EUROPEAN REPORT
on the Free Movement of Workers
in Europe in 2011-2012

FOLLOW-UP OF CASE LAW OF THE COURT OF JUSTICE

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1. INTRODUCTION

The national experts were requested to give an in-depth analysis and interpretation of the importance and potential impact of the Court's recent judgments. This will include a full account of follow up both by the legislator and the national courts. For the 2011-2012 edition the following 6 key judgments of the CJEU on free movement of workers were proposed:

- *Zambrano* (C-34/09)
- *McCarthy* (C-434/09)
- *Dereci* (C-256/11)
- *Tsakouridis* (C-145/09)
- *Dias* (C-325/09)
- *Casteels* (C-379/09)

Except for a short notice on *Zambrano* no follow up case law report was received from Luxembourg..

2. ZAMBRANO (C-34/09)

2.1. Follow up to Zambrano

The Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) has, essentially, asked the Court of Justice whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third-country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit. That question has arisen in the context of proceedings between Mr Ruiz *Zambrano*, a Colombian national, on the one hand, and the Office national de l'emploi (National Employment Office) (ONEm), on the other hand, concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

The Court starts by pointing out that, under Article 3(1) of Directive 2004/38/EC, entitled '[b] beneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members …'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

It follows that Article 20 FTEU confers the status of citizen of the Union on every person holding the nationality of a Member State. Since Mr Ruiz *Zambrano*'s second and third children possess the Belgian nationality, they undeniably enjoy that status.

The court then states - as it has several times before - that citizenship of the Union is intended to be the fundamental status of nationals of the Member States. In those circumstances, Article 20 FTEU 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. According to the Court, a refusal to grant a right of residence and also a work permit to a third-country national who has dependent mi-

nor children in the Member State where those children are nationals and reside, has such an effect.

It must be assumed that a refusal (of a right of residence to such a person) would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, without a work permit such a person would risk not having sufficient resources to provide for himself and his family. That would also result in the children having to leave the territory of the Union. In those circumstances, the Court concludes, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

Accordingly, the Court rules that, Article 20 FTEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children. It also precludes the refusal to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

2.2. Concluding on Zambrano

The present writer would like to point out at the outset that some of the national reports (f.e. Estonia, Luxembourg, Poland and Slovakia) dealt with possible impacts of Directive 2004/38/EC regarding *Zambrano*-like cases. It is reiterated here that the Court explicitly stated that the directive does not apply to a situation such as that at issue in *Zambrano*.

Based on the national reports on *Zambrano* (annex I.1) the following can be concluded.

No reference

The *Slovenian* report does not go into the details of *Zambrano*.

No impact

Taking into account the circumstances of the case, the *Zambrano* decision would not have any impact in *Estonia*.

Under *Cypriot* law a *Zambrano* situation could occur, but it is exceptional due to the fact that Cypriot law on citizenship is dominantly based on the ius sanguinis principle and the granting of citizenship is based on discretionary power of the authorities and met with strong reluctance. If a rare situation like that were to occur, the *Zambrano* judgment might presumably apply.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *Zambrano*.

In *Romania* the strict application of the ius sanguinis citizenship principle precludes in most cases the possibility of a minor child obtaining Romanian citizenship while his parents have another (third-country) citizenship.

Existing legislation questionable

It is questionable whether the existing legislation in *Belgium*, *Czech Republic*, *France*, *Hungary*, *Luxembourg* and the *United Kingdom* is in conformity with the *Zambrano* judgment.

The specificity of the *Belgian* law is the principle of assimilation of a Belgian's family members to an EU citizen's family members using free movement. A project to change the

law in 2011 on this topic (see below) led to a new law on 8 July 2011, which maintains the principle of assimilation but modifies the conditions to benefit from family reunification. The conditions are now the same for a Belgian's or a TCN's family members. This means that in fact no real assimilation exists anymore. *Zambrano* was mentioned during the discussion in the Travaux préparatoires. The draft law was examined for a pre-legal advice by the Belgian Council of State just one month after *Zambrano*. The Council of State reiterated that Article 20 TFEU precluded national measures that have the effect of depriving EU citizens of the genuine enjoyment of substance of the rights conferred by virtue of their status as citizens of the Union. According to the Council of State, the new draft legislation failed to satisfy this objective when it considered a Belgian as a non-EU citizen under the right of family reunification. The Parliament did not however follow the Council of State's view. The interest in *Zambrano* resides in the new conditions for family reunification with a Belgian citizen, which do not apply to 'family members … who are the father and the mother of a Belgian minor of age' (Article 40 ter, § 3 Aliens law).

Although *Czech* law appears to be in line with *Zambrano*, the conditions for issuance of a residence card are not. Due to the definition of a 'family member' in the FoRa Act a parent in a *Zambrano*-like situation should have an accommodation ensured and a common household with his child. Furthermore, a parent must not be a burden on the social system.

In *France* two judgments of the Administrative Court of Lyon refer specifically to the CJEU *Zambrano* judgment. It does not seem obvious that these judgments are in full compliance with the jurisprudence of the CJEU. It therefore becomes essential to wait for a possible referral to or advice from the Council of State. In particular the judgment of the Administrative Court of 19 October 2011[1] seems to introduce an additional requirement: the judges concluded that France may not be regarded as the state of habitual residence of the French daughter of an Ivorian national, whose maternal grandmother took care of after her mother's departure for France and whose father was still living in Côte d'Ivoire to the date of the decision in dispute.

According to *Hungarian* law persons who are the official carer of a minor Hungarian national qualifies as 'family member'. They are entitled to residence for more than three month even if no suitable financial means can be presented. But Hungarian law provides for unemployment benefits only if the previous employment was lawful. In this respect the law at present would qualify a situation like the one in the *Zambrano* case in the same way as Belgian law did.

The *Luxembourg*'s Ministry of Immigration underlines that some provisions of the law of 29 August 2008 on free movement of persons and immigration do not apply to the *Zambrano* situation. By excluding their application, the Ministry seems to recognize that those provisions apply to third-country nationals only, while in the *Zambrano* case, a situation has arisen where EU-law is applicable: thus the conditions for small children born in Luxembourg and of Luxembourgish nationality to be granted the authorization to stay in Luxembourg are different and easier than for cases of family reunion of children of third-country nationals not falling under the *Zambrano* jurisprudence.

Although in the *United Kingdom* the substantive law as interpreted by the courts seems in line with *Zambrano*, applicants under *Zambrano* are not being granted a right of appeal, nor is there any provision for applications to be made from outside the UK. Furthermore, in a

1 Cour administrative d'appel Lyon, 19 Octobre 2011, n°11LY00762, Tape Epouse Toa Bi c Préfecture du Puy-de-Dôme.

memo dated 16 September 2011, the Home Office set out to caseworkers how the *Zambrano* case should be applied to cases in the UK. The problems which are arising in practice due to this memo comes from the so-called 'sole carer' test: if there is somebody who can look after the British child or dependent adult who is not the third country national, then the third country national will not have a right to reside in the UK and the application will be refused.

Existing legislation in contradiction

The legislation in *Bulgaria, Greece, Latvia, Lithuania, Poland, Slovakia* seems to contradict the *Zambrano* judgment.

The conditions for issuance of a residence card provided in Article 24 of the *Bulgarian* LFRB and the administrative practice make it nearly impossible for a third-country national parent like *Zambrano* to obtain a residence card. The national report mentions nevertheless several judgments of the Sofia Administrative Court in which the refusal of a residence permit was annulled with reference to the *Zambrano* case.

In *Greece* third-country national parents shall only be issued with a residence card if they are dependent on – in this case – their Greek children. Therefore, Greek legislation is not in line with the *Zambrano* judgment.

Latvian law does not cover situations like the one in the *Zambrano* case. Under the Immigration Act a right of residence can be granted to parents like *Zambrano*, but only (among others) after they reached the pensionable age. However, the administrative practice in Latvia is the opposite of its laws, as OCMA (Office of Citizenship and Migration Affairs) grants temporary and permanent residency permits to third-country national parents of minor Latvian citizen.

With reference to the *Zambrano* judgment, there could be similar problems in *Lithuania* as in Belgium. A derivative right of residence from the child who is an EU national is not among the exhaustive list of residence grounds in the Aliens Law.

The *Polish* Act on entry shall be applicable only in transnational situations (i.e. EU citizens and members of their families). Consequently, the (internal) situation like the one in the *Zambrano* case does not fall under the scope of this Act. In addition, the Act on promotion of labour and employment institutions does not release a parent like *Zambrano* from the obligation to obtain a work permit. Although the right to take up employment is granted to family members of an EU/EEA citizen or specific third country nationals (foreigners), the definition of a family member covers only a spouse of an EU or a Polish citizen as well as a descendant of a Polish citizen or a foreigner (as mentioned above) who is under 21 years of age or is dependent. Therefore, this definition does not cover ascendants of a (minor) EU citizen who has the custody over that minor EU citizen.

As regards the *Zambrano* case, parents, third country nationals, of children, who are Slovak citizens will not be entitled to reside in *Slovakia* according to current Slovak legislation in force. The right to reside of the parents cannot be derived from the right to reside of the children, unless the parents are dependent on them. The same applies to other relationships of dependency. The right to reside of an individual cannot be derived from the right to reside of a Slovak citizen, who is dependent on the individual concerned, and did not exercise his/her right to freedom of movement.

Existing legislation in conformity

The existing legislation is considered in conformity with the *Zambrano* judgment in *Austria, Denmark, Finland, Germany, Ireland* (INIS website questionable), *Italy* (even more liberal), *the Netherlands, Spain* and *Sweden*.

According to the Austrian rapporteur the CJEU case law doesn't require an amendment of national law. There is the possibility to take 'family requirements' into account when expulsion orders or residence bans are enacted – it is a matter of application.

In *Denmark* it is the assumption of the Ministry of Refugee, Immigration and Integration Affairs that a residence card will only have to be granted in situations where a third-country national is the only parent on whom the minor child is dependent and no other parent, capable of taking care of the child, is residing in the Member State. In other words, the minor child will only have to be considered as deprived of the genuine enjoyment of the substance of the rights attaching to his or her status of Union citizen, if refusal of residence to the third-country parent would in effect require the child to follow the parent to his or country of origin.

The *Finnish* rapporteur expects no major influence of the *Zambrano* judgment, as family members of Finnish citizens living in Finland are issued with a residence permit on the basis of family ties. Also, that permit grants an unlimited right to work.

Based on extensive coverage of Federal and national case law the *German* rapporteurs conclude that the legislation as interpreted by the courts is in conformity with the *Zambrano* judgments of the CJEU.

The *Zambrano* judgment has important implications for the third-country national parents of children born in *Ireland* prior to 1 January 2005 as such children were constitutionally entitled to jus soli Irish citizenship. A constitutional amendment in 2004 removed this constitutional entitlement in respect of children of third-country nationals born in Ireland after 1 January 2005 under certain circumstances. According to the website of the Irish Naturalisation and Immigration Service (INIS), the *Zambrano* judgment applies to an Irish born citizen's country of residence and nationality. Therefore, if an Irish born citizen child has not been ordinarily resident in Ireland, his/her parent(s) cannot rely on *Zambrano* as a basis for securing a right of residence in Ireland. However, in a recent case, an Irish citizen child was allowed to return to Ireland to apply for *Zambrano* residence where the child and their mother had previously been required to leave Ireland on the expiration of their visa. The INIS website further provides that the *Zambrano* judgment is not applicable to any person who left Ireland of his/her own free will. The present writer considers the content of the INIS website questionable in the light of the *Zambrano* judgment.

Italian law appears to be in conformity with the *Zambrano* judgment, as the parents of an Italian minor living in Italy can be issued with a residence card for family members.

Dutch law as interpreted by the Judicial Division of the Council of State should be considered in line with *Zambrano*. The first occasion in *the Netherlands* on which the Judicial Division of the Council of State expressed its views on the *Zambrano* ruling was March 7, 2012, when it handed down four cases.[2] In three of the 7 March-cases the Judicial Division

2 For an earlier decision dismissing reliance on the genuine enjoyment test on procedural ground, see: Afdeling Bestuursrechtspraak Raad van State, 12 January 2012, 201200054/2/V2, MigratieWeb ve12000216, *idem.*, 14 September 2011, 201012035/1/V3, LJN: BT1936, JV 2011/462 with commentary T.P. Spijkerboer. For an injunction decision, see: Pres. Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201108763/2/V2, MigratieWeb ve1102228.

of the Council of State found that the decision not to apply the genuine enjoyment-test was inadequately substantiated. In two of these cases, the genuine enjoyment-test should have resulted in the issuing of a residence permit respectively a long-stay visa. These cases share that there is only one parent involved in the children's care as the Dutch parent has passed away (long-stay visa) respectively disappeared from the scene with unknown destination (residence permit).[3] In the long-stay visa case, the Judicial Division of the Council of State dismisses the argument that the children can live with the paternal grandparents who are residents of the Netherlands without considering whether the grandparents are willing and capable of caring for the children, as the test is whether the children would have to leave EU-territory in order to live with their parent(s), not whether there might be a third party in the Member State of which the children are a national who can care for them.[4] It also finds immaterial the fact that the children have limited ties with the Netherlands as they have spent all or most of their lives in Indonesia where they attend an international school and do not speak the language of that country.[5] In the residence permit case, the Judicial Division of the Council of State dismisses as an option the fact that the Spanish authorities have been requested to assume responsibility under the Dublin-II Regulation as the claim has not been acknowledged by Spain and it is not clear whether the claim has been or still can be executed.[6] Along the same lines as in the long-stay visa case, the presence of an uncle in Spain is labelled immaterial as the question is not whether the children will be cared for, but whether the children will have to leave the EU-territory to be with their parent(s).[7] In the two other cases the Judicial Division of the Council of State ruled that the decision to withhold residence permission did not amount to the denial of the genuine enjoyment of EU-citizenship rights notwithstanding the fact that the Dutch parent was considered unfit to care for the children. A statement establishing that the Dutch parent was unfit to take up paid employment was not considered evidence that s/he is not capable of caring for the children. In both cases the Judicial Division of the Council of State emphasizes that professional assistance is available in the Netherlands and that there is no evidence that the Dutch parent will not benefit from this public service. As Dutch nationals are, in principle entitled to public benefits, the fact that the Dutch parent is dependent on public funds for the livelihood of the children is found immaterial.[8]

The mandatory application of the *Zambrano* case law in *Portugal* is strengthened by its own Constitution which establishes in Article 33(1) a fundamental right for every Portuguese national to stay and reside in the Portuguese territory. According to Article 18(3) the substance of a fundamental right may in no way be restricted. Such constitutional provision would preclude by itself the reverse discrimination that might occur if the CJEU had decided

3 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.1 and *idem*., 201102780/1/V1 cons. 2.3.8.

4 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.7.10.

5 *Idem*., cons. 2.3.4.

6 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201102780/1/V1 cons. 2.3.8.

7 *Idem*.

8 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201108763/1/V2, cons. 2.5.4 and 2.5.7. and *idem*., 201011743/1/V1, cons. 2.3.7. Reliance on latter decision: Rechtbank 's-Gravenhage, zp Middelburg, 22 March 2012, Awb 11/35478. In this case the refusal to grant the third-country national parent a residence permit was not considered to amount to an obligation to leave the EU-territory for her son who suffered from a language and speech deficiency. The father was found to be able to take on the daily care of the child, if necessary with assistance of public services. The fact that this would interfere with his work obligations was set aside by the court arguing that it was the father who would have to choose between work and the care for his son.

that the right of residence foreseen by Article 21 TFEU presupposed the previous exercise of the right to move to the host Member State.

Spanish law as interpreted by different courts (see the national report) should be considered in line with *Zambrano*.

Swedish law too as interpreted by the courts (see the national report) should be considered in line with *Zambrano* (even more liberal).

Legislative and/or policy amendments

Legislative and/or policy amendments are reported in *Belgium, Denmark, Ireland, Lithuania, the Netherlands, Spain* and *the United Kingdom.*

Already in 2006 the *Belgian* Nationality Code was modified in order to restrict the access to the Belgian nationality iure soli. In consequence, practically, Belgian children (EU citizens) of TCNs are fewer. The specificity of Belgian law is the principle of assimilation of a Belgian's family members to an EU citizen's family members using free movement. A project to change the law in 2011 on this topic led to a new law on 8 July 2011, which maintains the principle of assimilation but modifies the conditions to benefit from family reunification. The conditions are now the same for a Belgian's or a TCN's family members. This means that in fact no real assimilation exists anymore. *Zambrano* was mentioned during the discussion in the Travaux préparatoires. According to the Council of State, the new draft legislation failed to satisfy the assimilation objective when it considered a Belgian as a non-EU citizen under the right of family reunification. Parliament did not however follow the Council of State's view.

As regards the issue of reconsideration of cases in which the residence right of parents has been refused prior to the *Zambrano* judgment, the *Danish* Ministry of Refugee, Immigration and Integration Affairs has issued guidelines based on the principle that the CJEU interpretation of Art. 20 TFEU must be given effect as of the date of entry into force of this provision, i.e. 1 November 1993 when the Maastricht Treaty establishing Union citizenship entered into force.

In 2004 an *Irish* constitutional amendment removed the constitutional entitlement to ius soli Irish citizenship in respect of children of third-country nationals born in Ireland after 1 January 2005. Regarding the third-country national parents of these children the *Zambrano* case will not be applicable. The *Zambrano* judgment will however have important implications for third-country national parents of children born in Ireland prior to 1 January 2005. The Department of the Minister for Justice and Law Reform shall examine all cases before the courts involving Irish citizen children where the *Zambrano* judgment would be relevant and, where appropriate, take decisions without necessitating a Court ruling. The examination of cases involving Irish citizen children, with potential application of the *Zambrano* case, is ongoing. In March 2012, the Minister for Justice, and Equality reported that 1,680 persons had applied to the Immigration Service of his Department for re-examination of their case in light of the *Zambrano* judgment. As of March 2012, decisions had been made in 925 cases and permission to remain was granted in 791 cases.

In *Lithuanian* administrative practice, there have been a few practical situations in which the migration authorities provided advise to its subordinate body to issue a residence permit in a *Zambrano* type of case concerning the issuance of a residence permit to a father taking into account the best interests of the child who was an EU national.

In *the Netherlands* based on the case law of the Judicial Division of the Council of State of 7 March 2012 (see above) the minister of Immigration, Integration and Asylum concluded on 2 July 2012: 'that if there is an objective obstacles for the Dutch parent to take care for the child care, the other parent, not a union citizen, has a right of residence as the child would otherwise has to leave the Union. This can happen due to medical impediments or because that parent is deprived of parental authority, etc. The care need not take place in the Netherlands, but can also provided in another Member State. These cases must be assessed individually.' The policy guidelines will be adjusted. It is expected to have a limited number of cases per year.[9] It is questionable whether the reference to the possibility of care in another Member State is in conformity with the case law of the Judicial Division of the Council of State of 7 March 2012.

In *Spain* a Circular of the Attorney General 5/2011, 2 November 2011, (JUR 2011\395037) refers to the *Zambrano* judgment to exclude from the measure of expulsion as an alternative to imprisonment (art.89 Criminal Code) the foreign parents of Spanish children and EU children.

In a memo dated 16 September 2011, *the United Kingdom* Home Office set out to caseworkers how the *Zambrano* case should be applied to cases in the UK. According to this there are two classes of potential beneficiary: a third country national adult upon whom a British citizen *child* is dependent and a third country national adult upon whom a British citizen adult is dependent. The problems which are arising in practice comes from the so-called 'sole carer' test: if there is somebody who can look after the British child or dependent adult who is not the third country national, then the third country national will not have a right to reside in the UK and the application will be refused. Another issue is that applicants under *Zambrano* are not being granted a right of appeal, nor is there any provision for applications to be made from outside the UK. The Home Office sets out in its memo that it will be amending the Regulations and providing further detailed guidance. As yet this has not happened.

Judicial references

References by national courts and/or ombudsmen to the *Zambrano* judgment are mentioned in the *Austrian, Bulgarian, Czech, French, German, Irish, Dutch, Polish, Spanish, Swedish* and *UK* reports.

Academic references

In *Belgium, Italy* and *the Netherlands* the *Zambrano* judgment is also reported as mentioned in academic articles.

9 Tweede Kamer, 2011-2012, 30 573, no. 110.

3. McCARTHY (C-434/09)

3.1. Follow up to McCarthy

European Union law allows the spouse of a national of a Member State residing legally in another Member State to remain with his spouse even if that spouse is not a national of an EU Member State.

Shirley *McCarthy*, a national of the United Kingdom, is alsoan Irish national. She was born in the United Kingdom and has always resided there,without ever having exercised her right to move and reside freely within the territory of other EU Member States. Following her marriage to a Jamaican national, Mrs *McCarthy* applied for an Irish passport for the first time and obtained it. She then applied to the British authorities for a residence permit, as an Irish national wishing to reside in the United Kingdom under European Union law. Her husband applied for a residence document as the spouse of a Union citizen. Those applications were refused on the ground that Mrs *McCarthy* could not base her residence on European Union law and invoke that law to regularise the residence of her spouse, since she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Supreme Court of the United Kingdom, before which the case was brought, asked the Court of Justice whether Mrs *McCarthy* can also invoke the rules of European Union law designed to facilitate the movement of persons within the territory of the Member States.
In its judgment, the Court states, first, that the directive relating to freedom of movement for persons determines how and under what conditions European citizens can exercise their right to freedom of movement within the territory of the Member States. Accordingly, the directive concerns the travel or residence of a person in a Member State other than that of which he is a national. In this regard, the Court recalls that under a principle of international law, reaffirmed in the European Convention on Human Rights, Union citizens residing in the Member State of which they are a national – such as Mrs *McCarthy* – enjoy an unconditional right of residence in that State. The Court therefore finds that the directive cannot apply to such persons.

Similarly, the Court notes that the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement. Thus, the Court finds that the directive is not applicable to Mrs *McCarthy*'s situation. With regard to Mrs *McCarthy*'s husband, the Court finds that as he is not the spouse of a national of a Member State who has exercised her right to freedom of movement, he also cannot benefit from the rights conferred by the directive.

The Court then recalls that a person – such as Mrs *McCarthy* – who is a national of at least one Member State enjoys the status of a Union citizen and may, therefore, rely on the rights pertaining to that status, including against her Member State of origin, in particular the right to move and reside within the territory of the Member States. However, the failure by the national authorities to take into account the Irish nationality of Mrs *McCarthy* for the purposes of granting her a right of residence in the United Kingdom in no way affects her right to remain in the United Kingdom or to move and reside freely within the territory of the Member States. Likewise, the national decision does not have the effect of depriving Mrs *McCarthy* of the genuine enjoyment of the substance of the other rights associated with her status as a Union citizen.

Consequently, the Court rules that, in the absence of national measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights arising by

virtue of her status as a Union citizen or of impeding the exercise of her right to move and reside freely within the territory of the Member States, the situation of Mrs *McCarthy* has no connection with European Union law and is covered exclusively by national law. In these circumstances, Mrs *McCarthy* cannot base her residence in the United Kingdom on rights associated with European citizenship.

3.2. Concluding on McCarthy

Based on the national reports on *McCarthy* (annex I.1) the following can be concluded..

No reference
The *Bulgarian, Danish, Finish, Lithuanian, Slovenian* and *Spanish* reports do not cover *McCarthy*. The French, Greek and Slovakian reports do not go into the details of *McCarthy* either.

There is no *Luxembourg*'s follow up report available.

No impact
The outcomes of the *McCarthy* case would not have significant influence to the *Estonian* system.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *McCarthy*.

Existing legislation questionable
It is questionable whether the existing legislation in *the Netherlands* and *Poland* is in conformity with the *McCarthy* judgment.

In *the Netherlands* due to conflicting case law of the Judicial Division of the Council of State (judgments of October 28, 2011 and November 2, 2011) is it questionable of *McCarthy* is implemented correctly. In both cases the Judicial Division of the Council of State's reading of consideration 43 of the *McCarthy* judgment is that Directive 2004/38/EC does not apply to cases in which an EU-citizen who is a national of two Member States, but has always resided in a Member State of which s/he is a national. Applying this to the two cases it finds on October 28, 2011 that a Spanish national who has acquired Dutch nationality later in life and has not argued that she has de facto moved to another Member State under Union law does not derive rights from Directive 2004/38/EC as, according to Article 3(1), she does not qualify as beneficiary.[10] Four days later, it rules that the presumption underlying the conclusion that a Dutch/Portuguese national who has exercised free movement rights prior to acquiring Dutch citizenship should be treated as a Dutch national who has never exercised free movement rights, is that acquisition of Dutch nationality detracts from the rights which this individual enjoys by virtue of the fact that he is also a national of another Member State.[11] In his commentary Boeles argues that the 2 November 2011 decision rectifies the 28 October 2011 ruling and is compatible with the *McCarthy* ruling.

10 Afdeling Bestuursrechtspraak Raad van State, 28 October 2011, 201012858/1/V2, LJN: BU3406, JV 2012/44, cons. 2.4.2.

11 Afdeling Bestuursrechtspraak Raad van State, 2 November 2011, 201011940/1/V1, LJN: BU3411, JV 2012/45, with commentary P. Boeles, cons. 2.4.2.

Concerning the *McCarthy* judgment, the Polish Act on entry shall not be applicable to those Polish citizens, who have never made use of free movement rights and consequently their situation may be described as wholly internal. Holding double citizenship is irrelevant in such a situation. Consequently, family members of such nationals cannot make use of the rights enshrined in the Act. However, there is one important exception to this rule. According to Article 16 point 4 an EU citizen shall have the right to reside for a period longer than 3 months if he/she is married to a Polish national. There is no obligation for the Polish national concerned to make use of free movement rights. The scope of application of the Act on entry was analysed in a judgment of Supreme Administrative Court.[12] According to the Court Polish nationals are excluded from the personal scope of the Act on entry. The rapporteur emphasizes that she does not agree with this Supreme Administrative Court judgment. It may be the case (taking into account the obligation of pro-European interpretation of national law) that a Polish national, making previously use of free movement rights, will be able to rely on provisions of the Act on entry.

Existing legislation in contradiction

The legislation in *Romania* and *the United Kingdom* seems to contradict the *McCarthy* judgment.

At this moment the *Romanian* rapporteur cannot report any practice based on the *McCarthy* case. No Romanian national rules exist dealing explicitly with this case.

The *UK* Border Agency's position following the judgment in *McCarthy* is set out in a memo from the European Operational Policy Team dated 31 August 2011. The intention of the Home Office is to amend the Immigration (EEA) Regulations to reflect the terms of the *McCarthy* judgment. The Regulations are to be amended but in the mean time the Home Office is allowing people who hold British nationality and the nationality of another Member State to continue to rely on that EEA nationality as Regulation 2 of the Immigration (EEA) Regulations 2006 currently allows it.

Existing legislation in conformity

The existing legislation is considered in conformity with *McCarthy* in *Austria, Belgium, Cyprus, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Portugal* and *Sweden*. In the Czech Republic, Hungary and Italy the legislation is even more liberal, while reverse discrimination between nationals who used their free movement rights and others who did not, is excluded in national law. The same applies most probably for Portugal as well, based on a constitutional provision.

According to the *Austrian* rapporteur the *McCarthy* case law doesn't require an amendment of national law. There is the possibility to take 'family requirements' into account when expulsion orders or residence banns are enacted – it is a matter of application.

It is too early to know the exact impact of *McCarthy* in the *Belgian* case-law and practice but the new Belgian law of 8 July 2011 (see below) does not seem in contradiction with the cumulative interpretation of the three judgments (*Zambrano, McCarthy* and *Dereci*). Nevertheless, the new law modified the conditions for the conditions for Belgium nationals

12 The judgment of the Administrative Supreme Court of 24 November 2008, file no. II OSK 1344/07.

to benefit from family reunification. The conditions are now the same for a Belgian's or a TCN's family member.

Following the warning letters from the European Commission, the law transposing the free movement directive was amended in December 2011[13] to stipulate exclusively that the law extends to *Cypriots* repatriated to Cyprus after having exercising their right to free movement in another Member State. There is no provision in the law granting to Cypriots, who have not exercised their right to move, the right to have their third country spouses reside with them in Cyprus, a situation raising issues of reverse discrimination. Although since the amendment the law and the *McCarthy* ruling basically go hand in hand, this is still an issue dividing Cypriot case law, as some Court decisions recognise the right of Cypriots who have not moved to be joined in Cyprus by their third country spouses, whilst others do not. No case has been tried by the Supreme Court since the said law was amended in December 2011.

From the *Czech* migration legislation it can be concluded that a person in situation of *McCarthy* would be able to obtain residence (temporary or permanent) in the Czech Republic without the necessity to derive the right to reside from the right of free movement of his/her spouse. Consequently the question of the application of the *Zambrano* test and its limits (whether in the particular case the EU national was really deprived of genuine enjoyment of the EU citizenship substance) would not arise in such context.

Based on extensive coverage of Federal and national case law the *German* rapporteurs conclude that the legislation as interpreted by the courts is in conformity with the *McCarthy*judgments of the CJEU.

As *McCarthy* concerns *Hungarian* law eliminated reverse discrimination. According to the FreeA Hungarian nationals are conferred the same rights as those Union citizens have who exercised their free movement rights in Hungary.

The Irish approach to *McCarthy* is that non-free moving *Irish* nationals are not entitled, even if they also hold the nationality of another Member State, to enjoy the rights of a 'beneficiary' under Article 3 of Directive 2004/38.

As *McCarthy* concerns in *Italy* the same rules apply when family reunification is asked by both EU and Italian nationals, irrespective whether the later exercised their free movement rights. Furthermore, the non-EU foreigner who is the spouse (or a relative to the second degree) of an Italian national, and lives under the same roof, is protected from expulsion and granted with a residence card for family reasons.

Latvian law seems in conformity with *McCarthy*.

In *Portugal* the reverse discrimination to which the *McCarthy* judgment gives rise and which the applicant in the main proceedings tried to avoid relying on her second nationality could be overcome through the application of Article 36 of the Portuguese Constitution. That provision grants to everyone the right to marry and to found a family.

Swedish law too as interpreted by the courts (see the national report) should be considered in line with *McCarthy*.

Legislative and/or policy amendments

Legislative and/or policy amendments are reported in *Belgium* and *the United Kingdom*.

13 By article 2 of Law 181(I)/2011, which added a new paragraph (6) to article 4 of the basic law N.7(I)/2007.

The specificity of *Belgian* law is the principle of assimilation of a Belgian's family members to an EU citizen's family members using free movement. A project to change the law in 2011 on this topic led to a new law on 8 July 2011, which maintains the principle of assimilation but modifies the conditions to benefit from family reunification. The conditions are now the same for a Belgian's or a TCN's family members. This means that in fact no real assimilation exists anymore. According to the Council of State, the new draft legislation failed to satisfy the assimilation objective when it considered a Belgian as a non-EU citizen under the right of family reunification. Parliament did not however follow the Council of State's view.

The *UK* Border Agency's position following the judgment in *McCarthy* is set out in a memo from the European Operational Policy Team dated 31 August 2011. The intention of the Home Office is to amend the Immigration (EEA) Regulations to reflect the terms of the *McCarthy* judgment. The Regulations are to be amended but in the mean time the Home Office is allowing people who hold British nationality and the nationality of another Member State to continue to rely on that EEA nationality as Regulation 2 of the Immigration (EEA) Regulations 2006 currently allows it.

Judicial references

References by national courts and/or ombudsmen to the *McCarthy* judgment are mentioned in the *Austrian, Cypriot, Czech, German, Irish, Dutch, Polish, Swedish* and *UK* reports.

Academic references

In *Belgium, Italy* and *the Netherlands* the *McCarthy* judgment is also reported as mentioned in academic articles.

4. DERECI (C-256/11)

4.1. Follow up to Dereci

The questions posed to the CJEU in *Dereci* arose in light of the Court's above mentioned decision in *Zambrano*. The subsequent case of *McCarthy* applied the test established in *Zambrano,* yet did little to clarify its scope. On the facts of the case the Court decided that, unlike in *Zambrano,* mrs *McCarthy* would not be 'deprived of the genuine enjoyment of the substance of her rights' by refusal of a residency permit to her third country national spouse. Against this context, the questions presented to the court in *Dereci* attempt to clarify the scope and application of the 'genuine enjoyment' test for the right of residence of third country national family members of static EU citizens set out in *Zambrano*.

The *Dereci* case is a joint case of five applicants, each of whom is a third country national wishing to reside in Austria with his/her Austrian family member. None of the applicants' family members have exercised their right to free movement within the Union. The nature of the familial relationship, the current place of residence and the regularity of initial entry into Austria differs for each applicant.

All five applicants have had their applications for residence permits rejected by the Austrian Bundesministerium für Inneres, which refused to apply provisions under Directive 2004/38 for family members of EU citizens on the grounds that the Union citizen concerned has not exercised right of free movement. .

The action before the referring court (Verwaltungsgerichtshof) pertains to the rejection of the applicants' appeals against the refusal of the grant of residency permits to them. By order of the President of the CJEU of 9 September 2011 the accelerated procedure was applied to the preliminary reference.

The issues to be decided by the Court can be summarised as follows:

1. Does Article 20 TFEU preclude Member States from refusing residence permits to the applicants, notwithstanding that each respective Union citizen is not dependent upon his/her family member for their subsistence?
2. If the answer to question one is yes, does this right of residence flow directly from Union Law, or is it sufficient for Member State to grant residence under national provisions?
3. If a right of residence flows from Union law, under what exceptional conditions does a right of residence for such family members not exist under EU law, or under what conditions can a third country national family member be deprived of right of residence? If a right of residence can be satisfied under national provisions, under what conditions may a third country national family member be denied right of residence, notwithstanding the obligation in principle on Member States to enable that person to acquire residence?

   The referring court also posed an ancillary question in relation to Mr *Dereci*'s circumstances, concerning the appropriate conditions of initial entry to be applied to Turkish citizens in light of the 'standstill clause' in the Association Agreement with Turkey.
4. Does Article 41 of the Additional Protocol preclude the application of legislation governing conditions on initial entry of Turkish citizens that is more restrictive than previous legislation, but that is not more stringent than that legislation in force at the date of entry into force of the Additional Protocol?

The Court first determined that Directives 2003/86 and 2004/38 do not apply to the applicants in the current case. Article 3(3) of Directive 2003/86 stipulates that it does not apply to family members, whilst Article 3(1) of Directive 2004/38 states that Union citizens who have not exercised their right of free movement do not fall within the scope of the Directive. In turning to consider the relevance of the Treaty provisions concerning citizenship of the Union, the Court noted that 'the situation of a Union citizen…who has not made use of right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation'.

The Court noted the previous decision in *Zambrano*, that 'Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'.In applying the test of 'genuine enjoyment of the substance' of citizenship rights, the Court states that: 'it follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.' [paras. 66 – 68]

Turning to consider the right to respect for private and family life, the Court notes that the meaning and scope of Art 7 of the Charter are the same as those laid down in Art 8(1) of ECHR, yet the Charter addresses Member States only when they are implementing European law. The Court leaves the issue of whether the current situation falls within the scope of EU law to be determined by the referring court, in line with their evaluation of whether or not the family members of the applicants were deprived of the genuine enjoyment of the substance of the rights by the decision of the Bundesministerium.

In relation to the issue of the limits of the Association Agreement with Turkey, the Court held that the standstill obligation extends to any new obstacle that makes more stringent the conditions at any given time, so that Member State cannot depart from objective of standstill clauses by reversing measures that they have adopted in favour of the free movement of Turkish workers subsequent to the entry into force of the Additional Protocol. Furthermore, the fact that Mr *Dereci* entered Austria irregularly does not prevent him from benefiting from standstill clause, as at the time at which he made his application he had a right of establishment by reason of his marriage to an Austrian national.

Issues 1 – 3 were answered as follows:

'European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member

State of which he has nationality, who has never exercised his right to free movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.'

Issue 4, regarding the association agreement with Turkey, was answered as follows:

'Article 41(1) of the Additional Protocol…must be interpreted as meaning that the enactment of new legislation more restrictive than the previous legislation which, for its part, relaxed earlier legislation concerning the conditions for the exercise of the freedom of establishment of Turkish nationals at the time of entry into force of that protocol in the Member State concerned must be considered a 'new restriction' within the meaning of that provision.'

4.2. Concluding on Dereci

Based on the national reports on *Dereci* (annex I.1) the following can be concluded. The findings in *Dereci* concerning the stand-still clause for Turkish citizens will be – as far as mentioned in the national reports (Austria and Hungary) – discussed separately.

No reference

The *Bulgarian, Danish, French, Finish, Lithuanian, Slovenian* and *Spanish* reports do not cover *Dereci*. The *Greek, Italian, Polish* and *Slovakian* reports do not go into the details of *Dereci* ether.

There is no *Luxembourg*'s follow up report available.

No impact

The *Dereci* case would have an impact to the *Estonian* situation only as far as it requires the application of Article 7 of the Charter and Article 8 ECHR.

In *Latvia* nothing relevant with regard to *Dereci* is to report.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *Dereci*.

Existing legislation questionable

It is still questionable whether the existing legislation in *Austria* and *Cyprus* is in conformity with the *Dereci* judgment.

In the context of the *Cypriot* case law which, in the overall, does not adequately engage with EU case law on the subject, *Dereci* could result in forcing the Courts to be more focused on the rights of Union citizens than on national sovereignty. In light of *Dereci*, Cypriot courts are now specifically required to verify, on facts proven before it, whether a denial of the genuine enjoyment of the substance of EU citizens' rights will ensue. Moreover, given that the Cypriot legal framework contains strong references in the constitution and protocol 12 on equal treatment on the ground of nationality and national origin, may allow courts to address the question of reverse discrimination, as this results from *McCarthy* and from implementing the 2011 amendment to the law transposing the free movement directive (see above).

According to the *Austrian* report the Administrative Court while applying the *Dereci* judgment considers only whether the refusal of a residence permit forces the Austrian partner to leave Austria.

Existing legislation in contradiction
Not reported.

Existing legislation in conformity
The existing legislation is considered in conformity with *Dereci* judgment in *Belgium, Czech Republic* (even more liberal), *Germany, Hungary, Ireland, the Netherlands, Portugal, Sweden* and *the United Kingdom*.

It is too early to know the exact impact of *McCarthy* and *Dereci* in the *Belgian* case-law and practice but the new Belgian law of 8 July 2011 (see below) does not seem in contradiction with the cumulative interpretation of the three judgments when the law limits, in fact, the principle of assimilation between Belgian or EU family members using free movement. This interpretation seems even broader than the one in *Dereci* because the Belgian law contains no condition of financial dependency between the child and the TCN parent.

Concerning the situations which arose under *Dereci*, i.e. third country family members would be eligible for temporary residence in the *Czech Republic* while the question of the application of the *Zambrano* test and its limits (whether in the particular case the EU national was really deprived of genuine enjoyment of the EU citizenship substance) would not arise in such a context.

Based on extensive coverage of Federal and national case law the *German* rapporteurs conclude that the legislation as interpreted by the courts is in conformity with the *Zambrano, McCarthy* and *Dereci* judgments of the CJEU.

While *Dereci* confirms the case law of *Zambrano* and *McCarthy* the *Hungarian* rapporteur is of the opinion that the afore-said on these judgments should be taken into account in Hungarian law.

The effect of Derici in *Ireland* to date appears to be in confirming the limited application of the *Zambrano* judgment.

Dutch law as interpreted by the Judicial Division of the Council of State should be considered in line with *Zambrano* and *Dereci*. The first occasion in the Netherlands on which the Judicial Division of the Council of State expressed its views on the *Zambrano* and *Dereci* ruling was March 7, 2012, when it handed down four cases.[14] In all four cases the Judicial Division of the Council of State sets to work in the same fashion. It first reproduces consideration 42 of *Zambrano* and considerations 59-69 of the *Dereci* case.[15] Regarding consideration 68 of the latter case, the Judicial Division of the Council of State observes that Article 20 TFEU does not intend to protect the right to family and private life, as this is protected by other provisions of international (Article 8 ECHR), European (Article 7 of the Fundamental Rights Charter and Directive 2004/38/EC) and national law (Article 15 Vreemdelingenwet), and concludes that it is, therefore, only of limited significance in the context. What has to be established, according to the Judicial Division of the Council of State, is whether there is no other choice than residence outside the territory of the European Union.[16] It is the third-

14 For an earlier decision dismissing reliance on the genuine enjoyment test on procedural ground, see: Afdeling Bestuursrechtspraak Raad van State, 12 January 2012, 201200054/2/V2, MigratieWeb ve12000216, *idem.*, 14 September 2011, 201012035/1/V3, LJN: BT1936, JV 2011/462 with commentary T.P. Spijkerboer. For an injunction decision, see: Pres. Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201108763/2/V2, MigratieWeb ve1102228.

15 CJ EU case C-256/11, *Murat Dereci a.O*, v. *Bundesministerium für Inneres*, 15 November 2011, n.y.r.

16 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.3, *idem*., 201102780/1/V1 cons. 2.3.5, *idem*., 201108763/1/V2, cons. 2.5.3 and *idem*., 201105729/1/V1, cons. 2.7.6.

country national parent who has to make a reasonable case that as a result of the Dutch measure the citizen of the Union has no other choice than to leave the territory of the European Union.[17]

According to the *Portuguese* rapporteur it is a matter for the referring court to verify, on the basis of the criterion developed by the CJEU in *Dereci*, if the national measures at issue in the main proceedings do not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union. If the referring court verifies such denial, the situation is covered by EU law in the meaning of Article 51(1) of the Charter. Therefore the referring court must also examine whether the refusal of the right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. In this respect, the CJEU explains: 'On the other hand, if the referring court takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR'. If the referring court is Portuguese, it can also undertake that examination in the light of Article 26(1) of the Constitution which guarantees to everyone the right to respect for private and family life.

Swedish law too should be considered in line with *Dereci*.

Based on national case law the *UK* rapporteur is of the opinion that the application is in conformity with *Dereci*.

Legislative and/or policy amendments

Not reported.

Judicial references

References by national courts and/or ombudsmen to the *Dereci* judgment are mentioned in the *Austrian, German, Irish, Dutch* and *UK* reports.

Stand-still clause (Dereci)

In *Austria* according to the Residence and Resettlement Act the application for a residence title has to be done abroad. The Administrative Court (23.2.2012, 2009/22/0127; 10.1.2012, 2008/22/0837; 15.12.2011, 2007/18/0430; and others) decided that the present act is more restrictive than the former Aliens Act, which violates the stand-still clause. At the moment, there is no provision in force which fits for the Turkish citizen´s situation. The stand-still clause does not help in cases of marriages of convenience and fraud (Administrative court 24.4.2012, 2008/22/0872).

In *Hungary* the preferential treatment of Turkish workers, let alone the stand-still clause has not inserted into the national legislation due to their low presence in the labour market.

17 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.5, *idem*., 201102780/1/V1 cons. 2.3.6, *idem*., 201108763/1/V2, cons. 2.5.5 and *idem*., 201105729/1/V1, cons. 2.7.7.

5. TSAKOURIDIS (C-145/09)

5.1. Follow up to Tsakouridis

In *Tsakouridis* (C-145/09) the Court of Justice clarifies the concept of 'imperative grounds of public security' capable of justifying the expulsion of a Union citizen who has resided for more than ten years in a Member State other than that of which he possesses the nationality.

Mr *Tsakouridis*, a Greek national born in Germany and having spent most of his life there, was the subject of an expulsion measure to Greece on 28 August 2007, after being sentenced to imprisonment of more than five years for dealing in narcotics as part of an organised group.

The Administrative Court of Stuttgart annulled this decision, considering that Mr *Tsakouridis* qualified for the 'enhanced' protection provided for under Article 28(3) of 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, which prohibits an expulsion measure being taken against a Union citizen who has resided in the host Member State for the previous 10 years, except if the decision is based on 'imperative grounds of public security'. According to the court, Mr *Tsakouridis* qualified for this 'enhanced protection' and the criminal conviction does not in itself suffice to establish the existence of 'imperative grounds' of public security which may justify his expulsion from German territory.

Hearing the appeal, the Higher Administrative Court of Baden-Württemberg asked the Court on the one hand under which conditions the 'enhanced protection' can be achieved or lost and, on the other hand, what is to be understood by 'imperative grounds of public security'.

With regard, firstly, to the question concerning the possibility for a Union citizen to benefit from the enhanced protection introduced by Article 28(3) of Directive 2004/38/EC, the Court states that the decisive criterion is whether this citizen has lived in the Member State in question for the 10 years preceding the expulsion decision. To ascertain this, all the relevant factors must be taken into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State and which are of a nature to ascertain whether or not those absences involve the transfer to another State of the centre of personal, family or occupational interests.

With regard, secondly, to the 'imperative grounds of public security' which may justify the expulsion of a person qualifying for 'enhanced protection', the Court first of all emphasises that this concept presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness. In its opinion, trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a part of it.

It adds however that the conduct of the person concerned must represent a genuine and present threat and that the expulsion measure cannot be based on the existence of previous criminal convictions or considerations of general prevention. The national authorities must undertake an individual examination of the specific case, in which they must assess whether the measure contemplated is proportionate to the aim pursued, in the light in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was

committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State.

The Court points out that in the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure.

5.2. Concluding on Tsakouridis

Based on the national reports on *Tsakouridis* (annex I.2) the following can be concluded.

No reference
The *Belgian, Danish, Finish, Maltese, Spanish* and *United Kingdom* reports do not go into the details of *Tsakouridis*. There is no *Luxembourg*'s follow-up report available.

No impact
Not reported.

Existing legislation questionable
It is questionable whether the existing legislation in *Bulgaria, Cyprus, Estonia, France, Italy, Lithuania, the Netherlands* and *Poland* is in conformity with the *Tsakouridis* case.

In *Bulgaria* the national provision translates the term 'on imperative grounds of public security' of Article 28(3) of the Directive as 'only in exceptional cases, related to the national security'. The wording of the term does not make it clear whether the exceptional cases are a limited group within the broader scope of national security grounds or all national security grounds are regarded as relating to 'exceptional cases'. Furthermore, with regard to determining whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision the Bulgarian law makes no further specifications. Nevertheless, with reference to judgments of the Supreme Administrative Court the rapporteur concludes that the Bulgarian case law has adopted the content of the term 'public security'as provided for in the case law of the CJEU.

The question of expulsion and deportation and placement on stop lists and preconditions to acquiring the right to permanent residence as well as entry to and exit from *Cyprus* were some of the issues raised by the European Commission's warning letter to the Republic of Cyprus,[18] which the Commission considers unresolved[19] despite the clarifications by the Cypriot Government.[20] In 2012 a number of Cypriot cases (see the annexed national report) dealt with the issue of expulsion of EU citizens. The basic ruling in *Tsakouridis* that very good reasons would have to be put forward to justify the expulsion measure of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State is crucial for the Cypriot context. The standards set by Cypriot courts have not been so high; no similar case was brought before the Courts, although a number of cases of Union

18 Ref SG-GREFFE(2011)D/F7974, No. 2011/2064, 19/5/2011.
19 European Commission letter dated 22.3.2012. In response to this, a further clarification letter was sent from the Cypriot Government on 25.07.2012.
20 The EU Commission sent letters on 22.09.2009 and 20.05.2011, which had been responded to by the Cypriot government on 27.01.2011 and 25.07.2011 respectively.

citizens deported after several years of stay have been highlighted by the media and the Ombudsman but never reached the Courts.

In *Estonia* the Citizen of European Unions Act nor the case law specifies what a serious threat to public security means. The case law of the CJEU is important for Estonia for interpretative reasons.

Recent legislation (Act No. 2011-672 of 16 June 2011) in *France* has changed the possibilities of expulsion of the EU citizens. The expulsion of European and assimilated persons for reasons of public order may take several forms depending on the situation of the person concerned. Firstly, the order to leave French territory, which is now possible during the first three months of residence in France. According to the rapporteur, this is contrary to the principle of freedom of movement and residence of EU citizens for 3 months. It is emphasized that EU and assimilated citizens with a right of permanent residence may not be the subject of such an 'order to leave French territory'. Secondly, the expulsion 'simple' (art. L. 521-1 and following of CESEDA), unless the person has a legal residence in France for ten years. Only the expulsion necessary for the security of the State or public safety is possible after ten years. In so far the legislation is in conformity with *Tsakouridis*.

The *Italian* report suggests that 'imperative grounds of public security' is not part of the enhanced protection as mentioned in Article 28(3) of the Directive only but justifies in general the expulsion of a Union citizen when the behaviour of the person amounts to a genuine, present and sufficiently serious threat. A number of expulsion orders have indeed been justified on an imperative ground of public security, even when the person in question could not enjoy the enhanced protection because s/he has not yet resided in Italy for the required time. The Italian rapporteur could not find any judicial case in which courts discussed whether the conditions for enjoying the enhanced protection were met. The relevant provision in Italian law states that, in evaluating whether the behaviour of the person concerned can justify an expulsion order on 'imperative grounds of public security', the competent authority shall take into account any conviction for a crime that give rise to surrender pursuant to a European arrest warrant issued in accordance to Framework Decision 2002/584/JHA, which covers both 'participation in a criminal organization' and 'illicit trafficking in narcotics drug and psychotropic substance'.

Although according to the *Lithuanian* rapporteur the Lithuanian legislation is in line with the principles established by the CJEU in *Tsakouridis*, the present writer has his doubts. The report is silent on the issue whether the provision on enhanced protection of Article 28(3) of the Directive is transposed. Furthermore it is doubtful whether transposition by the way an Order of the Commissar General of the Lithuanian Police is acceptable considering the judgment of the CJEU in the TA Luft (C-361/88) that Union law has to be implemented in binding national law and not in administrative circulars.

In *the Netherlands* Article 28(3) of Directive 2004/38 is transposed by Article 8.22(3) of the Aliens Decree: Unless imperative grounds of public security such require, lawful residence will not be terminated, when the alien has lived in the Netherlands during the preceding ten years. 'Imperative grounds of public security' are not specified in the Aliens Decree nor in the Aliens Circular.

The *Polish* Act on entry regulates the possibility to expel EU citizen or member of his/her family who has been residing in the territory of Poland for a period longer than 10 years in a different way as it is stated in Art. 28(3)(a) of the Directive The Directive refers to imperative grounds of public security, whereas the Act on entry states that an expulsion decision may not be taken against Union citizens, if they have resided in Poland for the period

exceeding ten years, except if the decision is based on grounds of national defence, national or public security by means of constituting a threat for peace, humanity, independence or defence of the Republic of Poland, or due to terrorist activity. According to the rapporteur the wording of the Act on entry leads to a conclusion that it contains more severe conditions to be fulfilled. According to Polish legislation, drugs crimes are treated as very serious crimes constituting a real, genuine and fundamental threat for the interests of the society.

Existing legislation in contradiction

In *Hungary*, *Latvia*, and *Slovakia* the existing legislation seems in contradiction with the *Tsakouridis* case.

Union citizens who are permanent residents in *Hungary* and live there for more than ten years can only be expelled by a judgment of the court as a criminal sentence (in case of a conviction for more than five years imprisonment) but not by the immigration authority. Nevertheless, the limitation 'except if the decision is based on imperative grounds of public security' is not transposed in the Hungarian legislation. There is no provision as regards the interruption of the ten years' period.

Latvian law in general does not provide a definition of the concepts 'public security' as well as 'serious grounds of public policy' or 'imperative grounds of public policy'. There have been no national court decisions on expulsion of a Union citizen on such grounds. Consequently Latvian implementing measures of Directive 2004/38 do not differentiate between provisions of Article 28(2) and 28(3) of the said directive. They also do not provide for requirement of such a thorough assessment of the personal situation as established by the CJEU in paragraphs 49 to 53 of the Tsakoudis judgment.

In *Slovakia* the term 'public security' as mentioned in the Directive is translated as 'security of the state'. The term 'imperative grounds of public security' is not defined in the Act on Foreigners, nor does the Act contains a provision for the determination whether a Union citizen has resided in Slovakia for ten years.

Existing legislation in conformity

The existing legislation is considered in conformity with the *Tsakouridis* judgment in *Austria, Czech Republic, Germany, Greece, Ireland, Portugal, Romania, Slovenia* and *Sweden*.

According to the *Austrian* rapporteur the *Tsakouridis* case law does not require an amendment of the national legislation. Sect. 66 and 67 of the Aliens Police Act (see footnotes 101 and 102) seem a fair transposition of Article 28 of Directive 2004/38. The 'enhanced' protection provided for under Article 28(3) of Directive 2004/38 is embedded in Sect. 66(3) APA. Nevertheless, there is a need for a better application of the relevant provisions, in particular Sect. 67 APA concerning the criteria to be applied.

In the *Czech Republic* judgments which deal with the issue of public policy and public security pointed out the necessity to interpret Czech legislation in conformity with relevant CJEU case law.

In *Germany* following the *Tsakouridis*-judgment no legislative or administrative decisions have been considered necessary in order to implement the judgment.

Article 28(3) of the Directive is literally transposed in the *Greek* legislation.

In *Ireland* Regulation 6(b) of the 2006 Regulation provides that a removal order may not, except on imperative grounds of public security, be made in respect of a Union citizen

who, inter alia, has resided in Ireland for the previous ten years. According to the Department of Justice and Equality has no one has been removed from Ireland based on 'imperative grounds of public security'.

In *Portugal* Article 28(3) of the Directive is transposed more or less literally in the Portuguese legislation (Article 23(3) of Law 37/2006).

The *Romanian* legislation is considered to be in conformity with *Tsakouridis*.

The *Slovenian* Aliens Act addresses in a correct way the phenomena of residing in the host Member State for the 10 years preceding the expulsion decision as well as the distinction between 'imperative grounds of public security' and 'serious grounds of public policy or public security'.

In *Sweden* the provision of Article 28(3) of the Directive is not transposed literally, but the expulsion measure should be 'absolutely necessary referring to public security'.

Legislative and/or policy amendments

Not specifically as a consequence of the *Tsakouridis* judgment but legislative amendments concerning the 'public order' exception are reported in the *Austrian* (2011), *Bulgarian* (2012), *Italian* (2011) and *Lithuanian* (2011) reports.

Judicial references

Judicial references to *Tsakouridis* are mentioned in the *Austrian, Czech, German, Greek* and *Dutch* reports.

References to the *Tsakouridis* judgment by the Administrative Court are mentioned in the *Austrian* report. The court annulled a residence ban while the authorities had to deal in greater detail with the reasons showing a danger for the ordre public; a general reference is insufficient.

In the *Czech Republic* the Supreme Administrative Court dealt with the notion of 'imperative grounds of public security' in its decision 7 As 85/2009 – 81 of 21 January 2010.

In *Germany* the Bavarian Administrative Appeal Court (VGH München)[21] considers the *Tsakouridis* judgment as a confirmation of its interpretation of Art. 28 of the Union Citizens Directive. The case concerned a Polish national who had received a temporary residence permit in 1989 which has been prolonged until 2002 – and the court had to decide whether he could rely after accession of Poland to the European Union upon Article 28 of Directive 2004/38. The applicant argued that under Art. 28, having stayed lawfully within Germany for a period of more than ten years, he was entitled to rely upon the specific protection of Article 28. The Bavarian Administrative Appeal Court rejected his claim, arguing that Article 28 has established a three-tier-system of protection. Therefore, it was not sufficient that the Union citizen had in fact been legally resident in the federal territory for a period of ten years.

The *Greek* Council of State referred to *Tsakouridis* in its judgment 4023/2011. It accepted that dealing in narcotics could be covered by the concept of 'serious grounds of public policy' and is capable of being covered by the concept of 'imperative grounds of public policy' as well. However the Court did not refer to a crime in connection with dealing in narcotics as part of an organised group.

21 Judgment of 21.12.2011, 10 B 11.182, Informationsbrief Ausländerrecht 2012, 161.

In *the Netherlands* the Judicial Division of the Council of State 5 October 2011, 201100780/1/V1 [LJN: BT8385] referred to the *Tsakouridis* judgment: drug trafficking poses a threat to the health, safety and quality of life of citizens of the European Union and to the legal economy, stability and security of the Member States.

6. DIAS (C-325/09)

6.1. Follow up to Dias

The claimant, Ms *Dias*, was a Portuguese national who entered the UK in 1998. The Court divided her subsequent residence in the UK into five periods

1. January 1998 to summer 2002: in work
2. Summer 2002 to 17 April 2003: on maternity leave
3. 18 April 2003 to 25 April 2004: not working
4. 26 April 2004 to 23 March 2007: in work, and
5. Since 24 March 2007: not working.

On 13 May 2000, the Home Office issued the claimant with a residence permit corresponding to Article 4 of Directive 68/360 and valid from 13 May 2000 to 13 May 2005.

On 26 March 2007, that is in period 5, following the expiry of the period for transposition of Directive 2004/38 on 30 April 2006, Ms *Dias* claimed income support. According to the national law applicable at that time, the success of her application for income support depends on whether she already enjoyed a right of permanent residence at that time under Article 16(1) of Directive 2004/38.

Following rejection of her application, Ms *Dias* appealed to the Social Security Commissioner against that rejection. The Social Security Commissioner decided that her application for income support was well founded, because she had a right of permanent residence under Article 16 of Directive 2004/38.

The Secretary of State appealed to the Court of Appeal which referred the following questions to the CJEU:

(1) If a European Union citizen, present in a Member State of which she is not a national, was, prior to the transposition of Directive 2004/38 …, the holder of a residence permit validly issued pursuant to Article 4(2) of Directive 68/360 …, but was for a period of time during the currency of the permit voluntarily unemployed, not self-sufficient and outside the qualifications for the issue of such a permit, did that person, by reason only of her possession of the permit, remain during that time someone who 'resided legally' in the host Member State for the purpose of later acquiring a permanent right of residence under Article 16(1) of Directive 2004/38 …?

(2) If five years' continuous residence as a worker prior to 30 April 2006 [in the territory of a host Member State] does not qualify to give rise to the permanent right of residence created by Article 16(1) of Directive 2004/38 …, does such continuous residence as a worker give rise to a permanent right of residence directly pursuant to Article 18(1) [EC] on the grounds that there is a lacuna in the Directive?'

The Court first made it clear that rights to reside derive from the EC Treaty and the provisions adopted for its implementation. The granting of a residence permit did not give rise to those rights, although it could act as evidence that a right existed.

The Court confirmed the effect of its earlier decision Secretary of State v Lassal CJEU Case C-162/09) that a continuous period of five years during which there was a right to reside in accordance with earlier EU instruments which were repealed by the Citizenship Directive, completed before 30 April 2006, conferred a permanent right to reside under that

Directive effective from April 2006. Accordingly the claimant had served the five year period by January 2003.

Finally, the Court addressed the significance of the period from 18 April 2003 to 25 April 2004 when the claimant had no EU right to reside. It held that this situation should be regarded as analogous to the rule that permanent residence is lost through an absence from the Member State of more than two years (Directive 2004/38/EC, Art 16(4)). Thus, as the period was just over a year it did not affect the acquisition by the claimant of a permanent right to reside effective from 30 April 2006.

The decision only affects cases where a question arises as to whether a claimant has completed the required period of lawful residence prior to 30 April 2006 and only concerns periods falling before 30 April 2006. If a claimant completes five years of lawful residence prior to 30 April 2006 and this is followed by a continuous period of more than two years (ending before 30 April 2006) during which the claimant had no right to reside under those Community Law instruments which were repealed and codified by the Citizenship Directive then the right to permanent residence is lost.

6.2. Concluding on Dias

Based on the national reports on *Dias* (annex I.3) the following can be concluded.

No reference
The *Danish, French* and *Spanish* reports do not go into the details of *Dias*. There is no *Luxembourg*'s follow-up report available.

No impact
No impact of the *Dias* case is foreseen in *Cyprus, Germany, Greece, Romania* and *Slovenia*.

There is no relevant case decided by the *Cypriot* courts. It must be noted that Cyprus has no income support system equivalent to that of the UK. Most benefits such as unemployment benefits are based on contributions. Basic subsistence benefits are paid to all persons without income irrespective of nationality; some other benefits are provided to specific categories of the population. Given that the Cypriot constitution (Article 28) prohibits discrimination on (inter alia) 'any ground whatsoever', a legislative provision granting rights of public assistance to Cypriots and denying same to non-Cypriots may be hard to justify in law. On the broader issue of the pre-transposition status the Supreme Court recognised in employment situations the rights deriving from the status of a Union citizen prior to transposition of the free movement directive. This may not necessarily be the conclusion of the Court where an applicant claims public benefit rights deriving from his/her pre-transposition status.

The *Dias* judgment has not been discussed within the *German* legal context. It should be noted, however, that similar legal problems with regard to requirements for permanent residence status under Article 16 Directive 2004/38/EC are dealt with in CJEU, Joint Cases C-424/10 and C-425/10, Ziolkowski & Szeja. In this case, the CJEU had to interpret the term 'legal residence' in Article 16.1 Directive 2004/38/EC. This judgment was quickly taken up by domestic German courts, noting that the calculation of the 10year time-limit for permanent residence in situations predating the entry into force of the directive and EU enlargement does not require factual residence only. Courts must moreover consider whether the EU

citizen in question would have had a right to residence in Germany under EU law, if the country of his/her nationality had been an EU Member State at this time already.

There is no relevant case law in *Greece*. Therefore there is no particular influence of the CJEU *Dias* judgment.

The *Dias* case does not represent any importance to *Romania*, due to the accession date: 2007. Romania, before the accession date, directly transposed the new regulation on free movement, Directive 2004/38/EC trough the Government Emergency Ordinance no. 102/2005. Therefore the Council Directive 68/360/EEC never was transposed into the Romanian law, and no residence was started under this earlier directive in Romania.

According to the information given by the *Slovenian* Ministry of Interior the outcome of the *Dias* case would have caused no major obstacles or problems in praxis.

Existing legislation questionable

It is questionable whether the existing legislation in *Bulgaria, Czech Republic, Hungary, Ireland, Lithuania, Malta* and *Slovakia* is in conformity with the *Dias* case.

The only explicit national regulation in *Bulgaria* with regard to the issues in the *Dias* case is Article 16 (1) of LERD (the law governing the situation of EU nationals in Bulgaria), which provides that permanent residence is given provided that the person 'has resided legally and without interruption for a period of five years on the territory of Bulgaria'. With regard to the second part of the CJEU's ruling in the *Dias* case, namely that periods of residence of less than two consecutive years, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, it should be noted that prior to Bulgaria´s EU membership (1 January 2007) no such legal residence had been possible in Bulgaria unless the person was already a holder of a permanent residence permit under the LFRB (the general immigration law).There is no explicit regulation on the loss of the permanent residence status by EU nationals under the LFRB. With regard to third country nationals, currently Article 40 (1) (6) LFRB provides that the permanent residence permit is lost upon absence from the territory of the EU Member States for a period longer than 12 consecutive months. In the absence of a legal provision in Bulgarian law EU nationals should with regard to loss of permanent residence status directly rely on Directive 2004/38.

According to Sec. 16 of the *Czech* Act on Assistance in Material Need, stipulates that in case the claimant is an EU national or a family member of an EU national the responsible authority must examine whether the claimant does not constitute an unbearable burden for the system of assistance in material need. Such an obligation does not apply if the claimant obtained a permanent residence on the territory of the Czech Republic. Currently, the permanent residence is granted to EU nationals on the basis of 5 years continuous temporary stay in the Czech Republic (Sec. 87 g) FoRA). If a '*Dias*' scenario would appear at present the 5 years period necessary for obtaining a permanent residence would be counted according to the Directive 2004/38 only, as this Directive was transposed into the Czech legal system in 2006. The Czech report does not provide information on national provisions with regard to the loss of the permanent residence status by EU nationals.

It seems that in the *Hungarian* legislation which transposed Directive 2004/38 (FreeA) only periods completed under the new rules are taken into account. However, this statement is valid – according to the relevant provision of the law (Article 17 (1)) – only 'until the con-

trary is proven'. It means that union citizens and his/her family members can evidence their former legal residence periods by any other means, e.g. by presenting residence permits issued under the earlier EU instruments – and that shall have full legal force. There is no explicit mention of the findings in the Lassal and *Dias* cases in Hungarian law, however, the essential message of these cases might be applicable.

The *Dias* case may affect any EU migrants who came to *Ireland* and completed five years' continuous residence, without more than two consecutive years of absence, prior to that date of transposition (in Ireland 28 April 2006), and who later seek permanent residency. The explanatory leaflet to the European Communities (Free Movement of Persons) Regulations 2006 is silent on the issue whether the period of five years' residence includes pre-transposition residence. However, discussions with an official in the Irish Nationality and Integration Service indicate that pre-transposition residence would count towards a grant of permanent residence (although it has not been possible to ascertain how often this has happened).

With regard to *Dias* judgment, *Lithuanian* legislation complies with the principles developed in this case, as it calculates for the purpose of permanent residence the periods of legal stay. This is regulated by the Order on Issuance of the Certificate to Confirm Permanent Residence of EU national in Lithuania and Issuance of Residence Permit for Family Members of EU nationals who are third country nationals, approved by the Order of the Minister of Interior on 25 October 2007 (as amended subsequently). In accordance with para. 52 of the Order, the right of residence may be only lost in case the person departs from Lithuania for a period exceeding 2 years (Art. 104(7) of the Aliens' Law) or the residence permit is withdrawn on national security or public order grounds (para. 1 of Art. 106(1) of the Aliens' Law). Both the Aliens' Law and the implementing legislation are silent on whether the periods for permanent residence would be calculated on the basis of declaratory residence permits or verification of the existence of residence rights. The practice (as reported by the Migration Department in May 2012) is that the general order is to certify the accumulation of 5 years by verifying the existence of documents, therefore it seems that the calculation would be based on verification of formal requirements rather than the existence of a right of residence.

With regard to the *Dias* case so far there have not been in *Malta* any cases arising in relation to the issues involved. However, when contacted, the Director for Citizenship in Malta advised that he is aware of the contents of the judgment and will take them into consideration should circumstances so require.

The *Slovak* Act on Foreigners does not deal with the situations similar to *Dias*. Nevertheless, the wording of the Act on Foreigners, which transposes Directive 2004/38/EC does not preclude a treatment that was held by the Court as a treatment in accordance with Article 16 (1) and (4) of the Directive 2004/38/EC, however, the opposite treatment is also not explicitly excluded.

Existing legislation in contradiction

In *Italy* and *Latvia* the existing legislation seems in contradiction with the *Dias* case.

As regards the *Italian* legislation, Article 14 of Legislative Decree 2007 no. 30 reproduces almost literally Article 16 of Directive 2004/38. The only difference can be found in para. 4. While the Directive reads 'Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding two consecutive years', the Leg-

islative Decree reads 'Once acquired, the right of permanent residence shall be lost in any case through absence from the Italian territory for a period exceeding two consecutive years' (art. 14 (4)). According to circular letter 18-7-2007 no. 200704165/15100/14865(39), periods of residence in Italy prior to the date of the entry into force of the Legislative Decree 2007 no. 30 can be taken into account when calculating the five years of continued residence. In that case, residence is legal when the applicant has been issued with a residence card or a residence permit under the conditions established by the legislation then in force. Therefore, contrary to *Dias* Italy attaches importance to the documents that the applicant possesses, rather than to the underlying substantial conditions.

There is no legal regulation under *Latvian* law providing explicitly how do residence periods before 30 April 2006 have to be taken into account for the purposes of acquisition of permanent residence right under Article 16(1) of Directive 2004/38.

Existing legislation in conformity

The existing legislation is considered in conformity with the *Dias* judgment in *Austria, Belgium, Estonia, Finland, the Netherlands, Poland, Portugal* and *Sweden*.

The *Austrian* Administrative Court (5.7.2011, 200821/0522) confirmed that a permanent residence right is granted after five years of legal stay. The Administrative Court also stated that the Union citizen´s right to reside is not depending on a formal residence title; a residence permit has declaratory character only (16.2.2012, 2009/01/0062). Sect. 9 Residence and Settlement Act (RSA) (Niederlassungs- und Aufenthaltsgesetz; NAG) uses the phrase 'to document the right to stay'; therefore the Austrian law is in line with the requirement of 'declaratory character'.

In *Belgium*, permanent residence is granted after a continuous period of only three years (Article 42quinquies, §1 Aliens Law) as a result of Article 37 of Directive 2004/38 on more favourable national provisions. This is due to the fact that the Belgian nationality can be granted after three years of residence. However, the question of the dies a quo and the quality of a 'legal residence' is the same for this period of three years. The Lassal case (C-162/09) was the first to mention that periods of residence completed before the date of transposition of Directive 2004/38, namely 30 April 2006, in accordance with earlier European law instruments, must be taken into account. This was the practice in Belgium. *Dias* did not change the practice in Belgium since the Belgian law was on the same track. Since its transposition by the Belgian law on 25 April 2007, Article 42quinquies, §1 of the Aliens law requires a continuous three-year residence period 'on the basis of the present chapter of the law', namely the chapter on the right of residence for EU citizens.

The *Estonian* legislation (Citizen of European Union Act) is considered to be in line with the *Dias* judgment. The latest version of the Act transposed Directive 2004/38 and was adopted in 2006. It contains provisions for the transitional period from the old Act (2002) to the 2006 Act:

- Upon entry into force of the Act, a citizen of the European Union who holds a long-term residence permit is deemed to have acquired a permanent right of residence.
- The period before the entry into force of this Act during which a citizen of the European Union or a member of his or her family resided in Estonia shall be deemed part of the eligibility period required for acquiring a permanent right of residence.

The Estonian report does not provide information on national provisions with regard to the loss of the permanent residence status by EU nationals.

In *Finland* residence preceding the transposition of the Citizenship Directive is taken into account when counting the five years' residence that is required for a permanent right of residence, provided that this residence has been lawful, i.e. that the person concerned has met the preconditions of residence. Any periods when the person in question does not meet the preconditions for residence interrupt the accumulation of the five year's residence, in which case the counting of the five years starts over when the person in question meets the preconditions for residence. The Finnish report does not provide information on national provisions with regard to the loss of the permanent residence status by EU nationals.

Community nationals enjoy lawful residence in *the Netherlands* as long as they reside in the country in conformity with EU/EER law (Article 8(e) Aliens Act). All Community nationals who have resided legally in the Netherlands for an uninterrupted period of five years are entitled to permanent residence (Article 8.17 Aliens Decree). Permanent residence will be lost in case of absence from the Netherlands for more than two consecutive years (Article 8.18 Aliens Decree). Aliens Act, Aliens Decree and Aliens Circular are not explicit on the issue whether the period of five years' residence includes pre-transposition residence. But the general wording of Article 8.17(1)(a) Aliens Decree (entitled to permanent residence is the EU/EER or Swiss national who resided legally in the Netherlands for a uninterrupted period of five years) indicates that pre-transposition residence will be taken into account as well. Act, Decree and Circular are silent as well on the issue of the application by analogy of the absence for two consecutive years´ rule during the pre-transposition period. But again, the general wording of article 8.18 Aliens Decree indicates its application during that period as well.

According to Article 42 of the *Polish* Act on entry which implements Article 16 of the Directive the Union citizen shall obtain a right of permanent residence after five years of continuous residence within the territory of Republic of Poland, if all the conditions of residence referred to in Chapter 3 of the Act are fulfilled. Furthermore, the Polish law is in line with the Lassal case law, because continuous periods of five years' residence completed before the date of transposition of Directive 2004/38, namely before 30 April 2006, are to be taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16.1.

In *Portugal* Article 16(1) and (4) of the Directive are transposed more or less literally in Article 10(1) an (5) of Law 37/2006.

Concerning the calculation of the period that should be the base for the requested five year period as well as temporary stays outside *Sweden Dias* is observed (Aliens Act ch. 3A § 6 and § 8).

Legislative and/or policy amendments

Following the *Dias* ruling the Department for Work and Pensions in the United Kingdom issued Memo DMG 23/11 in September 2011 advising Decision Makers (DM) that the CJEU's decision is a 'relevant determination'. Any decision made before 21 July 2011 which would have been made differently had the CJEU judgment been in existence at the time is not an official error and cannot be revised.

Judicial references

Judicial references to *Dias* are mentioned in the *Austrian, Swedish* and *UK* reports.

The *Austrian* Administrative Court (5.7.2011, 200821/0522) referred to *Dias* and confirmed that a permanent residence right is granted after five years of legal stay. The Administrative Court also stated that the Union citizen´s right to reside is not depending on a formal residence title; a residence permit has declaratory character only (16.2.2012, 2009/01/0062).

In *Sweden* MIG 2010:8 (calculation of periods of residence) and MIG 2010:14 (permanent residence after five years) reflect *Dias*.

In *the United Kingdom* the Court of Appeal (Okafor v SSHD [2011] EWCA Civ 499) held that, following *Dias*, periods spent under art. 12(3) of the Directive (right of children to remain in education after death of the EU citizen and right of father to remain as custodial parent) did not amount to lawful residence for the purpose of qualifying for permanent residence. Nonetheless, the Upper Tribunal seems to have been unconvinced on the point and, in Alarape and another (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 00413 (IAC), referred the question of entitlement to permanent residence under the regulation to the Court of Justice.

7. CASTEELS (C-379/09)

7.1. Follow up to Casteels

Employers who transfer employees between Member States need to consider how to ensure that employers' benefits are not adversely affected by the transfer in light of the *Casteels* judgment of the CJEU.

Mr *Casteels* had worked for different British Airways companies in different Member States for several years. The issue arose after he had worked in Germany for almost three years and then voluntarily moved to another Member State. The rules relating to qualifying periods in Germany are radically different to those in the UK; in very broad terms, the upshot of legislation and a collective bargaining agreement meant that Mr *Casteels* could not qualify for a pension under the German scheme because he had not completed five years service with the German company.

Broadly, the Advocate General Kokott concluded that the entire duration of an employee's employment with the same employer at various establishments should be taken into account with regard to vesting/qualifying periods. He concluded that the qualifying period applicable to Mr *Casteels*' participation in the German occupational pension scheme was capable of obstructing freedom of movement, even though he had transferred voluntarily to his employer's establishment in another Member State.

The CJEU followed the Advocate General.

Besides the question whether Article 48 TFEU has direct effect, to which the CJEU answered negatively, the Court ruled as follows:

> *Article 45 TFEU must be interpreted as precluding, in the context of the mandatory application of a collective labour agreement:*
>
> *– for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment;*
>
> *– a worker who has been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State from being regarded as having left the employer of his own free will.*

Multinational employers should be aware that, where an employee transfers to another Member State but remains in the employment of the same corporate group, qualifying/vesting periods in relation to pension schemes (especially long ones) may breach EU law.

7.2. Concluding on Casteels

Based on the national reports on *Casteels* (annex I.4) the following can be concluded.

No reference

The *Casteels* judgment is not covered in the *Belgian, Danish* and *United Kingdom* reports. There is no *Luxembourg*'s follow-up report available.

No impact

No impact of the *Casteels* case is foreseen in *Austria, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, the Netherlands, Malta, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden*.

In *Austria* there is no follow up to that decision. According to Austria labour law experts there are no problems arising from that judgment.

According to the *Cypriot* rapporteur it is difficult to foresee how *Casteels* would impact the Cypriot context.

Currently in the *Czech Republic* no such legislation exists which would regulate the issue of enhancement of occupational old-age pensions. Consequently it appears that the problem which occurred in *Casteels* is currently not transferable into the context of the Czech Republic.

Estonia does not have any specific employer-based private pension schemes. This also means that the case under discussion would not have any impact.

The *Finnish* employee pension scheme is a statutory scheme which falls under the Regulations 883/2004 and 987/2009. Therefore the case of *Casteels* is not regarded to have relevance in Finland.

There are, to this date, no contributions elaborating upon or court cases exploring the implications of the *Casteels* judgment for the *German* legal system.

There is no previous jurisprudence in *Greece* concerning company pension schemes established by collective agreements. It is rather rare to identify such schemes in Greece.

Directive 98/49/EC that obliges Member States to provide for equal treatment in these cases has been implemented in *Hungary*, however, no other legislative act can be referred to, and no similar case has been yet reported.

The *Italian* rapporteur could not find any discussion on the case, neither draw for it any principle that could be of relevance for Italy.

There is no relevant legal regulation under *Latvian* law regarding determination of the period of acquisition of definitive entitlements to supplementary pension benefits in case a worker has been transferred from an establishment of his/her employer in one Member State to an establishment of the same employer in another Member State. There is also no information on the relevant national court practice.

No references to *Casteels* are found in *Dutch* case law and policy documents.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities.

The *Portuguese* rapporteurs are not aware of a collective labour agreement in force in Portugal with a similar normative content as contested in *Casteels*.

The problems risen in the *Casteels* case – interpretation of article 45 and 48 TFEU – have no practical effects for *Romania* yet. Due the recent date of accession, the issue was not met in practice.

In *Slovakia*, comparable supplementary pension schemes do not exist, therefore, the *Casteels* case is not applicable.

The relevance of the *Casteels* case for *Slovenia* is rather narrow. In Slovenia such insurances are regulated in Pension and Invalidity Insurance Act, which has for the functioning of the system authorised special private insurance companies.

In *Spain* no references are found.

The *Swedish* rapporteur is not aware of a similar situation in Sweden as was present in *Casteels*.

Existing legislation questionable
It is questionable whether the existing legislation in *Lithuania* and *Poland* is in conformity with the *Casteels* case.

In principle, *Lithuanian* legislation provides for taking into account the periods of work in another Member State for the purpose of calculating the periods for acquiring the pension rights. However in some respects the calculation of insurance periods for pension raises some concerns. According to the Law on State Social Security Pensions, the period of insurance is a period when the insurance payments are made. The same law defines in Article 54 the periods that are being equalled to the state social insurance pension periods. However, this Article deals with periods before the adoption of this law and does not refer to periods of insurance in other EU Member States.

According to the *Polish* Labour Code, transfer from an establishment of the employer in one Member State to an establishment of the same employer in another Member State, may be in particular cases treated as changing an employer, even if there is the same company in both Member States. According to Polish law, it is not possible to generally state that if an employee enters with employer into a mutual agreement on changing terms of work (including the place of work), it shall be automatically understood as if the employer has left the previous employer of his own free will. If entering into such a mutual agreement has been own initiative of the employer and for benefits of the employer, than it cannot be treated as own initiative and own will of employee. However, each time it is necessary to analyse factual basis of such an agreement, because it may not be assessed generally without the individual context. If the analysis leads to conclusion that there has been no change in the employer, but there has been only a change in place of work performance within the same employer, than in general, without any agreement or notice relating to particular terms of agreement contract it is not possible, automatically, not to include for the purpose of determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the period of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment.

Existing legislation in contradiction
Not reported.

Existing legislation in conformity
The existing legislation is considered in conformity with the *Casteels* judgment in *Bulgaria, France* and *Ireland.*

The *Bulgarian* Code on Social Security does not set limitations as to where the social security contributions should have been made, but rather allows for a procedure for proving and taking into account those insurance periods. Therefore a collective labour agreement cannot introduce such limitations as that would lower the standards set in the law. Along these lines, the national legislation of Bulgaria seems in line with the judgment in the *Casteels* case.

In *Ireland*, the Pensions Act 1990 provides for the preservation of benefits and vesting of rights after 2 years of qualifying service - i.e. service as a member of an occupational scheme. If an individual leaves the employment after 2 years' qualifying service, his/her accrued benefits will be preserved and can remain in the pension scheme as a deferred benefit or can be transferred to another pension scheme of which the individual is a member. In general, it appears that, where an employee moves from another EU Member State into Ireland, the prior service will count towards the vesting period. There does not appear to have been any case law in Ireland concerning the effect of vesting rules on free movement.

Regarding the *Casteels* case, *French* judges, both of the judicial and administrative branch, have had to deal with similar cases and their jurisprudence appear to be consistent with that of the CJEU (see the annexed national report).

Legislative and/or policy amendments
Not reported.

Judicial references
Not reported.

8. COMPARATIVE CONCLUSIONS

The 'concluding' paragraphs of the sections 2, 3, 4, 5, 6 and 7 contain the substantive and detailed conclusions on the importance and potential impact in the Member States of each of the 6 CJEU judgments. The following paragraphs recall these concluding paragraphs in short in a comparative way.

Except for a small notice on *Zambrano*, no follow up case law report was received from Luxembourg.

8.1. No reference

Zambrano:
The *Slovenian* report does not go into the details of *Zambrano*.

McCarthy:
The *Bulgarian, Danish, Finish, French, Greek, Lithuanian, Slovakian, Slovenian* and *Spanish* do not go into the details of *McCarthy*.

Dereci:
The *Bulgarian, Danish, French, Finish, Greek, Italian, Lithuanian, Polish, Slovakian, Slovenian* and *Spanish* reports do not go into the details of *Dereci*.

Tsakouridis:
The *Belgian, Danish, Finish, Maltese, Spanish* and *United Kingdom* reports do not go into the details of *Tsakouridis*.

Dias:
The *Danish, French* and *Spanish* reports do not go into the details of *Dias.*

Casteels:
The *Casteels* judgment is not covered in the *Belgian, Danish* and *United Kingdom* reports.

8.2. No impact

Zambrano:
Taking into account the circumstances of the case, the *Zambrano* decision would not have any impact in *Estonia*.

Under *Cypriot* and *Romanian* law a *Zambrano*-like situation could occur, but it is exceptional due to the fact that Cypriot and Romanian law on citizenship is dominantly based on the ius sanguinis principle. If a rare situation like that were to occur, the *Zambrano* judgment might presumably apply.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *Zambrano*.

McCarthy:
The outcomes of the *McCarthy* case would not have significant influence to the *Estonian* system.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *McCarthy*.

Dereci:
The *Dereci* case would have an impact to the *Estonian* situation only as far as it requires the application of Article 7 of the Charter and Article 8 ECHR.

In *Latvia* nothing relevant with regard to *Dereci* is to report.

At the time of writing, the *Maltese* rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *Dereci*.

Tsakouridis:
No impact not reported.

Dias:
No impact of the *Dias* case is foreseen in *Cyprus*, *Germany*, *Greece*, *Romania* and *Slovenia*.

Casteels:
No impact of the *Casteels* case is foreseen in *Austria, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, the Netherlands, Malta, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden*.

Combined with the national reports which contain no reference to *Casteels* (*Belgium, Denmark* and *the UK*) the *Casteels* judgment is the 'great unknown'.

8.3. Existing legislation questionable

Zambrano:
It is questionable whether the existing legislation in *Belgium, Czech Republic, France, Hungary, Luxembourg* and *the United Kingdom* is in conformity with the *Zambrano* judgment.

According to the *Belgian* Council of State the new law of 8 July 2011 failed to satisfy the objective of Article 20 TFEU when it considered a Belgian as a non-EU citizen under the right of family reunification. The Parliament did not however follow the Council of State's view. The interest in *Zambrano* resides in the new conditions for family reunification with a Belgian citizen, which do not apply to 'family members … who are the father and the mother of a Belgian minor of age'

Although *Czech* law appears to be in line with *Zambrano,* the conditions for issuance of a residence card are not.

In *France* two judgments of the Administrative Court of Lyon refer specifically to the CJEU *Zambrano* judgment. It does not seem obvious that these judgments are in full compliance with the jurisprudence of the CJEU.

According to *Hungarian* law persons who are the official carer of a minor Hungarian national qualifies as 'family member'. They are entitled to residence for more than three month even if no suitable financial means can be presented. But Hungarian law provides for unemployment benefits only if the previous employment was lawful.

The *Luxembourg*'s Ministry of Immigration underlines that some provisions of the law of 29 August 2008 on free movement of persons and immigration do not apply to the *Zambrano* situation. By excluding their application, the Ministry seems to recognize that those provisions apply to third-country nationals only, while in the *Zambrano* case, a situation has arisen where EU-law is applicable.

Although in *the United Kingdom* the substantive law as interpreted by the courts seems in line with *Zambrano*, applicants under *Zambrano* are not being granted a right of appeal, nor is there any provision for applications to be made from outside the UK.

McCarthy:

It is questionable whether the existing legislation in *the Netherlands* and *Poland* is in conformity with the *McCarthy* judgment.

In *the Netherlands* due to conflicting case law of the Judicial Division of the Council of State (judgments of October 28, 2011 and November 2, 2011) is it questionable of *McCarthy* is implemented correctly.

According to the Supreme Administrative Court *Polish* nationals are excluded from the personal scope of the Act on entry. The rapporteur emphasizes that she does not agree with this Supreme Administrative Court judgment. It may be the case (taking into account the obligation of pro-European interpretation of national law) that a Polish national, making previously use of free movement rights, will be able to rely on provisions of the Act on entry.

Dereci:

It is questionable whether the existing legislation in *Austria* and *Cyprus* is in conformity with the *Dereci* judgment.

According to the *Austrian* report the Administrative Court while applying the *Dereci* judgment considers only whether the refusal of a residence permit forces the Austrian partner to leave Austria.

In the context of the *Cypriot* case law which, in the overall, does not adequately engage with EU case law on the subject, *Dereci* could result in forcing the Courts to be more focused on the rights of Union citizens than on national sovereignty.

Tsakouridis:

It is questionable whether the existing legislation in *Bulgaria, Cyprus, Estonia, France, Italy, Lithuania, the Netherlands* and *Poland* is in conformity with the *Tsakouridis* case.

In *Bulgaria* the national provision translates the term 'on imperative grounds of public security' of Article 28(3) of the Directive as 'only in exceptional cases, related to the national security'. Furthermore, with regard to determining whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision the Bulgarian law makes no further specifications.

The question of expulsion and deportation and placement on stop lists and preconditions to acquiring the right to permanent residence as well as entry to and exit from *Cyprus* were some of the issues raised by the European Commission's warning letter to the Republic of Cyprus, which the Commission considers unresolved despite the clarifications by the Cypriot Government.

In *Estonia* the Citizen of European Unions act nor the case law specifies what a serious threat to public security means.

Recent legislation in *France* has changed the possibilities of expulsion of the EU citizens. An order to leave French territory is now possible during the first three months of residence in France. According to the rapporteur, this is contrary to the principle of freedom of movement and residence of EU citizens for 3 months.

The *Italian* report suggests that 'imperative grounds of public security' is not part of the enhanced protection as mentioned in Article 28(3) of the Directive only but justifies in general the expulsion of a Union citizen when the behavior of the person amounts to a genuine, present and sufficiently serious threat.

Although according to the *Lithuanian* rapporteur the Lithuanian legislation is in line with the principles established by the CJEU in *Tsakouridis*, the present writer has his doubts. The report is silent on the issue whether the provision on enhanced protection of Article 28(3) of the Directive is transposed.

In *the Netherlands* Article 28(3) of Directive 2004/38 is transposed by Article 8.22(3) of the Aliens Decree: Unless imperative grounds of public security such require, lawful residence will not be terminated, when the alien has lived in the Netherlands during the preceding ten years. 'Imperative grounds of public security' are not specified in the Aliens Decree nor in the Aliens Circular.

The *Polish* Act on entry regulates the possibility to expel EU citizen or member of his/her family who has been residing in the territory of Poland for a period longer than 10 years in a different way as it is stated in Art. 28(3)(a) of the Directive.

Dias:

It is questionable whether the existing legislation in *Bulgaria, Czech Republic, Hungary, Ireland, Lithuania, Malta* and *Slovakia* is in conformity with the *Dias* case.

The only explicit national regulation in *Bulgaria* with regard to the issues in the *Dias* case is Article 16 (1) of LERD (the law governing the situation of EU nationals in Bulgaria), which provides that permanent residence is given provided that the person 'has resided legally and without interruption for a period of five years on the territory of Bulgaria'. With regard to the second part of the CJEU's ruling in the *Dias* case, namely that periods of residence of less than two consecutive years, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, it should be noted that prior to Bulgaria´s EU membership (1 January 2007) no such legal residence had been possible in Bulgaria

Currently, the permanent residence is granted to EU nationals on the basis of 5 years continuous temporary stay in the *Czech Republic* (Sec. 87 g) FoRA). If a '*Dias*' scenario would appear at present the 5 years period necessary for obtaining a permanent residence would be counted according to the Directive 2004/38 only, as this Directive was transposed into the Czech legal system in 2006.

It seems that in the *Hungarian* legislation which transposed Directive 2004/38 (FreeA) only periods completed under the new rules are taken into account.

The *Dias* case may affect any EU migrants who came to *Ireland* and completed five years' continuous residence, without more than two consecutive years of absence, prior to that date of transposition (in Ireland 28 April 2006), and who later seek permanent residency. The explanatory leaflet to the European Communities (Free Movement of Persons) Regulations 2006 is silent on the issue whether the period of five years' residence includes pre-transposition residence.

In *Lithuania* both the Aliens' Law and the implementing legislation are silent on whether the periods for permanent residence would be calculated on the basis of declaratory residence permits or verification of the existence of residence rights. The practice (as reported by the Migration Department in May 2012) is that the general order is to certify the accumulation of 5 years by verifying the existence of documents, therefore it seems that the calculation would be based on verification of formal requirements rather than the existence of a right of residence.

With regard to the *Dias* case so far there have not been in *Malta* any cases arising in relation to the issues involved.

The *Slovak* Act on Foreigners does not deal with the situations similar to *Dias*.

Casteels:

It is questionable whether the existing legislation in *Lithuania* and *Poland* is in conformity with the *Casteels* case.

In principle, *Lithuanian* legislation provides for taking into account the periods of work in another Member State for the purpose of calculating the periods for acquiring the pension rights. However in some respects the calculation of insurance periods for pension raises some concerns.

According to the *Polish* Labour Code, transfer from an establishment of the employer in one Member State to an establishment of the same employer in another Member State, may be in particular cases treated as changing an employer, even if there is the same company in both Member States.

8.4. Existing legislation in contradiction

Zambrano:

The legislation in *Bulgaria, Greece, Latvia, Lithuania, Poland, Slovakia* seems to contradict the *Zambrano* judgment.

The conditions for issuance of a residence card provided in Article 24 of the *Bulgarian* LFRB and the administrative practice make it nearly impossible for a third-country national parent like *Zambrano* to obtain a residence card.

In *Greece* third-country national parents shall only be issued with a residence card if they are dependent on – in this case – their Greek children. Therefore, Greek legislation is not in line with the *Zambrano* judgment.

Latvian law does not cover situations like the one in the *Zambrano* case. Under the Immigration Act a right of residence can be granted to parents like *Zambrano*, but only (among others) after they reached the pensionable age.

With reference to the *Zambrano* judgment, there could be similar problems in *Lithuania* as in Belgium. A derivative right of residence from the child who is an EU national is not among the exhaustive list of residence grounds in the Aliens Law.

The *Polish* Act on entry shall be applicable only in transnational situations (i.e. EU citizens and members of their families). Consequently, the (internal) situation like the one in the *Zambrano* case does not fall under the scope of this Act. In addition, the Act on promotion of labour and employment institutions does not release a parent like *Zambrano* from the obligation to obtain a work permit.

As regards the *Zambrano* case, parents, third country nationals, of children, who are *Slovak* citizens will not be entitled to reside in Slovakia according to current Slovak legisla-

tion in force. The right to reside of the parents cannot be derived from the right to reside of the children, unless the parents are dependent on them.

McCarthy:
The legislation in *Romania* and *the United Kingdom* seems to contradict the *McCarthy* judgment.

At this moment the *Romanian* rapporteur cannot report any practice based on the *McCarthy* case. No Romanian national rules exist dealing explicitly with this case.

The Regulations in *the UK* are to be amended but in the mean time the Home Office is allowing people who hold British nationality and the nationality of another Member State to continue to rely on that EEA nationality as Regulation 2 of the Immigration (EEA) Regulations 2006 currently allows it.

Dereci:
Not reported.

Tsakouridis:
In *Hungary*, *Latvia*, and *Slovakia* the existing legislation seems in contradiction with the *Tsakouridis* case.

The limitation 'except if the decision is based on imperative grounds of public security' is not transposed in the *Hungarian* legislation. There is no provision as regards the interruption of the ten years' period.

Latvian law in general does not provide a definition of the concepts 'public security' as well as 'serious grounds of public policy' or 'imperative grounds of public policy'.

In *Slovakia* the term 'public security' as mentioned in the Directive is translated as 'security of the state'. The term 'imperative grounds of public security' is not defined in the Act on Foreigners, nor does the Act contains a provision for the determination whether a Union citizen has resided in Slovakia for ten years.

Dias:
In *Italy* and *Latvia* the existing legislation seems in contradiction with the *Dias* case.

Contrary to *Dias Italy* attaches importance to the documents that the applicant possesses, rather than to the underlying substantial conditions.

There is no legal regulation under *Latvian* law providing explicitly how do residence periods before 30 April 2006 have to be taken into account for the purposes of acquisition of permanent residence right under Article 16(1) of Directive 2004/38.

Casteels:
Not reported.

8.5. Existing legislation in conformity

Zambrano:
The existing legislation is considered in conformity with the *Zambrano* judgment in *Austria, Denmark, Finland, Germany, Ireland* (INIS website questionable), *Italy* (even more liberal), *the Netherlands, Spain* and *Sweden*.

McCarthy:
The existing legislation is considered in conformity with *McCarthy* in *Austria, Belgium, Cyprus, Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, Portugal* and *Sweden*. In the Czech Republic, Hungary and Italy the legislation is even more liberal, while reverse discrimination between nationals who used their free movement rights and others who did not, is excluded in national law. The same applies most probably for Portugal as well, based on a constitutional provision.

Dereci:
The existing legislation is considered in conformity with *Dereci* judgment *in Belgium, Czech Republic* (even more liberal*), Germany, Hungary, Ireland, the Netherlands, Portugal, Sweden* and *the United Kingdom*.

Tsakouridis:
The existing legislation is considered in conformity with the *Tsakouridis* judgment in *Austria, Czech Republic, Germany, Greece, Ireland, Portugal, Romania, Slovenia* and *Sweden.*

Dias:
The existing legislation is considered in conformity with the *Dias* judgment in *Austria, Belgium, Estonia, Finland, the Netherlands, Poland, Portugal* and *Sweden.* In Estonia and Poland periods of residence completed before the date of transposition of Directive 2004/38, 30 April 2006, are to be taken into account for the purposes of the acquisition of the right of permanent residence.

Casteels:
The existing legislation is considered in conformity with the *Casteels* judgment in *Bulgaria, France* and *Ireland*.

Concluding:
Except for the separate remarks in the national reports on conformity or not of the national legislation and regulations with the selected CJEU judgments, the present writer noticed two overarching issues which divided the national rapporteurs.

Firstly, the issue of reverse discrimination in family reunification conditions. Despite the passionate appeal of A-G Sharpston in *Zambrano* (her conclusion para 139), the *Zambrano, McCarthy* and *Dereci* judgments do not address the issue of reverse discrimination, the poorer treatment of its own nationals regarding family reunification in some Member States. According to the national reports on *McCarthy* reverse discrimination between nationals who used their free movement rights and others who did not, is excluded in national law in the *Czech Republic, Hungary* and *Italy*. The same applies most probably for *Portugal* as well, based on a constitutional provision.

Secondly, according to the national reports on *Dias* of some of the new Member States there exists a different approach in these Member States on the issue whether the period of five years' residence for the acquisition of the right of permanent residence includes pre-transposition residence (completed before the date of transposition of Directive 2004/38, 30 April 2006) as well. The *Estonian* and *Polish* answer this question in the affirmative. The *Czech* and *Hungarian* answer is negative. Only residence under Directive 2004/38 is taken

into account. The *Bulgarian* answer is clear as well. Prior to Bulgaria's EU Membership (1 January 2007) no such legal residence had been possible in Bulgaria.

8.6. Reported legislative and policy impacts of the judgments

Zambrano:
Legislative and/or policy amendments are reported in *Belgium, Denmark, Ireland, Lithuania, the Netherlands, Spain* and *the United Kingdom*.

McCarthy:
Legislative and/or policy amendments are reported in *Belgium* and *the United Kingdom*.

Dereci:
Not reported.

Tsakouridis:
Not specifically as a consequence of the *Tsakouridis* judgment but legislative amendments concerning the 'public order' exception are reported in the *Austrian* (2011), *Bulgarian* (2012), *Italian* (2011) and *Lithuanian* (2011) reports.

Dias:
A policy amendment is reported in *the UK* report.

Casteels:
Not reported.

Concluding:
With the exception of the *Zambrano* judgment the selected CJEU decisions did only have occasionally some legislative and policy impacts. According to the national reports the legislative and administrative follow up of CJEU judgments seems rather limited in the Member States, with no noticeable differences in old and new Member States.

It should be recommendable if the relevant migration departments/ministries in the Member States issue yearly a report to the national parliaments on the relevance of the Court's recent cases on free movement and migration in general for the national legislation and/or administrative practice.

8.7. Reported references by national courts and other judicial bodies

Zambrano: Austria, Bulgaria, Czech Republic, France, Germany, Ireland, the Netherlands, Poland, Spain, Sweden and the United Kingdom.

McCarthy: Austria, Cyprus, Czech Republic, Germany, Ireland, the Netherlands, Poland, Sweden and the United Kingdom (MS of referring court).

Dereci: Austria (MS of referring court), Germany, Ireland, the Netherlands and the UK.

Tsakouridis: Austria, Czech Republic, Germany (MS of referring court), Greece and the Netherlands..

Dias: Austria, Sweden and the UK (MS of referring court).

Casteels: Not reported.

Concluding:
With the exception of the *Zambrano*, *McCarthy* (and *Dereci*) judgments CJEU judgments still play a limited role in the national case law of the Member States. This is the more remarkable as the national reports reveal that administrative practices in many Member States are still not in line with these judgments, or that conformity is at least disputable. The national reports provide a strong indication that awareness of EJC case law among national judges (let alone their preparedness to request preliminary rulings) should be strengthened.

ANNEX

I. NATIONAL REPORTS BY JUDGMENT

I.1. National reports on *Zambrano* (C-43/09), together with *McCarthy* (C-434/09) and *Dereci* (C-256/11)

Austria

According to the Austrian report as far as it *Zambrano* and *McCarthy* concerns the Administrative Court (15.12.2011, 2007/18/0750; 15.12.2011, 2008/18/0189) had to decide about the expulsion of third country nationals who have been married with an Austrian citizen which didn´t use the right of free movement. The couples lived separated so there was no common family live. Therefore the Administrative Court decided that the applicants can not refer to Union law for a residence right.

The Administrative Court (20.3.2012, 2008/18/0734; 23.2.2012, 2009/22/0158; and others) confirmed that there might be special situations when third country nationals have a right to stay according to Union law. Therefore, an expulsion (Sect. 53 Aliens Police Act) might be unlawful.

The CJEU case law doesn´t require an amendment of national law. There is the possibility to take 'family requirements' into account when expulsion orders or residence bans are enacted – it is a matter of application.

With regard to *Dereci*, according to Sect. 21 Residence and Settlement Act (RSA) (Niederlassungs- und Aufenthaltsgesetz; NAG) the application for a residence title has to be done abroad. The Administrative Court (23.2.2012, 2009/22/0127; 10.1.2012, 2008/22/0837; 15.12.2011, 2007/18/0430; and others) agreed with the CJEU´s case law and decided that Sect 21 Austrian Residence and Settlement Act (RSA) is more restrictive than the former Aliens Act; that violates the standstill-clause. The former Sect. 47 Aliens Act isn´t part of the legal regime anymore. At the moment, there is no provision in force which fits for the Turkish citizen´s situation.

The Administrative Court referred to the *Dereci*-decision as wel in the case of marriages of convenience and fraud: in the case of marriages of convenience and fraud the refusal of a residence title does not force the Austrian partner to leave Austria (24.4.2012, 2008/22/0254; 21.12.20011, 2009/22/0054).

The standstill-clause doesn´t help in the case of marriages of convenience and fraud: that was stipulated as a violation of ordre public already in the Aliens Act 1992, Residence Act 1992 and Aliens Act 1997 (Administrative court 24.4.2012, 2008/22/0872).

In a few cases the Administrative Court revoked the authority´s decision because it didn´t analyze the fact, that according to the *Dereci*-decision a residence title has to be granted if the refusal endangers an Union citizen´s right to stay in the Member State (e.g. 28.3.2012, 2009/22/0211; 19.1.2012, 2011/22/0309).

Belgium

These three 2011 judgments, *Zambrano* (C-34/09), *McCarthy* (C-434/09) and *Dereci* (C-256/11), should be seen together, as they are related and about purely internal situations. The previous Belgian and European report read that, since 2006, the modification of the Belgian Nationality Code led to a restricted access to the Belgian nationality ius soli. In consequence, practically, Belgian children (EU citizens) of TCNs are fewer.

However, cases of Belgian children of EU and TCN parents, like in *Dereci*, or cases of a Belgian and EU spouse, like in *McCarthy*, are of course possible and frequent.

One knows the specificity of the Belgian law: the principle of assimilation of a Belgian's family members to an EU citizen's family members using free movement. A project to change the law in 2011 on this topic led to a new law on 8 July 2011, which maintains the principle of assimilation but modifies the conditions to benefit from family reunification. The conditions are now the same for a Belgian's or a TCN's family members. This means that in fact no real assimilation exists anymore.

Zambrano was mentioned during the discussion in the *Travaux préparatoires*. The draft law was examined for a pre-legal advice by the Belgian Council of State just one month after *Zambrano*. The Council of State reiterated that Article 20 TFEU precluded national measures that have the effect of depriving EU citizens of the genuine enjoyment of substance of the rights conferred by virtue of their status as citizens of the Union. According to the Council of State, the new draft legislation failed to satisfy this objective when it considered a Belgian as a non-EU citizen under the right of family reunification. The Parliament did not however follow the Council of State's view.

The interest in *Zambrano* resides in the new conditions for family reunification with a Belgian citizen, which do not apply to 'family members … who are the father and the mother of a Belgian minor of age' (Article 40 ter, § 3 Aliens law).

The new law could be challenged by some NGOs in the Constitutional Court.

With the exception of the parent of a Belgian minor and in the view of *McCarthy* and *Dereci*, the Constitutional Court does not seem inclined to annul the new law. The denial of 'the genuine enjoyment of the substance of the rights' conferred by virtue of the status of EU citizen has to be interpreted as referring to 'situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole' (*Dereci*, § 66). It is too early to know the exact impact of *McCarthy* and *Dereci* in the Belgian case-law and practice but the new Belgian law does not seem in contradiction with the cumulative interpretation of the three judgments when the law limits, in fact, the principle of assimilation between Belgian or EU family members using free movement for the parents of a Belgian child. This interpretation seems even broader than the one in *Dereci* because the Belgian law contains no condition of financial dependency between the child and the TCN parent.

For commentaries in the Belgian doctrine, see:

T. BOMBOIS, 'La citoyenneté européenne appliquée aux situations purement internes : portée et enjeux des arrêts *Zambrano* et *McCarthy*', Jurisprudence de Liège, Mons et Bruxelles, 2011, p. 1227.

N. CAMBIEN, 'Mogen statische Unieburgers worden gediscrimineerd op het vlak van gezinshereniging? Enkele beschouwingen bij de arresten Ruiz *Zambrano* en *McCarthy* van het Hof van Justitie', Tijdschrift voor vreemdelingenrecht, 3, 2011, p. 242-253.

J.-Y. CARLIER, Annual chronique on free movement (in French), Journal de droit européen, 2012, p. 88.

See also, more broadly, in English:

Focused study of the Belgian National Contact Point for the European Migration Network (EMN), Misuse of the Right to Family Reunification: Marriages of Convenience and False Declarations of Parenthood, April 2012 (www.emnbelgium.be).

Bulgaria

The problem of reverse discrimination in Bulgaria has persisted since accession to the EU. Hopes that the issue will be addressed by the European Court of Human Rights in Strasbourg have not been met as one of the pending cases was struck out of the list and in the other case (application No. 20116/08) the Court issued its judgment on 10 May 2012, but omitted to discuss the complaint about reverse discrimination.

The regulation of the entry and residence rights of the family members of EU citizens is found in the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD). However, Art.1, Para.2 of the Law on the Foreigners in the Republic of Bulgaria (LFRB) stipulates that third-country nationals that are family members of Bulgarian citizens fall under its scope. This explicitly excludes family members of Bulgarian citizens from the facilitated regime of entry and residence for family members of other EU nationals.

Under Art.24 of the Law on the Foreigners in the Republic of Bulgaria, a foreigner can receive a permit for continuous residence (valid for up to 1 year), only after entering Bulgaria with a long-term visa (called 'D-type'). This precludes the regularization of the status of many third-country nationals who are family members of Bulgarian citizens, but for some reason have remained as undocumented immigrants and/or there are deportation orders pending against them. In order to complete the legal requirements of Art.24 LFRB, they need to go out of Bulgaria and re-enter with a D-visa. However, such a D-visa is refused to these persons, often without any reasoning by the Bulgarian institutions. Furthermore, deportation orders are usually accompanied by an explicit ban to enter Bulgaria for a number of years (from 3 to 10 years). Therefore, these third country nationals that are family members of Bulgarian citizens either remain in Bulgaria as illegal immigrants or are separated from their families by not allowing them re-entry to Bulgaria once they have come out of the country to get a D-visa.

In 2010 the first judgments on cases against refusals of D-visas to family members of Bulgarian citizens were ruled. In all of them both the Sofia City Administrative Court and the Supreme Administrative Court dismissed the arguments of the Ministry of Foreign Affairs that the appeals were inadmissible as they concerned the sovereign foreign policy. In all cases the court repealed the refusals of visa to family members of Bulgarian citizens. However at the time of writing the report in neither of these cases a visa has been issued following the judgment of the court. The Ministry of Foreign Affairs simply issued a new refusal, this time stating reasons, which is subject to a new long process of judicial appeal over two judicial instances. In the meantime family members are separated.

Other aspects of the reverse discrimination regarding the conditions for issuing residence permits to family members of Bulgarian nationals concern:

- The burden of proof that should be met: unlike family members of other EU nationals, family members of Bulgarian nationals should prove sufficient financial resources and accommodation in Bulgaria and provide a certificate of criminal conviction from their country of origin;
- The scope of the 'family members' notion: According to Art.2 (6) of the Law on the Foreigners in the Republic of Bulgaria, the partners under Art.2 (2) of the EU Citizens Directive are not included in the 'family' notion.
- The fees for issuance of the permit: 500 BGN or nearly 250 Euro for family members of Bulgarian citizens and 7 BGN or nearly 3.5 Euro to family members of other EU nationals.

In 2011 the *Zambrano* case was invoked in the following judgments of the Sofia City Administrative Court (SCAC):

1) Judgment of 13 June 2011 in case No.1361/2011

The case concerns the appeal by an Iranian asylum seeker of the decision of the State Agency for Refugees to reject his asylum application in an accelerated procedure as manifestly unfounded. Along with the argumentation concerning the situation in his country of origin, the applicant states that he has a child with a Bulgarian citizen who was born in 2008 and is a Bulgarian citizen. The applicant claims that he provides for and takes care of his child. However, as he has no identity documents, he has been unable to meet the legal requirements to recognize the child as his own or to conclude marriage with the mother.

The Sofia City Administrative Court allows the appeal. It states *inter alia* that once admitted into the regular procedure for the examination of his asylum application the applicant should be given an opportunity to take all legally available steps to recognize his child in Bulgaria. 'By rejecting his asylum application, the administrative organ has precluded the applicant from the possibility to recognize and take care of his child.' In that sense the court invokes the judgment in the *Zambrano* case where it has been found that 'the Union law according to Article 20 TFEU does not allow for a Member State to refuse residence (asylum) to a third country national who provides for his minor child that is a EU citizen and that resides in and is a citizen of the respective Member State'.

This judgment of the SCAC is final and not subject to appeal.

2) Judgment of 20 June 2011 in case No.7538/2010

The case concerns the appeal by a Russian citizen of the refusal of the Director of the Migration Directorate at the Ministry of the Interior to give him permanent residence permit in Bulgaria. The applicant is father of two children who are Bulgarian nationals, born in 2006 and in 2008 respectively. He has recognized the children as his own in 2009. In 2011 the applicant applied for a permanent residence permit on the ground of Article 25 (1) (4) of the Law on Foreign Nationals in the Republic of Bulgaria, which provides for a right to permanent residence to parents of Bulgarian citizens who take care of them. In cases of adoption or recognition of the child, however, the law provides for a three-year waiting period, only after which the right is constituted. As three years from the date of recognition of the two children of the applicant had not elapsed, the applicant was refused the permanent residence permit that he applied for. The mother of the two children testified that she and the applicant have been living together as a family since 2004 and the children are very fond of their father. The applicant argued that with his current temporary residence permit he was not allowed access to the Bulgarian labour market and that was detrimental also to his children.

The Sofia City Administrative Court allows the appeal. It invokes the *Zambrano* judgment in concluding that the applicant should be given a permanent residence permit as the EU law has primacy over the limitations stipulated in Article 25 (1) (4) of the Law on Foreign Nationals in the Republic of Bulgaria.

The judgment of SCAC has not been appealed and has entered into force.

3) Judgment of 18 July 2011 in case No.3523/2011

The case concerns the appeal by a third country national and a Bulgarian citizen, who are married husband and wife, against the refusal of the Director of the Migration Directorate at the Ministry of the Interior to issue a residence permit for a renewable period of up to one year to the third country national. The family member of the Bulgarian citizen then had a

temporary residence permit as an asylum seeker. The reason why he was refused a 'continuous' residence permit as a family member of a Bulgarian citizen was the fact that he lacked a long-term visa required by the Law on Foreign Nationals in the Republic of Bulgaria. The applicants invoked the case law of the CJEU (C-551/07, the *Metock* case, the *Zambrano* case, the *Carpenter* case) and Directive 2004/38 and claimed that there was inadmissible reverse discrimination against family members of Bulgarian citizens in comparison with other EU citizens in Bulgaria, which contradicted Article 14 in relation to Article 8 of the European Convention on Human Rights.

The national equality body, the Commission for Protection against Discrimination, stepped in the case as an interested party and expressed the opinion that the situation in question constituted unlawful reverse discrimination against family members of Bulgarian citizens.

The Sofia City Administrative Court allowed the appeal. It invoked *inter alia* the *Zambrano* judgment in concluding that the applicants were victims of reverse discrimination that contradicted both EU and international law.

The judgment of SCAC has not been appealed and has entered into force.

4) Judgment of 27 July 2011 in case No.796/2011

The case concerns the appeal by a Vietnamese national against the refusal of the Director of the Migration Directorate to issue him a 'continuous' residence permit for up to one year. The application by the third country national was reasoned with the fact that he is a family member of Bulgarian citizens – his wife and their child born in 2010. The administrative organ had reasoned its refusal by stating that the third country national had presented untrue data as a check by the officials revealed that the child was hosted by a centre for medical-social cares for children and did not live with his parents.

The Sofia City Administrative Court allowed the appeal. It stated that no investigation had been made as to why the child did not live with his parents. Besides that, the applicant was still a family member of Bulgarian citizens. He had been living in Bulgaria since 1988. Last but not least, the Court invoked the *Zambrano* judgment in concluding that the refusal of the residence permit prevented the applicant from taking care of his child and his wife who were Bulgarian citizens.

The judgment of SCAC has not been appealed and has entered into force.

The cases of *McCarthy* and *Dereci* have not been referred to by Bulgarian courts in 2011/12.

Cyprus

Zambrano was already discussed in the Cypriot Report 2010-2011. Citizenship of the Union requires a Member State to allow third country nationals who are parents of a child who is a national of that Member State to reside and work there, where a refusal to do so would deprive that child of the genuine enjoyment of the substance of the rights attaching to the status of citizen of the Union. This requirement applies even when the child has never exercised his right to free movement within the territory of the Member States. This principle would have important implications in the Cypriot context, providing citizenship is granted to children of foreign nationals. However, the procedure of granting nationality/citizenship is hardly one that can be considered as smooth as it would have been in a normally functioning polity. The fact that the question of granting citizenship is very much entangled with the disputed population issue in the negotiations to resolve the Cyprus problem complicates matters. In any case, the fact that the Cypriot law on citizenship is dominantly based on *ius sanguinis* princi-

ples together with the reluctance to grant citizenship.[22] A non-Cypriot who resides lawfully in the Republic may acquire citizenship via discretionary naturalisation if he or she fulfils all of the residence and character conditions relating to lawful stay.[23] The law also provides for acquisition of citizenship via naturalisation for students, visitors, self-employed persons, athletes and coaches, domestic workers, nurses and employees who reside in Cyprus with the sole aim of working there as well as spouses, children or other dependent persons. The pre-requisites are that they must have ordinarily resided in the Republic for at least seven years and one year in the period immediately prior to the application their stay must be 'continuous'.[24] There are also exceptional situations where citizenship may be granted.[25] Children born in Cyprus to non-Cypriot migrants who legally entered and reside in Cyprus and have acquired or would have been entitled to acquire Cypriot citizenship via naturalisation are entitled to citizenship. However, the regime is based on discretionary power of the authorities and in particular the discretion of the Council of Ministers and the Minister of the Interior.

In the rare situation where a child is granted citizenship and the parents are not, then the principles of *Zambrano* would presumably apply.

The ruling in *McCarthy* may have some bearing on the rights of family members of Cypriot nationals. The principle that Union citizens, who never exercised their right to move and reside in any other Member States, cannot invoke Union law in order to secure the residence of their spouses, is already applied by the Courts in Cyprus. In fact the initial law transposing the free movement directive (N. 7(I)/2007 did not cover Cypriot nationals in its scope; following the warning letters from the European Commission, the law was amended in December 2011[26] to stipulate exclusively that the law extends to Cypriots repatriated to Cypriots after having exercising their right to free movement in another Member State. There is no provision in the law granting to Cypriots, who have not exercised their right to move, the right to have their third country spouses reside with them in Cyprus, a situation raising issues of reverse discrimination. This is an issue previously dividing Cypriot case law, as some Court decisions recognised the right of Cypriots who have not moved to be joined in Cyprus by their third country spouses, whilst others did not. No case has been tried by the Supreme Court since the said law was amended in December 2011. It would be interesting to see how the Courts will view requests from Cypriots who have not moved to be joined in Cyprus by their third country spouses, in light of the amendment of the law and of the CJEU ruling in *McCarthy*, which basically go hand in hand.

As discussed in more detail in the Cyprus Report on the Free Movement of Workers 2010-11, the policy and legal framework have resulted in uncertainty and reverse discrimination against Cypriots who have not exercised their right to move. This is the case despite the decision of the Ministerial Committee for the Employment of Aliens on 28.8.2009 that all matters of entry and stay in the Republic of family members of Cypriots will be decided along the lines of the respective conditions for family members of other EU citizens, as provided in Law 7(1)/2007. In practice, third country family members of Cypriots continue to be discriminated in different ways by being subjected to a more stringent regime than the

22 Trimikliniotis, N. (2010) 'Country Report: Cyprus", the European Democracy Observatory on citizenship (EUDO) *National Report on Citizenship in Cyprus*, April 2010, at http://eudo-citizenship.eu/docs/CountryReports/Cyprus.pdf.

23 Table 3 annexed to the law (Sub-section 111) ofLaw on the Population Data Archives No. 141(I)/2002.

24 Introduced by amendment 58(1)/1996.

25 Introduced by amendment 70(1)/1996.

26 By article 2 of Law 181(I)/2011, which added a new paragraph (6) to article 4 of the basic law N.7(I)/2007.

family members of other Union citizens. The resulting situation was described by the Cypriot Equality Authority as 'a contradictory and defensive position' of the immigration authorities.[27] Court decisions have been divided on these matters and there have been numerous complaints to the Ombudsman[28] illustrating the inadequacy of the policy and legal framework on the matter.

Case law in 2010-2012 is indicative of the contradictory approach of the courts: two cases in 2010 endorse the logic that leads to reverse discrimination; another case seems to go the other way.[29] Some cases address the issue whether rights afforded to Union citizens exercising free movement also apply to Cypriots or residents in Cyprus who have not moved. In other cases judges reiterated that the rights afforded under the EU free movement law do not cover situations where the citizen has not exercised his/her right to move across the EU.

The ruling in *Dereci* (C-256/11) is particularly important for Cyprus. At first sight, *Dereci* may be interpreted as legitimising the line of Cypriot case law which considers that Union law on Union citizenship allows a Member State to refuse a third country national the right to reside on its territory when that person's spouse is a Union national who had never exercised the right to free movement. However, the interesting innovation introduced by *Dereci*, which may offer a new twist to Cypriot case law, is the test introduced by the Court, that any refusal of such rights must not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his/her status as a Union citizen. Whereas in other Member States the test was greeted as having 'the potential to limit *Zambrano*'s impact - effectively raising the bar when applicants facing expulsion are required to prove denial of the genuine enjoyment of the substance of an EU citizen family member's rights',[30] this is not/may not be so in Cyprus. In the context of the Cypriot case law which, in the overall, does not adequately engage with EU case law on the subject, it could result in forcing the Courts to be more focused on the rights of Union citizens than on national sovereignty. In light of *Dereci*, Cypriot courts are now specifically required to verify, on facts proven before it, whether a denial of the genuine enjoyment of the substance of EU citizens' rights will ensue. Moreover, given that the Cypriot legal framework contains strong references in the constitution and protocol 12 on equal treatment on the ground of nationality and national origin, may allow courts to address the question of reverse discrimination, as this results from *McCarthy* and from implementing the 2011 amendment to Law 7(I)/2007.[31]

Czech Republic

The judgments *Zambrano*, *McCarthy* and *Dereci* have certain common features particularly that all three are not typical free movement judgments as the legal problem concerns on

27 *Έκθεση Επιτρόπου Διοικήσεως αναφορικά με την εφαρμογή στην Κύπρο του κοινοτικού κεκτημένου στα θέματα της οικογενειακής επανένωσης και τη δυσμενή μεταχείριση Κυπρίων πολιτών και των μελών των οικογενειών τους που είναι υπήκοοι τρίτων χωρών*, Α/Π 1623, Α/Π 1064, dated 06.05.2009, p. 1.

28 See for instance the section entitled "iii. Το δικαίωμα εισόδου και παραμονής πολίτη τρίτης χώρας που είναι σύζυγος ή σύντροφος Κύπριου ή Ευρωπαίου πολίτη", of the *Ombudsman's Annual Report of 2007*, http://www.ombudsman.gov.cy (accessed 29.09.2009).

29 *Svetlana Shalaeva v. Republic of Cyprus* (No. 45/2007, dated 27.4.2010). *Republic of Cyprus* v. *Svetlana Shalaeva* (No. 72/2008, dated 22.12.2010); *Abdulkader Majed v. Republic of Cyprus* No. 1099/2009, 7.2.2011.

30 See Gary McIndoe (2011) '*Dereci* - Narrowing *Zambrano*?', *Latitude Law*, 23-11-2011, at http://www.latitudelaw.com/news-*Dereci*-narrowing-*Zambrano*-by-gary-mcindoe-37.html.

31 See previous paragraph.

rights connected to the status of citizens of the Union, and in all three cases the persons concerned did not exercise the right of free movement.

In *McCarthy*, the CJEU applied the test established in *Zambrano* (test of 'genuine enjoyment of the substance' of EU citizenship rights) and *Dereci* judgment contributed to the clarification of the scope of this test. However, the judgments differ in facts and also in results. In contrast to *Zambrano*, the CJEU decided in *McCarthy* that an EU citizen would not be 'deprived of the genuine enjoyment of the substance of her rights' if issuing of a residence permit to her third country national spouse will be refused. As for *Dereci* it must be stressed that the CJEU left it to the national court (which asked the preliminary questions) to decide on the fact whether the particular situation falls within the scope of EU law and whether or not the family members (EU nationals) were deprived of 'genuine enjoyment of the substance' of EU citizenship rights by the decision of the responsible authority.

As to the situation which appeared in *Zambrano*, we may recall our statement from the yearly report 2011. The legislation of the Czech Republic does not allow deprivation of the Czech citizenship. A child has a right to family reunification too. The definition of a family member in FoRA covers the *Zambrano* situation. What may still appear as a problem is a situation when a person does not live with a child in a common household (e.g. a child entered a foster care). Then the parent, a third country national, does not fulfil conditions of Sec. 15a of FoRA (definition of a family member), which insists on parents´ living with a child in a common household. Another problem may appear with conditions for issue of a residence card (a person will be issued the card in case he/she is a family member of EU/Czech national). Immediately after a parent obtains a residence card, he/she may work without a work permit, upon the same conditions as Czech citizens. But if – and it most probably will not be a typical situation, but it may happen – a person does not have a residence card then he/she may be unemployed because he/she needs a work permit for the access to labour market and thus may become an unreasonable burden on the social system and therefore the residence card will not be issued to him/her. At least one similar case was subject to review of the Commission for Residence of Foreigners[32] and the case was solved with a reference to *Zambrano* case. But in this case it was obvious that the parent cares of the child, visits him very often (the child was placed in a 'children´s home', a state run place for children which were taken away from their families for legal reasons) and tries to live a regular 'family life'. So to conclude, there might remain some problems with correct application of *Zambrano* judgment in edge cases.

The *McCarthy* judgment was mentioned in judgments of Czech Supreme Administrative Court (3 AS 4-2010/151 of 26 July 2011 and 3 AS 4-2010/171 of 18 August 2011), but the application of the case was limited to the referral to this judgment; in other words, the courts did not apply the judgment, they just referred to it. Therefore we shall concentrate on the possible impact of the judgment for the legal order of the Czech Republic.

In *McCarthy* the specificity was that Ms. *McCarthy* is a dual Irish-UK national, relying on her EU citizenship rights in order to ensure the right of residence for her third country family member. If exploring the case under the Czech legislation, it has first to be noted that the Czech legislator decided to abolish the reverse discrimination of Czech citizens by adopt-

32 The Commission is an appeal institution for the Asylum and Migration Policy Department of the Ministry of Interior. The Commission is a part of the Ministry too, but is formed by outside workers too. The information about the case was given to the rapporteur by a member of the commission in a phone interview.

ing the rule that provisions applicable to third country national family members of EU nationals shall be applicable also to third country national family members of Czech citizens.[33]

According to Sec. 87b) FoRA a third country national family member of an EU national (or of a Czech citizen) needs to apply the Ministry of the Interior of the Czech Republic for a 'temporary residence permit' (i.e. a residence card; the deadline for application is 3 months since the entry on the territory) , if he/she wants to stay on the territory of the Czech Republic together with his/her family member for a period longer than 3 months. Compulsory attachments of the application are: a travel document; a document confirming that the applicant is a family member of an EU citizen, or a dependent; 2 photographs; proof of travel medical insurance, (not required if the purpose of the stay is employment, business or other gainful employment); and proof of accommodation. The third country national family member may also apply for permanent residence permit. In such a case he/she has to prove 5 years of continuous stay in the territory of the Czech republic or fulfil the following substantial conditions: be a family member of an EU citizen; 2 years of continuous temporary residence in the Czech Republic; being at least 1 year a family member of a citizen of the CR who is registered with permanent residence in the territory (or being a family member of a citizen from another EU Member State, who has been issued a permanent residence permit for the Czech Republic); present a proof of accommodation. We may note that dual nationality of a Czech citizen does not play a role when granting temporary or permanent stay of his/her third country family member on the territory of the Czech Republic. From the above mentioned it can be followed that a person in situation of Mr. *McCarthy* would be able to obtain residence (temporary or permanent) in the Czech Republic without the necessity to derive the right to residence from the right of free movement of his spouse. Consequently the question of the application of *Zambrano* test and its limits (whether in the particular case the EU national was really deprived of genuine enjoyment of the EU citizenship substance) would not arise in such context.

In *Dereci* (C-256/11), the CJEU left the decision whether EU law is applicable to the national court. Similarly the Czech courts would have to decide, whether to apply the EU law in such cases as occurred in *Dereci* and whether not issuing a stay to third country family members of EU nationals would in the concrete causa result in the 'deprivation of the genuine enjoyment of the substance of the rights'. The CJEU thus offered only a limited clarification of the *Zambrano* test, which leads to two conclusions: First, in cases like *Dereci* the Czech courts would enjoy a broad scope of discretion on deciding whether to apply (and how to apply) the *Zambrano* test. Second, to the situations which arose under *Dereci*, the explanations made above in the context of *McCarthy* would be applicable, i.e. third country family members would be eligible for temporary residence in the Czech Republic.

Denmark

According to the Ministry of Refugee, Immigration and Integration Affairs, the *Zambrano* judgment will only in exceptional cases necessitate the issuance of a residence permit under EU law in Denmark, since children as a general rule only obtain Danish citizenship at birth if

33 The Ministry of Interior prepared a project of new legislation on foreigners at the end of 2010. The Ministry is now preparing the draft law; it should be presented till the end of 2012. The Ministry plans to separate the issue of EU nationals and their family members and that of third country nationals. There should be a special law on EU nationals and their family members, the family members of Czech nationals will most probably be incorporated into the law on third country nationals which will be a change in comparison to the current situation, because the issue of reverse discrimination might appear again.

at least one of the parents is a Danish citizen.[34] This assessment reflects the view that the judgment is based on the assumption that residence right under EU law should be granted to a third-country national having a minor child being a Union citizen, only in cases where the minor child is dependent on the third-country parent, and they are residing in the Member State of which the child is a citizen.

Thus, the Ministry assumes that residence right under EU law will only have to be granted in such situations where the third-country national is the only parent on whom the minor child is dependent, and there is no other parent residing in the Member State who is capable of taking care of the child.[35] In other words, the minor child will only have to be considered as deprived of the genuine enjoyment of the substance of the rights attaching to his or her status of Union citizen, if refusal of residence to the third-country parent would in effect require the child to follow the parent to his or country of origin.

As regards the issue of reconsideration of cases in which the residence right of parents has been refused prior to the *Zambrano* judgment, the Ministry of Refugee, Immigration and Integration Affairs has issued guidelines based on the principle that the CJEU interpretation of Art. 20 TFEU must be given effect as of the date of entry into force of this provision, i.e. 1 November 1993 when the Maastricht Treaty establishing Union citizenship entered into force. However, the practical implementation of this principle seems to be somewhat modified by way of reference to principles of Danish administrative law.[36]

McCarthy and *Dereci* are not covered in the Danish report.

Estonia

In the *Zambrano* judgment the European Court of Justice seems to have held that the parents of a child who is a national of a Member State must be granted the right to work and the right of residence in that Member State in order to protect the right of the child to live in Europe. This case would have an impact by granting the right of residence and right to work in Estonia due to the fact that the children would have Estonian nationality. According to the Estonian constitution a child will have a right for Estonian citizenship in case at least one of the parents has Estonian citizenship. Taking into account the circumstances of the case, the decision would not have any impact in Estonia. It would have only impact if one of the parents had Estonian citizenship. Only the complications would have a parent without Estonian citizenship. The legal status on non-Estonian spouse will resolved within the framework of legal position of the family-members.

The *McCarthy* case concerns the right of a person to move freely within the European Union and also the situation, where a person wants to relay on the European rules in case she or he never used right to free movement.

The outcomes of the case would not have significant influence to the Estonian system. The position of the citizen of the European Union has been in Estonia determined by the Citizen of the European Union Act. The Act will harmonise EU directive 2004/38/EC. As the basis of the directive is the idea of free movement between Member States, the Estonian

34 Memorandum of 11 May 2011 from the Ministry of Refugee, Immigration and Integration Affairs.

35 In at least one instance this resulted in the third-country parent being issued a residence permit after the passing away of the Danish citizen who was the other parent, cf. decision of 30 August 2011 by the Danish Immigration Service. A similar delimitation of the scope of the residence right under EU law may seem to have been implicitly accepted by the Danish Supreme Court in its judgment of 17 February 2012 (Case 194/2011) concerning the expulsion of a third-country national parent of a child whose Danish parent was still in the country, given the Court's tacit rejection of the appellant's reference to the *Zambrano* judgment.

36 Memorandum of 19 August 2011 from the Ministry of Refugee, Immigration and Integration Affairs.

CEUA foresees, that in order to apply the rules of Citizen of European Union Act, a person has to make use of the free movement. If a person did not use the right for free movement he or she is not considered to apply the rules of the European Union and it is considered to be pure internal situation and should be solved under the Aliens Act. In order to apply Citizen of the European Union Act and the rights that have been foreseen in that Act, a person concerned has to make use of free movement between Member States.

The case of *Dereci* would have an impact to the Estonian situation. As the CJEU stated in the case that the right to stay in Member States are guaranteed by the TFEU itself, it is also necessary every time to prove not only the Directive 2004/38, but also the European Union charter of Fundamental Rights Art icle 7 and also ECHR Article 8 that guarantees a right for family life. The statement of CJEU makes the activity of migration administration and also the involvement of the courts more intensive in order to find out, if the right for family life will be violated or if there is any justification not to respect the right to family life.

Finland

The case of *Zambrano* is not expected to have any major influence in Finland. This is so because pursuant to section 50 of the Aliens Act, family members of Finnish citizens living in Finland, as well as minor unmarried children or the family members, are issued with a residence permit on the basis of family ties. In such case, the issuance of the permit does not require the alien to have secure means of support. Those issued with a permit on this ground have an unlimited right to work.

The Supreme Administrative Court asked in 2011 from the CJEU a preliminary ruling in two cases that concerned the right of residence of a spouse of a minor Finnish citizen's parent. In both cases, a person, who was the sole guardian of a minor Finnish citizen, was married to a third country national who did not have a residence permit in Finland because he did not meet the income requirement that was the precondition for obtaining a permit. The Supreme Administrative Court asked whether EU law precludes the application of the income requirement in such case, because that may result in a situation where an EU citizen, who is dependent on her guardian, may not enjoy her rights flowing from this citizenship. See joined cases C-356/11 and C-357/11.

McCarthy and *Dereci* are not covered in the Finnish report.

France

Two judgments of the Administrative Court of Lyon refer specifically to the CJEU *Zambrano* judgment. It does not seem obvious that these judgments are in full compliance with the jurisprudence of the CJEU. It therefore becomes essential to wait for a possible referral to or advice from the Council of State.

The first judgment is delivered October 19, 2011.[37] The prefect of the Puy-de-Dôme refused to grant the applicant a residence permit in 2009. It appears from the legal proceedings that Ms. A, an Ivorian citizen, came regularly in France August 10, 2008, accompanied by her Ivorian son, born July 19, 2006. She filed an application for asylum which she then expressly waived by letter dated 28 April 2009 and then submitted a request to issue a residence permit as a parent of a French child. This application was denied May 11 2009, due to the failure of the stay in France of her French daughter born December 17, 2004 and due to

37 Cour administrative d'appel Lyon, 19 Octobre 2011, n°11LY00762, Tape Epouse Toa Bi c Préfecture du Puy-de-Dôme.

the absence of evidence that Ms A participated in the maintenance and education of her child from birth on or for at least two years.

Following the arrival in France of the child, 16 October 2009, Ms. A made by letter dated 26 October 2009 received by the prefecture of the Puy-de-Dôme on the 30th of the same month, a new request for issuance of a temporary residence permit on the basis of 6° of Article L. 313-11 CESEDA. On 24 November 2009, the prefect of the Puy-de-Dôme asked to complete the file, within fifteen days, with a certificate of the French nationality of her daughter, the school certificate of the latter for the year 2009/2010, a complete copy of her passport and evidence of Ms. A's participation in the maintenance and education of the child since birth. In response, 8 December 2009, Ms. A has provided a number of documents.

The judges emphasized firstly that Ms. A, who has lived away on her own initiative from her French daughter from 10 August 2008 to 16 October 2009, has not produced evidence at the date of the implicit refusal, that she has actually contributed, since the child's birth or for at least two years, in the maintenance and education of her French daughter born December 17, 2004 in Côte d'Ivoire and who lived in this country, where her father and maternal grandmother reside as well, until 16 October 2009.

The judges then returned to the jurisprudence of the CJEU:

> *'It follows from the judgment of the Court of Justice of the European Union of 8 March 2011, Case C-34/09, Zambrano that Article 20 FTEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children. It also precludes the refusal to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen, and that, however, as has already been said, the French daughter of Ms. A was born in Ivory Coast December 17, 2004 and lived there until October 16, 2009, when she joined her mother, arrived in France for more than a year ago and, aware of the possibility she had to obtain a residence permit as a parent of a French child, had taken steps in this direction and decided to bring her daughter to France for this purpose.'*

The judges concluded that France may not be regarded as the state of residence of the French daughter of Ms. A, whose maternal grandmother took care of after her mother's departure for France and whose father was still living in Côte d'Ivoire to the date of the decision in dispute. As a result, at the date of the contested decision, Ms. A did not meet the conditions enabling her to benefit from the application of the provisions of Article 20 of the Treaty on the Functioning of the European Union.

The second judgment dated June 7, 2012,[38] set aside the judgment of the tribunal. According to the judges the facts are as follows: it appears from the file that Ms. X, a citizen of Benin, came for the first time to France May 21, 2007, on a short-stay visa. She gave birth in France, June 21, 2007 of her daughter Priscilla, of French nationality while her father had recognized her prenatally on February 2, 2007. Ms. X and her daughter returned to Benin three weeks after the birth of the child. They returned to France, under a short-stay visa, on 2

38 Cour administrative d'appel de Lyon, 7 juin 2012, n°11LY01612, Préfecture du Puy-de-Dôme c Hounvide épouse Amoussou.

October 2010, four months before the decision of the prefect refusing to issue a residence permit to Ms. X, with the obligation to leave French territory. It is not alleged that the young Priscilla has maintained contact with her father living in France during the three years of their separation as a result; and notwithstanding the presence in France of the father of the child and the possible enrollment of young Priscilla in kindergarten at the time of the decision at issue, given the very low residence time of this child in France, where her mother is returned under a short-stay visa, the young Priscilla must be regarded as ordinarily resident in Benin at the date of the desputed decision.

The judges refer firstly to Article 20 TFEU on the concept of citizenship and the rights attached thereto. They add:

> *'These rights shall be exercised under the conditions and limits defined by the Treaties and by the measures adopted pursuant thereto. It follows from the judgment of the Court of Justice of the European Union of 8 March 2011, Grand Chamber, Case C-34/09, Zambrano c / NEO that Article 20 of the Treaty on the Functioning of the European Union must be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children. It also precludes the refusal to grant a work permit to that third-country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.'*

Then they made reference to the *Dereci* judgment of the Court of Justice of the European Union of 15 November 2011 (C-256/11) which states:

> *'European Union law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to free movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.'*

The conclusion drawn by the judges is as follows: France can not be regarded as the habitual residence of Ms. X and her daughter Priscilla at the time of the refusal to issue a residence permit, which, in any event, does not preclude that the young Priscilla remains in France with his father and does not oblige, by itself, Ms. X to leave French territory. Thus, the plea alleging infringement of the aforementioned provisions of Article 20 of the Treaty on the Functioning of the European Union by the decision of the prefect of the Puy-de-Dôme refusing to issue a residence permit to Ms. X, must be rejected.

Germany

Various court decisions deal with the impact of the CJEU's *Zambrano, McCarthy* and *Dereci* judgments on the scope of application of free movement rights.

The Federal Administrative Court in a judgment of 22.06.2011[39] refers to the *Zambrano* judgment and the subsequent *McCarthy* judgment in arguing that Union law does not provide for a free movement right of a third country national spouse of a German national who did not make use of his free movement rights within the European Union. The court argues that the CJEU in its *Zambrano* judgment did not follow the advocate general's request to abolish reverse discrimination with regard to rights derived from union citizenship for nationals who have not exercised their free movement rights, since the CJEU does not require a cross-border element only within the 'core' of EU citizenship rights (a position which the CJEU reiterated and confirmed in its *Dereci* judgment which was delivered after the ruling of the German Federal Administrative Court). In applying these principles, the Federal Court concludes from the *McCarthy*-judgment that the denial of a residence right for a third country national spouse of a union citizen does not result in a denial of the core substance of union citizenship. Different to the situation in *Zambrano* and in parallel to the *McCarthy* decision of the CJEU, the rejection of a residence right for spouses does not amount to an obligation of the union citizen to leave the territory of the European Union. Based upon his nationality a German national possesses an unlimited residence right. In the absence of crossborder movement activating the free movement rules, the conditions or limitations of the right of spouses to join their German spouses were to be determined exclusively by national law.[40]

On the same line argues the Administrative Appeal Court of Lower Saxony (OVG Sachsen) in a decision of 4 October 2011.[41] The court was facing a request for a residence permit for an unemployed third country national for the purpose of being able to visit on a regular basis his child for which he does not paid any subsistence costs and which is living in a 'care family' following a decision of the competent family court. The court rejects the application of *Zambrano* principles on the core of EU citizenship stating that the German child not be forced to leave the territory of the European Union in case of a denial of a residence permit would, since the German child, which had never made use of free movement rights within the European Union, was living in a care family and had only lose connections with his father based by temporary visits. Even if the father left the EU, the child could therefore be expected to stay with the care family.

The same conclusion with regard to the consequences of *Zambrano* and *McCarthy* are drawn by the Administrative Appeal Court of Hesse (VGH Kassel).[42] The court was addressed with an appeal against the rejection of a residence permit of an Albanian national who was living together with a German national in Germany and having with her a common daughter possessing as well German nationality. The Albanians national's application for a residence permit (following an expulsion for criminal offences) was rejected with the argument that the denial of a residence permit did not interfere into the core substance of rights of the German child in accordance with the CJEU decisions. The court argues that the applicant did not show that his child was forced to leave the Union territory due to the fact that he had been compelled to leave the Federal Republic. Therefore, the applicant Albanian national could only be authorized to return to Germany on the basis of a new procedure limiting the effects of the previous expulsion decision (not on the basis of the child's Union citizenship). The application of the *Zambrano* criteria required, in the court's view, that the applicant shows for what legal or factual reason that departure has to be considered as impossible. The

39 BVerwG, judgment of 22 June 2011, Case 1 C 11.10, www.berwg.de.
40 *Ibid*., para. 10, referring to the *Metock*-Judgment of the CJEU, ECRE 2008, I-6257.
41 4 NE 184/11, Informationsbrief Ausländerrecht 2012, 13.
42 Decision of 20.10.2011, 3 A 554/11 Z, Informationsbrief Ausländerrecht 2012, 63.

mere fact of being father of a German child and being obliged to return in the implementation of a deportation procedure to the country of origin could not be considered in the absence of particular circumstances as a barrier for deportation.

In a similar vein, a couple of other judgments reject direct implications of the said CJEU judgments, arguing that the rejection of residents permit to third country national family members of German nationals which have never exercised their free movement rights within the European Union would not force the German nationals in question to leave EU territory. Therefore, Article 20 TFEU and/or the Citizenship Directive do not apply to the cases decided – mirroring the *McCarthy* and *Dereci* rulings of the CJEU. None of the Courts mentioned below does however embark upon an extensive legal assessment of their own; they usually refer to the *McCarthy* and/or *Dereci* rulings as well as to the judgment of the Federal Administrative Court of June 2011 mentioned above, to justify their result:

- Administrative Appeals Court (OVG) Berlin-Brandenburg, Urteil vom 19.03.2012, OVG 3 B 21.11;
- Administrative Appeals Court (OVG) Lüneburg, Beschluss vom 04.10.2011, 4 ME 184-11;
- VGH Baden-Württemberg, Urteil vom 07.12.2011, 11 S 897/11;
- Administrative Appeals Court (OVG) Northrine Westfalia, Beschluss vom 29.04.2011, 18 B 377-11;
- Administrative Appeals Court (OVG) of Hesse, Beschluss vom 27.10.2011, 6 D 1633/11;
- Administrative Appeals Court (OVG) of Hesse, Urteil vom 07.07.2011, 7 B 1254/11.

The Administrative Appeal Court (VGH) of Baden-Württemberg is also faced with the implications of the *Zambrano* judgment on the national rules on family reunion.[43] Somewhat different from the Federal Administrative Courts judgment discussed above, the Appeal Court argues that the *Zambrano* judgment is to be interpreted as ousting the provisions of the German residence act on family reunion, which apply to third-country national parents of German citizens. The court, however, leaves open whether the *Zambrano*-judgment results in an obligation to treat equally third country national spouses of German citizens with Union citizens who have made use of their free movement rights within the European Union and whether the provisions of the Union Citizens Directive 2004/38, in particular Article 28, have to be applied by analogy to family relatives of German citizens in general. Independent of an application of such provisions by analogy the court argues that Art. 6 para. 2 of the EU Treaty as well as Art. 52 para. 3 and 7 of the Fundamental Rights Charter an equivalent human rights protection has to be adopted in order to achieve an equal application between the rights under the EU Fundamental Rights Charter and the European Convention of Human Rights.

The same court (Administrative Appeal Court (VGH) of Baden-Württemberg) also has to decide the case of a Japanese national living in the Southern German city of Ulm who separated from the mother of his common child, who is a German national. While the father stayed in the German city of Ulm and maintained joint custody with the child, the mother and the child moved to the Austrian capital of Vienna. The father now claims a residence rights as the family member of an EU citizen on the basis of CJEU case-law and/or the citizenship directive, although the denial of this right under EU law would not directly affect his

43 Administrative Appeal Court Baden-Württemberg, judgment of 04.05.2011, 11 S 207/11.

legal capacity to remain within Germany, since he has a residence permit as an economic migrant which guarantees residence security, but provides somewhat less rights than free movement law. The case was referred to the CJEU in order to identify the implications of the *Zambrano* line of cases and/or Article 24 of the Charter of Fundamental Rights (Case C-40/11, pending).

In order to receive an interim judicial protection of a Union citizen right based upon the *Zambrano* judgment the Administrative Appeal Court of Baden-Württemberg (VGH Mannheim)[44] takes the view that a third country national as a father of a child born in Germany and possessing German nationality may be entitled to judicial interim protection. The applicant relied upon the *Zambrano*-judgment in order to get a work permit and a residence permit. He argued that his deportation would interfere into his daughters' right as a Union citizen. The court applies in principle the *Zambrano*-criteria arguing that limitations of rights derived from the core substance of Union citizenship may be subject only to limitations in accordance with the jurisprudence of the European Court of Human Rights under Art. 8 ECHR.

Greece

With regard to *Zambrano*, *McCarthy* and *Dereci* the Greek report refers to Art. 6 par. 2 of the Presidential Decree (P.D.) 106/2007 according to which provision third-country family members in possession of a valid passport accompanying or joining a Union citizen have the right of residence on Greek territory for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. The right of residence for more than three months, according to Art. 7 par. 2 of P.D. 106/2007, is extended to family members who are not nationals of a Member State, accompanying or joining a Union citizen, provided that such Union citizen satisfies the conditions provided by law for such a residence. Therefore, no status of previous residence in another Member State is provided and the *Metock* and the *Eind* judgments do not have influence in Greece.

Art. 61 of Law 3386/2005 provides that family members of Greeks or other EU Member State citizens, who are third-country nationals and accompany them or wish to join them, provided that they lawfully reside in the country and their length of residence exceeds three months, shall be issued a 'Residence Card for family member of a Greek or another EU Member State citizen'. The holders of the Residence Card shall be entitled to employment. Family members of a Greek or other EU Member State citizen shall be first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them. family members of Greeks or other EU Member State citizens, who are third-country nationals and accompany them or wish to join them, provided that they lawfully reside in the country and their length of residence exceeds three months, shall be issued a 'Residence Card for family member of a Greek or another EU Member State citizen'. The holders of the Residence Card shall be entitled to employment. Family members of a Greek or other EU Member State citizen shall be first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them.

44 Decision of 12.05.2011, 11 S 765/11.

Hungary

In the *Zambrano* case the residence rights and the free access to work of the third-country national parents of two minor EU citizens were at stake in Belgium where no connections to another Member State were present.

First of all, Hungarian law (especially Act LV of 1993 on Hungarian Nationality, Article 3(3) thereof) lays down that a child of stateless persons having a permanent residence in Hungary shall be deemed Hungarian nationals until the contrary is proven (conditional acquisition). The pure fact that the parents did not apply for nationality for their child in their country of origin would not suffice to obtain Hungarian nationality. However, the (de jure or/and de facto) statelessness definition in the Act LV of 1993 is not determined while the Act II of 2007 sets up a recognition procedure of statelessness due to the UN Convention (1954).

As regards residence rights, however, Hungarian law is more liberal. In Hungary, according to Article 2 paragraph bg) of FreeA the person who is the official primary carer of a minor Hungarian national qualifies as 'family member' in terms of EU legislation (Directive 2004/38/EC). Family members are, in terms of the logic of the Hungarian legislation, entitled to install themselves with the EU national (Article 6 (2) of the Act) if the EU national disposes over suitable financial means to cover the living costs of the third-country family members. According to Article 7(3) of FreeA residence beyond three months can be permitted to persons who are primary carers of a minor Hungarian national even if no suitable financial means can be presented.

As regards free (without work permit) access to the labour market in the above situation, the UnemplA states in Article 2(2) that persons disposing over the right to free movement and residence in Hungary shall be treated equally with Hungarian nationals. Third-country parents of a Hungarian national can be qualified as family members in terms of Article 2 point bg) of the FreeA. Consequently, if the residence rights are granted and the parents fall within the definition of 'family member', then also free access to the labour market is guaranteed. Additionally, Hungarian law provides exemptions for specific categories but they are connected to the type of work and not to the civil law status of the third-country national.

Lastly, as regards entitlement to unemployment benefits, Hungarian law provides for unemployment benefits only if the previous employment was lawful and, cumulatively, the person has a right to search for work. In the *Zambrano* case the person's employment was unlawful because he worked without a work permit. Hungarian law at present would qualify the situation in the same way and would not grant unemployment benefit. However, if the third-country national would exercise a lawful free access, s/he would be able to qualify as a job-seeker and to apply for benefits while also searching for work.

In the *McCarthy* case the CJEU declared that a person who lives in the UK while having both British and Irish citizenship, and who has never exercised her right to free movement, does not qualify as a 'beneficiary' in terms of Directive 2004/38 and likewise, this person can not avail herself of the rights guaranteed under Article 21 TFEU. Essentially, UK law did not treat *McCarthy* as a migrant EEA national and that is why her husband was not in the position to obtain residence permit under EU law.

Hungarian law eliminated reverse discrimination upon the entry into force of the FreeA. According to the Act, Hungarian nationals are conferred the same rights as those union citizens have who exercised their free movement rights in Hungary. Hungarian law puts them on equal footing. However, they are not positively discriminated, meaning that also Hungari-

an citizens are required to meet certain criteria when they wish to obtain a residence card for a family member. Connected to this case, Hungarian citizens are awaited to be economically active or self-sufficient, or need to provide for adequate financial resources in order to avoid the family member becoming a financial burden on the social assistance system of Hungary. It means that if a Hungarian person is able to prove that s/he has adequate financial resources for him/herself and for the family members, the residence card is issued on the basis of EU law.

There have been two cases before the Hungarian Supreme Court of Hungary as regards marriages of convenience.[45] In these cases the Supreme Court declared that, in a proceeding, based on an application of a third-country spouse to obtain a residence card in Hungary, the Hungarian authorities are ex officio entitled to check, pursuant to Article 14 (2) of the FreeA, whether the marriage has only been contracted to obtain a residence right. In both cases the Supreme Court confirmed that the decisions of the immigration authorities, when rejecting the applications, were well-founded and in compliance with Directive 2004/38/EC.

In the *Dereci* case third-country national family members were refused residence rights in Austria. The CJEU declared that Directive 2004/38/EC was not applicable, and the Treaty provisions on union citizenship would preclude a Member State from refusing to allow residence rights only if such a refusal would lead to the denial of genuine enjoyment of the rights conferred on union citizens. However, the CJEU deemed the Austrian rules being a forbidden new restriction in terms of the standstill clause of Decision 1/80.

We can split the judgment into two major parts. The first part confirms the former case law of *Zambrano* and *McCarthy*, concerning which the afore-said are to be taken into account in Hungarian law. As regards the applicability of Decision 1/80 as regards Turkish nationals, it has to be admitted that in Hungary no negative change was implemented in the regulation of access of third-country nationals, neither as regards residence rights, nor as regards access to the labour market. With time Hungarian rules have become more and more loosened and permissive. However, the preferential treatment of Turkish workers has not inserted to the national law with reference on their low presence in the labour market (in the year of 2011 176 out of the total 10556).[46]

Ireland

In the 2003 Supreme Court case of *AO & DL v Minister for Justice, Equality and Law Reform*, the majority of the Supreme Court held that the constitutional right of Irish citizen children to the presence of their parents in the State was not absolute and unqualified, but could be overridden by grave and substantial reasons associated with the common good, e.g. the need to ensure respect for the integrity of the immigration and asylum system.[47] This case resulted in the deportation of third-country national parents of Irish citizen children and, in turn, the effective removal of the Irish citizen children.

The *Zambrano* judgment has important implications for the third-country national parents of children born in Ireland prior to 1 January 2005 as such children were constitutionally entitled to jus soli Irish citizenship. A constitutional amendment in 2004 removed this constitutional entitlement in respect of children of third-country nationals born in Ireland after 1

45 *Közigazgatási-Gazdasági Döntvénytár 2011/121; Közigazgatási-Gazdasági Döntvénytár 2011/149.*
46 http://www.afsz.hu/engine.aspx?page=stat_kulf_munkavall_mo-on (Data of 2011 and I. quater of 2012).
47 [2003] 1 IR 1.

January 2005 under certain circumstances. To the extent that such children are not Irish citizens under the relevant legislation, the *Zambrano* case will not be applicable.

According to the website of the Irish Naturalisation and Immigration Service (INIS), the *Zambrano* judgment applies to an Irish born citizen's country of residence and nationality. Therefore, if an Irish born citizen child has not been ordinarily resident in Ireland, his/her parent(s) cannot rely on *Zambrano* as a basis for securing a right of residence in Ireland. However, in a recent case, an Irish citizen child was allowed to return to Ireland to apply for *Zambrano* residence where the child and their mother had previously been required to leave Ireland on the expiration of their visa.[48] The INIS website further provides that the *Zambrano* judgment is not applicable to any person who left Ireland of his/her own free will.[49]

The examination of cases involving Irish citizen children, with potential application of the *Zambrano* case, is ongoing. In March 2012, the Minister for Justice, and Equality reported that 1,680 persons had applied to the Immigration Service of his Department for re-examination of their case in light of the *Zambrano* judgment. As of March 2012, decisions had been made in 925 cases and permission to remain was granted in 791 cases. The Minister explained that the majority of the remaining cases are those for which further documentation is required. The Minister also stated that a number of third country nationals who have already been given permission to remain in the State (e.g. students or dependents) have sought to have the terms of the *Zambrano* judgment applied to them on the basis of being a parent of an Irish citizen child. It has recently been reported that waiting times for an application based on the *Zambrano* judgment have increased from 3-6 months to 6-12 months.[50]

Additionally, there were 193 cases subject to judicial review proceedings, where a link to the *Zambrano* judgment had been identified. Of these cases, 148 have led to the grant of permission to remain in Ireland (according to the Minister's statement of March 2012).[51]

The case of *Zambrano* was considered in *AO v Minister for Justice, Equality and Law Reform & Ors (No. 2)*.[52] This case involved a Nigerian applicant who came to Ireland and unsuccessfully applied for asylum. During this period he became a father to an Irish citizen child, by which time the relationship with the Irish mother of the child had broken down. Some months after the birth of his daughter, the applicant applied for access and guardianship rights. On seeking a stay on his deportation order, the applicant sought to apply the *Zambrano* principle to his case. It was held that the applicant could not show that his child was in any way dependent on him, as he had not seen the child, nor had he paid any contributions towards her upkeep. There was no prospect of reconciliation between the applicant and the child's mother. Furthermore, because the child's mother was an Irish citizen, there was no realistic prospect that the child would be obliged by the State to leave the EU territory. In such circumstances, *Zambrano* could not be held to apply. The Court, however, considered the constitutional right of the child to the care and company of his or her parents and on this basis declined to pre-empt the resolution of the applicant's guardianship request and thus stayed the deportation order. In a subsequent related decision, *AO v Minister for Justice, Equality and Law Reform & Ors (No. 3)*,[53] the High Court adjourned the applicant's challenge to the decision on subsidiary protection and granted leave to amend judicial review

48 http://www.nascireland.org/latest-news/nasc-case-questions-ordinarily-resident-requirement-in-zambrano-applications/.
49 http://www.inis.gov.ie/en/INIS/Pages/WP11000038.
50 http://brophysolicitorsimmigration.blogspot.com/2012/05/zambrano-applications-irish-child-not.html.
51 Parliamentary debates, 29 March 2012 http://debates.oireachtas.ie/dail/2012/03/29/00157.asp.
52 [2012] IEHC 79.
53 [2012] IEHC 104.

pleadings to assert the rights of the Irish citizen child under the Constitution and, if needs be, Article 8 of the European Convention on Human Rights. Mr. Justice Hogan said that the most important question presented by the application was the extent to which the Court could take account of the baby's interests, over and above the wishes of her mother and sole guardian. The outcome of this challenge remains to be seen.

In another recent case, *Smith and Ors v Minister for Justice and Equality & Ors*,[54] the applicant (a Nigerian national) challenged a decision of the Minister for Justice and Equality to refuse to revoke a deportation order. The applicant had an Irish citizen son and sought permission to remain in Ireland on foot of the *Zambrano* decision. The Minister decided that, following the deportation of the applicant, the minor in question would continue to remain in the State with his mother and that the applicant had not demonstrated that his son was dependent on him. *Zambrano* was thus deemed inapplicable. Arguments based on the emotional bond between the father and son were not persuasive. The judicial review proceedings in the High Court, challenging the Minister's decision, upheld that decision.

In the High Court, Mr. Justice Cooke stated: 'The removal of a third country national from the State does, of course, also remove the individual from the territory of the European Union. In circumstances such as those in the present case, however, it is only where the principle of the *Zambrano* judgment is applicable that the Member State comes under any obligation derived from Union law not to effect the removal. As the Minister has, correctly and lawfully in the judgment of the Court, decided in the first refusal that this was not a case in which the *Zambrano* principle was applicable because the deportation of Mr. Smith would clearly not result in any other member of the family leaving the European Union, that consideration cannot be said to arise in this case.' The Court also noted that there had been repeated abuse by Mr. Smith of the immigration laws of the State and the laws of another Member State that would, in the judgment of the Court, be ample ground for refusing the application in any event.[55]

These cases demonstrate that the application of *Zambrano* in Ireland will require something substantially more than a family relationship between the party seeking permission to stay and the Irish citizen child in question. To be successful on *Zambrano* grounds, the applicant will have to show that his/her deportation will result in the removal of an Irish citizen child from the State.

The Irish approach concerning *McCarthy* is similar to the UK approach in that non-free moving Irish nationals are not entitled, even if they also hold the nationality of another Member State, to enjoy the rights of a 'beneficiary' under Article 3 of Directive 2004/38/EC.

The 'principle' of reverse discrimination thus continues to apply. The 'reverse discrimination' issue was addressed directly in the case of *TM & Ors. v Minister for Justice, Equality and Law Reform*.[56] That case involved a Chinese woman (Ms. W) who had an Irish citizen daughter, son-in-law and grandchildren. She was refused permission to remain in Ireland, and challenged that decision on that basis of her dependence on her daughter and son-in-law, and in turn, their reliance on her to take care of the grandchildren. Amongst other arguments, the applicants drew attention to the fact that Ms W.'s Irish citizen daughter was subject to

54 [2012] IEHC 113. The decision was delivered on 5 March 2012.
55 Paragraphs 24-25 of the decision.
56 [2009] IEHC 500.

discrimination in comparison to non-Irish EU citizens who, exercising their right to reside in Ireland, could have their dependent parents reside with them in the State.

In refusing leave to challenge the Minister's decision, Mr. Justice Edwards stated as follows:

> *'It is fundamental to the notion of discrimination that you have two persons who are in an equivalent situation and that one is treated differently from the other, notwithstanding this equivalence. In this case, however, the court is satisfied that the first named applicant's situation is not equivalent to that of a non-Irish [EU] worker who travels to Ireland to take up a job and brings her non-[EU] national mother with her to reside in Ireland. In the case of the non-Irish [EU] worker that person has specifically invoked her freedom of movement rights under the [EU] Treaties and the provisions of Directive 38/2004/EC. By comparison, the first named applicant, as a naturalised Irish person, is entitled as of right to work here and does not need to invoke or rely upon any Treaty right, or the provisions of any Directive. Accordingly her situation is not equivalent to the situation of a non-Irish [EU] national exercising her free movement rights […] Ireland is entitled to treat the applicants less favourably than a national of another Member State who is in a position to reply upon a specific Treaty right that the applicants are not in a position to avail of.'*[57]

Reverse discrimination was also at issue in the case of *O'Leary & Ors. v Minister for Justice, Equality and Law Reform*,[58] heard before the High Court in June 2011. The case involved an Irish citizen man who married a South African born woman, who acquired Irish citizenship on marriage. The South African parents of the now Irish citizen woman sought permanent residence in Ireland, due to ill-health and other difficult circumstances in South Africa. Mr. Justice Hogan referred to *McCarthy*, stating that: 'The question of reverse discrimination under EU law also hovers over this case.'[59] If it was the case that the South-African born wife of the Irish citizen, who herself became an Irish citizen, had been a citizen of another EU state, she would have been allowed to have her dependent parents reside with her, under the provisions of the Directive 2004/38/EC. Because of her Irish citizenship, she could not invoke provisions of the Directive in the context of matters governed entirely by domestic law, as per *McCarthy*.[60] The High Court granted leave to apply for judicial review of the Minister's decision to refuse the parents permission to reside in Ireland. The grounds of review were primarily based on the interference with the applicant's constitutional family rights. Justice Hogan also granted express leave based on the argument that it would be 'incongruous that dependent parents could be protected under EU law if no equivalent protections were available under our domestic law and that Article 41 [of the Constitution] should not be so weakly interpreted as to sanction this state of affairs'.[61] In February 2012, the decision of the Minister was quashed on the basis that the decision was not based on a fair and reasonable assessment of the underlying facts, and that inadequate consideration had been given to balancing the applicant's family rights under the Constitution with the interests of the State in maintaining the integrity of immigration laws.

57 See paragraphs 81 – 82 of the judgment.
58 [2011] IEHC 256.
59 See paragraph 46 of the judgment.
60 See paragraph 46 of the judgment.
61 See paragraph 47 of the judgment.

The current Minister for Justice and Equality made the following statement regarding reverse discrimination, prior to becoming Minister, in a debate on proposed new Immigration legislation:

> *'Too many Irish citizens engaged in a full family and properly intimate marriage relationship, experience difficulties in having a non-Irish non-EU spouse granted residency rights in this State in circumstances in which no difficulty should arise. Essentially, because Irish citizens do not have a statutory right to be joined by family members who are non-EU citizens in Ireland, they can experience what can properly be described as reverse discrimination in comparison to the rights that apply to other EU citizens under the EU Freedom of Movement Directive 2004 [i.e. Directive 2004/38/EC]. While this anomaly also exists in some other EU states, its impact is reduced by domestic immigration rules which prescribe in detail the entitlement to family reunification and which are not dependent on the exercise of individual discretion by the Minister, or a decision made by an official in his Department. This area needs to be much better addressed in the [Immigration, Residence and Protection] Bill [2010].'*[62]

At the time of writing, the proposed legislation referred to in the Minister's statement continues to be debated before the Irish Parliament.[63]

In *Dereci*, the Court of Justice applied the test of 'genuine enjoyment of the substance' of EU citizenship rights. It found that a denial of these rights refers to situations where the EU citizen has to leave not only the territory of the Member State of which he is a national, but also the territory of the Union as a whole.

The case of *Dereci* has had some brief mention in recent immigration cases. In *AO v Minister for Justice, Equality and Law Reform & Ors (No. 2)*,[64] the Court quoted directly from the *Dereci* judgment in paragraph 21, to confirm that: 'European Union law […] does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union, which is a matter for the referring court to verify.'

The circumstances of this case, as referred to above,[65] were that the Nigerian applicant came to Ireland and unsuccessfully applied for asylum. During this period he became a father to an Irish citizen child, by which time the relationship with the Irish mother of the child had broken down. On seeking a stay on his deportation order, the applicant sought to apply the *Zambrano* principle to his case. In distinguishing *Zambrano* (as described above), the Court drew on *Dereci*, and found that there was no prospect that the child would be removed from the territory of the EU, and thus deprived of the real benefits of Union citizenship. The applicant failed to show any dependency of his daughter on him. In this way, the High Court used the judgment of *Dereci* to confine *Zambrano* to its particular facts of where a Union

62 Parliamentary debate on the Immigration, Residence and Protection Bill 2010, 6 October 2010.
63 http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2010/3810/document1.htm.
64 [2012] IEHC 79.
65 See analysis of the *Zambrano* decision above for further details on the facts of this case.

citizen child is dependent on its third country parent for the real enjoyment of its citizenship rights. As noted above, in a follow-on decision seeking judicial review *(AO v Minister for Justice, Equality and Law Reform & Ors (No. 3))*,[66] the High Court granted leave to the applicant to seek judicial review on the basis of the family rights of the child under the Constitution and, if necessary, under Article 8 of the European Convention on Human Rights.

Dereci was also mentioned in the case of *Smith and Ors v Minister for Justice and Equality & Ors*.[67] The decision to refuse to revoke a deportation order relied on the following passage of the *Dereci* decision:

> *'The mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.'*

In refusing to grant relief to review the decision, the High Court noted that the non-application of *Zambrano* was reaffirmed on the basis that the child would not be obliged to leave the State because of a deportation order imposed on his father. As advocated in *Dereci*, the High Court also addressed Article 7 and Article 8 rights under the Charter of Fundamental Rights and the European Convention on Human Rights respectively. It found Article 7 to be inapplicable due to the fact that the issue to be decided did not raise a matter of EU law. It further found that Article 8 rights had been sufficiently addressed in the Minister's decision in respect of the deportation order. According to Mr. Justice Cooke: 'an explanation was given as to how the conclusion to make the deportation order was reached in balancing the rights in question against the interest of the State […] a full analysis and appreciation of the Article 8 rights was carried out and communicated to the applicants'.[68]

In sum, the effect of *Dereci* in Ireland to date appears to be in confirming the limited application of the *Zambrano* judgment.

Italy

The *Zambrano* and *McCarthy* cases have been widely debated by legal scholars. In general, while the former case was welcome, the latter was rather unexpected – and even disappointing in the eyes of some writers. The implications for EU law have been discussed. On the contrary, it comes as no surprise that their impact for Italy has not been delved into, since both cases, if they have been taken place in Italy, would have been adjudicated according to Italian law, and the courts would probably not have made any preliminary reference to the European Court of Justice.

As to *Zambrano*, Article 30 of Legislative Decree no. 286 of 1998[69] shall be mentioned. The parents of an Italian minor living in Italy can be issued with a residence card for family

66 [2012] IEHC 104.

67 [2012] IEHC 113. The decision was delivered on 5 March 2012. This case is also described above in the analysis of the *Zambrano* decision.

68 See paragraph 22 of the judgment.

69 '1. Fatti salvi i casi di rilascio o di rinnovo della carta di soggiorno, il permesso di soggiorno per motivi familiari è rilasciato: ... d) al genitore straniero, anche naturale, di minore italiano residente in Italia. In tal caso il permesso di soggiorno per motivi familiari è rilasciato anche a prescindere dal possesso di un valido →

reasons, even though they do not meet the substantial conditions laid down for foreigners in general, provided that they do not forfeit their parental responsibility over the minor according to Italian law The provision applies also to single-parents.

As to *McCarthy*, two sets of rules shall apply. On the one hand, family reunification of Italian nationals is regulated by Legislative Decree 2007 no. 30, implementing Directive 2004/38/EC. That means that the same rules apply when family reunification is asked by both EU and Italian nationals. On the other hand, Article 19, para. 2, lit. c) of Legislative Decree no. 286 of 1998[70] states that the non-EU foreigner who is the spouse of an Italian citizen, and lives under the same roof, is protected from expulsion and granted with a residence card for family reasons (*permesso di soggiorno per coesione familiare*). The case-law is rather established. Cohabitation is the only condition for the issuance of the residence permit (Corte di Cassazione, order 29-10-2010 no. 22230; 20-4-2012 no. 6315).

Article 19, para. 2, lit. c) of Legislative Decree no. 286 of 1998 also protects the relative within the second degree of kinship of an Italian national, living under the same roof, from expulsion. The Supreme Court has stated that the grandfather of a very young Italian national is protected from expulsion, if the child and his parents declare that they want to live together under the same roof (Corte di Cassazione, judgment 23-9-2011 n. 19464, 5-12-2011 no. 25963; order 3-5-2012 no. 6694).

The cases have never been mentioned by courts, as far as we know.

Legal literature on the case:

A. Adinolfi, Diritto di soggiorno di cittadini di Stati terzi per rendere effettivo il diritto di soggiorno di cittadini dell'Unione nel loro Stato di cittadinanza, *Rivista di diritto internazionale*, 2011, 467.

C. Berneri, Le pronunce *Zambrano* e *McCarthy*: gli ultimi sviluppi giurisprudenziali sulle unioni famigliari tra cittadini comunitari ed extracomunitari, *Quaderni costituzionali*, 2011, 696-699.

R. Conti, R. Foglia, Diritti connessi allo status di cittadino dell'Unione, *Il corriere giuridico*, 2011, 6, 875.

E. Falletti, La presenza di figli minori cittadini dell'Unione osta al rifiuto del permesso di soggiorno e di lavoro dei genitori cittadini di paesi terzi, *Famiglia e Diritto*, 2011, 10, 955.

P. Mengozzi, La sentenza *Zambrano*: prodromi e conseguenze di una sentenza inattesa, *Studi sull'integrazione europea*, 2011, 417-432.

L. Montanari, Una nuova tappa nella definizione della cittadinanza europea: alcune riflessioni sulle sentenze Ruiz *Zambrano* e *McCarthy*, *La Comunità internazionale*, 2011, 433-

R. Palladino, Il diritto di soggiorno nel 'proprio' Stato membro quale (nuovo) corollario della cittadinanza europea, *Studi sull'integrazione europea*, 2011, 331-355.

I. Ottaviano, Ancora sui diritti riconosciuti ad un cittadino di Paese terzo in quanto genitore di un minore cittadino dell'Unione: la Corte di giustizia estende la giurisprudenza Chen, *Gli stranieri*, 2011, 1, 123-127.

I. Ottaviano, la Corte di giustizia riconosce all'art. 20 un'autonoma portata attributiva di diritti al cittadino europeo, *Europa e diritto privato*, 2011, 797-809.

titolo di soggiorno, a condizione che il genitore richiedente non sia stato privato della potestà genitoriale secondo la legge italiana.'

70 '2. Non è consentita l'espulsione, salvo che nei casi previsti dall'articolo 13, comma 1, nei confronti: […] c) degli stranieri conviventi con parenti entro il secondo grado o con il coniuge, di nazionalità italiana […].'

S. Rossi, Il caso *McCarthy*: la cittadinanza europea e la cruna dell'ago, *Diritto pubblico comparato ed europeo*, 2011, 1238-1243.
F. Vecchio, Il caso Ruiz *Zambrano* tra cittadinanza europea, discriminazioni a rovescio e nuove possibilità di applicazione della Carta dei diritti fondamentali dell'Unione, *Diritto pubblico comparato ed europeo*, 2011, 1249-1251.
E. Falletti, Libera circolazione e cittadinanza dell'Unione europea, *Famiglia e Diritto*, 2012, 1, 65.
D. Gallo, La Corte di Giustizia rompe il vaso di Pandora della cittadinanza europea, *Giornale di diritto amministrativo*, 2012, 1, 39.

Latvia

The situation analysed in the *Zambrano* case is not regulated by Latvian law. First, under the Citizenship Law a child born in Latvia after 21 August 1991 is entitled to Latvian citizenship only if his/her parents are stateless or are non-citizens of Latvia and if a child himself/herself fulfils the following criteria: (1) has a permanent residence in Latvia; (2) has not been convicted of a criminal offence with a sentence of imprisonment for longer than five years; (3) has been all the time before application to Latvian citizenship stateless or non-citizen of Latvia. Consequently Latvia law does not provide for a possibility to a child whose parents (both) are citizens of a third country to obtain Latvian citizenship.

At the same time there might be a situation where already after award of Latvian citizenship to a child, the parent (-s) changes his/her citizenship status - for example, stateless or non-citizen of Latvia becomes a third country national (for example, of the Russian Federation). In case a parent has been a non-citizen of Latvia before acquisition of citizenship of a third country he/she has an individual right to a permanent residence permit in Latvia. However there are problems with a parent who has been stateless before acquisition of citizenship of a third country.

Immigration Law does not envisage regulation for a situation where a minor child - Latvian citizen has parents who are third country nationals. The Immigration law recognizes the right of parents of a Latvian citizen to reside in Latvia only after attainment of pensionable age and under the condition that the parent will not require any social assistance in Latvia. It follows that Immigration Law covers only situation of an adult Latvian citizen and his/her elderly parents – third country nationals. At the same time it does not cover the situation of a minor child -Latvian citizen- and his/her adult parents, third country nationals. Consequently parents – third country nationals until attainment of pensionable age are not granted ever a residence right in Latvia on account of the fact they a have minor child with Latvian citizenship.

In administrative practice however there are no problems with regard to the correct application of Article 20 of the TFEU in the light of *Zambrano* case. OCMA (Office of Citizenship and Migration Affairs) grants either temporary or permanent residency permits to parents, third country nationals of a minor Latvian citizen. Most frequently residence permits to parents, third country nationals, are granted on the basis of Article 23(3)(2) of Immigration Law – human considerations. In practice there have been a number of such cases connected with parents, citizens of the Russian Federation. Most frequently they have been Latvian non-citizens before acquisition of citizenship of the Russian Federation, thus while they were Latvian non-citizens their children were granted Latvian citizenship. However, very frequently such group of persons retain both status - Latvian non-citizen and citizenship of the Russian Federation what is illegal and thus they deprive themselves the right to claim permanent residency permit in Latvia as former non-citizens of Latvia because of the provi-

sion of false information to the administrative institutions of Latvia. However, OCMA (as explained above) nevertheless grant to such parents residence permits.

With regard to permission to work - Article 9(2)(1) of Immigration Law provides that work permission for foreigners who have a permanent residence right is not required and Point 13.5 of Regulation No.553 'Regulation on work permission to foreigners' provides that family member of Latvian citizen has a right to work for any employer if he/she has a temporary residence permit.

In the context of the decision of the CJEU in *McCarthy* Latvian law does not provide for the right to enjoy the EU immigration regime unless a Latvian citizen returns from another EU Member State. In general the Citizenship Law does not allow Latvian citizens to hold double citizenship. However, the Transitional provisions of Citizenship Law allowed holding double citizenship for those Latvian citizens and their descendants who was Latvian citizens on 17 June 1940 and who had to leave Latvia during World War II on account of Communist repressions or as the result of forced deportations and who had applied for Latvian citizenship before 1 July 1995. Consequently there are Latvian citizens holding double citizenship. As reported by OCMA there have been no relevant cases in Latvia. OCMA considers that in case, for example, a Latvian/Swedish citizen would get married with a third country national in Latvia – Latvian Immigration Law will be applicable regarding residence rights, while in case a Latvian/Swedish citizen would get married with a third country national in Sweden and then would return to Latvia Regulations No.675 (Directive 2004/38/EC) would be applicable anyway, because the said regulation concerns both Latvian citizens and citizens of other EU Member States which come to Latvia after having resided in other EU Member State.

There is nothing relevant to report with regard to decision of the CJEU in case *Dereci*. Latvian law requires a cross-border element for Regulations No.675 (implementing Directive 2004/38/EC) to become applicable. For the purposes of providing genuine enjoyment of the substance of the rights conferred by virtue of one's status as a citizen of the Unions OCMA most probably would apply Article 23(3)(2) of Immigration Law allowing to grant a residence permit on human considerations like it is with regard to parents – third country nationals of a minor child – a Latvian citizen.

Lithuania

With reference to the *Zambrano* judgment, there could be similar problems in Lithuania as in Belgium. A derivative right of residence from the child who is an EU national is not among the exhaustive list of residence grounds in the Aliens' Law (Art. 101: if the person is not employed or self-employed, is not a family member of worker, is not studying, does not have sufficient resources to stay in the country for himself and his family, etc.), as well as it is not within grounds for maintaining residence rights. Pending amendments to the Aliens' Law do not also envisage the transposition of this CJEU jurisprudence. A similar issue is with *Teixeira* and *Ibrahim* judgments and there have been no developments in respect of implementing the principles (introducing residence ground on the basis that the child of the person in question is engaged in education) set by these judgments during 2011-first half of 2012. In administrative practice, there have been a few practical situations when the migration authorities provided advise to its' subordinate body to issue the permit in the *Zambrano* type of case concerning the issuance of a residence permit to a father taking into account the best interests of the child who was an EU national.

McCarthy and *Dereci* are not covered in the Lithuanian report.

Luxembourg

Upon questioning of the association of support of foreign workers ASTI, the Ministry of Immigration answered that following the *Zambrano* case, there is no necessity to change the law in Luxembourg.

According to the Ministry, this decision by the CJEU does not grant to the parents of European Union small children any right under Directive 2004/38/EC.

This comment is somehow odd: although legally right, as this is an interpretation by the European Court, however such a right is indeed granted under the case-law of the Court through its decisions on free movement of workers, which extends or interprets the provisions of the said Directive.

In a subsequent answer, the Ministry underlines that some provisions of the law of 29 August 2008 on free movement of persons and immigration do not apply to the *Zambrano* situation. In essence, the ministry cites articles 70§5 and 73§4 on family reunion, which ASTI said were of importance. By excluding their application, the Ministry seems to recognize that those provisions apply to third-country nationals only, while in the *Zambrano* case, a situation has arisen where EU-law is applicable: thus the conditions for small children born in Luxembourg and of Luxembourgish nationality to be granted the authorization to stay in Luxembourg are different and easier than for cases of family reunion of children of third-country nationals not falling under the *Zambrano* jurisprudence.

Malta

At the time of writing, the Maltese rapporteur is not yet advised on any concrete action or follow-up taken by the Maltese authorities with regard to *Zambrano*, *McCarthy* and *Dereci*.

The Netherlands

As reported in the 2010-2011 Dutch report the Minister for Immigration and Asylum made a public statement regarding the implications of the *Zambrano* case for the Netherlands on March 31, 2011.[71] In a letter to the Dutch Second Chamber he informed the MPs that the concise justification offered by the Court of Justice in *Zambrano* for its 'genuine enjoyment-test' implied that that Court had merely envisaged to find a solution for a particular case, which he felt would not easily occur in the Netherlands as children born in the Netherlands who do not acquire a nationality at birth have to wait for three years before they are eligible for Dutch nationality. Accordingly the genuine enjoyment-test would only have implications in cases in which:

- both parents are nationals of a third-country,
- the minor is stateless at birth and acquires Dutch nationality through option after having resided in the Netherlands lawfully for three years,
- after the child acquires Dutch citizenship, the parents (no longer) have a valid residence permit; and
- the minor child is fully dependent of the parents.

71 Brief van de Minister voor Immigratie en Asiel aan de voorzitter van de Tweede Kamer der Staten-Generaal [Letter from the Minister of Immigration and Asylum to the Chair of the Second Chamber], March 31, 2011, *TK* 2010-2011, 19637, nr. 1408.

Following a number of decisions from first instance courts showing a mixed, albeit restrictive reading of the genuine enjoyment-test,[72] the first occasion on which the Judicial Division of the Council of State expressed its views on the *Zambrano* ruling was March 7, 2012, when it handed down four cases.[73] In three of these cases the refusal to grant a residence permit was tested against the genuine enjoyment-test[74] and in the fourth case, it was a refusal to issue a long-stay visa that was claimed to be incompatible with *Zambrano*.[75] In all four cases the Judicial Division of the Council of State sets to work in the same fashion. It first reproduces consideration 42 of *Zambrano* and considerations 59-69 of the *Dereci* case.[76] Regarding consideration 68 of the latter case, the Judicial Division of the Council of State observes that Article 20 TFEU does not intend to protect the right to family and private life, as this is protected by other provisions of international (Article 8 ECHR), European (Article 7 of the Fundamental Rights Charter and Directive 2004/38/EC) and national law (Article 15 Vreemdelingenwet), and concludes that it is, therefore, only of limited significance in the context. What has to be established, according to the Judicial Division of the Council of State, is whether there is no other choice than residence outside the territory of the European Union.[77] It is the third-country national parent who has to make a reasonable case that as a result of the Dutch measure the citizen of the Union has no other choice than to leave the territory of the European Union.[78]

On a general note, residence permission granted in accordance with *Zambrano* falls under Article 8(a) of the Vreemdelingenwet [Immigration Act] that refers to Article 14 Vreemdelingenwet as the legal basis for lawful residence, rather than Article 8(e) Vreemdelingenwet that provides for lawful residence as a 'gemeenschapsonderdaan'(community national), i.e. residence ex Directive 2004/38. Though an application made under Article 8(e) Vreemdelingenwet will not be considered in the light of *Zambrano*, it is possible to make a fresh application under Article 8(a) of that act. It is in the course of this procedure that the genuine enjoyment-test is applied.[79] The choice for Article 8(a) rather than Article 8(e) Vreemdelingenwet raises the question what the nature of the residence right is.

In three of the 7 March-cases the Judicial Division of the Council of State found that the decision not to apply the genuine enjoyment-test was inadequately substantiated. In two of these cases, the genuine enjoyment-test should have resulted in the issuing of a residence permit respectively a long-stay visa. These cases share that there is only one parent involved in the children's care as the Dutch parent has passed away (long-stay visa) respectively dis-

72 On this case law, see: H. van Eiken, 'Ruiz Zambrano the aftermath: De impact van artikel 20 VWEU op de Nederlandse rechtspraak', 18 *Nederlands Tijdschrift voor Europees Recht* (2012-2) p. 41-48 and H. Oosterom-Staples, 'Het effectieve genot van het reis- en verblijfsrecht; drie arresten en een veelvoud aan vragen', *Journaal Vreemdelingenrecht* 2012, forthcoming.

73 For an earlier decision dismissing reliance on the genuine enjoyment test on procedural ground, see: Afdeling Bestuursrechtspraak Raad van State, 12 January 2012, 201200054/2/V2, MigratieWeb ve12000216, *idem.*, 14 September 2011, 201012035/1/V3, LJN: BT1936, JV 2011/462 with commentary T.P. Spijkerboer. For an injunction decision, see: Pres. Afdeling Bestuursrechtspraak Raad van State, 6 September 2011, 201108763/2/V2, MigratieWeb ve1102228.

74 Afdeling Bestuursrechtspraak Raad van State, 7 March, 2012, 201011743/1/V1, *idem*., 201102780/1/V1 and *idem*., 201108763/1/V2.

75 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1.

76 CJ EU case C-256/11, *Murat Dereci a.O*, v. *Bundesministerium für Inneres*, 15 November 2011, n.y.r.

77 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.3, *idem*., 201102780/1/V1 cons. 2.3.5, *idem*., 201108763/1/V2, cons. 2.5.3 and *idem*., 201105729/1/V1, cons. 2.7.6.

78 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201011743/1/V1, cons. 2.3.5, *idem*., 201102780/1/V1 cons. 2.3.6, *idem*., 201108763/1/V2, cons. 2.5.5 and *idem*., 201105729/1/V1, cons. 2.7.7.

79 IND Decision, 3 February 2012, 9505-15-6105/911.001.0536, MigratieWeb ve12000517, p. 3. See also: IND Decision 11 April 2012, 9507-07-4001/091.502.9662, MigratieWeb ve12000938, p. 1.

appeared from the scene with unknown destination (residence permit).[80] In the long-stay visa case, the Judicial Division of the Council of State dismisses the argument that the children can live with the paternal grandparents who are residents of the Netherlands without considering whether the grandparents are willing and capable of caring for the children, as the test is whether the children would have to leave EU-territory in order to live with their parent(s), not whether there might be a third party in the Member State of which the children are a national who can care for them.[81] It also finds immaterial the fact that the children have limited ties with the Netherlands as they have spent all or most of their lives in Indonesia where they attend an international school and do not speak the language of that country.[82] In the residence permit case, the Judicial Division of the Council of State dismisses as an option the fact that the Spanish authorities have been requested to assume responsibility under the Dublin-II Regulation as the claim has not been acknowledged by Spain and it is not clear whether the claim has been or still can be executed.[83] Along the same lines as in the long-stay visa case, the presence of an uncle in Spain is labelled immaterial as the question is not whether the children will be cared for, but whether the children will have to leave the EU-territory to be with their parent(s).[84]

In the two other cases the Judicial Division of the Council of State ruled that the decision to withhold residence permission did not amount to the denial of the genuine enjoyment of EU-citizenship rights notwithstanding the fact that the Dutch parent was considered unfit to care for the children. A statement establishing that the Dutch parent was unfit to take up paid employment was not considered evidence that s/he is not capable of caring for the children. In both cases the Judicial Division of the Council of State emphasizes that professional assistance is available in the Netherlands and that there is no evidence that the Dutch parent will not benefit from this public service. As Dutch nationals are, in principle entitled to public benefits, the fact that the Dutch parent is dependent on public funds for the livelihood of the children is found immaterial.[85]

Based on the case law of the Judicial Division of the Council of State of 7 March 2012 the minister of Immigration, Integration and Asylum concluded on 2 July 2012: 'that if there is an objective obstacles for the Dutch parent to take care for the child care, the other parent , not a union citizen, has a right of residence as the child would otherwise has to leave the Union. This can happen due to medical impediments or because that parent is deprived of parental authority, etc. The care need not take place in the Netherlands, but can also provided in another Member State. These cases must be assessed individually.' The policy guidelines will be adjusted. It is expected to have a limited number of cases per year.[86]

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80 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.1 and *idem*., 201102780/1/V1 cons. 2.3.8.

81 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201105729/1/V1, cons. 2.7.10.

82 *Idem*., cons. 2.3.4.

83 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201102780/1/V1 cons. 2.3.8.

84 *Idem*.

85 Afdeling Bestuursrechtspraak Raad van State, 7 March 2012, 201108763/1/V2, cons. 2.5.4 and 2.5.7. and *idem*., 201011743/1/V1, cons. 2.3.7. Reliance on latter decision: Rechtbank 's-Gravenhage, zp Middelburg, 22 March 2012, Awb 11/35478. In this case the refusal to grant the third-country national parent a residence permit was not considered to amount to an obligation to leave the EU-territory for her son who suffered from a language and speech deficiency. The father was found to be able to take on the daily care of the child, if necessary with assistance of public services. The fact that this would interfere with his work obligations was set aside by the court arguing that it was the father who would have to choose between work and the care for his son.

86 Tweede Kamer, 2011-2012, 30 573, no. 110.

Relying on its ruling of 7 March 2012 (case 201011743/1/V1), the Judicial Division of the Council of State found in favour of the State on 15 March 2012, reversing the decision in first instance.[87] Article 20 TFEU and *Zambrano* did not entail an obligation to allow the third-country national parent to reside in the Netherlands as no case had been made that a refusal to grant residence permission would equate to an obligation to leave EU-territory for the Dutch children. Regarding the obligation to take the best interests of the child into consideration (Article 24 Charter) the Judicial Division of the Council of State acknowledges that they have been taken into consideration, but, as there are no exceptional circumstances and the application is one of first admission, they are not decisive for the final decision to withhold residence permission.[88] The applicant in this case had previously applied for asylum. In this case it had been established and upheld by the Judicial Division of the Council of State that rejection of the claim was justified as the claim was implausible due to justified doubts regarding the identity and nationality of the applicant.[89]

On 23 February 2012 the Dutch National Ombudsman referred to the *Zambrano* and Chen cases in a report concerning a complaint made by a Turkish national and her daughter who had been detained following their application for a residence permit, because they could not submit a long-stay visa (machtiging tot voorlopige verblijf). The purpose of the reference was to show that in European law there is recognition of the rights of children in their own right, evidencing a trend that children should not become a victim of their parents' choices.[90]

On October 28, 2011 and November 2, 2011 the Judicial Division of the Council of State handed down a judgment on the position of Dutch citizens who have acquired Dutch nationality by naturalisation who were previously or still are a national of another Member State. According to the policy rules, which are modelled on the Court of Justice's ruling in the Scholz case,[91] rights acquired under European law prior to naturalization are retained post-naturalization. For the position of family members this means that family ties which existed and reunification that was accomplished prior to naturalization are still treated in accordance with European standards.

In both cases the court in first instance had, relying on a decision of the Judicial Division of the Council of State of July 15, 2008, decided that there is an inter-State link that triggers EU-free movement rules if a Dutch-Portuguese/Dutch-Spanish national applies for family reunion with a third-country national partner. In its 2008 decision the Judicial Division of the Council of State, relying on *Garcia Avello*, *Chen* and *Micheletti*,[92] had found that residence in the Netherlands in a case in which the applicant was a dual national, Dutch/Spanish, did not justify a refusal to apply European free movement rules because of a lack of an inter-State link.[93] In the 2011 cases the Minister appealed the decision of the first instance court arguing that the Judicial Division of the Council of State's 15 July 2008 ruling did not provide a solution for the case at hand as the conditions in Article 3 Directive 2004/38/EC were not satisfied. In both cases the Judicial Division of the Council of State's

87 Afdeling Bestuursrechtspraak Raad van State, 15 March 2012, 201106038/1/V1, LJN: BW0011. Decision in first instance: Rechtbank 's-Gravenhage, zp Utrecht, 26 April 2011, Awb 10/38692, LJN: BQ2526.

88 Afdeling Bestuursrechtspraak Raad van State, 15 March 2012, 201106038/1/V1, LJN: BW0011, cons. 2.4.1.

89 Afdeling Bestuursrechtspraak Raad van State, 9 Ju1y 2009, 200902163/1/V3, www.raadvanstate.nl.

90 Nationale Ombudsman, 23 February 2012, report 2012/028, retrieved from: http://www.ombudsman.nl/rapporten.

91 CJEU case C-419/92 [1994] ECR I-505.

92 CJEU cases C-148/02 [2003] ECR I-11613; C-200/02 [2004] ECR I-9925; & C-369/90 [1992] ECR I-I-4239.

93 Afdeling Bestuursrechtspraak Raad van State 15 July 2008, 200800488/1, J+LJN BD8585, *JV* 2008/356.

reading of consideration 43 of the *McCarthy* judgment is that Directive 2004/38/EC does not apply to cases in which an EU-citizen who is a national of two Member States, but has always resided in a Member State of which s/he is a national. Applying this to the two cases it finds on October 28, 2011 that a Spanish national who has acquired Dutch nationality later in life and has not argued that she has de facto moved to another Member State under Union law does not derive rights from Directive 2004/38/EC as, according to Article 3(1), she does not qualify as beneficiary.[94] Four days later, it rules that the presumption underlying the conclusion that a Dutch/Portuguese national who has exercised free movement rights prior to acquiring Dutch citizenship should be treated as a Dutch national who has never exercised free movement rights, is that acquisition of Dutch nationality detracts from the rights which this individual enjoys by virtue of the fact that he is also a national of another Member State.[95] In his commentary Boeles argues that the 2 November 2011 decision rectifies the 28 October 2011 ruling and is compatible with the *McCarthy* ruling. He points out that close reading of consideration 39 of that decision reveals that according to the Court of Justice the inter-State link that triggers free movement rules, as laid down in Article 3(1) of Directive 2004/38/EC, only applies 'in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national (emphasis added)'; a finding that 'cannot be influenced by' (consideration 40) the dual nationality of the EU-citizen.

Publications

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G. Davies, 'Ruiz *Zambrano* en de non-EU ouders van (bijna) Nederlandse kinderen', 1 *Asiel & Migrantenrecht* (2011-7), p. 274-283.

H. van Eiken, 'Ruiz *Zambrano* the aftermath: De impact van artikel 20 VWEU op de Nederlandse rechtspraak', 18 *Nederlands Tijdschrift voor Europees Recht* (2012-2), p. 41-48.

H.U. Jessurun d'Oliveira, 'Unieburger in eigen land', 1 *Asiel & Migrantenrecht* (2011-2), p. 78-79.

K. Lenaerts, '"Civis europaeus sum": van grens- overschrijdende aanknoping naar status van burger van de Unie', *Sociaal Economische Wetgeving* (2012-1).

A.P. van der Mei, S.C.G. van de Bogaert & G.R. de Groot, 'De arresten Ruiz *Zambrano* en *McCarthy*. Het Hof van Justitie en het effectieve genot van EU-burgerschapsrechten', 17 *Nederlands Tijdschrift Europees recht* (2011-6), p. 188-199.

H. Oosterom-Staples, 'Het effectieve genot van het reis- en verblijfsrecht; drie arresten en een veelvoud aan vragen', *Journaal Vreemdelingenrecht 2012*, 6.

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94 Afdeling Bestuursrechtspraak Raad van State, 28 October 2011, 201012858/1/V2, LJN: BU3406, *JV* 2012/44, cons. 2.4.2.

95 Afdeling Bestuursrechtspraak Raad van State, 2 November 2011, 201011940/1/V1, LJN: BU3411, JV 2012/45, with commentary P. Boeles, cons. 2.4.2.

Poland

The act on entry implementing Directive 2004/38 shall be applicable only in transnational situations. Art. 1 of the Act on entry explains that the Act lays down the rules and conditions governing the entry, residence and exit of the territory of Poland of foreign nationals – EU citizens (Article 3 point 3 of the Act). The only exception covers foreign spouses of Polish nationals, who have to right to stay in Poland for a period longer than 3 months. Therefore there is no provision in the Act on entry who entitles a third country national – a parent of an EU citizen to stay with the child at the territory of Poland. There is a reverse provision that entitles the EU parent who has custody over a child to accompany him irrespective the right of primary carer to enable the child to finish education.

Additionally, the Act on promotion of labour and employment institutions in Article 87 lists a group of foreign beneficiaries who may take up employment without obligation to apply for permission. This list does not cover ascendants of minor EU citizens who have custody over minor EU citizen in the country of his nationality. Consequently, they are treated for the purpose of application of the Act of promotion of labour as third country nationals.

However, according to the rapporteur, so far there has been no such a situation as was the case in *Zambrano*. Therefore, taking into account the obligation for interpretation of national law in line of European law, it may be the case that a result of such European interpretation of both Act on entry and Act on promotion of labour shall result in recognizing rights of such third country nationals.

As explained above, the Act on entry in principle applies only to situations with transnational dimensions. Therefore the Act shall not be applicable to those Polish citizens, who have never make use of free movement rights and consequently their situation may be described as wholly internal. Holding double citizenship is irrelevant in such a situation. However, there is one important exception to such a rule. According to Article 16 point 4 an EU citizen shall have the right to reside for a period longer than 3 months if he/she is married to Polish national. There is no obligation for a Polish national to make use of free movement rights, therefore it covers also a wholly internal situations. The Act does not expand such a right on descendants of such Polish nationals of non-Polish nationality. However, in such a situation a descendant may rely on a right to stay as a child of a migrating foreign national who is a spouse of Polish national residing in Poland.

However, the right to stay of a foreign national as stated in Article 16 point 4 of the Act on entry is not combined with the right of such a spouse to take up employment without permission. Article 87 of the Act on promotion of labour does not cover such situations.

The scope of application of the Act on entry was analysed in the judgment of Supreme Administrative Court in case, where a third country national tried to invoke the Act on entry to protect himself against expulsion as a result of committing a drug crime due to the fact that he was a spouse of a Polish national.[96] The Court explained, however, that although the Polish national may be at the same time qualified as EU citizen, however, he/she is not a foreigner within the meaning of Article 2 of the Act. Article 2 point 3 of the Act in connection with Article 2 point 3 states that the Act shall apply only to those EU citizens who are at the same time foreigners. Consequently, Polish nationals are excluded from the personal scope of the Act on entry. However, in the opinion of the rapporteur, there is a significant misunderstanding of the personal scope of the Act on entry. The Act on entry shall not automatically exclude Polish nationals from the scope of the Act. The pro-European interpreta-

96 The judgment of the Administrative Supreme Court of 24 November 2008, file no. II OSK 1344/07.

tion of national law, in comparison with the hitherto jurisdiction of CJEU shall not exclude the possibility to apply provisions of the Act on entry to Polish citizens provided that they have previously made use of free movement rights and their situation may not be qualified as a wholly internal one.

However, according to the Court such a conclusion shall not relief the relevant national court from making a comparison between wholly internal (i.e. national) provisions and EU provisions in order to assess whether the only differentiating factor is based on the use of free movement rights and whether as a consequence an individual is treated in a worse manner solely because he has not made use of free movement rights and the EU provisions therefore may not be applicable.

There is a general obligation put on courts to combat against differentiating the situation of individuals who are in the same factual and legal position while the only factor that distinguishes them is the fact of (not) making use of free movement rights. Therefore whenever the court comes to a conclusion that such a situation takes place, irrespective of fact that the consequences of the wholly internal principle, the court shall not apply rules that are less favourable automatically.

In such a situation, according to the Supreme Administrative Court and according to the Constitutional Tribunal, the relevant national court shall not permit to make differentiation between foreigners and nationals when their factual and legal position are exactly the same and the only difference is the case of making use of free movement rights that are detrimental to the national.[97]

As explained above concerning the *McCarthy* judgment, the Act on entry only applies to these situations that have transnational dimensions. Therefore the Act shall not be applicable to Polish citizens, who have never made use of free movement rights and their situation may be described as wholly internal. Consequently, members of family of such nationals cannot make use of the rights enshrined in the Act on entry, as their rights are depended on rights of primary beneficiaries of the Act. However, the issue of reverse discrimination as described above may take place.

The rapporteur would like to emphasize that she does not fully agree with the Supreme Administrative Court judgment analysed above (II OSK 1344/08). The right for a Polish national to rely on provisions of the Act on entry is not excluded at all, as a consequence that such a person shall not be treated as foreigner. It may be the case (taking into account the obligation of pro-European interpretation of national law, with special emphasis on these regulations that implement European measures) that a Polish national, making previously use of free movement rights, will be able to rely on provisions of the Act on entry. In such a situation, consequently, members of his/her family will have also a depended right to rely also on those provisions.

Portugal

By the questions referred for a preliminary ruling in *Zambrano*, the national court asked the CJEU whether the provisions of the TFEU on EU citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are EU citizens, are dependant, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him

97 See E. Łętowska 'O regulacyjnej swobodzie państwa - w związku z kontrolą konstytucyjności ustawy o biopaliwach', in: *Ius et Lex, Księga jubileuszowa Profesora Andrzeja Kabata*, Olsztyn 2004.

from having to obtain a work permit in that Member State. Those EU citizens (in casu, Belgian nationals) had not moved to or resided in a Member State other than that of which they were nationals. For that reason and relying on Article 3(1) of Directive 2004/38 – pursuant to which it applies to all Union citizens who move to or reside in a Member State other than that of which they are national, and to their family members – the CJEU held that such directive did not apply to the situation of those EU citizens. However, Article 20 TFEU – which establishes the 'fundamental status of nationals of the Member States' – was interpreted by CJEU as meaning that it precludes national measures which have the effect of depriving EU citizens of the genuine enjoyment of the substance of the rights conferred by virtue of such status. The CJEU held concretely that Article 20 TFEU precludes Member States from refusing a third country national upon whom his minor children, who are EU citizens, are dependant, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national. Such refusal decisions, leading to a situation where those children would have to leave the territory of the Union in order to accompany their parents, deprive them of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen.

The CJEU apparently recognised, as suggested by the Advocate General, the existence in Article 21 TFEU of a free-standing fundamental right of residence, independent of the exercise of the right to move to another Member State. The substance of that fundamental right would be violated if the EU citizen had to leave the territory of the Union in order to accompany his parents, due to a refusal to them of the above mentioned derived rights.

The mandatory application of this case law in Portugal is strengthened by its own Constitution which establishes in Article 33(1) a fundamental right for every Portuguese national to stay and reside in the Portuguese territory. According to Article 18(3) the substance of a fundamental right may in no way be restricted. Such constitutional provision would preclude by itself the reverse discrimination that might occur if the CJEU had decided that the right of residence foreseen by Article 21 TFEU presupposed the previous exercise of the right to move to the host Member State.

The *McCarthy* case gave the CJEU the opportunity to clarify the criterion previously settled down in *Zambrano* concerning 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'. The national measure at issue was the administrative refusal of the applications of S. *McCarthy* and her husband, a third country national, for a residence permit and residence document under European Union law as, respectively, a Union citizen and the spouse of a Union citizen.

Since the situation at issue in the main proceedings was once again that of a EU citizen who has never exercised her right of free movement and who has always resided in a Member State of which she is a national, although she is also a national of another Member State and holds a passport of it, the CJEU stated that Directive 2004/38, concerning the conditions governing the exercise of the right to move and reside freely within the territory of the Member States, cannot apply to such situation. Concerning the applicability of Article 21 TFEU to the same situation, the CJEU stated preliminarily that the situation of a Union citizen who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation (which is confined in all relevant respects within a single Member State) precluding by definition the application of EU law. In fact, as a national of at least one Member State, S. *McCarthy* enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including

against her Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.

However, according to the CJEU, the failure by the authorities of her State of residence to take into account her nationality of another Member State for the purposes of granting her a right of residence in the former Member State in no way affects her in her right to move and reside freely in the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen. By contrast with the case of *Zambrano*, the national measure at issue in the present case does not have the effect of obliging S. *McCarthy* to leave the EU. In that context the general rule explicated by the CJEU is following: Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he/she is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him/her of the genuine enjoyment of the substance of the rights conferred by virtue of his/her status as a Union citizen or of impeding the exercise of his/her right of free movement and residence within the territory of the Member States.

In Portugal the reverse discrimination to which such judgment gives rise and which the applicant in the main proceedings tried to avoid relying on her second nationality could be overcome through the application of Article 36 of the Constitution. That provision grants to everyone the right to marry and to found a family. Inasmuch as the CJEU considers that the case at issue is not one where a Member State is implementing EU law in the meaning of Article 51(1) of the Charter, it is not possible for the applicant to rely in that context on Article 9 of the Charter – which guarantees also the right to marry and to found a family.

The *Dereci* gave once more the opportunity to the CJEU to interpret the EU law provisions on citizenship of the Union and to precise the conditions under which a EU citizen, who has never exercised his/her right to freely move and reside in the territory of the Member States, can rely on Articles 20 and 21 TFEU for the purpose of a genuine enjoyment of the substance of that right attaching to the status of EU citizen. The national measures at issue in the main proceedings were administrative rejections of the application for residence authorisations, coupled with an expulsion order and individual removal orders from the territory of a Member State. The applicants are third country nationals who wish to live with their family members, EU citizens who have never exercised their right to free movement and are not maintained by them. Therefore, unlike the situation in *Zambrano*, there is no risk here that the EU citizens concerned may be deprived of their means of subsistence. The question referred by the national court was precisely whether the provisions of the TFEU concerning citizenship of the Union must be interpreted as precluding a Member State from refusing to grant residence within its territory to a third country national, although that third country national wishes to reside with a family member who is a EU citizen, resident and a national of that Member State, who has never exercised his right to free movement and who is not maintained by that third country national.

In its answer the CJEU could clarify that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the EU as a whole. That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of

residence may not, exceptionally, be refused to a third country national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.

It is a matter for the referring court to verify, on the basis of the criterion developed by the CJEU, if the national measures at issue in the main proceedings do not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union. If the referring court verifies such denial, the situation is covered by EU law in the meaning of Article 51(1) of the Charter. Therefore the referring court must also examine whether the refusal of the right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. In this respect, the CJEU explains: 'On the other hand, if the referring court takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR'. If the referring court is Portuguese, it can also undertake that examination in the light of Article 26(1) of the Constitution which guarantees to everyone the right to respect for private and family life.

Romania

The CJEU stated in the revolutionary case *Zambrano* (Case C-34/0) that article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country – Columbian – national upon whom his minor children, who are European Union – Belgian – citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

At this moment, no practical application of the imperative indicated in this case. The strict application of *ius sanguini* citizenship principle precludes in most of the cases the possibility of a minor to obtain Romanian citizenship and parents to have another (third country) citizenship. According to the Romanian regulation on citizenship, the Law no. 21/1991, the child found on Romanian territory is considered a Romanian citizen, until proven otherwise, if none of the parents is known. This child will lose its Romanian citizenship, if up to the age of 18 it was established the lineage from both parents, and they are foreigners.[98]

The *McCarthy* case – dealing with the possibility of an EU citizen (in this case, a dual Irish-UK citizen, but without any exercise of her right to free movement) to rely on EU law for obtaining residence for a family member, citizen of a third country, against her home Member State – presents an immediate importance, because the situation of Romanian citizens with a third country national family member is a reality. At this moment we cannot report any practice based on the *McCarthy* case. The Court considered that the free movement directive (2004/38/EC) and Article 21 TFEU is inapplicable in this case. No Romanian national rules exist dealing explicitly with this case, therefore the judgment has an interpretative role of the existing legislation.

Both the *McCarthy* and *Dereci* cases underlines the exceptional character of the interpretation given by the Court in *Zambrano*.

Slovakia

As regards *Zambrano* case (together with *McCarthy* and *Dereci* cases), parents, third country nationals, of children, who are Slovak citizens will not be entitled to reside in Slovakia according to current Slovak legislation in force. The right to reside of the parents cannot be

98 Art. 5, art. 30.

derived from the right to reside of the children, unless the parents are dependent on them. The same applies to other relationships of dependency. The right to reside of an individual cannot be derived from the right to reside of a Slovak citizen, who is dependent on the individual concerned, and did not exercise his/her right to freedom of movement.

Slovenia

The *Zambrano* case must be despite possible revolutionary label (in comparison with *McCarthy* and *Dereci*) treated with a special respect. The Court has given a very important emphasis to the phenomenon of the citizenship of the Union. The impact of the Court's decision may be evaluated as even stronger due the explanation of the primary EU law (Article 20 TFEU) as basis for a decision.

McCarthy and *Dereci* are not covered by the Slovenian report.

Spain

The Superior Court of Justice of Castille-La Mancha, judgment no. 10058/2012 of 13 February (JUR 2012 \ 68103), judges invoke the *Zambrano* case to recognize the right to obtain the permanent resident permit to a foreign father of a Spanish child. The Circular of the Attorney General 5/2011, 2 November, (JUR 2011\395037) refers to the judgment Ruiz *Zambrano* to exclude from the measure of expulsion as an alternative to imprisonment (art.89 Criminal Code) for foreign parents of Spanish children and EU children. 'The application of the doctrine of the CJEU in its proper and limited terms of Article 89 CP must exclude this category of aliens from the substantive scope of judicial expulsion. If it were not valued, the expulsion of the father or mother may inevitably result in expulsion of Spanish.'

In the judgment of the High Court, 10 November 2011 (RJCA 2011\898), recognized the right to obtain the residence permit by a mother of Spanish child. The National Court considers to be applied *Zambrano* doctrine which recognizes the right of the parent father of a national of a Member State of the Union, to obtain a residence permit, has been proclaimed the European Court of Justice (Grand Chamber) of March 8, 2011 (CJEU 2011, 44) (Case C - 34/09), so that these children enjoy the status of their rightful citizenship (Article 20 TFEU). In the same terms the Sentence of High Court, 13 July 2011, (JUR 2011\264030).
No references to *McCarthy* and *Dereci* are found in Spain.

Sweden

In *Zambrano* minor children's right in their capacity of being union citizens dependent of the parents were examined referring to article 20 of the TFEU.[99] The parents had been staying in Belgium after their applications for asylum in that Member State had been rejected. The case therefore refers to a so called 'internal situation' and there is no cross-border perspective to consider.

In Sweden, an EU citizen's child should have a residence right, even if the EU citizen leaves Sweden or dies (the Aliens Ordinance, ch. 3a § 2, amended in 2011 through Ordinance F 2011:408). The same right should apply to the person that is taking care of the child. Further the residence right should remain until the child's studies are finished.

99 The circumstances in *Zambrano* should be noted; the children were born in Belgium and in accordance with Belgian law, the children automatically became Belgian citizens at birth. The family had been staying in that Member State for eleven years and the children were in school.

In accordance with Case *MIG 2007:56*, if a child that is an EU citizen has an independent right of residence, also the parent that is a third-country national being the factual caretaker should have a right to stay in Sweden.

In Case *MIG 2011:17* – relevant in the light of *McCarthy* – the primary person/EU citizen was both a citizen in Poland and in Sweden and both article 3.1 of the Directive 2004/38 as well as the Aliens Act ch. 1 § 3b should apply only if the EU citizen is staying in a Member State other than his or her home State. (The Migration Court also referred to *Metock*.)[100]

Concerning the term 'dependent' in Swedish law, see also the Migration Court Case *MIG 2009:37* referring to Case C-1/05 *Jia.*

In Case *MIG 2009:22* the Court's examination concerning parents' or caretakers' residence rights should embrace the minor's own residence right, and if the child has a residence right also the factual caretaker/parent that is a third country national should have a right to stay in Sweden.

C-256/11 *Dereci*. EU law and the Union citizenship should not prevent a Member State from refusing a third-country national to reside on its territory, where this person wishes to reside with a member of his family who is a citizen of the Union of which he has nationality, provided that the refusal means a denial of the rights connected to the citizen's Union citizenship. In *Dereci* the citizens had not used their right to free movement and their situation was not embraced by Directive 2004/38. Further, compared with the situation in *Zambrano*, *Dereci* and the others should not have to leave the Union and, following that, they were not excluded from the core of their Union citizens' rights.

United Kingdom

The UK Border Agency's position following the judgment in *McCarthy* is set out in a memo from the European Operational Policy Team dated 31 August 2011. The intention of the Home Office is to amend the Immigration (EEA) Regulations to reflect the terms of the *McCarthy* judgment as they read it, i.e.

> *'that a person who holds the nationality of the host Member State and has never exercised their right of free movement and residence do not benefit from the terms of the Free Movement Directive. This is regardless of whether or not they hold dual nationality with another EEA Member State. This also means that family members are also unable to derive a right of residence under the Directive on the basis of their relationship to such a national.'*

The Regulations are to be amended but in the mean time the Home Office is allowing people who hold British nationality and the nationality of another Member State to continue to rely on that EEA nationality as Regulation 2 of the Immigration (EEA) Regulations 2006 currently allows it.

In a memo dated 16 September 2011, the Home Office set out to caseworkers how the *Zambrano* case should be applied to cases in the UK. According to this there are two classes of potential beneficiary: a third country national adult upon whom a British citizen child is dependent and a third country national adult upon whom a British citizen adult is dependent. The problems which are arising in practice comes from paragraph 10 of the memo which states as follows:

100 Regarding the matters dealt with in the case, see also Cases *MIG 2008:30* and *MIG 2009:11*.

In cases where there is another parent/guardian/carer upon whom the child is, or can become, dependent then this would fall out of scope. This is because removal of the third country national in such circumstances would not oblige the child to leave the EU because an alternative carer is available.

This has led to a 'sole carer' test. In other words if there is somebody who can look after the British child or dependent adult who is not the third country national, then the third country national will not have a right to reside in the UK and the application will be refused.

This question was considered in *Sanade and others (British children – Zambrano* and *Dereci*) [2012] UKUT 00048 which considered the application of *Zambrano* in deportation cases. It did not consider that the position was altered by the wrongdoing of the parents. However, following *Dereci*, it found that expulsion would not be prohibited if the children's constructive expulsion would not follow because, as here, the child's other parent is a British citizen and can care for the child in the UK. The Tribunal in *Latif (s. 120 – revocation of deportation order)* [2012] UKUT 78 (IAC) also considered that *Zambrano* was not applicable where, on the evidence, the child was able to reside in the UK without the appellant.

Another issue is that applicants under *Zambrano* are not being granted a right of appeal, nor is there any provision for applications to be made from outside the UK. The Home Office sets out in its memo that it will be amending the Regulations and providing further detailed guidance. As yet this has not happened.

I.2. National reports on *Tsakouridis* (C-145/09)

Austria

Sect. 86 Aliens Police Act (APA) (*Fremdenpolizeigesetz*, *FPG*), which implemented Article 28 § 3 lit. a Directive 2004/38, was replaced by Sect. 67 APA in 2011.[101] This provision

[101] Par. 67 Fremdenpolizeigesetz:
(1) Die Erlassung eines Aufenthaltsverbotes gegen unionsrechtlich aufenthaltsberechtigte EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige ist zulässig, wenn auf Grund ihres persönlichen Verhaltens die öffentliche Ordnung oder Sicherheit gefährdet ist. Das persönliche Verhalten muss eine tatsächliche, gegenwärtige und erhebliche Gefahr darstellen, die ein Grundinteresse der Gesellschaft berührt. Strafrechtliche Verurteilungen allein können nicht ohne weiteres diese Maßnahmen begründen. Vom Einzelfall losgelöste oder auf Generalprävention verweisende Begründungen sind nicht zulässig. Die Erlassung eines Aufenthaltsverbotes gegen EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige, die ihren Aufenthalt seit zehn Jahren im Bundesgebiet hatten, ist dann zulässig, wenn aufgrund des persönlichen Verhaltens des Fremden davon ausgegangen werden kann, dass die öffentliche Sicherheit der Republik Österreich durch seinen Verbleib im Bundesgebiet nachhaltig und maßgeblich gefährdet würde. Dasselbe gilt für Minderjährige, es sei denn, das Aufenthaltsverbot wäre zum Wohl des Kindes notwendig, wie es im Übereinkommen der Vereinten Nationen vom 20. November 1989 über die Rechte des Kindes vorgesehen ist.
(2) Ein Aufenthaltsverbot kann für die Dauer von höchstens zehn Jahren erlassen werden.
(3) Ein Aufenthaltsverbot kann unbefristet erlassen werden, wenn insbesondere
1.der EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige von einem Gericht zu einer unbedingten Freiheitsstrafe von mehr als fünf Jahren rechtskräftig verurteilt worden ist;
2.auf Grund bestimmter Tatsachen die Annahme gerechtfertigt ist, dass der EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige einer kriminellen Organisation (§ 278a StGB) oder einer terroristischen Vereinigung (§ 278b StGB) angehört oder angehört hat, terroristische Straftaten begeht oder begangen hat (§ 278c StGB), Terrorismus finanziert oder finanziert hat (§ 278d StGB) oder eine Person für terroristische Zwecke ausbildet oder sich ausbilden lässt (§ 278e StGB);

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stipulates the requirements for residence bans as regards EEA citizens, Swiss citizens and favoured Third Country nationals. Sect. 66 APA is the provision about expulsions concerning that group.[102]

The Administrative Court (14.4.2011, 2010/21/0232 and 24.4.2012, 2011/23/0264) referred to the *Tsakouridis* decision and revoked an authority´s residence ban: The authority has to deal in great detail with the reasons showing a danger for the *ordre public*; a general reference is insufficient.

The CJEU case law doesn´t require an amendment of national law but maybe there is a need for a better application of the relevant provision (e.g. Sect. 67 APA (former Sect. 86 APA)).

Belgium

The Belgian report does not cover *Tsakouridis*.

Bulgaria

Expulsion as a coercive administrative measure against EU nationals and their family members in Bulgaria is regulated in Article 23 and Article 25 of the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family (LERD).

The limitations to the possibility to expel according to Art.28 (3) of Directive 2004/38 have been transposed in Art.25 (2) LERD. The national provision translates the term 'on imperative grounds of public security' as 'only in exceptional cases, related to the national security'. The wording of the term does not make it clear whether the exceptional cases are a

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3.auf Grund bestimmter Tatsachen die Annahme gerechtfertigt ist, dass der EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige durch sein Verhalten, insbesondere durch die öffentliche Beteiligung an Gewalttätigkeiten, durch den öffentlichen Aufruf zur Gewalt oder durch hetzerische Aufforderungen oder Aufreizungen, die nationale Sicherheit gefährdet oder

4.der EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige öffentlich, in einer Versammlung oder durch Verbreiten von Schriften ein Verbrechen gegen den Frieden, ein Kriegsverbrechen, ein Verbrechen gegen die Menschlichkeit oder terroristische Taten von vergleichbarem Gewicht billigt oder dafür wirbt.

(4) Bei der Festsetzung der Gültigkeitsdauer des Aufenthaltsverbotes ist auf die für seine Erlassung maßgeblichen Umstände Bedacht zu nehmen. Die Frist beginnt mit Eintritt der Durchsetzbarkeit zu laufen.

(5) §59 Abs.1 gilt sinngemäß.

102 Par. 66 Fremdenpolizeigesetz:

(1) EWR-Bürger, Schweizer Bürger und begünstigte Drittstaatsangehörige können ausgewiesen werden, wenn ihnen aus den Gründen des § 55 Abs. 3 NAG das unionsrechtliche Aufenthaltsrecht nicht oder nicht mehr zukommt, es sei denn, sie sind zur Arbeitssuche eingereist und können nachweisen, dass sie weiterhin Arbeit suchen und begründete Aussicht haben, eingestellt zu werden; oder sie bereits das Daueraufenthaltsrecht (§§ 53a, 54a NAG) erworben haben; im letzteren Fall ist eine Ausweisung nur zulässig, wenn ihr Aufenthalt eine schwerwiegende Gefahr für die öffentliche Ordnung oder Sicherheit darstellt.

(2) Soll ein EWR-Bürger, Schweizer Bürger oder begünstigter Drittstaatsangehöriger ausgewiesen werden, hat die Behörde insbesondere die Dauer des Aufenthalts im Bundesgebiet, sein Alter, seinen Gesundheitszustand, seine familiäre und wirtschaftliche Lage, seine soziale und kulturelle Integration im Bundesgebiet und das Ausmaß seiner Bindung zum Herkunftsstaat zu berücksichtigen.

(3) Die Erlassung einer Ausweisung gegen EWR-Bürger, Schweizer Bürger oder begünstigte Drittstaatsangehörige, die ihren Aufenthalt seit zehn Jahren im Bundesgebiet hatten, ist dann zulässig, wenn aufgrund des persönlichen Verhaltens des Fremden davon ausgegangen werden kann, dass die öffentliche Sicherheit der Republik Österreich durch seinen Verbleib im Bundesgebiet nachhaltig und maßgeblich gefährdet würde. Dasselbe gilt für Minderjährige, es sei denn, die Ausweisung wäre zum Wohl des Kindes notwendig, wie es im Übereinkommen der Vereinten Nationen vom 20. November 1989 über die Rechte des Kindes vorgesehen ist.

(4) § 59 Abs. 1 gilt sinngemäß.

limited group within the broader scope of national security grounds or all national security grounds are regarded as relating to 'exceptional cases'.

With regard to determining whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision under Article 28 (3) (a) of Directive 2004/38, the Bulgarian law makes no further specifications. In light of the *Tsakouridis* judgment, it might be argued that Article 25 (2) LERD shall be interpreted in relation with Article 23 (2) and (3) of LERD, which have been meant to transpose Article 28 (1) and Article 27 of Directive 2004/38. According to Article 23 (3) LERD, before taking an expulsion decision the authorities shall take into consideration how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. Article 23 (2) LERD provides that the imposition of the expulsion measure shall be based exclusively on the personal conduct of the individual concerned and shall depend on the extent to which that conduct threatens the national security, the public order or the public health.

In the Bulgarian LERD there is no explicit transposition of Article 28 (2) of Directive 2004/38 and the term 'serious grounds of public policy or public security'. In relation to it, Article 25 (1) of LERD - like Article 27 (2) of Directive 2004/38 - provides that expulsion is imposed when the presence of the individual in question 'creates a genuine, present and serious threat to the national security and the public order'. The current text of Article 25 (1) is the result of amendments in the law that took place in March 2012 (State Gazette No.21/2012). Previously the provision stipulated that expulsion is imposed when the presence of the individual creates a 'real threat' to the national security and the public order.

It can be concluded that the Bulgarian LERD has adopted the term 'national security' instead of 'public security'. Therefore we shall seek to reply whether the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'national security' under Bulgarian law. The answer is affirmative.

A legal definition of the term 'national security' is found in the Law on the Protection of the Classified Information. Paragraph 1.3 of its Additional Provisions stipulates that ''national security' is a state of the society and the State, at which the fundamental rights and freedoms of the person and the citizen, the territorial integrity, the independence and the sovereignty of the country are protected and the democratic functioning of the State and the civic institutions is guaranteed, as a result of which the nation preserves and extends its well-being and is developing'.

Bulgaria has ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which Preamble recognized 'the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States'.

In an Interpretative Judgment of 22 March 2011 regarding the application of Directive 2004/38 in relation to exit bans imposed on Bulgarian citizens, the General Assembly of the Supreme Administrative Court of the Republic of Bulgaria stated that

> *'the content of the terms public order, public security and public health is deducted from the case law of the Court of the European Union. The Treaties and the secondary legislation do not contain their definitions. The content of these terms is interpreted strictly, it cannot be defined unilaterally by each Member State without control by the institutions of the Union (see paragraph 18 of the judgment in the* Van Duyn *case), but*

the Member States are free to set the requirements related to the public order and the public security in accordance with their national needs within the limits defined by the Treaty.' (point 6 of the judgment)

Furthermore, in a Judgment of 19 January 2011 in case No.2431/2010 the Supreme Administrative Court pointed out that 'the case law has specified that the term public order presupposes not only any disturbance of the public order such as is the case with every infringement of the law, but also includes the presence of a genuine, present and sufficiently serious threat affecting a fundamental interest of society (judgment in the cases of *Regina v Pierre Bouchereau*, § 35, *Gheorghe Jipa*, § 23, *Rutili*, § 28, and others)'.

Therefore we can draw the conclusion that the Bulgarian case law has adopted the content of the term 'public security' as provided for in the case law of the CJEU and therefore the concept covers the fight against crime in connection with dealing in narcotics as part of an organised group.

The case of *Tsakouridis* has not been referred to by Bulgarian courts in 2011/12.

Cyprus

Tsakouridis will almost certainly have a significant impact on the Cypriot legal context as it deals with an issue of concern raised repeatedly in previous country reports on Cyprus. The question of expulsion and deportation and placement on stop lists and preconditions to acquiring the right to permanent residence as well as entry to and exit from the Republic were some of the issues raised by the European Commission's warning letter to the Republic of Cyprus,[103] which the Commission considers unresolved[104] despite the clarifications by the Cypriot Government.[105] In particular the issue related to improper transposition and violation of articles 30 and 31 of the Directive. Despite the more positive general climate in the treatment of migrants, concerns about the conditions of detention and expulsion of foreigners, including EU citizens is a matter that NGOs have repeatedly raised.

In 2012 a number of Cypriot cases, discussed further down, dealt with the issue of expulsion of EU citizens. The basic ruling in *Tsakouridis* that very good reasons would have to be put forward to justify the expulsion measure of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State is crucial for the Cypriot context. The standards set by Cypriot courts have not been so high; no similar case was brought before the Courts, although a number of cases of Union citizens deported after several years of stay have been highlighted by the media and the Ombudsman but never reached the Courts.

The cases listed below concern applications to arrest the execution of an order (of expulsion, of detention, of no re-entry etc); they do not concern the actual examination of the request to annul and set aside these orders. At the time of writing, the applications to annul these orders were still pending before the Courts. Thus, although the Courts' decisions in the interim applications may be indicative of what the final ruling on the case might be, the judges do stress that the criteria used to decide on these interim applications are meant only for the interim applications. The norms emerging from the Courts' decisions on the interim

103 ref SG-GREFFE(2011)D/F7974, No. 2011/2064, 19/5/2011.

104 European Commission letter dated 22.3.2012. In response to this, a further clarification letter was sent from the Cypriot Government on 25.07.2012.

105 The EU Commission sent letters on 22.09.2009 and 20.05.2011, which had been responded to by the Cypriot government on 27.01.2011 and 25.07.2011 respectively.

applications, however, which are in line with previous cases decided, dating back to the decision often cited as authority on the expulsion of non-Cypriots dating back to the pre-accession period suggest a predominance of the sovereignty principle in the exercise of immigration policy: 'Permission to enter was in the discretion of the appropriate authorities of the Republic in accordance with the provisions of the Aliens and Immigration Law, Cap. 105. Power to refuse entry to aliens is an incident of the sovereignty of the country. The discretion to refuse entry to an alien is very wide bordering on absolute discretion.'[106] In 2011 on a number of cases the Supreme Court cited Moyo as authority on the sovereignty logic exercised in cases of Union nationals and their family members.[107] Little, if any consideration is given by the Courts to the length of stay of the persons threatened with expulsion or with a no re-entry ban, or to whether or not the crime in which they were allegedly implicated amounted to a threat to public security; the Courts would invariably assume that the length of stay in Cyprus was irrelevant, as was the applicants' age, state of health, family etc, and that the crime they were linked to was a public security issue.[108] A further notable characteristic of the cases below is that the Court was satisfied that confidential information held by the police can justify a deportation decision even in the absence of any formal complaint against the applicants, thus vesting the police with unlimited discretion to collect and assess

106 In *Moyo and another v. Republic* (1988) 3 CLR 1203, Pikis Judge (pages 226-227) quoted from the case of Amanda Marga Ltd v.Republic (1985) 3 C.L.R. 2583), stating: 'The passage cited below is definitive of the powers of the State and suggestive of the breadth of the discretion to refuse entry to an alien. I adopt and repeat it as an accurate statement of the law (p. 2587): "By the terms of the Aliens and Immigration Law, Cap. 105, the discretion of the State to exclude aliens is very wide, as broad as it can be in law, consistent with the supremacy and territorial integrity of the State; but not absolute. It is subject to the bona fide exercise of the discretion. So long as the discretion is exercised in good faith, the Court will query the decision no further. An alien, subject to any rights that may be conferred by convention or bilateral treaty, has no right to enter the country. His only right is that an application to enter the country should be considered in good faith. Acknowledgment of any further obligation on the part of the State would be inconsistent with the sovereign right of the State to exclude aliens".'

107 *Abdulkader Majed v. Republic of Cyprus* No. 1099/2009, 7.2.2011. The court expressly referred to the cases *Ήρωα ν. Δημοκρατίας* (2005) 3 Α.Α.Δ. 307, *Slavova v. Δημοκρατίας*, 1272/2000, 18.4.2002, *Moyo and another v. Republic* (1988) 3 CLR 1203 και *Amanda Marga Ltd v.Republic* (1985) 3 C.L.R. 2583). Many other cases in 2011 cited the same authority.

108 In 2010, a complaint was submitted to the Equality Body by AW, a British national permanently residing in Cyprus, for the deportation order issued against his same-sex partner JM, a British national originating from Tanzania, with whom he had a steady relationship for the past nine years. At the time of submission of the complaint, JM was serving a prison sentence for drunk driving. The immigration police decided his deportation because he was an HIV carrier and thus suffering from an infectious disease threatening public health, as per article 6(1)(c) of the Aliens and Immigration Law. His name was also added on the stop list, banning his re-entry into Cyprus for the next 10 years from the date of deportation. The complaint was supported by a medical certificate from a doctor in UK certifying that JM had never had an AIDS event and because his virus is controlled medication, he could not be described as a 'threat to the population of Cyprus'. The immigration department declared JM as an 'unwanted immigrant' who had to be deported due to: the "seriousness of the offence for which he was sentenced to imprisonment"; his actions which show that he poses "a genuine, present and sufficiently serious threat affecting the public and legal order and public health"; and because "he has no bond with Cyprus and his family resides in the UK". The Equality Body ruled that the measures taken were disproportionate to the conviction of JM (one month's imprisonment for drunk driving). No investigation had been carried out in order to conclude that his behaviour was such so as to constitute a threat to public order. The conclusion that JM was a danger to public health emanated not from a medical source, but from a district immigration officer. The Equality Body criticised the immigration authorities' allegation that JM has no bond with and no family in Cyprus, since it was known to them that JM had a long standing relationship with a permanent resident: Equality Body Report Ref. A.K.P 69/2010, dated 16 June 2010, http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/40F8C057F681EAE5C22577580037C2E0/$file/AKP69.2010-16062010.doc?OpenElement.

information that is of determining significance for the case without having to justify its source or its credibility.

Certain conclusions may be drawn from the regular practice of tactical retreats by the immigration authorities when faced with Court actions for unjustified deportations of EU nationals or their family members. Although perhaps the number of cases is still too small in order to legitimately describe this policy as a trend, it is noticeable that the authorities are quick to revoke deportation orders or no-entry bans, where they are likely to face actions in the District Courts for compensation on the basis of Article 146(6) of the Constitution.[109] In the case of *Robert Harvey v. the Republic of Cyprus* discussed below, the applicant's claim to have his unlawful detention deportation order annulled rather than revoked gave him the right to claim damages against the Republic, which he would not have been entitled to had the immigration authorities managed to revoke the orders prior to annulment by the Court. One cannot dismiss the presumption that the Republic chose not to contest his claim in order not to upset its diplomatic relations with the British High Commission in Cyprus, which was clearly not a concern for Bulgarian or Romanian nationals, since their respective governments' support is not of as crucial significance as that of the UK government.

Supreme Court approves deportation of a Bulgarian national on suspicion of illegal activities, based upon confidential information held by the police

In *Krisztian Bekefi v. Republic of Cyprus*[110] the Supreme Court dealt with a complaint of a Bulgarian national deported on suspicion of illegal activities, based upon confidential information held by the police. An ex parte application on behalf of a deported Hungarian national seeking to annual the decision to deport him until his case is heard in Court. The applicant presented a police document naming the applicant as dangerous person for participating in an illicit group offering 'protection' and beating up Greek Cypriots and foreigners. Information about this group was given to the police but no official complaint was launched since the victims were alleged to have been blackmailed. The applicant argued that the deportation decision is illegal because it did not comply with the principle of proportionality, foreseen in article 29 of the law transposing Directive 2004/38[111] and that it was also in breach of article 30 of the same law which requires that the authorities take into account the applicant's age, state of health, family and economic situation, social and political integration in the Republic and his links with his country of origin. His main line of argumentation was that the decision to deport the applicant was taken on the basis of suspicion and without proof or formal complaint, but rather on information and general assessment of the facts by the police. The Judge ruled that where the information draws on credible sources and cause concern regarding the presence of a migrant in Cyprus, the deportation decision may be justified even if the evidence is merely general indication. Citing previous authorities the judge found that the presence of the applicant when his case is being tried is not necessary since the case can be examined on the basis of written testimony and the applicant will not sustain irreparable damage by the non-cancellation of the deportation order.

109 Article 146(6) of the Constitiotn provides that any person aggrieved by any decision or act declared to be void under paragraph 4 of this Article or by any omission declared thereunder that it ought not to have been made, shall be entitled to damages to be assessed by the court or to be granted such other just and equitable remedy as such court is empowered to grant.

110 Supreme Court case N. 293/2012, dated 7 March 2012.

111 Law N. 7(1)/2007.

Supreme Court suspends the no-entry ban of Romanian national unlawfully deported

In *Anghel Viorel v. The Republic of Cyprus*[112] the Court ruled in favour of a Romanian national residing in Cyprus from 1991. In 1993 he married another Romanian and in 2001 they had a child. From May 2007 he had a visa to reside in the Republic as a Union citizen, set to expire in May 2012. He continued to reside lawfully as his stay by then exceeded five years. In July 2012, he was deported for reasons of public security upon the instructions of the Attorney General who ordered his deportation before the expiry of three days from his arrest. He had no criminal record, no judgment against him nor was there any criminal procedure pending against him. Following the filing of a recourse challenging the legality of orders issued against him for deportation and prohibition of re-entry, the applicant also filed an ex parte application seeking to arrest the execution of the orders until the recourse is tried.

The applicant's lawyer alleged manifest illegality, in view of the fact that the applicant was deported merely upon the instructions of the Attorney General. He further alleged manifest illegality in the procedure followed for the deportation, as the applicant was not given one month from notification of the deportation decision to enable him to appeal against it, in accordance with article 32(3) of the law; he had been deported within a day from the issue of the detention order. He further alleged a breach of the proportionality principle, bearing in mind his bonds with Cyprus, the fact that he had no criminal record and no criminal prosecution against him.

The Court ruled that the deportation did not meet the preconditions set out in article 29 of the law nor did it observe the procedural safeguards set by article 33. Given that the deportation had already been executed, the Court ordered the suspension of the prohibition of entry of the applicant into the Republic.

Supreme Court denies compensation to a Bulgarian national deported on 'public security' grounds

In *Stenoslav Stoyanov v. The Republic of Cyprus*[113] the Supreme Court denied compensation to a Bulgarian national deported on 'public security' grounds. The applicant was a Bulgarian national who worked in Cyprus as a Union citizen, until he was declared an unlawful immigrant under article 6(1)(z) of the Aliens and Immigration Law Cap 105, on the basis of confidential information supplied to the police that he was involved in illegal activities is a member of a group that offered private security services. His registration was cancelled and orders of detention and deportation were issued against him. He was subsequently deported and his name was entered on the stop-list. In the course of the investigation for the purposes of the trial, the respondents revoked the challenged administrative decisions because these were based on the wrong article of law 7(I)/2007. The revocation letter added that the applicant, apart from being an illegal immigrant under article 6(1)(z) of the Aliens and Immigration Law, was a threat to public order under article 29 of Law 7(I)/2007 and his re-entry into the Republic was thus forbidden for the next ten years. The respondents argue that in view of the revocation, the present application lacks substance, whilst the applicant contends that even if the revocation is valid (which he disputes) there remains a damaging impact entitling the applicant to claim compensation under article 146(6) of the Constitution.

112 *Anghel Viorel v. The Republic of Cyprus,* Supreme Court Case No. 1064 /2012 dated 2 August 2012, ex parte application dated 17.07.2012.

113 *Stenoslav Stoyanov v. The Republic of Cyprus*, Supreme Court Case No. 1406/2011 dated 31 May 2012.

The Court found that the applicant failed to mention anything specific in order to prove his allegations about damaging impact and failed to produce evidence to substantiate his claims about loss suffered as a result of rentals paid, current accounts, furniture and vehicle. And although the compensation claim would have to be tried by the District Court and not by the Supreme Court, the latter nevertheless had to be convinced that there was some damaging impact. The applicant's claim, that a damaging impact emerged as a result of the violation of his right to freedom from detention and deportation, was also rejected by the Court because the administrative act challenged was erroneous only partly and only technically, since it was based on article 35 of Law 7(I)/2007 whilst there was no previous conviction; the simultaneous decision of declaring the applicant an illegal immigrant under article 6(1)(z) of the Aliens and Immigration Law was still valid and reasonable, in light of information gathered by the police. The applicant was still regarded as a threat to public security under another legal provision than the one initially invoked (article 29 rather than article 35 of Law 7(I)/2007). The Court further found that there remained no damaging impact, nor any deprivation of any of the applicant's rights.

It is questionable whether the test of laid down in *Tsakouridis* about 'serious grounds of public policy or public security' is satisfied in this case. Moreover, this decision essentially strips the applicants of his rights to claim compensation under article 146(6) of the Constitution, to recover from the District Court the losses he has suffered as a result of the administrative acts challenged and lifts the bar to deportation on the ground of public security based merely on police confidential information.

Supreme Court annuls unlawful detention/deportation decision to enable British citizen to claim compensation

This is a rare case where the Supreme Court[114] annulled as unlawful the detention/deportation decision to enable a Union citizen to claim compensation. The applicant, a British national residing in Cyprus for the past few years was detained for the purpose of deportation, based on orders of detention and deportation issued against him. His detention lasted for only a few hours and he was then released upon the orders of the Ministry of Interior which revoked the aforesaid orders. In spite of the revocation, the applicant insisted on annulling the decisions so as to seek damages for unlawful detention. The respondents agreed to the annulment of the challenged decision.

The Supreme Court ruled in an uncontested claim by the applicant that the detention for the purpose of deportation/expulsion of a British citizen was unlawful as a violation the EU *acquis* on free movement. In particular, the court decided that it was unlawful to use the provision of Aliens and Immigration law Cap. 105,[115] a provision stipulating the conditions for deporting/excluding foreigners, in combination with article 35 of Law 7(1)/2007, which purports to transpose art. 33 of the Free Movement Directive 38/2004. The Court found that the correct legal framework to use is article 27 of Law 7(1)/2007, which purports to transpose art 33 of the Free Movement Directive given that the expulsion order was not the penalty or legal consequence of a custodial penalty. In light of the fact that the application for annulment was not contested by the respondents, the Court annulled the decision challenged.

Subsequent attempts by other applicants to rely on this judgment met with the Court's refusal, as the judge would argue that the claim in Harvey had been uncontested by the re-

114 *Robert Harvey v. the Republic of Cyprus*, Supreme Court Case No. 1726/2010, dated 17 January 2012.

115 The law dating from colonial times but with tens of amendments: Sec. 6(1)(ζ) and 14 of Cap. 105.

spondents. This particularity of Harvey places it in a category of its own; it does not rank as a precedent, and it is unlikely that other Union citizens, particularly from eastern European countries would succeed without consent of the immigration authorities.[116]

Other Cypriot cases of expulsion of Union citizens or member of their families

In *Shahbaz-ul-Hassan Shah v. Republic of Cyprus*[117] the Supreme Court considered and rejected an application to suspend the execution of detention and deportation orders against spouse of Union citizen. The applicant filed a recourse seeking annulment of the detention and deportation orders issued against him and at the same time filed an ex parte application seeking the suspension of the two orders until the final trial. Whilst the recourse is still pending, this is the examination of the ex parte application. The applicant is a Pakistani student who married a Polish woman in a religious Moslem marriage; his wife is expecting a child. In May 2012 he was arrested because his student visa had expired; detention and deportation orders were immediately issued against him. A few days later he filed an asylum application which postponed the execution of the deportation order until the determination of the asylum application. The applicant sought a postponement until the determination of the appeal which he will file in case his asylum application is not successful. He further argued that his detention violates inter alia Law 7(I)/2007 on the right of Union citizens and their families to move freely and reside in the Republic. He had not sought the legalization of his residence in Cyprus on account of his marriage to a Union citizen, claiming that the law grants him an automatic right of residence.

The Court rejected the ex parte application for suspension of the orders because there was no manifest illegality in the orders nor will their non-suspension lead to an irreparable damage. The Court refused to consider whether Law 7(I)/2007 grants an automatic right to reside in the Republic without prior application to the authorities, as this will be examined during the hearing of the substance of the recourse filed by the applicant. In view of this refusal, the Court found that the applicant's arrest and detention did not amount to a manifest violation of Law 7(I)/2007. Besides, added the Court, the applicant chose another way of legalizing his stay in the Republic, that of applying for asylum, therefore no issue of irreparable damage arises.

Czech Republic

In *Tsakouridis* case, the CJEU clarified conditions under which the 'enhanced protection' under the Directive 2004/38/EC can be achieved or lost, and it also clarified the notion of 'imperative grounds of public security'.

Out of the highest Czech courts, only the Supreme Administrative Court dealt with the notion 'imperative grounds of public security' in its decision 7 As 85/2009 – 81 of 21 January 2010. However, in the time period under review, several judgments of this court concerned public security as possible limitation on the free movement of workers, but no judgment addressed specifically Article 28(3) of the Directive 2004/38/EC. Judgments which deal with the issue of public policy and public security pointed out the necessity to interpret

116 A factor which may be of importance is the fact that we are dealing with a British citizen; in general Cyprus retains very good diplomatic relations with its' former colonial master and the British High Commissioner has a strong standing in Cyprus, particularly of matters relating to the rights of British citizens.

117 Supreme Court case 884/2012, dated 17 July 2012, Interim application dated 6 June 2012 for suspension of detention and deportation orders.

Czech legislation in conformity with relevant CJEU case law.[118] Moreover, the Supreme Administrative Court in the case 3 As 4/2010 – 129 of 5. 5. 2010 reached the conclusion that its interpretation of the notion 'public policy' needs to be unified. The court then dealt with the issue in extended bench of judges (plenary) and issued the judgment 3 As 4/2010 - 151 of 26 July 2011, reiterating once again the necessity to take into consideration relevant CJEU judgments.

Denmark

The Danish report does not cover *Tsakouridis*.

Estonia

The *Tsakouridis* case concerns the right of a Member State to expel a person who has lawfully resided in Member States, but who has committed different crimes. According to the CJEU, if a person has committed crimes dealing with drugs, this situation would be viewed as serious threat to the public security and would justify expelling a person form the Member States. This case does not at the moment have any impact to the Estonian legal regulation, but it could have an impact by interpretation of the Citizen of European Union Act. As the Estonian Citizen of European Union Act has foreseen, that it is possible to refuses to grant a right to stay or to expel a person due to the fact, that there is a serious threat to the public security. The Act itself and also the case law did not so far clarify, what does a serious threat to the public security mean. As the Estonian case law does not have any examples, then on basis of the court decision mentioned above, Estonian authorities could understand what is a threat to public security. Also this judgment gives to the courts guidance how to assess if a person has left the country and how long a person was absent from the country concerned. The case is important for Estonia for reasons of interpretation.

Finland

The Finnish report does not cover *Tsakouridis*.

France

Recent legislation has changed the possibilities of expulsion of the EU citizens. Act No. 2011-672 of 16 June 2011 on immigration, integration and citizenship implements a specific provision governing the obligation to leave French territory with regard to citizens of the European Union and their family members.

Now are deportable citizens who are nationals of a Member State of the European Union in a situation of short stay (less than three months). The new law of 16 June 2011[119] on immigration, integration and citizenship introduced a new Article L. 511-3-1 which reads:

> *'The competent administrative authority may, by a reasoned decision requiring a national of a Member State of the European Union (...) or a member of his family to leave the French territory when it notes:*
>
> *1. That he is no longer entitled to any right of residence as provided by Articles L. 121-1, L. 121-3 or L. 121-4-1;*

118 See for example judgments of the Supreme Administrative Court No. 5 As 51/2009 of 9. 10. 2009, 2 As 61/2011 – 128 of 20. October 2011, 7 As 87/2010 – 132 of 23. December 2011 and 2 As 143/2011 – 85 of 04. April 2012.

119 Loi n° 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalité, JORF n°0139 du 17 juin 2011 page 10290, qui entrera en vigueur au 30 septembre 2011.

2. *Or that his residence constitutes an abuse of rights. The renewal of residence of less than three months in order to remain on the territory as the requirements for a stay of longer than three months are not met, constitutes an abuse of rights. Also living in France with the primary aim to benefit from the social assistance system constitutes an abuse of rights;*
3. *Or that, during the period of three months from the entry into France, his behavior constitutes a genuine, present and sufficiently serious threat to a fundamental interest of French society.*

The administrative authority shall take into account all the circumstances of his situation, including the length of stay of the person in France, his age, state of health, family and economic situation, social and cultural inclusion in France, and the intensity of his links with the country of origin.'

It is also clear that the provisions relating to administrative proceedings and litigation for challenging requirements to leave French territory and return prohibitions apply to EU nationals in the same way as foreign nationals.[120]

The case law has to clarify the provisions of the fifth paragraph of this section in determining the circumstances in which the situation of the person concerned, including the duration of his stay in France, age, health status, family status and economic, social and cultural integration in France and the intensity of his ties with his country of origin, are likely to impede the 'order to leave French territory'.

A first judgment came implementing these provisions is of the Administrative Court of Appeal of Bordeaux 1 March 2012.[121] Mr. A, a Romanian national, is appealing the judgment No. 1104294 dated September 26, 2011 by which the Administrative Court of Toulouse rejected his application for annulment of the decree of September 21, 2011 by which the prefect of Tarn has obliged him to leave French territory and promptly arrested him the same day ordering his placement in administrative detention.

It appears from the applicant's own statements, made to police officers during his arrest, that Mr. A, deprived of any identity document, is a Romanian national, and arrived in France from Italy in August 2011, one month before the adoption of the decree of the prefect of Tarn, 21 September 2011; thus, at the date of this order, he stayed in France for less than three months and was therefore in the case where, under the above provisions of Article 3 of L. 511-3-1 CESEDA, the prefect may decide to require a national of a Member State of the European Union to leave French territory.

It appears from the order that the prefect of Tarn based the obligation to leave French territory immediately taken September 21, 2011 on the circumstances that he had committed a robbery in Albi. This behaviour is a genuine, present and sufficiently serious threat to a fundamental interest of French society and its remoteness constitutes the reason for the urgency. It appears from the statements of the same person in the records that he is without resources other than those which would have his wife, whose presence and resources in France are moreover not demonstrated; thus, having regard to all the circumstances of the case, the prefect of Tarn, was able to conclude without committing an error of assessment, that the behaviour of Mr. A was constituting a threat to public order and, consequently, on

120 Article L. 512-1 à L. 512-4 CESEDA.
121 Cour Administrative d'appel de Bordeaux, 1er mars 2012, req. n°11BX02753.

the basis of the provisions cited above, to make an order against him to leave French territory without delay, and that this is sufficient to justify a genuine, present and sufficiently serious threat to public safety, which is a fundamental interest of society, within the meaning of Directive 2004/38/EC.

The Act also introduces a new Article L. 521-5:

> *'The expulsion referred to in Articles L. 521-1 to L. 521-3 may be taken against nationals of a Member State of the European Union (...)*[122] *or a member of their family if their personal conduct represents a genuine, present and sufficiently serious threat to a fundamental interests of society.*
> *To take such measures, the administrative authority shall take into account all the circumstances of their situation, including the duration of their stay in the country, their age, state of health, family and economic situation, social and cultural integration in French society and the intensity of the ties with their country of origin.'*

Article L. 521-2 of CESEDA amended by the same Act provides that the following person can not be the subject of a deportation order unless this measure is a necessity for the security of the State or public security: '6 The national of a Member State of the European Union, of another State party to the Agreement on the European Economic Area or the Swiss Confederation, who has resided regularly in France for ten years.'

It follows from the foregoing that the expulsion of European and assimilated persons for reasons of public order may take several forms depending on the situation of the person concerned:

- Obligation to leave French territory is possible during the first three months of residence in France. This is contrary to the principle of freedom of movement and residence of EU citizens for 3 months. It is emphasized that EU and assimilated citizens with a right of permanent residence may not be the subject of such an 'order to leave French territory';
- Expulsion 'simple' (art. L. 521-1 and following of CESEDA), unless the person has a legal residence in France for ten years. Only the expulsion necessary for the security of the State or public safety is here possible. This gradation in the magnitude of the threat to public order should be subject to judicial control.

Germany

Following the *Tsakouridis* judgment no legislative or administrative decisions have been considered necessary in order to implement the judgment. In its judgment of 21 December 2011 the Bavarian Administrative Appeal Court (VGH München)[123] considers the *Tsakouridis* judgment as a confirmation of its interpretation of Art. 28 of the Union Citizens Directive. The case concerned a Polish national who had received a temporary residence permit in 1989 which has been prolonged until 2002 – and the court had to decide whether he could rely after accession of Poland to the European Union upon Art. 28 of Directive 2004/38. He argued that under Art. 28, having stayed lawfully within Germany for a period of more than ten years, he was entitled to rely upon the specific protection of Art. 28. The Bavarian Administrative Appeal Court rejected his claim, arguing that Art. 28 has established a three-tier-system of protection. Therefore, it was not sufficient that the Union citizen

122 Sont assimilés aux ressortissants d'un Etat membre de l'Union européenne.
123 Judgment of 21.12.2011, 10 B 11.182, *Informationsbrief Ausländerrecht* 2012, 161.

had in fact been legally resident in the federal territory for a period of ten years. According to the court Art. 28 establishes a coherent tier-system of successive protection rights with increasing protection on every tier according to the degree of integration of the Union citizen. The court explicitly relies upon no. 25 ff. of the *Tsakouridis* judgment stating that Art. 28 has been established a coherent system of successive protection levels directly connected with the degree of integration reached on every on every tier. The court as well refers to the judgment of 08.12.2011.[124]

Greece

Pursuant to judgment 4023/2011 the Council of State (*Symvoulio tis Epikrateias*) referred to the *Tsakouridis* judgment concerning an expulsion decision and the imperative grounds of public security.

Art 22 par. 2 of Presidential Decree 106/2007 provides that

> *'the expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on Greek territory shall be taken only on serious grounds of public policy or public security', and par. 3 that 'an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, if they: (a) have resided in Greece for the previous 10 years'.*

The Council accepted that the fight against crime in connection with dealing in narcotics could be covered by the concept of 'serious grounds of public policy or public security' which may justify a measure expelling a Union citizen who is a permanent resident in Greece. It has also accepted that dealing in narcotics is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in Greece for the preceding 10 years.

However the Court did not refer to a crime in connection with dealing in narcotics as part of an organised group.

It also referred to the fundamental rights and in particular the right to respect for private and family life To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, it underlined that account must be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in Greece, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural ties in Greece and the ties with the State of provenance.

The Council justified the measure of expulsion also taking into account that the Union Citizen has not invoked reasons related to his health or the interruption of his links with the State of provenance.

Hungary

The *Tsakouridis* case concerned the conceptual elements of 'public security' and 'imperative grounds of public security' as enshrined in Directive 2004/38/EC. The German court was interested to know (1) what circumstances are capable of interrupting the period of 10 years'

124 *Ziebell*, C-371/08, *Informationsbrief Ausländerrecht* 2012, 43, emphasizing that the directives system of protection is essentially based upon an increasing degree of integration. Therefore protection on the highest level after ten years time requires a previous acquisition of the second tier level of protection.

residence and (2) whether criminal offences in connection with dealing in narcotics as part of an organised group can be covered by the concept of 'imperative grounds'.

According to the Hungarian law (Article 33 of the FreeA) the right to free movement can only be limited if the persons' personal conduct embodies a real, direct and serious threat to the public order, public security, national security or public health. In accordance with this objective the Hungarian Criminal Code (in Article 61 (6) para.) lays down that a person who exercised his/her right to free movement in Hungary can only be expelled if s/he is sentenced to a minimum of five years imprisonment. It means that only serious offences can be penalized by expulsion. In this regard a case has been adjudicated by the Supreme Court of Hungary.[125] According to this case an EU national (Romanian) was imposed a fine for an attempt of stealing, while, as a supplementary sentence, he was also sentenced for a two years' long expulsion. He appealed the expulsion decision as being contrary to the above-said law. The Supreme Court cited Article 61(6) of the Criminal Code and declared that the expulsion sentence was against the law.

Moreover, pursuant to Article 42(1) of the FreeA expulsion by the immigration authorities can not be decided against a union citizen and his/her member of family if they reside legally for more than ten years within Hungarian territory or if s/he is a minor, except if the expulsion is in the interest of the minor.

It can be seen that the limitation 'except if the decision is based on imperative grounds of public security' does not form part of the Hungarian implementation in the FreeA. An immigration decision can not be passed in this regard.

The approach of Hungarian law as regards points (1) and (2) is as follows:

- union citizens who are permanent residents in Hungary and live here for more than ten years can only be expelled by a res iudicata judgment of the court as a criminal sentence but not by the immigration authority. However, there is no guidance on its content hence no such case has yet been adjudicated.
- there is no provision as regards the interruption of the ten years' period.

Ireland

The Court in *Tsakouridis* examined the condition of 'enhanced protection' following ten years' residence in a host Member State. It assessed the criteria for expulsion from a host Member State where 'enhanced protection' applies, on the basis of 'imperative grounds of public security'.

Article 28 of Directive 2004/38, dealing with protection against expulsion, has been transposed into Irish law by Regulation 20 of the 2006 Regulations. Regulation 20 deals with removal of an EU citizen from Ireland by way of a removal order. Removal orders can be made on various grounds. Regulation 6(b) provides that a removal order may not, except on imperative grounds of public security, be made in respect of a Union citizen who, inter alia, has resided in the State for the previous ten years. Removal orders are enforced by the Garda National Immigration Bureau (GNIB).

According to a Ministerial statement made in 2009, a total of 50 EU citizens had been removed on foot of removal orders, made in accordance with Regulation 20. A total of 4 EU citizens were removed in 2007, 39 in 2008 and 7 were removed up until May 2009. According to the website of the INIS, in 2011, a total of 41 EU nationals were returned to their countries of origin on foot of an EU Removal Order. This is in the context of a total of al-

125 Bírósági Határozatok 2008/289.

most 4,000 persons being deported or removed from Ireland in 2011 and a further 475 persons choosing to return home voluntarily in 2011.[126] The Department of Justice and Equality has confirmed that no one has been removed from Ireland based on 'imperative grounds of public security' (i.e. the basis for expulsion after ten years' residence, considered in *Tsakouridis*).

A statement from a previous Minister for Justice, Equality and Law Reform, in 2007, highlights the importance of proportionality in any decision to restrict free movement on the grounds of public policy or public security. In the particular context of entering the State, the Minister recognised that:

> *'The Directive provides that measures taken on grounds of public policy or public security must comply with the principle of proportionality and must be based exclusively on the personal conduct of the person concerned.'*[127]

In a recent paper on developments in sentencing, Irish barrister Tom O'Malley made the following observation:

> *'Cases have recently arisen in Ireland where judges have suspended prison sentences on the condition that the offender leave the country and not return for a specified period. In some instances, the specified period has been very long, up to ten years in one case that comes to mind. This clearly creates a legal problem when the offence is not particularly serious and when the offender is an EU citizen. Cases may arise where such a measure would be acceptable, but it is generally best avoided. Courts would be better advised to impose whatever sentence would be appropriate if the offender were an Irish citizen.'*[128]

The Court of Justice in *Tsakouridis* also looked at the particular requirements for gaining 'enhanced protection', and decided that Member States must take all relevant factors into account, including absences from the State, the frequency and duration of those absences, the reasons for absences and whether those absences involve the transfer of the centre of interest to another State. In this regard, the guidelines of the Department of Social Protection on the habitual residence condition are illustrative of the criteria applied in determining whether a person's centre of interest has transferred to another state.[129]

Italy

The rapporteur could not find any judicial case in which courts discussed whether the conditions for enjoying the enhanced protection laid down in Article 27.3 of Directive 2004/38/CE (corresponding to Art. 20.7 of Legislative Decree 2007 no. 30) were met.

Even if Art. 20 of Legislative Decree 2007 no. 30 does not literally reproduce art. 27 of the Directive, the substantial and procedural guarantees there established are as a whole respected.

126 http://www.inis.gov.ie/en/INIS/Pages/Immigration%20in%20Ireland%202011%20–%20a%20year-end%20snapshot%20–%20major%20changes%20and%20more%20to%20follow.
127 http://debates.oireachtas.ie/dail/2007/11/21/00236.asp.
128 http://www.dppireland.ie/filestore/documents/PAPER_-_Tom_O'Malley_BL1.pdf.
129 http://www.welfare.ie/en/operationalguidelines/pages/habres.aspx.

The legislator has tried to define when an imperative ground of public security can justify an expulsion order. The provision now in force (after the amendments brought by Decree-Law 2011 no. 89, turned into Law 2011 no. 129) states that imperative grounds of public security subsist when the behaviour of the person to expel amounts to a real, effective and serious threat to fundamental human rights or to public safety.

A number of expulsion orders have indeed been justified on an imperative ground of public security, even when the person in question could not enjoy the enhanced protection laid down by art. 27.3 of the Directive, because s/he has not yet resided in Italy for the required time. Before the 2011 amendments, from the point of view of national authorities, to base an expulsion decision on imperative grounds of public security was more advantageous, because an expulsion order in that case, firstly, could be taken by the local representative of the State (i.e. the Prefect); secondly, it was immediately enforceable by the Police; thirdly, the person to be expelled could be detained in a detention centre pending ratification of the decision by the judge; and fourthly, the application for judicial review did not have automatic suspensive effect. For that reasons, there have even been cases of expulsion on imperative grounds of public security of a Union citizen who supposedly was a prostitute, or who had police charges. After the 2011 amendments, expulsion orders adopted on 'imperative grounds of public security' shall no more be immediately enforced, but any expulsion decision shall be immediately enforced only if the Questore (Head of Police) demonstrates, on a case by case basis, that the presence of the person in question in the country is irreconcilable with orderly society.

Crime connected with dealing in narcotics is covered by the concept of 'imperative grounds of public security' and can be the basis for an administrative expulsion. Art. 20.3 states that, in evaluating whether the behaviour of the person concerned can justify an expulsion order on 'imperative grounds of public security', the competent authority shall take account of any conviction for a crime that give rise to surrender pursuant to a European arrest warrant issued in accordance to Framework Decision 2002/584/JHA, which covers both 'participation in a criminal organization' and 'illicit trafficking in narcotics drug and psychotropic substance'. An example is the case of a EU citizen, expelled on 'imperative grounds of public security', because she had been convicted for thefts and drug dealing (Supreme Court of Cassation, Civil Branch, sixth chamber, order 22-3-2012 no. 4636).

A conviction for a crime connected with dealing in narcotics can also ground a judicial expulsion. In fact, a foreigner found guilty of serious crimes related to drugs can be expelled (Article 86 of Decree of the President of the Republic no. 309 of 1990). The provision is drafted in general terms and is applicable to Union citizens too (see Supreme Court of Cassation, Criminal Branch, fourth chamber, judgment 8-6-2007 no. 22511; first chamber, judgment 27-11-2008, no. 44336; fourth chamber, judgment 2-7-2010, no. 25150). In that case, expulsion is a security measure, which is a measure enacted against a person who represents a danger for the general public, in order to prevent him from committing further crimes. Therefore, expulsion is not automatic, but depends on a specific analysis of the danger that the offender represents, made by both the judge who convicts him and the supervising court after the person has served his term of imprisonment. In order to ascertain if the person represents a danger, the judges have to take account of the offence committed, the circumstances in which the offence took place, and the personality of the offender. In doing that, the judge is expressly committed to take the general principles laid down by Article 20 of Legislative Decree 2007 no. 30 (implementing Articles 27 and 28.1 of Directive 2004/38/EC) into account (Article 183-ter of Legislative Decree 1989 no. 271).

Security measures are of undetermined duration, but can be repealed if the person ceases to be a danger for the general public. Thus, even if the expulsion order is permanent, it can be repealed.

Latvia

Latvian law in general does not provide a definition of the concepts 'public security' as well as 'serious grounds of public policy' or 'imperative grounds of public policy'. There have been no national court decisions on expulsion of a Union citizen on such grounds.[130]

The legal act regulating expulsion of Union citizens, Regulation No. 675, merely provides that expulsion order could be taken by the Minister of Inferior on the grounds that a Union citizen represents a threat to the public policy or security (Point 58). It further clarifies that threats must be actual and sufficiently serious and that previous criminal conviction may not constitute a ground of expulsion itself (Point 59). Point 60 of Regulations No. 675 requires assessment of the personal situation of a Union citizen, in particular, length of stay in Latvia, age, state of health, family and economic situation, social and cultural integration in Latvia and ties with a Member State of origin. Consequently Latvian implementing measures of Directive 2004/38 do not differentiate between provisions of Article 28(2) and 28(3) of the said Directive. They also do not provide for the requirement of such a thorough assessment of the personal situation as established by the CJEU in paragraphs 49 to 53 of the *Tsakouridis* judgment in question.

Lithuania

Concerning the *Tsakouridis* judgment, Lithuania regulated the assessment of threats for the purpose of issuing residence permits and amended bylaws in this area in 2011. The Order of the Commissar General of the Lithuanian Police (of 5 April 2011) on Verification of Data about foreigners who submitted an application for a temporary residence permit, a long-term residence permit or an asylum application and on the preparation of a on potential threat to public order, provides that considering the threat to state security and public order the responsible officer takes into account the following aspects: that the foreigner was sentenced for a serious and particularly serious crime; the foreigner was sentenced for a crime punishable with more than one year imprisonment; the foreigner received an official warning or court obligations in accordance with the Law on Organised Crime prevention; the foreigner is reasonably suspected in commission of a serious or particularly serious crime and there are evidences that he/she is intending to commit such crimes; the foreigner is subject to compulsory medical measures envisaged in Art. 98 of the Penal Code of Lithuania; the foreigner is wanted by the foreign country for the commission of a crime for which the Lithuanian Penal Code provides a punishment of more than one year imprisonment. Additional criteria may also be taken into account, like: behaviour of the person, punishment for the crime committed which was served, and the administrative offences committed during the past 2 years. The Order does not explicitly mention such aspects as proportionality, but generally it can be concluded that Lithuanian legislation is in line with the principles established by the Court in *Tsakouridis*.

Luxembourg

No follow-up report.

130 Telephone interview with Head of Unit of Legal and European Affairs, 12 June 2012.

Malta

The Maltese report does not cover *Tsakouridis*.

The Netherlands

Article 28(3) of Directive 2004/38 is transposed by Article 8.22(3) of the Aliens Decree: Unless imperative grounds of public security such require, lawful residence will not be terminated, when the alien has lived in the Netherlands during the preceding ten years. 'Imperative grounds of public security' are not specified in the Aliens Decree nor in the Aliens Circular.

In Judicial Division Council of State 5 October 2011, 201100780/1/V1 [LJN: BT8385] the Council of State took into consideration that, as has been contemplated in inter alia the *Tsakouridis* judgment that drug trafficking poses a threat to the health, safety and quality of life of citizens of the European Union and to the legal economy, stability and security of the Member States, the behaviour of the alien that has led to the declaration as undesirable alien represents a genuine, present and sufficiently serious threat to the fundamental interests of society. In the light of Article 32 of the Directive (Duration of exclusion orders) the alien has to substantiate in the context of its request for waiver of his declaration as undesirable alien that a change in the meaning of this provision has occurred. By pointing on his work as a bicycle taxi driver in Amsterdam and by stating that he owns a house in Romania, no longer uses drugs and wants to build up an existence with his girlfriend in the Netherlands, failed to substantiate this claim, already while he still committed crimes since being declared undesirable in the Netherlands till shortly before his application.

The *Tsakouridis* judgment is published in *Jurisprudentie Vreemdelingenrecht* 2011/3, with annotation P. Boeles.

Poland

The Act on entry regulates the possibility to expel EU citizen or members of his/her family who has been residing in the territory of Poland for a period longer than 10 years in a different way as it is stated in Article 29.3.a of the Directive 2004/38. The Directive refers to imperative grounds of public security, whereas the Act on entry states that an expulsion decision may not be taken against Union citizens, if they have resided in Poland for the period exceeding ten years, except if the decision is based on grounds of national defence, national or public security by means of constituting a threat for peace, humanity, independence or defence of the Republic of Poland, or due to terrorist activity. Two remarks shall be done. First of all, there is no reference to 'imperative' grounds of defence or security, unlike in cases of those EU citizens who have a right of permanent stay but who are in Poland for a period shorter than 10 years. But it does not mean that the more strict conditions to legally expel EU citizens or member of his family in case of their stay for period of more than 10 years are not applicable. Article 69 of the Act on entry creates a two level check before taking decision on expulsion. It is not enough to determine that the stay of a given individual constitutes a threat to the national defence or public security, it shall also be examined whether a particular behaviour endangers such basic values of Polish society as peace, humanity, independence or defence also in the light of threat of a terrorist attacks. Therefore the wording of Article 69 of the Act on entry leads to a conclusion that it contains more severe conditions to be fulfilled in respect of those individuals who have spent at the territory of Poland a period longer than 10 years.

Moreover, Article 70 of the Act states that it is necessary, during the proceedings related to the expulsion of a Union citizen or his/her family member without Union citizenship, to take several factors into account, such as:

1) how long the individual concerned has resided on the territory of the Republic of Poland;
2) his/her age and state of health;
3) family and economic situation;
4) social and cultural integration into the Republic of Poland; and
5) the extent of his/her links with the country of origin.

Therefore the assessment to be done according to the Act on entry is comprehensive and takes into account several factors. Taking into account the wording of point 1, 4 and 5 above, surely such factors as the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned must be taken into account.

As regards the qualification of the obligation for a Member State to combat crimes in connection with dealing with narcotics, such a behaviour of the individual may justify the expulsion of an individual who have been residing in Poland for a period longer than 10 years. Such a criminal activity may be treated as a threat of national security by means of constituting a threat for peace and humanity. According to the Polish legislation, drugs crimes are treated as very serious crimes.[131] Poland has a very strict regulations on combating drugs crimes. According to the Supreme Administrative Court, a person who has been declared guilty for drugs crimes shall be qualified as constituting a real, genuine and fundamental threat to interests of the society such as fighting against and combating drug addiction as well as combating the trade of drugs. Additionally the Court declared that the threat to fundamental interests of the society is such seriously in case of drugs that the decision of expulsion may interfere in a justified way in rights enshrined in Art.icle 8 of the European Convention on human rights.[132]

Portugal

In *Tsakouridis* the first question answered by the CJEU is about the extent to which absences from the host Member State during the period referred to in Article 28(3)(a) of Directive 2004/38 – transposed by Article 23(3) of Law 37/2006 –, that is, during the 10 years preceding the decision to expel the person concerned, prevent that person from enjoying the enhanced protection against expulsion laid down in that provision. As the CJEU stated, that provision is silent as to the circumstances which are capable of interrupting the period of 10 years' residence for the purposes of the acquisition of the right to enhanced protection against expulsion. Therefore, in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, which is the decisive criterion for granting enhanced protection under that provision, all the relevant factors must be taken into account in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those

131 The Act of 29 July 2005 on combating drug addiction (Ustawa o przeciwdziałaniu narkomanii), *Journal of Laws* of 2005, no. 179, item 1485.

132 The judgment of the Administrative Supreme Court of 24 November 2008, file no. II OSK 1344/07.

absences, and the reasons why the person concerned left the host Member State. Such reasons may establish whether those absences involve the transfer to another State the centre of the personal, family and occupational interests of the person concerned.

The CJEU also clarified that the concept, used by Article 28(3) of Directive 2004/38, of 'imperative grounds of public security' intends to limit measures of expulsion to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive. Thus, such provision must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by that concept. It may justify an exceptional measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years.

Romania

The CJEU in the *Tsakouridis* case clarified the concept of 'imperative grounds of public security' as a justification of the expulsion of a Union citizen who has resided for more than ten years in a Member State other than that of which he possesses the nationality (enhanced level of protection). According to the court, this concept presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, and the conduct of the person concerned must represent a genuine and present threat and that the expulsion measure cannot be based on the existence of previous criminal convictions or considerations of general prevention. Any measure must be based on the individual examination of the specific case, and must be analyzed the subjective conditions as well, such as the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State.

The Romanian regulation is in harmony with the approach of the court.

The right to free movement within Romania may be restricted only for imperative reasons of national security in the case of residents with continuous and legal stay in Romania for the past 10 years. The adoption by the competent authorities of any decision to restrict the freedom of movement, especially on removal from the territory of Romania it is possible only by taking into account the actual duration of stay of the person concerned on the territory of Romania, the age, state of health, family and economic situation, the degree of social and cultural integration in Romania. Any measures restricting the free movement rights in Romania for EU citizens and their family members should be made on the principle of proportionality and shall be based exclusively on the behavior of the person concerned. This behavior must represent a genuine, present and sufficiently serious threat to the fundamental values of society. Such a measure can not be based solely on the existence of a prior criminal conviction. Reasoning that rely on considerations of general prevention cannot be accepted, and the situation is similar if the arguments are not directly related to the case. Any measure to restrict the right to free movement within Romania for EU citizens and their family members can be only temporary.

Slovakia

As regards the *Tsakouridis* case, the Slovak Act on Foreigners has in its Article 2 (i) the definition of the 'threat to the security of the state' that shall be understood as the action of a person who threatens democratic order, sovereignty, territorial cohesion or inviolability of state borders; or the action of a person who violates the fundamental rights and freedoms which protect the lives and health of persons, property and environment. 'The security of the

state' is used in the Act on Foreigners, where the term 'public security' of the Directive 2004/30/EC is transposed. 'Imperative grounds' are not defined in the Act on Foreigners.

The Act on Foreigners does not explicitly provide for, in order to determine whether a Union citizen has resided in the host Member State for the 10 years, taking into account the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State, reasons which may establish whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned. Nothing particular can be found in the Act on Foreigners itself with this regard except for the general rules that the police, when deciding about administrative expulsion of a Union citizen, shall take into account the appropriateness of administrative expulsion with regard to personal and family conditions of a Union citizen, his/her age, health condition, family and financial situation, length of previous residence, level of his/her integration into the society as well as the scope of relationships with his/her country of origin.

Slovenia

The ruling in the *Tsakouridis* case gives some very precise and useful explanation of the article 28 of the Directive 2004/38. The Aliens Act which regulates the issue of expulsion in the Slovenian legal order, addresses the phenomena of residing in the host Member State for the 10 years preceding the expulsion decision as well as the distinction between 'imperative grounds of public security' and 'serious grounds of public policy or public security'. It is true that those grounds are not described in details but that does not cause any serious obstacles in the decision making of the administrative bodies..

Spain

Concerning *Tsakouridis* no reference is found in Spain.

Sweden

In *Tsakouridis* the CJEU deals with the right to enhanced protection and the concept of 'imperative grounds of public security' for justifying the expulsion of a Greek national and Union citizen born in Germany, who had resided for more than ten years in a Member State other than that of which he possesses the nationality. The decision on expulsion was taken after he had been sentenced to imprisonment of more than five years for dealing in narcotics as part of an organized group.

A foreigner who has a right of residence may be expelled from Sweden referring to public order or security (the Aliens Act ch. 8 § 7a). However, if the foreigner has a permanent right of residence there must be particular reasons for such a decision. If the foreigner has children in Sweden or has been staying in Sweden for the last ten years, he or she may be expelled only if the measure is absolutely necessary referring to public security.[133] However, a crucial issue is the criminal activities, if it is grave etc., to which the citizen has been found guilty.

United Kingdom

Tskarouridis is not covered by the UK report.

133 Concerning judicial practice, in Case MIG 2009:21 the Migration Court of Appeal – referring to Directive 2004/38/EG considered that a Croatian citizen married to a Union citizen and committing serious criminal activities in Sweden should be expelled as being a serious threat to public order and security (referring to the Aliens Act, Ch. 3 a §§ 3 and 4, Ch. 5 kap. §§ 3 and 17a, Ch. 8 §§ 1, 7a and 17a).

I.3. National reports on *Dias* (C-325/09)

Austria

The CJEU had to deal with Article 16 Directive 2004/38 and times of residence prior 30th April 2006. The Administrative Court (5.7.2011, 200821/0522) confirmed that a permanent residence right is granted after five years of legal stay.

The Administrative Court also stated that the Union citizen´s right to reside is not depending on a formal residence title; a residence permit has declaratory character only (16.2.2012, 2009/01/0062). Sect. 9 Residence and Settlement Act (RSA) (*Niederlassungs- und Aufenthaltsgesetz; NAG*) uses the phrase 'to document the right to stay'; therefore the Austrian law is in line with the requirement of 'declaratory character'.

Belgium

Article 16 of Directive 2004/38 provides that EU citizens 'who have resided legally for a continuous period of five years in the host Member State' obtain the right of permanent residence. In Belgium, permanent residence is granted after a continuous period of only three years (Article 42quinquies, §1 Aliens Law) as a result of Article 37 of Directive 2004/38 on more favourable national provisions. This is due to the fact that the Belgian nationality can be granted after three years of residence. In the future, this period could be extended to five years and could also extend, in consequence, the period necessary for permanent residence.

However, the question of the dies a quo and the quality of a 'legal residence' is the same for this period of three years. The *Lassal* case (C-162/09) was the first to mention that periods of residence completed before the date of transposition of Directive 2004/38, namely 30 April 2006, in accordance with earlier European law instruments, must be taken into account. This was the practice in Belgium.

The *Dias* case (C-325/09) provides more details on the meaning of the words 'in accordance with earlier European Law'. *Dias* reads that a residence period validly issued pursuant to the old Directive 68/360, without the conditions governing entitlement to any right of residence having been satisfied, does not satisfy the conditions under Article 16 of Directive 2004/38. Residence of less than two consecutive years does not however affect the acquisition of the right of permanent residence on the basis of a continuous period of five years (three years in Belgium) of legal residence completed prior to that date.

Dias did not change the practice in Belgium since the Belgian law was on the same track. Since its transposition by the Belgian law on 25 April 2007, Article 42quinquies, §1 of the Aliens law requires a continuous three-year residence period 'on the basis of the present chapter of the law', namely the chapter on the right of residence for EU citizens.

Joined cases *Ziolkowski* and *Szeja* (C-424/10 and C-425/10) mentioned that residence as the sole basis of national law cannot be regarded as satisfying for permanent residence, which seems to be similarly interpreted by the Belgian law on the basis of the special chapter in the Aliens Law on EU citizen residence.

Bulgaria

The Republic of Bulgaria is a Member State of the European Union since 1 January 2007. Directive 2004/38 was transposed in Bulgaria by means of the Law on the Entry, Residence and Departure of the Republic of Bulgaria of EU Citizens and the Members of their Family ('LERD'), separate from the Law on the Foreigners in the Republic of Bulgaria (LFRB) that remained to regulate the situation of third country nationals. LERD was adopted by the Na-

tional Parliament on 20 September 2006. It was published in the Official Journal of Bulgaria on 3 October 2006. LERD entered into force on 01 January 2007.

Since Directive 2004/38 repealed Directive 68/360/EEC, Bulgaria found needless to transpose the latter. Therefore, in Bulgaria there are no residence permits that have been issued under Directive 68/360/EEC. Bulgaria had issued residence permits to EU nationals under the LFRB, which set the general immigration regime for entry and residence in Bulgaria by foreign nationals. The LFRB provided for two types of residence permits for a stay over three months. The first type is the so-called 'continuous' residence permit, which is issued for a renewable period of up to one year, as long as the foreign national meets any of the grounds for the issuance of the permit (e.g. work, study, business, etc.). The second type is the so-called 'permanent' residence permit, which is issued for a limitless period of time after the foreign national has resided continuously in Bulgaria for five years. Once the foreign national has acquired a permanent residence permit, it is no longer necessary to prove the existence of a ground for residence as is the case with the 'continuous' residence permit for up to one year. That is, only the 'permanent' residence under LFRB could be regarded as residence on the basis solely of a residence permit validly issued pursuant to LFRB, without the conditions governing entitlement to any right of residence having been met. It also corresponds to the factual situation in the *Lassal* and *Dias* cases in as far as it is acquired after a period of continuous legal residence of five years. Unless the EU national had a permanent residence permit under LFRB, prior to Bulgaria's EU membership as of 1 January 2007 it was not legally possible to reside in Bulgaria for renewable periods of up to one year without meeting any of the conditions (grounds) that give entitlement to residence in the country.

In corollary, prior to 1 January 2007 Bulgaria has not issued residence permits without the conditions governing entitlement to any right of residence having been met. Only the completion of five years of continuous residence granted the right to a permanent residence permit under LFRB. If the EU national had been holder of an up-to-one year residence permit (the so-called 'continuous' residence permit under the terms of Bulgarian law), he/she should have met the conditions for its issuance stipulated in LFRB.

With regard to the second part of the CJEU's ruling in the *Dias* case, namely that periods of residence of less than two consecutive years, completed on the basis solely of a residence permit, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, again it should be noted that no such legal residence had been possible in Bulgaria unless the person was already a holder of a permanent residence permit under the LFRB. There is no explicit regulation on the loss of the permanent residence status by EU nationals under the LFRB. With regard to third country nationals, currently Article 40 (1) (6) LFRB provides that the permanent residence permit is lost upon absence from the territory of the EU Member States for a period longer than 12 consecutive months. Until May 2009 Article 40 (1) (6) LFRB provided that the permanent residence permit is lost if it is established that the foreign national did not reside on the territory of Bulgaria for a period of at least six months and one day during the previous calendar year. With regard to loss of permanent residence status by EU nationals, currently Directive 2004/38 applies.

Having made the above analysis, it is to be noted that the only explicit national regulation with regard to the issues in the *Dias* case is Article 16 (1) of LERD (the law governing the situation of EU nationals in Bulgaria), which provides that permanent residence is given

provided that the person 'has resided legally and without interruption for a period of five years on the territory of Bulgaria'. No further 'qualitative elements' (within the meaning of Paragraph 64 of the *Dias* judgment), besides the territorial and time factors, are explicitly required by the Bulgarian law.

There is no national case law in this regard. The case of *Dias* has not been referred to by Bulgarian courts in 2011/12.

Cyprus

There is no relevant case decided by the Cypriot courts. It must be noted that Cyprus has no income support system equivalent to that of the UK. Most benefits such as unemployment benefits are based on contributions.[134] Basic subsistence benefits are paid to all persons without income irrespective of nationality;[135] some other benefits are provided to specific categories of the population.[136] Given that the Cypriot constitution (Article 28) prohibits discrimination on (inter alia) 'any ground whatsoever', a legislative provision granting rights of public assistance to Cypriots and denying same to non-Cypriots may be hard to justify in law. Having said that, the Courts are known to have interpreted this constitutional provision very restrictively and in a manner that can potentially negate the very essence of this right. It would thus be difficult to envisage a situation analogous to that of *Dias* occurring in Cyprus, where rights to public benefit depend on the type or status of visa granted.

On the broader issue of pre-transposition status, a Supreme Court case provides insight into the recognition of work performed in a similar position in another country prior to Cyprus transposing the free movement directive. In the case of *Theodorou*,[137] discussed below, the court recognized the pre-transposition years of work in a similar position in Greece, for the purposes of ranking the complainant in terms of job promotion. However, we have to distinguish between employment-related situations such as that of *Theodorou*, from public benefit situations such as that of *Dias*, as the policy implications of each situation are inevitably different. Thus, although in employment situations the Courts will not hesitate to recognise rights deriving from the status of a Union citizen prior to transposition of the free movement directive, this may not necessarily be the conclusion of the Court where an applicant claims public benefit rights deriving from his/her pre-transposition status.

In the case of *Theodorou* the applicant was an Educational Psychologist in the Cypriot Ministry of Education from 2006, prior to which he had worked as temporary employee in the same position for 4 years. Before that, he had worked as school psychologist in Greece, performing similar duties as those performed in the Cypriot Ministry of Education. In November 2009 the applicant requested that his service in Greece be recognized as service for the purpose of a promotion, which required experience and seniority, as well as for calculating leave and other benefits. The Attorney General, whose opinion was requested by the Commission for Public Service, stated that a civil servant's prior service with comparable duties in another Member State must be taken into account in order to determine seniority,

134 The law on Social Insurance provides benefit for all those who have contributions of at least 26 weeks from the day of beginning their social insurance contributions and covers the benefits for the unemployed, maternity, sickness, marriage, birth, and funeral. See Third Table of law 59(I)/2010. Art. 31(4)(b) provides that the applicant for such benefit must be unemployed, capable and available for work or that he/she is undertaking a vocational training program approved by the Minister of Labour.

135 On the basis of the Public Assistance and Services Law 95(I)/2006 as a amended (Περι Δημόσιων Βοηθημάτων και Υπηρεσιών Νόμος).

136 Student grants for instance or other benefits for disability etc.

137 *George Theodorou v. The Republic of Cyprus*, Supreme Court (Review Authority) Case No. 1057/2010, dated 30.01.2012.

irrespectively of how long ago the position in the other Member State was held, but it is up to the Cypriot authorities to determine whether the previously held position in the other Member State is equivalent to the one held in Cyprus. With a subsequent opinion delivered in 2010, the Attorney General's office clarified that the years of employment in another Member State may only be taken into account provided the employment was completed after Cyprus' accession to the EU; any employment which commenced and was completed prior to accession cannot be taken into account. The Public Service Commission adopted the position of the Attorney General that, since the applicant's employment in Greece started and finished before Cyprus' accession to the EU and no right of movement was exercised in the framework of the EU *acquis*, his prior service in Greece could not be taken into account. The applicant argued that the obligation to respect his qualifications and especially the experience and seniority acquired in other Member States is absolute and that the justification for rejecting his request, that he had not exercised his right to free movement after Cyprus' accession to the EU, was contrary to the EU *acquis*. The Court noted that given that Cyprus did not reserve any provision in the implementation of the EU *acquis*, all national regulations as to recognizing previous employment service, which is now being invoked by the Commission for Educational Service, must be interpreted in the framework of the principles protected by article 29 of the Treaty and by 1612/68/EEC. The Court found that the CJEU rulings referred to by the applicant's lawyers made no reference to the time of exercise of the right to free movement and allowed the applicant's request for annulling the decision of the Commission for Educational service.

Czech Republic

In *Dias* the CJEU dealt with interpretation of Article 16 of Directive 2004/38 and the right of permanent residence as precondition for granting income support to an EU national in the UK. In the context of the Czech Republic it needs to be clarified, what would be the equivalent of the UK 'income support'. The relevant Czech legislation recognizes: (1) unemployment benefits as benefits which are provided to those who become unemployed, (2) benefits which are provided to persons is in need of help. Two types of support of persons in need relevant for this case can be distinguished. Under the Act no. 117/1995 Coll., on State Social Support, as amended, following benefits are available: child allowance; housing allowance; parental allowance; foster care benefits; birth aid; funeral aid. The Act no. 111/2006 Coll., on Assistance in Material Need, as amended, provides financial contributions in cases of certain emergency situations and in cases when a person is not able to satisfy his/her basic living requirements because of low income, which that person is objectively unable to increase. Hence it appears that the 'income support' would be equal to the latter category in the Czech Republic, i.e. to the assistance in material need.

The assistance in material need covers three types of benefits: allowance for living; supplement for housing; and extraordinary immediate assistance. Pursuant to Sec. 5 of the Act on Assistance in Material Need, all three types of benefits may be claimed also by EU nationals and their family members, subject to following conditions: 1. the claimant obtained a residence certificate (residence under Article 7 of the Directive, an EU national *may* ask for it, but he/she is not obliged to do so) - except the case when the right to the social benefit follows from directly applicable EU law, and 2. he/she has a *place of residence* on the territory of the Czech Republic. The condition of place of residence was introduced by the latest amendment to the Act on Assistance in Material Need in 2011.

The term *place of residence* used in this context is legally defined in Sec. 5(6) Act on Assistance in Material Need, according to which a person resides in the territory of the

Czech Republic in particular if he/she is staying there on long term basis, works there, attends a school in order to comply with compulsory education requirements, or there are other reasons, which prove the close link of the claimant with the Czech Republic. Prima facie it can be concluded that under these provisions a person in situation of Ms. *Dias* would fulfil the eligibility conditions for being granted the income support/assistance in material need, as permanent residence is not an eligibility precondition. However Sec. 16 of the Act on Assistance in Material Need, stipulates that in case the claimant is an EU national or a family member of an EU national the responsible authority must examine whether the claimant does not constitute an unbearable burden for the system of assistance in material need (burden on the social assistance system). Such an obligation does not apply if the claimant obtained a permanent residence (which was in question also in *Dias*) on the territory of the Czech Republic. Currently, the permanent residence is granted to EU nationals on the basis of 5 years continuous temporary stay in the Czech Republic (Sec. 87 g) FoRA). If a '*Dias*' scenario would appear at the present the 5 years period necessary for obtaining a permanent residence would be counted according to the Directive 2004/38 only, as this Directive was transposed into the Czech legal system in 2006. A person in the situation of Ms. *Dias* would be legally residing in the territory and fulfil the preconditions for permanent stay. Hence the authority deciding on the granting of assistance in material need would not need to consider whether such person constitutes a burden on the social assistance system. Consequently such claimant would fulfil all the eligibility preconditions for assistance in material need ('income support').

Denmark

Dias is not covered in the Danish report.

Estonia

According to the case the following is important:

- The CJEU holds that possession of an EU residence permit does not in and of itself mean a claimant can have a right of residence.
- The CJEU holds that for someone who has done 5 years legal residence in a Member State prior to 30 April 2006 but before that date stops having a right of residence and continues living in Member State then this does not prevent the acquisition of a permanent right of residence on 30 April 2006 provided the period when residing here without a right of residence was less than 2 consecutive years.

The reasoning and the impact of the case is modest, because the situations mentioned in the case are regulated in Estonian Citizen of the European Union Act. In Estonia there were two versions of that act. The first one was adopted already in 2002 and the second one in order to harmonise Directive 2004/38 was adopted in 2006. The last one also contains the rules how to overcome the transitional period from the old act to the new act. The transitional provisions, which have been foreseen are following:

- Upon entry into force of the Act, a citizen of the European Union who holds a temporary residence permit is deemed to have acquired a temporary right of residence. The term of the right of residence is the residence permit's period of validity. The validity of the said temporary right of residence is not affected by the existence of a registered residence in Estonia.
- Upon entry into force of the Act, a citizen of the European Union who holds a long-term residence permit is deemed to have acquired a permanent right of residence.

- The period before the entry into force of this Act during which a citizen of the European Union or a member of his or her family resided in Estonia shall be deemed part of the eligibility period required for acquiring a permanent right of residence

Finland

According to information received from the National Police Board, residence preceding the transposition of the Citizenship Directive is taken into account when counting the five years' residence that is required for a permanent right of residence, provided that this residence has been lawful, i.e. that the person concerned has met the preconditions of residence.[138] Any periods when the person in question does not meet the preconditions for residence interrupt the accumulation of the five year's residence, in which case the counting of the five years starts over when the person in question meets the preconditions for residence.

France

The French report does not cover *Dias*.

Germany

Dias has not been discussed within the German legal context. It should be noted, however, that similar legal problems with regard to the qualification requirements for permanent residence status under Article 16 Directive 2004/38/EC are dealt with in CJEU, Joint Cases C-424/10 & C-425/10, Ziolkowski & Szeja [2011] ECR I-000 – a judgment which is based upon a preliminary reference by the Federal German Administrative Court (BVerwG). In the case, the CJEU had to interpret the term 'legal residence' in Article 16.1 Directive 2004/38/EC which designates an autonomous concept of EU law and must be construed as a period of residence which complies with the conditions laid down in the Directive (namely, the person concerned must be a worker or self-employed person in the host Member State or have sufficient resources).

This judgment was quickly taken up by domestic German courts, noting that the calculation of the 10 year time-limit for permanent residence in situations predating the entry into force of the directive and EU enlargement does not require factual residence only. Courts must moreover consider whether the EU citizen in question would have had a right to residence in Germany under EU law, if the country of his/her nationality had been an EU Member State at this time already. For a follow-up case implementing the CJEU judgment see the Upper Administrative Court of Bavaria (VGH München).[139] The case concerned a Polish national who entered Germany at a young age with his mother, although their application for recognition as ethnic Germans which had suffered under the consequences of World War II (which implies the right to settle in Germany) was rejected. He received temporary residence permits prior to Polish EU accession and applied for a residence permit as an EU citizen therefore. According to the facts described in the judgment the Polish national finished high school (*Hauptschule*), but did not finish his training as a restaurant cook and there is also no information that he worked in Germany (the courted discussed the question and rejects both the identity as an worker or as a child of a migrant worker, since there is no evidence that the applicant or his mother worked in Germany for an extended period of time[140]). He does how-

138 E-mail from senior officer Jukka Hertell, National Police Board, 4.6.2012.
139 Judgment of 21 December 2011, 10 B 11.182, juris.
140 *Ibid*., paras. 28-30.

ever have an extensive criminal record. The court rejects the claim of permanent residence status on the basis of the CJEU judgment.

Greece

There is no relative case law concerning a) periods of residence completed before 30 April 2006 on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been satisfied or b) periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date.

Therefore there is no particular influence of the Court of Justice judgment in the case *Dias*.

Hungary

In the *Dias* case the UK Secretary of State for Work opposed to the grant of income support to a union citizen arguing that she was not permanently resident there. The CJEU declared that a five years' long lawful and continuous residence, completed entirely prior to the 30th of April 2006, can not give rise to the acquisition of the right of permanent residence in terms of the Directive.

As regards Hungarian law, it is to be cited what has been laid down concerning the Lassal case. In Hungarian law the applicant is entitled to prove that his/her former residence periods would suffice for the acquisition of the right to permanent residence pursuant to Article 17(1) of the FreeA. The immigration authorities are to judge whether the submitted documents provide for a well-founded claim or not, in this sense, Hungarian law seems being more generous for the applicants.

Ireland

In the *Dias* case, the Court of Justice decided that residence based solely on the possession of a residence card under Directive 2004/38/EC does not amount to legal residence, where the conditions of the right to residence are not satisfied. As Ireland does not issue an equivalent residence card (prior to the acquisition of permanent residence), this finding in *Dias* is of limited application.

The *Dias* judgment further confirmed that the five year qualifying period for permanent residence can be fulfilled prior to the date of transposition, but the right of permanent residence can only arise from the date of transposition.

The effective date of transposition of Directive 2004/38/EC in Ireland was 28 April 2006, the date on which the European Communities (Free Movement of Persons) Regulations 2006 came into force.

The *Dias* case may affect any EU migrants who came to Ireland and completed five years' continuous residence, without more than two consecutive years of absence, prior to that date of transposition, and who later seek permanent residency.

An explanatory leaflet accompanying the application for a permanent residence certificate in Ireland provides that the relevant form should be completed:

> *'[…] by an EU citizen who wishes to apply for a permanent residence certificate, having resided in the State for a period of five years or more while engaged in employment,*

self-employment, the pursuit of a course of study, involuntary unemployment, or the possession of sufficient resources. '[141]

The explanatory leaflet is silent on the issue whether the period of five years' residence includes pre-transposition residence. However, discussions with an official in the Irish Nationality and Integration Service indicate that pre-transposition residence would count towards a grant of permanent residence (although it has not been possible to ascertain how often this has happened).

Italy

Contrary to the UK, Italy, as a rule, does not make access to social benefits conditional upon the right of residence, but rather requires that the applicant has resided in the territory for some years. Residence is a matter of fact and amounts to the presence in the country. It can be proved by the registration in the population registry: whoever is entered in the population registry, resides in Italy, in the absence of proof to the contrary.

The Regional Administrative Court for Lombardia discussed the case of the right of a Romanian national to access to social housing. The applicant has been entered in the population registry since 2007, when Romania became a member of the Union, but has been in Italy since 2004, even if as an irregular foreigner. The competent authority calculated the 5 years residence, upon which access to social housing was conditional according to the relevant Regional Law, from 2007 and as a consequence rejected the application. The court annulled the decision rejecting the application, since nothing in the law required to take account only of the period of legal residence (TAR Lombardia, chamber I, judgment of 14-12-2011 no. 3151).

As regards legislation, Article 14 of Legislative Decree 2007 no. 30 reproduces almost literally Article 16 of Directive 2004/38/CE. The only difference can be found in para. 4. While the Directive reads 'Once acquired, the right of permanent residence shall be lost *only* through absence from the host State for a period exceeding two consecutive years', the Legislative Decree reads 'Once acquired, the right of permanent residence shall be lost *in any case* through absence from the Italian territory for a period exceeding two consecutive years' (art. 14 (4)).

The right of permanent residence is certified by a document issued by the Municipality of the place of residence, within thirty days of the request (Article 16 of the Legislative Decree 2007 no. 30). According to Article 21 of the Directive, 'Continuity of residence is broken by any expulsion decision *duly enforced* against the person concerned'. On the contrary, Article 18 of the Legislative Decree 2007 no. 30 reads as follows: 'Continuity of residence is broken by any expulsion decision *adopted* against the person concerned' (emphasis added).

The concepts of 'legal residence' and 'continuous period of five years' are defined by circular letters issued by the Ministry of the Interior.

According to circular letter 6-4-2007 no. 19, residence is legal when the conditions established by Legislative Decree 2007 no. 30 are met. The continuity of residence shall be proved by any means allowed. To have been entered into the population registry is a valid proof. Even if not required by the law nor by the circular letter, the keeper of the population registry who is in charge of certifying the right of permanent residence, also asks the appli-

141 http://www.inis.gov.ie/en/INIS/Form%20EU2%20Explanatory%20Leaflet.pdf/Files/Form%20EU2%20Explanatory%20Leaflet.pdf.

cant to submit a declaration stating that s/he has never left Italy for more than 6 months during the previous 5 years.

According to circular letter 18-7-2007 no. 200704165/15100/14865(39), periods of residence in Italy prior to the date of the entry into force of the Legislative Decree 2007 no. 30 can be taken into account when calculating the five years of continued residence. In that case, residence is legal when the applicant has been issued with a residence card or a residence permit under the conditions established by the legislation then in force. This regime is applicable to Bulgarians and Romanians too.

Therefore, Italy attaches importance to the documents that the applicant possesses, rather than to the underlying substantial conditions. No case-law on the acquisition or loss of the right of permanent residence could be found.

Latvia

There is no legal regulation under Latvian law providing explicitly how do residence periods before 30 April 2006 have to be taken into account for the purposes of acquisition of permanent residence right under Article 16(1) of Directive 2004/38. There is also no relevant national court practice.

Lithuania

With regard to the *Dias* judgment, Lithuanian legislation complies with the principles developed in this case, as it calculates for the purpose of permanent residence the periods of legal stay. This is regulated by the Order on Issuance of the Certificate to Confirm Permanent Residence of EU national in Lithuania and Issuance of Residence Permit for Family Members of EU nationals who are third country nationals, approved by the Order of the Minister of Interior on 25 October 2007 (as amended subsequently). In accordance with para. 52 of the Order, the right of residence may be only lost in case the person departs from Lithuania for a period exceeding 2 years (Art. 104(7) of the Aliens' Law) or residence permit is withdrawn on national security or public order grounds (para. 1 of Art. 106(1) of the Aliens' Law). Both the Aliens' Law and the implementing legislation are silent on whether the periods for permanent residence would be calculated on the basis of declaratory residence permit or verification of the existence of residence rights. The Order explicitly mentions only those periods when the person was involuntary unemployed (if registered appropriately in the employment office), when a person did not work not due to his own choice, as well as periods of unemployment or termination of employment due to sickness or accident, as those that should be included in calculation of periods for permanent residence (these periods would be equated to periods of employment). The practice (as reported by the Migration Department in May 2012) is that the general order is to certify the accumulation of 5 years by verifying the existence of documents (temporary residence permit, registration certificate confirming the right of residence, EC residence permit), therefore it seems that the calculation would be based on verification of formal requirements rather than the right of residence. All other situations would be very individually assessed.

Luxembourg

No follow-up report.

The Netherlands

Community nationals enjoy lawful residence in the Netherlands as long as they reside in the country in conformity with EU/EER law (Article 8(e) Aliens Act). They will not receive any document or sticker which proves their lawful residence (Aliens Circular B10/2.6). All

Community nationals who have resided legally in the Netherlands for an uninterrupted period of five years are entitled to permanent residence (Article 8.17 Aliens Decree). On request they are provided with a document 'permanent residence for EU citizens' (Article 8.19 Aliens Decree). Permanent residence will be lost in case of absence from the Netherlands for more than two consecutive years (Article 8.18 Aliens Decree).

Aliens Act, Aliens Decree and Aliens Circular are not explicit on the issue whether the period of five years' residence includes pre-transposition residence. But the general wording of Article 8.17(1)(a) Aliens Decree (entitled to permanent residence is the EU/EER or Swiss national who resided legally in the Netherlands for a uninterrupted period of five years) indicates that pre-transposition residence will be taken into account as well. Act, Decree and Circular are silent as well on the issue of the application by analogy of the absence for two consecutive years´ rule during the pre-transposition period. But again, the general wording of article 8.18 Aliens Decree indicates its application during that period as well.

No references to the *Dias* judgment are to be found in case law, policy documents or literature. The *Dias* judgment is published in *Jurisprudentie Vreemdelingenrecht* 2011/371.

Malta

With regard to the *Dias* case on the right of permanent residence and right to reside, , so far there have not been any cases arising in relation to the issues involved. However, when contacted, the Director for Citizenship in Malta advised that he is aware of the contents of the judgment and will take them into consideration should circumstances so require.

Poland

Article 16 of the Directive that clearly states that only legal residence of a period of 5 years may entitle to apply for the right for permanent stay. Article 42 of the Act on entry states that the Union citizen shall obtain the right of permanent residence after five years of continuous residence within the territory of Republic of Poland, if all the conditions of residence referred to in Chapter 3 were fulfilled within this period. The reference to Chapter 3 clearly states that the application for permanent stay may be successfully made only if during the period of 5 years of stay the applicant has fulfilled all requirements that are demanded for stays in Poland that exceeds 3 months. Therefore it is obvious that only such applications for a permanent stay shall be positively examined that fulfil all obligations that are put on applicants according to the Act on entry that implements Directive 2004/38.

It shall be additionally added that the Polish law is in line with the *Lassal* case law, because continuous periods of five years' residence completed before the date of transposition of Directive 2004/38, namely before 30 April 2006, are to be taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16.1.

Article 99 of the Act on entry states that the provisions of this Act shall apply to the proceedings concerning the residence permits or temporary residence permits, initiated before the entry into force of the Act and not finished with a final decision. Moreover, according to data collected by the Office for Foreigners, between 26 August 2006 and 31 December 2007 184 applications for permanent stay of EU citizens have been positively considered and 3 of EU family members. It is therefore obvious that periods of legal residence before the date of transposition of Directive 2004/38 (in Poland the Directive was transposed on 14 July 2006) have been recognised by Polish authorities.

Portugal

In *Dias* the CJEU was asked to interpret Article 16(1) and (4) of Directive 2004/38 – transposed by Article 10(1) and (5) of Law 37/2006 – containing general rules on the acquisition of a right of permanent residence in a Member State, with regard to periods of residence which were completed before the date of transposition of that Directive i.e. 30 April 2006. The CJEU held that the periods of residence of a Union citizen in a host Member State which were completed on the basis solely of a residence permit validly issued under Directive 68/360 (no longer in force), but without the conditions governing entitlement to any right of residence having been satisfied, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1).

On the other side, Article 16(4) must be interpreted as meaning that periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

Romania

In the issue of periods of residence completed before the transposition of the Directive 2004/38/EC, the CJEU ruled that article 16 (1) and (4) of Directive 2004/38/EC must be interpreted as meaning that periods of residence completed before 30 April 2006 on the basis solely of a residence permit validly issued pursuant to Council Directive 68/360/EEC, without the conditions governing entitlement to any right of residence having been satisfied, cannot be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16 (1) of Directive 2004/38, and periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

This case does not present an importance issue in Romania, due to the accession date: 2007.

Romania, before the accession date, directly transposed the new regulation on free movement, Directive 2004/38/EC trough the Government Emergency Ordinance no. 102/2005. Therefore the Council Directive 68/360/EEC never was not transposed into the Romanian law, and no residence was started under this earlier directive in Romania.

Slovakia

There is no jurisdiction of Slovak courts in cases similar to *Dias*. The Act No. 404/2011 on the Residence of Foreigners and on Amendments of some Acts (hereinafter 'the Act on Foreigners') does not deal with such specific situations either. Nevertheless, the wording of the Act on Foreigners, which transposes the Directive 2004/38/EC does not preclude a treatment that was held by the Court as a treatment in accordance with Article 16 (1) and (4) of the Directive 2004/38/EC, however, the opposite treatment is also not explicitly excluded.

Slovenia
The *Dias* case offers the explanation of a certain provision of the Directive 2004/38. According to the information given by the Ministry of Interior following the outcome of the case would have caused no major obstacles or problems in praxis.

Spain
No reference found in Spain.

Sweden
A Member State should issue a certain proof on the right of residence for more than three months for by example workers that are Union citizens in accordance with Article 7 of Directive 2004/38/EC and Regulation 1612/68. The corresponding regulations in Swedish law is found in the Aliens Ordinance 2005:715, ch. 3a §§ 7-11 (see also the Aliens Act ch. 3a §§ 6-9).

Concerning the calculation of the period that should be the base for the requested five year period (the Aliens Act ch. 3a § 6) as well as temporary stays outside Sweden (§ 8) *Dias* has been observed; see Case MIG 2010:8 (residence right and stay period calculation) and MIG 2010:14 (permanent residence right after five years stay). (Compare above Chapter II, point 2 on entry and residence rights).

United Kingdom
Following the *Dias* ruling or the CJEU the Department for Work and Pensions issued Memo DMG 23/11 in September 2011 advising Decision Makers (DM) that:

- The CJEU's decision is a 'relevant determination' for the purposes of the Act. Any decision made before 21.7.11 which would have been made differently had the CJEU judgment been in existence at the time is not an official error and cannot be revised.
- If, exceptionally a DM discovers a case where there was a period of more than two years falling entirely before 30.4.06 which means that there was no permanent right to reside as at 30.4.06 and provided that permanent residence has not been reacquired or that the claimant did not have a right to reside on some other basis, that DM can supersede an award of IS, JSA(IB) or SPC on the basis of error of law. The effective date will be 21.7.11.

In *Okafor v SSHD* [2011] EWCA Civ 499, the Court of Appeal held that, following *Dias*, periods spent under art. 12(3) of the Directive (right of children to remain in education after death of the EU citizen and right of father to remain as custodial parent) did not amount to lawful residence for the purpose of qualifying for permanent residence. This apparently authoritative ruling also concluded that residence under art 12 reg 1612/68 (now art 10 Reg 492/2011) was not lawful residence for this purpose. Nonetheless, the Upper Tribunal seems to have been unconvinced on the point and, in *Alarape and another* (Article 12, EC Reg 1612/68) Nigeria [2011] UKUT 00413 (IAC), referred the question of entitlement to permanent residence under the regulation to the Court of Justice.

I.4. National reports on *Casteels* (C-379/09)

Austria

There is no follow up to that decision in Austria. According to labour law experts there are no problems arising from that judgment.

Belgium

The Belgian report does not cover *Casteels*.

Bulgaria

The regulation of the collective labour agreement in Bulgaria is found in the Labour Code. The Labour Code is applicable also to EU nationals. It is important to note that according to Article 50 (2) of the Labour Code, the collective labour agreement cannot include clauses that are less favourable for the workers than the ones envisaged in the law or in a collective labour agreement that is binding to the employer. The collective labour agreement is applicable to the members of the trade union that is party to the agreement or to members who have joined later on (Article 57 of the Labour Code).

As regards supplementary pension benefits in Bulgaria, they are regulated in the Code on Social Security. There is a 'universal' and a 'professional' pension fund for supplementary pension benefits. According to Article 127 (1) of the Code on Social Security, payments in a 'universal pension fund' for entitlements to supplementary pension benefits are obligatory for everyone born after 31 December 1959 if they are insured in the 'Pensions' fund of the state social security. According to Article 127 (2) of the Code on Social Security, workers from the 'first and second category of labour' who are insured in the 'Pensions' fund of the state social security are also obliged to be insured in the professional pension fund for early retirement regardless of their age.

The right to a professional pension is regulated in Article 168 of the Code on Social Security. The provision states the required minimum number of years of social security payments (insurance periods). Paragraph 3 of Article 168 states that the periods of social security insurance are proven by a certificate issued by the National Social Security Institute. In order to prove an insurance period (payment of insurance contributions) abroad, the person shall submit an application to the National Social Security Institute. The details of the procedure are published on line at http://www.eulaw.egov.bg/DocumentDisplay.aspx?ID=184698 (accessed on 14 June 2012).

The Code on Social Security does not set limitations as to where the social security contributions should have been made, but rather allows for a procedure for proving and taking into account those insurance periods. Therefore a collective labour agreement cannot introduce such limitations as that would lower the standards set in the law. Along these lines, the national legislation of Bulgaria seems in line with the judgment in the *Casteels* case.

Article 1, Paragraph 1 of the Additional Provisions of the Labour Code gives a legal definition of 'employer'. According to it, 'employer' shall be any natural person, body corporate or division thereof, as well as any other organizationally and economically autonomous entity (enterprise, office, organization, cooperative, farm, establishment, household, association and the like), that independently hires employees under employment relationships. Therefore, on the one hand, it could be argued that under the Bulgarian Labour Code the division of a legal person could be regarded as a separate employer. However, on the other hand, that might not be compatible with the Constitution of the Republic of Bulgaria as its Article 122 (1) states that only physical and legal persons as such have the right to proce-

dural representation to defend their rights. The Constitution does not make reference to the divisions of the legal persons. As divisions cannot be subjects of procedural law, they cannot be subjects of material law either. Therefore under the Bulgarian Constitution, if a worker has changed his/her work place between different divisions of the same legal person, he/she is regarded as having been hired by the same employer.

The case of *Casteels* has not been referred to by Bulgarian courts in 2011/12.

Cyprus

It is difficult to foresee how *Casteels* would impact the Cypriot context. No similar case or issue has been raised in Cyprus. If a Union citizen works for the same company in different Member States, he/she becomes entitled to supplementary pension benefits (and other benefits), so that he/she is in a no less favourable position than if he/she had always worked in the country originally employed. However, the average employer in Cyprus is an SME and there are few if any multinational companies able to employ persons in different Member States.

Czech Republic

Currently in the Czech Republic no such legislation exists which would regulate the issue of enhancement of occupational old-age pensions. The Act No. 155/1995 Coll., on Contributory Pension Scheme is the legal basis for old age pensions, stipulating types of pensions (old age pension, disability pensions, widower´s and widow´s pension, orphan´s pension) and their calculation (Sec. 4). Consequently it appears that the problem which occurred in *Casteels* is currently not transferable into the context of the Czech Republic.

Denmark

The Danish report does not cover *Casteels*.

Estonia

The case of the CJEU to be assessed is dealing with the pension schemes under the specific conditions laid down in a collective agreement. The court draws from that case an important consequence: Article 48 of the TFEU does not have any impact in relations between private parties. It concerns mainly the state managed social security schemes. Estonia does not have any specific employer-based private pension schemes. This also means that the case under discussion would not have any impact. The case could have impact only in calculating the insurance periods if in some countries there are specific employers' financed and managed pension schemes. Also Estonia has to keep in mind, that by calculation of specific 'employers-based' pension schemes it would be necessary to take into account also the insurance periods in other Member States. Otherwise the pension calculation rules would be in breach of Art 46 of the TFEU on free movement of persons.

Finland

The Finnish employee pension scheme is a statutory scheme which falls under the Regulations 883/2004 and 987/2009. Therefore the case of *Casteels* is not regarded to have relevance in Finland.

France

Regarding the *Casteels* case, French judges, both of the judicial and administrative branch, have had to deal with similar cases and their jurisprudence appear to be consistent with that of the CJEU.

Following the judgment of the Court de cassation of 11 May 2009, the Court of Appeal of Toulouse made November 3, 2010[142] a ruling on the dispute between Mr. Denis Demaret and the French Railways (SNCF).

Mr. Demaret, of Belgian nationality, was hired April 6, 1992 by the Belgian Railways (SNCB), in which he served as train manager and from 1998 Deputy Railway Station Chief. Being married to a French spouse since 1998, he presented July 19, 2000 to the SNCF an application for a job equivalent to his position within the SNCB. After making various efforts, he was informed on 19 November 2001, that he was hired as of January 7, 2002. At that time, he was hired as a traffic technician on a temporary contract in Nîmes, with a gross monthly salary of 1.566.43 euro, with a trial period of 3 months. As of 1 April 2004, he was appointed as transportation technician in Perpignan. He made several times a request for inclusion in the permanent officers' cadre of SNCF which has not been satisfied. Believing the victim of discriminatory treatment by restricting his right to free movement of workers guaranteed by Article 39 of the Treaty establishing the European Community, Mr. Demaret appealed 19 April 2006 to the industrial tribunal in Perpignan to obtain damages and back-pay. The tribunal dismissed Mr. Demaret, which was affirmed on appeal. The Court of Cassation quashed that decision and referred the parties to the Court of Appeal of Toulouse.

In accordance with Article 39 of the EC-Treaty (now Article 45 TFEU) and Article 7 paragraph 1 of Regulation 1612/68: where a provision of a national regulation applicable in a public company provides the employees of this company an advancement, taking into account the seniority within the salary group concerned, migrant workers must be able to effectively take advantage of periods of employment in a comparable field of activity, performed previously in the service of a public enterprise of another Member State.

Annex C to Regulation RH 0254 of the SNCF, applicable to Mr. Demaret, provides that the monthly salary of workers is increased by 1.5% to a maximum of 33% for the whole period of 3 years from the moment of hiring. This provision of a national regulatory status applicable in a public company providing a salary increase due to seniority should be applied by the SNCF in the recruitment and the career of Mr. Demaret, a community national, taking into account his seniority within the SNCB, a public company of another Member State of the European Union, acquired in the employment in a comparable field of activity, the circulation of trains.

Contrary to what it supports, the SNCF has not taken into account the 9 years and 9 months of seniority of the person concerned acquired in Belgium since he was hired. Indeed, it follows from the terms of the employment contract of 7 January 2002 that the salary of Mr. Demaret was set forfaitairly without mentioning of any seniority. Moreover, in a letter dated 13 April 2004, the SNCF wrote to him that he was not getting salary increase for seniority. Finally, by letter dated June 5, 2009 SNCF informed him about salary increases for seniority, but as of 1 February 2005, that is to say, three years after his hiring.

The applicant is therefore entitled to back pay increases for seniority corresponding to the estimated 23 month period he claims, valued at 1.621.25 euro (1.566,43 x4,5%x23), in addition to related compensation payements.

Mr. Demaret argues that he applied for a job within SNCF on July 19, 2000, which application was completed on 3 August 2000 by a fax titled 'passage SNCB / SNCF', followed by a letter from September 25, 2000 referring to the principle of free movement within the European Union. So he has clearly expressed his desire to be integrated within the French

142 Cour d'appel de Toulouse, 3 Novembre 2010, n°09/01531, *Monsieur Denis Demaret c SNCF*.

public company in terms of taking into account his seniority, his experience and responsibilities within the SNCB as he had referred to in the initial letter. However, without considering his professional background in a public company of another Member State and in a comparable field of activity, and while he would reach November 5, 2000 the age limit of 30 years beyond which he could not be, according to the statutes, admitted to permanent position within SNCF, SNCF has been slow to treat his candidacy and has not hired him on a permanent basis but on a labour contract, moreover, without taking into account his age and imposing a probationary period of 3 months. The indirect discrimination by restricting the right of Mr. Demaret on the free movement of workers within the European Union is not legitimately justified by SNCF. As a result, Mr. Demaret was the subject of discriminatory treatment, which caused him harm associated with his position as contract staff, which are estimated, given all the facts of the case, to the 15,000 euro, repairing also personal and family impact, so there is no need to add a separate indemnification.

In administrative law in three judgments of 11 March 2011,[143] the Council of State confirmed the requirement imposed by EU law to take into account in the framework of recruitment in the public service, the previous professional activities of a EU-national, even as an agent of a private law company in another Member State, in order to establish his seniority classification in the service.

The judges of the Council of State argued that 'the provisions of Article 6 of the Decree of 27 January 1970 have the effect of excluding the consideration of services performed by foreign civilian personnel employed under German private law contracts by the French forces stationed in Germany. However, when similar activities should have been performed in Germany in French public service, they should have been taken into account, as provided for by these same provisions ' Thus, these provisions are contrary to Article 39 EC.

Germany

Legal online databases on German legal literature and recent court cases do not provide any references for CJEU, Case C-379/09, *Casteels* [2011] ECR I-000, except for journals which inform their readers about the contents of the judgment.

Greece

There is no previous jurisprudence in Greece concerning company pension schemes established by collective agreements. It is rather rare to identify such schemes in Greece.

Hungary

Mr *Casteels* worked for 22 years for the same employer (British Airways) in different Member States. As a result of the changes in his home base – and due to the provisions of the collective agreement – he has suffered a loss in his supplementary pension savings. The CJEU declared that his rights can not be asserted directly against his private employer on the basis of the Treaty (no horizontal direct effect exists). The CJEU also declared that the scheme in question constituted an obstacle and it was neither necessary nor proportional. The case concerns a supplementary pension scheme of a private employer. It asserts that a professional career has to be regarded as a single career in terms of acquired rights if the worker was employed essentially by the same employer.

143 Conseil d'Etat, 11 mars 2011, n°338403, *Kaeufling c Ministère de l'Ecologie, du développement durable, des transports et du logement*, Conseil d'Etat, 11 mars 2011, n°338404, *Dollinger c Ministère de la Défense et des anciens combattants*, Conseil d'Etat, 11 mars 2011, n°338405, *Auble c Ministère de la Défense et des anciens combattants*.

It means that the employer needs to guarantee that the rights acquired in one state – with one insurance fund – shall be in a way transferable and be aggregated with the rights acquired in another state. The effects of this case are difficult to assess. It seems that the burden of mitigating the differences between the insurance policies of different insurance funds throughout the Member States has fallen upon the employer. It indicates that an employer needs to provide for universal coverage and to organise its contracts with different insurance groups in a non-discriminatory way. This situation has been militated by the adoption the Directive 98/49/EC that obliges Member States to provide for equal treatment in these cases.

Directive 98/49/EC has been implemented in Hungary, however, no other legislative act can be referred to, and no similar case has been yet reported.

Ireland

The *Casteels* case concerned a particular collective agreement which precluded service completed by a worker for the same employer in establishments situated in different Member States pursuant to the same employment contract from counting towards the vesting period (which was 5 years). The Court of Justice found that such a collective agreement placed workers who exercised their right to free movement at a disadvantage and consequently was in breach of Article 45 TFEU.

We have spoken to a pensions law expert who takes the view that the collective agreement in *Casteels* is relatively unusual and that she has not come across this situation in Ireland.

In Ireland, the Pensions Act 1990 provides for the preservation of benefits and vesting of rights after 2 years of qualifying service – i.e. service as a member of an occupational scheme. If an individual leaves the employment after 2 years' qualifying service, his/her accrued benefits will be preserved and can remain in the pension scheme as a deferred benefit or can be transferred to another pension scheme of which the individual is a member. In general, it appears that, where an employee moves from another EU Member State into Ireland, the prior service will count towards the vesting period. There does not appear to have been any case law in Ireland concerning the effect of vesting rules on free movement.

Italy

The present rapporteur could not find any discussion on the case, neither draw for it any principle that could be of relevance for Italy.

Latvia

There is no relevant legal regulation under Latvian law regarding determination of the period of acquisition of definitive entitlements to supplementary pension benefits in case a worker has been transferred from an establishment of his/her employer in one Member State to an establishment of the same employer in another Member State. There is also no information on the relevant national court practice. It may be explained by the fact that, first, there are not many international companies operating in Latvia, second, that there are not many enterprises having collective agreements, and, third, that most probably only few of existing collective agreements provide for the entitlement to occupational old-age pension.

Lithuania

The issues analysed in the *Casteels* judgment, are relevant for Lithuania. In principle, Lithuanian legislation provides for taking into account the periods of work in another Member State for the purpose of calculating the periods for acquiring the pension rights (if the period acquired in one MS is not sufficient for assigning the pension). However in some respects

the calculation of insurance periods for pension raises some concerns. According to the Law on State Social Security Pensions, the period of insurance is a period when the insurance payments are made. The same law defines in Article 54 the periods that are being equalled to the state social insurance pension periods. However, this Article deals with periods before the adoption of this law and does not refer to periods of insurance in other EU Member States. However, if the person has not yet acquired the minimum period for pension (15 years) while working in Lithuania, the periods acquired in other Member States should be calculated. But this again is done only to determine the right to the benefit, but pension for these periods is not assigned in Lithuania (it would be assigned proportionally to the acquired Lithuanian insurance period only).

With regard to situations when the employee is transferred to another Member State to work for the same employer, up until 24 months his social rights would be determined by the sending state, thus would not be affected by the legislation of another Member State.

Luxembourg

No follow-up report.

The Netherlands

No references to *Casteels* are found in Dutch case law and policy documents.

Casteels is published in:

SEW-Tijdschrift voor Europees en economisch recht 2011(10), p. 452-454, with annotation Petra Foubert.

See also:

Ger Essers, '(Aanvullende) pensioenen in de Europese Unie: (half) gecoordineerd, Over de grens', *Vakblad voor grensoverschrijdend werken en wonen*, January 2011, p. 18 ff.

Anouk Bollen and Yves Steven, '*Casteels*. Aansluiting gemist bij British Airways', in: Ger Essers, Anne Pieter van der Mei, Filip Overmeiren (red.), *PS-special, Vrij Verkeer van Personen in 60 arresten. De zegeningen van het Europees Burgerschap*, Deventer: Kluwer 2012, p. 473-483.

Malta

In *Casteels* the CJEU confirmed that pension rules can restrict freedom of movement. At the time of writing, the rapporteur is not yet advised on any concrete action or follow-up by the Maltese authorities.

Poland

According to the Polish Labour Code, transfer from an establishment of the employer in one Member State to an establishment of the same employer in another Member State, may be in particular cases treated as changing an employer, even if there is the same company in both Member States. According to Article 3 of the Polish Labour Code, an employer is an organization, even if not a legal person, as well as a natural person, if they employ employees.

According to Polish law, it is not possible to generally state that if an employee enters with an employer into a mutual agreement on changing terms of work (including the place of work), it shall be automatically understood as if the employer has left the previous employer of his own free will. If entering into such a mutual agreement has been the own initiative of the employer and for the benefits of the employer, than it cannot be treated as own initiative and own will of employee. However, each time it is necessary to analyse the factual basis of such an agreement, because it may not be assessed generally without the individual context.

If the analysis leads to conclusion that there has been no change in the employer, but there has been only a change in place of work performance within the same employer, than in general, without any agreement or notice relating to particular terms of agreement contract it is not possible, automatically, not to include for the purpose of determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the period of service completed by a worker for the same employer in establishments of that employer situated in different Member States and pursuant to the same coordinating contract of employment.

If the employer would like to amend the rules concerning entitlements to supplementary pension benefits and the employee does not want to enter into a mutual agreement, than the employer may make a notice to change the terms of work and pay specified in the contract. Such a notice to change terms of work and pay shall be deemed made if an employee has been proposed new terms in writing. It is possible for the employee to disagree to such new terms. Then, the employment contract shall be terminated at the end of the period of noticed served.

However, such a change of place of work may in some cases also be treated as entrusting with work other than specified in the employment contract for a period not longer than 3 months in a calendar year, only if it does not result in a reduction of the employee's remuneration and that it corresponds to the employee's qualifications. In such cases, a general rule is that there is no change in other terms of employment contract.

Lastly, such a change in place of performing a work may be treated as a work for another employer. In such a case, the employee's consent expressed in writing is mandatory and the employer may grant the employee unpaid leave so that he may work for another employer for the period stipulated in the agreement relating to this matter made between the employers. The unpaid leave shall be then included in the period of work which determines the rights of an employee with respect to the existing employer.

According to Polish labour law, it is possible to have a collective agreements made for several work establishments or/and for a single work establishment. Provisions of such collective agreements may contain special rules referring to entitlements to supplementary pension benefits in a given Member State. The application of relevant collective agreement if it is in force in a given employer depends on the reservation made above. First it is necessary to examine if the change in place of performing a job results in change of the employer or not. If there is a change of employer, consequently there is no possibility to apply the same collective agreement for a single work establishment, but it is possible to apply several work establishments, under certain conditions.

Portugal

In *Casteels*, besides the question whether Article 48 TFEU has direct effect, to which the CJEU answered negatively, the national court asked whether Article 45 of TFEU must be interpreted as precluding, for the determination of the period for the acquisition of definitive entitlements to supplementary pension benefits in a Member State, the non-inclusion of the years of service already completed by a worker with the same employer in establishments of the employer situated in different Member States and pursuant to the same coordinating contract of employment. At the origins of the dispute there was a collective labour agreement that placed workers in such a disadvantageous situation by reason of the fact that they have exercised their rights to free movement within the European Union, in comparison with workers, employed by the same entity, who have not exercised such a right.

By virtue of the collective agreement, whereas a worker was transferred from a establishment of the same employer in another Member State to the Member State where the collective agreement was in force, the period of service completed at the first of those establishments is not regarded as a period of service which is relevant for the purposes of determining whether the person concerned has completed the minimum period required for the acquisition of definitive supplementary pension rights under the scheme in force in the latter Member State. By contrast, workers employed in the establishment in that Member State but who have not exercised their right to free movement are able to claim a uninterrupted length of service for purposes of verifying completion of the period required, pursuant the collective agreement, for acquisition of definitive entitlement to the mentioned supplementary pension rights.

Inasmuch as the collective agreement makes no provision for account to be taken of years of service completed by a worker in the establishment of the same employer in another Member State and for preventing a worker who had been transferred from an establishment of his employer in one Member State to an establishment of the same employer in another Member State from being regarded as having left the employer of his own free will, such collective agreement violates Article 45 TFEU and cannot be applied as criterion to solve the dispute in the main proceedings. We are not aware of a collective labour agreement in force in Portugal with a similar normative content.

Romania

The problems risen in the *Casteels* case – interpretation of article 45 and 48 TFEU – had no practical effects in Romania yet. Due the recent date of accession, the issue was not met in practice.

Slovakia

In the Slovak Republic, such company's supplementary pension schemes do not exist, therefore, the *Casteels* case is not applicable.

Slovenia

The relevance of the *Casteels* case dealing with the voluntary supplementary pension insurance is rather limited. In Slovenia such insurances are regulated with the Pension and Invalidity Insurance Act, which has for the functioning of the system authorised special private insurance companies. That means that even when such an insurance is company based it is still run by a certain insurance company that fulfils state stipulated conditions for such service. Nevertheless the outcome of the *Casteels* case is relevant, especially in a context of free movement of workers..

Spain

No references found.

Sweden

Mr. *Casteels* had since 1974 been working for British Airways in Belgium, France and Germany and in the case the EUCJ dealt with pension benefits regulated in law and collective agreement. When he was moving from Belgium to Germany he should have the right to the same working conditions as other employees in Germany with the exception for certain pension rights that followed from a collective agreement. The Court declared that the free movement of worker regulations also embrace collective agreements. Further, when moving to Germany he was put in a worse situation compared with if he had continued to work in

Belgium for the same employer. An EU citizen's right to move and work in other Member States should be facilitated and restrictions on the right to exercise fundamental right for EU citizens should be banned even if they are not discriminatory.

In Sweden there are regulations in collective agreements concerning pension rights. The situation the Court dealt with was special. Mr. *Casteels* had been working for the same employer in different countries, and the reporter is not aware of a similar situation as was present in *Casteels*.

United Kingdom

Casteels is not covered by the UK report.