The court is also considering people as citizens and not just in terms of their economic status.
- For every case which eventually reaches Luxembourg, there are probably thousands which do not, and not everyone, in particular unemployed people trying to defend their rights to unemployment benefit. They may not have the chance or opportunity, or the time to start litigation. The question is, how can their advisors (lawyers, or services such as ECAS), make use of the important principles and tests which are being developed by the Court of Justice? There is an enormous gap between the case law of the court and its recognition of the concept of European Citizenship in particular the right of free movement and equal treatment on the one hand, and what happens everyday when peoples' expectation that they will be treated as European citizens are actually disappointed, on the other.
- This debate should convince people that citizenship of the European Union is now just not some kind of *rhetorical ideal*, the realisation of which will have to wait until the problems into the constitution are sorted out or the Charter of Fundamental rights. European Citizenship is being created by the court and by European legislation.

I. Case law of the European Court of Justice

Speaking in a personal capacity and as a professor of law at Leuven University, Koen Lenaerts, gave the audience a wide ranging analysis of the background and case law based on articles 18 and 12. These are described in detail in the paper he had produced for a leading law journal as well as in the Durban law lecture by Dr. Julianna Kokott, Advocate General at the Luxembourg Court. Both papers were distributed to participants and are on the ECAS website (<http://www.ecas.org/product/91/default.aspx?id=511>).

The following were the main points to emerge from the background documents and the presentation by Koen Lenaerts.

1. The European Union based on unity and diversity is a citizen's project. Although the concept of citizenship was moulded over ten years in the Treaty of Maastricht, right from the start "the individual", "le particulier" has always been at the centre of European law, making out its specificity vis-à-vis general public international law. For the unity aspect you need a coherent legal order with mechanisms and cooperative standards among judges or competition authorities for example, but you also need citizens as bearers of rights and obligations. The recognition of the role of the individual, the citizen being the main distinguishing feature of the European Community was already made in the landmark judgement Van Gend en Loos, in 1963.

Concepts such as subsidiarity, proximity, transparency, representative democracy and legitimacy have all become part of the intellectual constitutional discourse about the European Union, precisely because the European Union is a citizen's Europe. A union has constantly to address the question: do we place responsibility at the right level of government from the perspective of producing what the citizen wants? This is part of the debate about the Constitutional Treaty.

2. At the same time, the concepts of citizenship may be problematic. The European Union is not aspiring to become a nation state so you cannot become a European like a US national, and for some this means that citizenship sounds slightly suspect. It seems to suggest a sense of belonging to a political entity the European Union does not aspire to become. Was this the problem, as the Dutch discovered at their referendum, with the concept of constitution? The whole debate on the constitution for Europe with the referenda in France and the Netherlands has shown that we are now in a citizen's Europe, where citizens debate on the European Union and whether or not they like the output or not. The Constitution fell victim to this debate, even though it is a better drafted document than the current amalgamation of Treaties in a Union without legal personality. The Constitution might have been a very good tool to meet, not entirely, but to a large extent, some of the concerns of the very people who voted "no". It aimed to include the Charter of fundamental rights in the primary law of a Union in which police and judicial cooperation would become more accountable and enforceable at the level of court practice.
3. What is European citizenship? "In many ways, citizenship is a 'pre-legal concept', it's a concept of a feeling of belonging, to a political entity which is not a nation state. Which is not contradictory to your original belonging, to your own state or sub state, regional, whatever it might be, its just an additional layer of feeling of belonging to your region, to your state and to Europe, because at each form of identity, you recognise common values, which you share with fellow citizens at each of these levels." Citizenship does not exist independently of the nationality laws of the member states. European citizenship as a legal concept has been thought in these terms and although expressed for the first time in the Maastricht Treaty in 1993, "it did not fall from the blue sky." The Maastricht Treaty did though encourage the gradual development of the Court and the legislation to consider citizens in their non-economic capacity, so that the dividing line between economic and non-economic is harder to draw.
4. European citizenship rights touch on sensitive areas of national sovereignty. One of the themes to emerge from this seminar was that jurisprudence involved reconciling European citizens' free movement rights with a large number of key areas of public policy – ranging from taxation, to the running of health services, the functioning of higher education or social protection and the rules governing nationality. Was there not a current of opinions in the "no" votes reflecting concern about social dumping that the European Union was not going far enough in areas such as social protection or taxation? The areas in which the Constitution negotiators failed to agree and which remain

in the area of unanimity rather than coming under the normal legislative process and majority voting – these are precisely the ones which end up in the Court. Where member states are not willing to harmonise at European level politically, such as taxation, there have been at least 50 landmark rulings. These show, in a more bottom-up approach, how tax systems have to be coordinated. Member states which want to retain their own freedom to set tax rates, cannot complain when other member states do the same and citizens or companies make use of their free movement rights to take advantage of the differences in national systems.

5. In the written papers and the speech by Koen Lenaerts, a number of cases illustrated how the court is combining free movement citizenship rights and the rights to equal treatment so that people can move and reside freely in an open space. This really is the people's Europe "where people feel the added value of the European Union and also to be the central actor of the whole system." For example:

- Just before the seminar, the court handed down a ruling that, provided certain conditions are met, a patient waiting for treatment under the UK national health service, has the right to go and obtain health care in another member state and be reimbursed. An institution conceived in a strictly national context can be inserted in the broader one of free movement of patients.
- Since the *Micheletti* case a member state cannot call into question the grounds on which another member state decides questions of nationality. This mutual trust has consequences: where there is no harmonisation, the freedom equally of other member states, to decide on nationality has to be accepted. So it is with the case of "baby Chen". A Chinese couple legally resident in the UK move to Northern Ireland to have another child which would not be allowed in their country of origin. Since Ireland considered as its nationals all those born either on its territory or in Northern Ireland, the Chinese baby is considered by the Court as a European citizen. Baby Chen can claim a right of residence as a non-economically active person, but having, through her parents, means of subsistence and health insurance.
- In the case of *Cowen*, the Court played a precursor role to the directives of the 1990s mentioned by Mr. Mattera on the free movement of students, pensioners and non-economically active people, and which in turn preceded the Maastricht Treaty article 18. Cowen as a tourist and a recipient of services, rather than at that time a Union citizen, was assaulted leaving the Paris metro. His claims for compensation for material and physical damage are upheld by the court on the grounds of equal treatment. The case law raises the question: once you are legally resident as a non-economically active person, to what rights of equal treatment based on nationality are you entitled? The case of *Martina Sala* claiming an education allowance for her child in Germany whilst not being economically active was decided in her favour. The judgement was a breakthrough but open to some criticism

because it referred to regulation 1408/71/EC on coordination of social security for migrant workers.

- In the case of *Grzelczyk*, a French national of Polish descent studying in Belgium, applied after four years for the *minimex*. He was refused. Even though no longer satisfying the requirement of having sufficient resources he had nevertheless been granted legal residence in Belgium for a fourth year. The Belgian government argued that he would only have been granted the *minimex* if he had come under the scope of regulation 1612/68/EC applicable to migrant workers. The court took a different view, arguing that as a citizen of the Union, he had moved lawfully from France to Belgium. Free movement of students came under the material scope of the application of the Treaty. Therefore the principle of Article 12 of non-discrimination on the basis of nationality applied. Belgians are not required to be wage earners to obtain the *minimex*. The government cannot apply a European citizen condition which they are not applying to their own nationals.

- In the case of *Bidar*, a French student who had followed secondary education for 3 years in the UK was refused a subsidized loan. The court reversed earlier case law on student loans pointing out that now there were the citizenship provisions in the Maastricht Treaty which also made education and free movement of students an explicit objective. It was though sensitive to the argument that the UK risked being flooded by foreign students claiming subsidised loans. *Bidar* won his case because he could show that he was integrated in UK society for 3 years before becoming a student, a period which the government itself recognised to be relevant. Therefore, the principle of equal treatment did apply and at that point no distinction could be made between the way EU citizens and UK nationals were treated.

Finally, just as this case shows that free movement of students is not unconditional, so in other cases the Court would not necessarily come down on the side of the citizen rather than that of the member state. There are conditions and limitations to the freedom of Article 18, for example by taking into account regulation 1488/71/EC, which does not for example allow for the export of all types of social benefits.

Following questions and answers with Koen Lenaerts, the debate moved on to consider Legislation developments.

II. Mr Michal Meduna DG Justice, Freedom and Security made a useful summary of Directive 2004/38/EC

Article 18 Part II of the Treaty grants citizens the right to move and reside freely within the Union, subject to certain limitations and conditions. ‘EU Citizenship’ despite its single framework, continues to have differences in treatment between Union citizens who come in different categories. On the one hand, the *economically*

active citizen possesses explicit rights and are better protected than, on the other hand, the *non-economically active* citizen, whom continue to be 'slightly suspect' to the social security or public funds of the Member State to which they migrate. The Commission and especially the Court have thus fought vigorously to bring all citizens onto an equal playing field.

Before April 2006, two Regulations and nine Directives governed the laws on free movement of persons. On April 30th 2006, Directive 2004/38/EC replaced the entire legal regime and incorporated important case law. The Directive however does not represent the current state of play as of the end of April; as the relationship between the Directive and the case of *Bidar* is still an outstanding question. Nevertheless, the Commission had always intended 'not to fall beyond what had already been achieved in the Community legislative' and although some people were disappointed that it had not gone further in front, its 'decent step ahead'.

Main 'novelties' of the Directive

Broader family

Before the new Directive, family members were limited to the spouse, dependant children and in some cases, dependent parents. The '*formal family*', made by contractual marriage thus excluded co-habitants and same sex relationships.

The new Directive now creates a '*core family*', whom now receive automatic rights to move and reside, regardless of nationality. For example, a German has the right to take his Korean wife to join him in Germany, and her parents if they are dependant on the spouse

In addition, Directive 2004/38EC, will also recognise registered partnership as *equivalent to marriage*, allowing the registered partner of the Union citizen to come under the scope of 'family members'. However, registered partnership will only be recognised when the partner *comes from* a Member State which recognises registered partnership *to* a Member State which also recognises registered partnership as equivalent to marriage. Most Member States remain conservative on the recognition, but more and more states have begun to recognise registered partnership as equivalent to marriage, the last being the Czech Republic.

Other family members not part of the 'core' now have a '*decent right*' to come and join the Union citizen in the host Member State. If a brother or a sister, an uncle, or nephew etc. are dependents or are members of the same household, they too will have the right to join the Union citizen in the host Member States.

The Directive also allows for unregistered relationships, for example a Union citizen's non-EU national fiancée will have the right to reside, if the relationship, which will be duly attested, is 'durable'.

It remains up to the host Member States to say no, but all personal circumstances into account and justify any denial of residence. So as not to be a '*victim to the whim of the border guard*', there is the right to appeal for independent redress. With an

element of discretion remaining, it is therefore not an automatic right of residence; nevertheless it's a '*big step ahead*'.

No more resident's permit

The right of residence is not *granted* or *permitted*: it is 'Union Citizenship' which is the source of all rights; the paper work only acknowledges these legal rights. Therefore, there will be no more residents' 'permit' but instead: 'residence certificates'. This paperwork is comparable to the ticket given when lodging 'luggage' in a locker, registration will also take place '*on the spot*'. This removes any room for Member States' discretion, covering all Union citizens, whether as primary beneficiaries of the right of residence or a citizen who has derived the right as a family member from a Union citizen. However, family members from third countries will be given a residence card; the difference was maintained to exempt the third country national family member from visa obligations, giving them a "pre-clearance", and to maintain general security. In addition, Member States must grant every facility to these persons to obtain the necessary visas, interpreted as being issued as soon as possible, free of charge. Member States should also take into only two aspects: whether you are a Union citizen or a family member.

Right of Residence

Only a valid passport or identification of nationality is required to be resident in another Member State for up to three months, i.e. identity and nationality grant EU citizenship.

Retention of the Right of Residence

Another critique of Community legislation for a long period of time was that family members, who had derived rights, were dependent on the residence of the Union citizen on the territory in question. Thus often, in event of death, departure or divorce of the Union citizen, the family member would be left without any legal basis.

The Directive now grants retention of the right of residence, in event of death, departure, divorce or termination of registered partnership, for family members. Although the Directive takes into account the level of 'integration' into society of the national, so long as they continue to meet the conditions on their own (sickness insurance and sufficient resources). Therefore, expulsion will amount if they become an unreasonable burden on the social assistance system of the host Member State; an expression of the financial solidarity between the Member State and the Union citizen. As the Court ruled in *Trojani*; where a citizen receives a resident's he/she has the right to equal treatment, therefore the right to receive social assistance as a Member States own nationals. After receiving benefits for a period of time, he/she will eventually amount to a serious burden on the social system, allowing Member States to expel a citizen. Thus, in applying the principle of proportionality; personal circumstances, amount of grant aided, whether the problems are temporary, age, health condition, element of integration into the society must all be taken into account, to allow a host Member State exercise expulsion.

Permanent Residence

Another new novelty is the right of *permanent* residence, which used to be limited to workers, pensioners or in event of an industrial accident. Under the Directive, permanent residence is achieved after *five years of legal continuous residence* in a Member State. For example, a student studying in Belgium for five years or more, will attain automatically right of residence, once again, right of residence is created once conditions are met. There is also no distinction between different categories of citizens and once obtained, will not be subject to conditions of health insurance or financial resources. However, permanent residence can be lost if there is *two years of continuous absence*.

Expulsion

The principle of proportionality stressed in every part of the Directive is a useful tool for both for Member States to protect their territory from '*unwanted Union citizens*' and guarantee Union citizens and their family members the right of free movement.

On one hand, the Directive states expulsion will only amount if you are a '*genuine, serious and present threat to one of the fundamental interests of society*'. Personal circumstances must also be taken to account: expulsion cannot be a general preventive measure, or be to serve economic ends. A conviction of a crime in itself is also not a sufficient reason for expulsion. Though this may conflict with the European arrest framework, as an extradition is forceful removal from the territory of a Member State where a Union citizen exercises the right of free movement, though this question also remains outstanding. However, when a citizen is expelled for not meeting the conditions, the citizen can re-enter at any time, there is no re-entry ban if it is not on the grounds of public policy or security.

Right of entry

In conjunction with the principle of proportionality; expulsion is the most serious, and the last resort. Based on the MRAX¹ case, the Directive also goes further, stating that after being unable to establish a threat to public health, security or policy; a Member State may not send back at the border a third country national who is married to a national of a Member State, who attempts to enter its territory without being in possession of a valid passport or a visa, where s/he is able to prove his/her identity and conjugal ties. The case stresses the importance of the right derived from a family link, i.e. the fact that you meet the conditions, and therefore the link can be proved by any type of document. However, this does not mean free movement without passports and visas, the risk that the border guard will turn you away remains; it is the principle that is significant.

¹ C-459/99

Personal Scope

“If you are a national of a Member State, you are a Union citizen”. This equation is not as simple as it seems. In the case of *Manjit Kaur*², the court ruled that in the UK, where there exist a ‘hierarchy’ of nationals, including nationals who cannot enter the UK, will not be considered as Union citizens. In addition, those from the Channel Islands and Isle of Man do not have a general link with the UK, thus no rights of free movement, though Union citizens do have the right to go to the Channel Islands or Isle of Man.

Derogations from the Principle of Equal Treatment

Member states are not obliged to give Union citizens other than workers and self-employed citizens, social assistance during the first three months of their residence.

Regarding maintenance aids for studies and vocational grants, so long as the student or trainee has no permanent residence, those non-economically active persons have no right to be treated equally. Note, *Bidar* states that if you have a previous link with society, and this link is genuine, then you will have the right to equal treatment.

Article 34 Publicity

Since this Directive introduces a new regime for free movement and residence and establishes new rights, it raises the obligation of the Member States to disseminate information regarding these rights to Union citizens, in other Member States as well as their own nationals. The Commission also feels that it is not information to be discharged in one go, the Commission will encourage Member States to carry out a continuous informative campaign, with this seminar as a start.

Mr. Mattera as the “agent provocateur” said that despite the work of the European Court of Justice, one still could not say “civis europaeus sum”. He raised the question “is there concordance or discordance between the case law and the legislation?” “ It was an important question because member states apply the legislation not the case law. The Court perceived the individual, the citizen, but the legislators still tended to see “...economics”. Two areas of ambiguity:

- Apparently equality of treatment for students is not to be applied until after five years by which time they are considered settled, whereas in the case of *Bidar* it was three years. However, in that particular case, the 3 year period was defined by the UK government.
- Would there really be abolition of residence permits if they were to be replaced by a simple “administrative formality”? It might be easier to carry around a residence card – say an Italian one, giving your address in Belgium, than having to keep with you a piece of paper declaring your residence in another EU country.

² In 1962, the UK had colonial power over Kenya, granted Ms Kaur UK citizenship, as White and Asian nationals of Kenya were not seen to belong to that country. She did not acquire Kenyan citizenship on de-colonisation.

In concluding the seminar, **Tony Venables** thanked the speakers and audience. He reiterated what had been said at the beginning by Vanessa Turner about the need to close the gap between the case law of the European Court and what happens in practice. This could only happen if citizens were much better informed and stood up for their rights. Of the EU Institutions, it was the Court of Justice which was closest to the citizen and which had done most to develop the concept of European citizenship. This was why ECAS was collecting signatures for a petition asking the European Parliament to develop a concept of European citizenship and demand advice from the other institutions.