Thematic report
2010-2011

FOLLOW-UP OF THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Network of experts

This report has been prepared by the European network on free movement of workers within the European Union.

The Network, coordinated by the University of Nijmegen under the European Commission's supervision, keeps track of legislation on free movement of workers and how it is applied; monitors how national courts interpret EU laws; raises awareness of the importance of free movement of workers as a fundamental right.

Contents

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 2010-2011 edition the following 6 key judgments of the CJEU on free movement of workers were proposed:

- Vatsouras (C-22/08)
- Bressol (C-73/08)
- Metock (C-127/08)
- Ibrahim (C-310/08) and Teixeira (C-480/08)
- Zambrano (C-34/09)

No follow up case law report was received from Germany. The German rapporteur referred for Vatsouras and Metock to his previous 2009-2010 follow up report which is here quoted again. As Vatsouras concerned, this information is more or less identical as provided in the 2010-2011 German national report.

2. VATSOURAS (C-22/08)

2.1. Follow up to Vatsouras

The Sozialgericht Nürnberg has asked the Court of Justice whether it is possible to exclude job-seekers from other Member States from certain financial benefits. That question has arisen in the course of proceedings between Mr Vatsouras, on the one hand, and the Arbeitsgemeinschaft (ARGE) Nürnberg 900 (Job Centre, Nuremberg 900), on the other, concerning the withdrawal of basic job-seekers benefits which Mr Vatsouras had been receiving. The Sozialgericht takes the view that the applicant did not, at the material time, benefit from the specific guarantees in favour of 'workers' since the 'brief minor' professional activity of Mr Vatsouras, 'did not ensure him a livelihood'. According to Article 24(2) of Directive 2004/38/EC a Member State is not obliged to confer entitlement to a social assistance benefit on citizens who are not economically active.

However, the Sozialgericht expresses doubts as to whether that exception is compatible with the principle of equal treatment guaranteed by Community law.
In its judgment of 4 June 2009, the Court first of all invites the Sozialgericht to analyse the applicant's situation in the light of its case-law concerning the status of worker. Independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that activity, following an overall assessment of the employment relationship at issue, may be regarded by the national authorities as real and genuine, thereby allowing the person engaged in that activity to be granted the status of 'worker'.

Were the Sozialgericht to conclude that Mr Vatsouras had the status of worker, he would have been entitled, in accordance with the directive, to receive the requested benefits for at least six months after losing his job.
The Court then goes on to examine the possibility of refusing a social assistance benefit to job-seekers who do not have the status of worker. In that regard, it notes that, in view of the establishment of citizenship of the Union, job-seekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market.

A Member State may, however, legitimately grant such an allowance only to job-seekers who have a real link with the labour market of that State. The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.
It follows that citizens of the Union who have established real links with the labour market of another Member State can enjoy a benefit of a financial nature which is, independently of its status under national law, intended to facilitate access to the labour market.

It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of the benefit in question. The objective of that benefit must be analysed according to its results and not according to its formal structure.

The Court points out that a condition such as that provided for in Germany for basic benefits in favour of job-seekers, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.

In this judgment the Court confirmed that the concept of worker is independent of the limited amount of remuneration and the short duration of the professional activity. It also ruled that a job-seeker can receive a benefit of a financial nature intended to facilitate access to employment. Such a benefit is not seen as social assistance, which Member States may refuse to job-seekers according to Article 24(2) Directive 2004/38. To be entitled to such a benefit the job-seeker can be required to have established genuine links with the labour market of the Member State, for example by instituting that the person has actually sought work in that Member State for a reasonable period.

2.2. Concluding on Vatsouras

Based on the national reports on Vatsouras (annex 1) the following can be concluded.

No reference

The *Belgian, French, Greek, Maltese, Slovakian, Slovenian, Spanish* and *Swedish* reports do not go into the details of Vatsouras. The *Luxembourg's* report does not cover Vatsouras either but provides an extensive overview of the benefits EU job seekers can have in Luxembourg.

No impact

Financial benefits equivalent to the one which was in question in Vatsouras do not exist in *Italy, Latvia* and *Poland*. In *Romania* the judgment has only a theoretical importance for future legislation. While Article 24 of the Directive 2004/38/EC is not transposed in *Slovakia* the Vatsouras judgment is not relevant for Slovakia either.

The Vatsouras judgment concerns two issues: the criteria for the status of worker and the character of benefits which are intended to facilitate access to the labour market.

Worker

Concerning the first issue the *Bulgarian* report reiterates that there is no transposition in Bulgarian law of Article 14 (4) (b) of Directive 2004/38 providing that "Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".

According to the *Cypriot* rapporteur the Vatsouras case may be illuminating in clarifying possible confusion in the practices by Cypriot authorities: work which had lasted barely more than one month was considered to be professional activity, following an overall assessment of the employment relationship, which may be considered by the

national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 45 TFEU.

The *Czech* report underlines that the Czech courts have to apply the EU understanding of the notion of worker.

The same applies to *Slovenia*.

The decision should have an impact on *Estonia* too in determining the notion of worker.

Also in *Belgium* it is necessary to insist on the wide definition of the notion of worker.

Existing legislation questionable

Irrespective of the Vatsouras judgment allowances for job seekers are in *Bulgaria* still considered as 'social assistance' in de meaning of Article 24(2) Directive 2004/38. The same applies most probably for *Ireland* and the *UK*. EU national job seekers who do not have habitual residence (Ireland) or the right to reside (UK) are still excluded from access to social benefits, even if these benefits are designed to assist individuals to get into or back into work.

In the *Netherlands* too the benefit based on the Work and Social Assistance Act is seen as "social assistance", despite its work incentive. Only an economic active EU citizen who has fulfilled effective and genuine activities and has become involuntary unemployed has a right to such a benefit in the Netherlands during the six months period he holds his status as a worker.

Also the *Portuguese* solidarity allowances are seen as social assistance. Although entitlement to such allowances require 'the active availability to work' the Portuguese rapporteur is of the opinion that EU national job seekers are not entitled to these allowances while they are not intended to facilitate access to the labour market but to grant minimum living conditions.

Doubts are expressed by the *Danish* rapporteur as well. Social assistance ('kontanthjælp') under the Act on Active Social Policy, is considered as 'social assistance' within the meaning of Art. 24 (2) of Directive 2004/38. But certain other benefits under the Danish Act on Active Social Policy should be considered as facilitating access to employment. The provision according to which 'first-time job seekers' are excluded from these benefits is most probably not in conformity with EU law.

Also in *Estonia* it is still unclear whether benefits to facilitate access to the labour market are excluded from the notion of "social assistance".

In *Cyprus* the issue of access to work and benefits after 3 months for job seekers has not been tested in Cypriot courts.

In *Germany* it is still controversial whether the benefit concerned does qualify as social assistance or as social benefit in order to facilitate the access to the labour market. There is as yet no official pronouncement on the issue.

Existing legislation in conformity

No problems in this regard are foreseen by the *Czech* rapporteur. EU citizens and their family members are in general treated equally with Czech nationals and the provision stipulating concrete preconditions for receiving unemployment benefits does not contain any restrictions in this regard.

The same applies to *Austria*. EU job seekers are treated as Austrians and have access to the same benefits.

Also the *Finnish* system is in line with the Vatsouras judgment.

Hungarian law too makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant.

In *Lithuania* unemployment benefits are applicable to nationals of other EU Member States as well, although there might be a problem while the applicant should have a work record of 18 months within the last 36 months.

Judicial references

References by national courts to the Vatsouras judgment are mentioned in the *German* and *Spanish* reports.

3. BRESSOL (C-73/08)

3.1. Follow up to Bressol

For some years, the French Community of Belgium has noted a significant increase in the number of students from other Member States, in particular France, enrolling in its institutions of higher education, in particular in nine medical or paramedical courses. Considering that the number of those students attending those courses had become too large, the French Community adopted the decree of 16 June 2006, according to which universities and schools of higher education are obliged to limit the number of students not considered as resident in Belgium who may register for the first time in one of those nine courses.[1] The total number of non-resident students is in principle limited, for each university institution and for each course, to 30 % of all enrolments in the preceding academic year. Once that percentage has been reached, the non-resident students are selected, with a view to their registration, by drawing lots. In that context, the Constitutional Court (Belgium), before which an action was brought seeking annulment of the decree, referred questions to the Court of Justice for a preliminary ruling.

First, the Court of Justice holds that the legislation in question creates a difference in treatment between resident and non-resident students. Such a difference in treatment constitutes indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified. According to the Court, in the light of the method of financing of the system of higher education of the French Community of Belgium, the fear of an excessive burden on the financing of higher education cannot justify that unequal treatment. In addition, it follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high quality medical service open to all, in so far as it contributes to achieving a high level of protection of health. Thus, it must be determined whether the legislation at issue is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it. In that regard, it is ultimately for the national court, which has sole jurisdiction to assess the facts of the case and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions.

In the first place, it is for the referring court to establish that there are genuine risks to the protection of public health. In that regard, it cannot be ruled out a priori that a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned. It also cannot be ruled out that a limitation of the total number of students in the courses concerned may reduce,

[1] The courses concerned lead to the following degrees: Bachelor in physiotherapy and rehabilitation, Bachelor in veterinary medicine, Bachelor of midwifery, Bachelor of occupational therapy, Bachelor of speech therapy, Bachelor of podiatry-chiropody, Bachelor of physiotherapy, Bachelor of audiology and Educator specialized in psycho-educational counseling.

proportionately, the number of graduates prepared in the future to ensure the availability of the service in the territory concerned, which could then have an effect on the level of public health protection. In assessing those risks, the referring court must take into consideration, first, the fact that the link between the training of future health professionals and the objective of maintaining a balanced high-quality medical service open to all is only indirect and the causal relationship less well-established than in the case of the link between the objective of protecting public health and the activity of health professionals who are already present on the market. In that context, it is for the competent national authorities to show that such risks actually exist. Such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.

In the second place, if the referring court considers that there are genuine risks to the protection of public health that court must assess, in the light of the evidence provided by the national authorities, whether the legislation at issue in the main proceedings can be regarded as appropriate for attaining the objective of protecting public health. In that context, it must in particular assess whether a limitation of the number of non-resident students can really bring about an increase in the number of graduates ready to ensure the future availability of public health services within the French Community.

In the third place, it is for the referring court to ascertain, in particular, whether the objective in the public interest relied upon could not be attained by less restrictive measures which aim to encourage students who undertake their studies in the French Community to establish themselves there at the end of their studies or which aim to encourage professionals educated outside the French Community to establish themselves within it. Equally, it is for the referring court to examine whether the competent authorities have reconciled, in an appropriate way, the attainment of that objective with the requirements of European Union law and, in particular, with the opportunity for students coming from other Member States to gain access to higher education, an opportunity which constitutes the very essence of the principle of freedom of movement for students. The restrictions on access to such education, introduced by a Member State, must therefore be limited to what is necessary in order to obtain the objectives pursued and must allow sufficiently wide access by those students to higher education. In that regard, it is for the referring court to ascertain whether the selection process for non-resident students is limited to the drawing of lots and, if that is the case, whether that means of selection based not on the aptitude of the candidates concerned, but on chance, is necessary to attain the objectives pursued.

3.2. Concluding on Bressol

Based on the national reports on Bressol (annex 2) the following can be concluded.

No reference

The *French, German, Irish, Lithuanian, Luxembourg's, Maltese, Slovenian, Spanish* and *UK* reports did not go into the details of Bressol.

No impact

According to the *Austrian* rapporteur the Bressol case has no specific influence on the Austrian situation. Austria has an agreement with the Commission on access to medical studies for Germans. There is little bearing on the *Cypriot* context either. According to the *Danish* rapporteur there is currently no information available on possible developments. The case had not had and is not likely to have any influence in *Finland* and *Greece*. According to the *Slovakian* and *Swedish* rapporteurs the Bressol case has no impact on the situation in their countries.

Existing legislation in conformity

More outspoken on the situation in their countries are the Bulgarian, Czech, Estonian, Hungarian, Italian, Latvian, Polish and Portuguese rapporteurs.

According to the *Bulgarian* legislation on higher education EU nationals are treated equally to Bulgarian nationals concerning admission to higher education.

The *Czech* Act on University Education uses the words "a condition of admissions of foreigners that must respect obligations which are resulting from binding international treaties". Even if the term "international treaties" may be seen as aimed at students who are admitted under development cooperation agreements, it may at the same time be interpreted as including commitments under EU law. Thus it can be argued, prima facie, that the relevant Czech legislation can be regarded as being fully in compliance with the Bressol judgment, as it does not stipulate any limitations on free movement of university students, but on the contrary, it reaffirms the obligation to comply with international commitments.

According to the *Estonian* legislation there is no restriction in order to enter the universities. According to the Universities Act everyone, who has graduated the secondary school or has an equal education can apply for studies at the university. There are no restrictions based on citizenship. The only requirement is the ability to understand the language of instruction.

The enrolment in *Italian* university courses is open to EU and Italian students on an equal footing. A foreign secondary school qualification is considered as equivalent to an Italian one, if it allows access to the university in the State that awarded it. Italy operates a numerus clausus system for regulating access to a limited number of university courses, but in that case again, equality of treatment is granted.

The *Latvian* Education Act provides the right to education to a Union citizen without requirements on the possession of a residence permit.

In *Poland* the numerus clausus for medical studies applies equally to Polish citizens and EU citizens and members of their families, irrespective the length and legal basis of their stay in Poland.

The application of Bressol in *Portugal* is not problematic. The numerus fixus policy for medical and paramedical courses is based on objective criteria.

Legislative and/or policy amendments

On 31 May 2011, the *Belgian* Constitutional Court issued its judgment in the Bressol case. The limitation of 30 per cent of non-resident students is confirmed in the curricula of physiotherapy and veterinary medicine (the two most important curricula in

terms of number of students), but invalidated in the other medical and paramedical curricula. The current Belgian Minister for Higher Education has welcomed this decision.

The *Netherlands* has not witnessed any legislative or policy amendments in 2010, but the case influenced the jurisprudence on the drawing system for medical studies. The Secretary of State for Higher Education announced this summer (2011) in the Strategic Agenda for Higher Education that he will gradually abolish the drawing system.

Judicial references

References by national courts to the Bressol judgment are mentioned in the *Belgian, Dutch* and *Italian* reports.

4. METOCK (C-127/08)

4.1. Follow up to Metock

In the Metock case the Court answered two questions of the Irish High Court on the compatibility of national immigration rules restricting the free movement of third-country national family members of EU migrants if the family members did not have prior lawful residence in another Member State.

The Court held the Irish rule, introducing the extra condition of previous lawful residence in the EU, to be incompatible with the text and the aim of Directive 2004/38 and with the objective of the internal market. The right of the third-country national family members to enter into and reside in the host Member State in order to accompany or join the Union citizen depends on two conditions only: the existence of the family relation, as defined in the Directive, and the presence of the Union citizen in the host Member State (par. 70).

The Court, in its answer to the second question of the Irish court, explicitly held it to be irrelevant whether the marriage was concluded before or after the Union citizen migrated to the host Member State, where the marriage was concluded and whether the third-country national entered the host Member State before or after the marriage.

The Court explicitly revoked its 2003 Akrich's ruling and followed again its previous case-law, inter alia, the judgments in MRAX and Commission v. Spain (par. 58). The right of residence of the family member of an EU migrant worker can only be terminated on two grounds: the public order exception of Article 27 and "in case of abuse of rights or fraud, such as marriages of convenience" in accordance with Article 35 of Directive 2004/38 (par. 74 and 95). The Member State has to prove that one of these situations occurs. All four of these Irish cases involved marriages in which the husband had submitted from outside the EU an application for asylum that was rejected, expulsion was announced and in one case actually carried out. The Irish court ruled that in none of these four cases, there was a sham marriage (par. 46). That is relevant because the discussions about this judgment are mainly focused on marriages of convenience.

4.2. Concluding on Metock

Based on the national reports on Metock (annex 3) the following can be concluded.

No reference
The decision is not mentioned in the *Luxembourg's* report.

No impact

As far as the Metock judgment is mentioned in the national reports the decision did not have any impact on *Belgium*, *Bulgaria, Estonia, Greece, Hungary Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden* as the existing legislation and administrative practice are already in line with the decision, in particular while no previous lawful residence of the third country family member in another Member State is required.

Legislative and/or policy amendments

Legislative and/or policy amendments due to Metock were reported in *Austria, Cyprus, Czech Republic, Denmark, Germany, Finland, France, Ireland, Italy, Lithuania and United Kingdom*.

In *Austria* the Metock-decision led to an amendment of the relevant provisions of the Settlement and Residence Act 2005. In recent decisions the Constitutional Court and the Administrative Court changed their previous case law and followed the Metock judgment. There is no need for legal stay in another Member State any more and the date of starting the relationship is irrelevant.

In *Cyprus* the director of the Civil Registry and Migration Department issued a circular, which discussed the legal significance of Metock: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in Cyprus or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the CJEU decision.

Although the *Czech* legislation is mainly in compliance with the Metock judgment, an eventual problem which might have caused non-compliance was solved in 2010 by an amendment to the Immigration Act (see the national report).

In *Denmark* the Metock judgment resulted in a significant change of administrative practice. In addition to abolishing the requirement of previous lawful residence, the personal scope of application of the EU rules concerning a residence right for third-country spouses of Danish citizens was widened. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means. Thus, although this issue was not expressly dealt with in the Metock judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

Section 153 of the *Finnish* Aliens Act was amended so that the requirement of previous lawful residence, which was previously contained in this provision as a precondition for the residence of EU citizens' family members, is no longer applied. The amended provision entered into force on 1 July 2010.

In *France* a Circular of 10 September 2010 has particularly clarified the scope of the Metock judgment according to the French authorities. The provisions of CESEDA does not subordinate the right of residence of a family member to the legality of his entry

into France. Nevertheless, there is still conflicting case law concerning the requirement of legal entry into France in order to obtain a residence permit as spouse of an EU citizen.

In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the Metock-judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. All family relatives of Union citizens possess a right of entry and residence provided that they can prove their status as family relatives and fulfill the requirements laid down in Directive 2004/38. Therefore, a third-country national family relative of a Union citizen must not fulfill the general requirements of the Aufenthaltsgesetz (basic knowledge of German etc.).

In *Italy* too the law has been put in line with the Metock judgment by the amendments brought by Decree-Law no. 89 of 2011. Before the amendments, the entry visa had to be attached to the request for a residence card, in case of residence for more than three months or of permanent residence, and compliance with the requirements for entry was necessary for residence for up to three months. The amendments repealed the requirement for the entry visa, and a valid passport will be the only document that the non-EU family member will need. Contrary to France, the first instance courts followed the Metock judgment from the beginning and annulled the decisions of refusal of residence due to the absence of an entry visa, or in case the applicant overstayed in the country.

The *Irish* Government reacted swiftly to the Metock judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed.

The *Lithuanian* legislation was unclear and implied indirectly the requirement of a previous stay in another EU country, however the authorities were motivating that this provision only applied to Lithuanian citizens who did not yet exercise their freedom of movement. The draft new aliens law of 2010 provides explicitly in Article 100(2) that family members of Lithuanian citizen who are not EU nationals are entitled to obtain an EU temporary residence card if they arrive together with or join a Lithuanian national who has exercised the right of free movement in the EU.

The *United Kingdom* authorities have finally amended the EEA Regulations to reflect properly the Metock judgment as regards spouses, minor children, descending and ascending dependent relatives in the direct line.

Retrospective application

According to the *Cypriot* report a retrospective application is denied although the Ministry of Interior recognized the need for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement. Individuals may well use the Metock case for the courts to reopen their cases, not by claiming retrospective application of Metock but for correcting the current and future status.

A retrospective application of Metock is extensively discussed in the *Irish* report. All applicants who had applied since 28 April 2006 (the coming into force of Directive 2004/38) for a residence card and had been refused because they did not have prior lawful residence would have their applications reviewed. It was envisaged at the time that this process would take three or four months to complete, though it is understood that it

may have taken longer. There is no publicly available information on the number of cases reviewed following the Metock ruling, or on the outcome of such reviews.

Reverse discrimination

The issue of reverse discrimination in this respect is explicitly discussed in the following reports.

As regards third-country nationals with a relationship to an *Austrian*, it is a prerequisite that the Austrian stayed abroad before and made use of his/her free movement rights. According to the Austrian Constitutional Court this is a justified differentiation.

Italy decided to avoid reverse discrimination by extending to non-EU family members of Italian nationals the same treatment granted to non-EU family members of EU citizens.

Abuse and fraud

Measures to prevent abuse of the EU rules on residence rights, in particular those concerning third-country national family members are reported in the *Danish*, *French*, *Hungarian*, *Irish*, *Lithuanian*, *Dutch* and *Swedish* reports.

As regards *Danish* citizens returning from another Member State, it is stipulated that the principal person applying for a registration certificate or residence card for family members must declare to have established genuine and effective residence in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines, and in principle the requirement should not become unreasonable or insurmountable. In practice, however, in some cases forms of documentation appear to be requested that can be difficult to meet.

In *France* a Circular of 10 September 2010 reminds the prefectural services that, in case they have doubts about the sincerity of the marital union between a citizen of the EU and third-country nationals, they have the opportunity to conduct an investigation to determine whether the conclusion of this union is not intended only to obtain a residence permit.

The *Hungarian* report mentions increased attention to marriages of convenience. To assess a sham relationship is a joint responsibility of the Office for Immigration and Naturalization and the consular officers, but the distinct responsibilities has not been defined clearly.

The *Irish* government too has now focused on the issue of marriages of convenience.

In the *Netherlands* an extensive policy paper against abuse and fraud was presented in December 2009. The government distinguishes three forms of use. Firstly, a group of nationals and EU-citizens that makes regularly use of their free movement rights. Secondly, there is a group that cheats and concludes marriages of convenience. Thirdly, it distinguishes a group " which, albeit formally observing the conditions laid down by Community rules, does not comply with the purpose of those rules" while circumventing the national legislation on family reunification (the so-called "Europe route"). The government would be able to act firmly against the abuse of the second and

the "abuse of rights" of the third group. In October 2010 the government has announced its intention to open negotiations at the European level with a view to put a halt to the so-called 'Europe route', if necessary through amendment of Directive 2004/38/EC.

Finally, if the *Swedish* Migration Board suspects that a marriage could be a pro forma marriage, a deeper examination should be carried out. Regarding the burden of proof, it is the State authority that must prove that the marriage is a pro forma marriage etc. The investigation should be made in the same way as when investigating whether a marriage is serious or not. That is, an examination concerning for instance the establishment of the relationship and the parties' familiarity etc. Concerning the criteria of a pro forma marriage, the preparatory works explicitly refer to the practice in the CJEU.

Recently the Migration Board has been commissioned by the Government to present statistics concerning residence permits and marriage of conveniences and fraud including child marriages. In a communication to the Government, the Board in 2011 presented an account for 53 cases that had been dealt with by the Board.

Amendment of the Directive

Initiatives for an amendment of Directive 2004/38 are reported in the Danish, Irish and Dutch reports, of which the Dutch initiatives are the most far reaching.

Ireland started a campaign to amend the Directive. It was joined in this campaign by *Denmark*.

As mentioned above the *Dutch* government has announced its intention to open negotiations at the European level with a view to put a halt to the so-called 'Europe route', if necessary through amendment of Directive 2004/38/EC. The proposals are specified in a position paper of March 2011 and in a letter of the Minister of Social Affairs to the Second Chamber of Parliament of April 2011. They include inter alia the proposal that family reunification with third-country national family members of EU migrants would be subject to the rules of the Family Reunification Directive 2003/86/EC, and that those rules should be made more restrictive on eight points; previous irregular stay in the Member State should be a ground for refusal of family members of EU migrants.

Judicial references

References by courts, Ombudsman etc. to the Metock judgment are mentioned in the *Austrian, French, Hungarian, Irish, Italian, Dutch, Spanish, Swedish* and *UK* reports.

5. IBRAHIM (C-310/08) AND TEIXEIRA (C-480/08)

5.1. Follow up to Ibrahim and Teixeira

Regulation 1612/68 provided that the members of the family of a migrant worker who was a national of one Member State and employed in another Member State had the right to install themselves with that worker, whatever their nationality (Article 10 of the Regulation). It also provides that the children of such a worker are entitled to attend general educational, apprenticeship and vocational training courses if they are residing in the host Member State (Article 12).

In the Baumbast judgment (C-413/99) the Court of Justice held that that article must be interpreted as meaning that the child of a migrant worker has a right of residence if he or she wishes to attend educational courses in the host Member State, even if the migrant worker no longer resides or works in that Member State. That right of residence extends also to the parent who is the child's primary carer.

Directive 2004/38 amended that regulation and replaced some earlier legislation on the freedom of movement of citizens. It provides that all citizens have the right to move and reside in the territory of another Member State as workers or students or if they have comprehensive sickness insurance cover and sufficient resources not to become a burden on the social assistance system. It repealed Article 10 of the regulation, on the right of residence of members of the family of a migrant worker, replacing it with a right of residence for members of the family of citizens who satisfy the conditions for residence. It did not, on the other hand, repeal Article 12 of the regulation, on the right of access to the educational system. It also provides that the right of residence of a child enrolled at an educational establishment, for the purpose of studying there, and that of the parent who has actual custody of the child are not affected by the departure or death of the citizen.

The Court of Appeal of England and Wales, which dealt with these two cases, asked the Court of Justice whether the interpretation of Article 12 of the regulation adopted in the Baumbast judgment still applies following the entry into force of the new directive, and whether the right of residence of the person who is the child's primary carer is now subject to the conditions laid down by the directive for the exercise of the right of residence, especially the requirement that the parent must have sufficient resources not to become a burden on the social assistance system.

Ibrahim(C-310/08)

Ms Ibrahim, a Somali national, arrived in the United Kingdom in February 2003 to join her husband, Mr Yusuf, a Danish citizen, who worked there from October 2002 to May 2003. The couple have four children of Danish nationality, aged from 1 to 9. The three eldest arrived in the United Kingdom with their mother and the fourth was born in the United Kingdom. The two eldest have attended State schools since their arrival.
From June 2003 to March 2004 Mr Yusuf claimed incapacity benefit. After being declared fit to work in March 2004, he left the United Kingdom. Between ceasing work

and leaving the United Kingdom, Mr Yusuf ceased to satisfy the conditions for lawful residence there under Community law.

Ms Ibrahim separated from Mr Yusuf after his departure. She was never self-sufficient, and depends entirely on social assistance. She does not have comprehensive sickness insurance cover and relies on the National Health Service. In January 2007 she applied for housing assistance for herself and her children. The application was rejected on the ground that only persons with a right of residence under European Union law could make such an application, and neither Ms Ibrahim nor her husband were resident in the United Kingdom under European Union law. Ms Ibrahim appealed to the national courts against that decision.

Teixeira (C-480/08)

Ms Teixeira, a Portuguese national, arrived in the United Kingdom in 1989 with her husband, also a Portuguese national, and worked there until 1991. Their daughter Patricia was born there on 2 June 1991. Ms Teixeira and her husband were subsequently divorced, but they both remained in the United Kingdom. From 1991 to 2005 Ms Teixeira worked for intermittent periods in the United Kingdom, and Patricia went to school there.

In June 2006 a court ordered that Patricia should live with her father, but could have as much contact with her mother as she wished. In November 2006 Patricia enrolled on a child care course at the Vauxhall Learning Centre in Lambeth. In March 2007 Patricia went to live with her mother.

On 11 April 2007 Ms Teixeira applied for housing assistance for homeless persons. Her application was rejected on the ground that she did not have a right of residence in the United Kingdom, since she was not in work and was not therefore self-sufficient. She challenged that refusal before the national courts, arguing that she had a right of residence because Patricia was continuing her education.

In its judgments of 23 February 2010, the Court points out that Article 12 of the regulation allows the child of a migrant worker to have an independent right of residence in connection with the right of access to education in the host Member State. Before the entry into force of Directive 2004/38, when Article 10 of the regulation concerning the right of residence was still in force, the right of access to education laid down by Article 12 of the regulation was not conditional on the child retaining, throughout the period of education, a specific right of residence under Article 10. Once the right of access to education has been acquired, the right of residence is retained by the child and can no longer be called into question. Article 12 of the regulation requires only that the child has lived with at least one of his or her parents in a Member State while that parent resided there as a worker. That article must therefore be applied independently of the provisions of European Union law which expressly govern the conditions of exercise of the right to reside in another Member State.

That independence was not called into question by the entry into force of the new directive. The Court points out that Article 12 of the regulation was not repealed or even amended by the directive, unlike other articles of the regulation. Furthermore, the legislative history of the directive shows that it was designed to be consistent with the Baumbast judgment.

Next, the Court observes that the grant of the right of residence for the children and the parent is not conditional on self-sufficiency. That interpretation is supported by the directive, which provides that the departure or death of the citizen does not entail the loss of the right of residence of the children or the parent.

Consequently, the Court finds that the right of residence of the parent who is the primary carer of a child of a migrant worker who is in education is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of the host Member State.

Finally, in answer to a further question raised in the Teixeira case, as to whether the parent's right of residence ends when the child reaches the age of majority - the question was raised because in 2009 Ms Teixeira's daughter reached the age of 18, thus coming of age under the law of the United Kingdom - the Court observes that there is no age limit for the rights conferred on a child by Article 12 of the regulation: the right of access to education and the child's associated right of residence continue until the child has completed his or her education.

In addition, although children who have reached the age of majority are in principle assumed to be capable of meeting their own needs, the right of residence of the parent may nevertheless extend beyond that age, if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education. It is for the national court to assess whether that is actually the case.
The Court concludes that the right of residence of the parent who is the primary carer for a child of a migrant worker, where that child is in education in the host Member State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

5.2. Concluding on Ibrahim and Teixeira

Based on the national reports on Ibrahim and Teixeira (annex 4) the following can be concluded.

No reference
The decisions are not mentioned in the *German*, *Luxembourg's* and *Spanish* reports and not elaborated in the *Greek* report.

No impact
As far as the Ibrahim and Teixeira judgments are mentioned in the reports, the decisions do not have any impact yet in *Austria, Belgium, Malta, Romania* and *Sweden*.

Existing legislation questionable
It is questionable whether the relevant legislation is in conformity with the Ibrahim and Teixeira cases in the following Member States: *Czech Republic, Estonia, Finland* and *Slovenia*.

Although "study" is a reason for residence in the *Czech Republic*, the definition of study is unclear and the notion may be limited to secondary and higher education only.

Although theoretically a parent could have a right to stay in *Estonia* because his child is studying, the law should be amended in this respect.

In *Finland* no information was found on any arrangement that would guarantee persons like Ibrahim and Teixeira a right of residence.

The *Czech, Estonian and Slovenian* rapporteurs explicitly mention the direct applicability of Regulation 1612/68 as last resort.

Existing legislation in contradiction

More outspoken are the *Bulgarian, Cypriot, French, Hungarian, Italian, Latvian, Lithuanian, Slovakian* and *UK* rapporteurs. The existing legislation and/or administrative practice are in contradiction to the Ibrahim and Teixeira judgments.

Access to sufficient resources to care for the child and himself/herself is still a precondition in *Bulgaria, Cyprus, France, Latvia* and *Slovakia*.

In *Hungary* the right of residence for primary carers is limited to the period of parental supervision (up to majority of the descendant). In this context the education is only a subsidiary condition.

In *Italy* a clear basis is lacking in the administrative guidelines for residence of the primary carer.

The same applies to *Lithuania*: residence purely on the ground that the child is engaged in education is not part of the existing list of residence grounds.

In the *UK* the current guidance does still not recognise the right of a child to remain for education in accordance with Article 12 of Regulation 1612/68 as explained by the CJEU in Ibrahim.

Existing legislation in conformity

The existing legislation and regulations are considered to be in conformity with the CJEU judgments in the *Netherlands* and *Portugal*.

Legislative and/or policy amendments

Legislative and/or policy amendments due to Ibrahim and Teixeira are reported in *Denmark* and *Poland*.

In *Denmark* Section 14 (4) of the EU Residence Order already provides for the residence right of the child and the parent in such situations. The adjustment of the administrative practice affects mainly the issue of sufficient resources. The precise scope of the adjustment does not seem to have been officially clarified, just as the criteria for reconsideration of applications rejected under the past practice appear less than clear.

In *Poland* a new Article 19a has been added to the Act on entry, which came into force on May 25, 2011. According to the new provision, a child of an EU citizen, who (the EU citizen) has been working on the territory of Poland but has not retained his right of residence, shall still have a right to stay in Poland until the end of his/her studies. In such a case, a parent who has custody over the EU citizen's child, shall have the right to accompany the child until his/her majority or even longer, if the child still needs assistance of the parent in order to continue and to finish his/her studies.

Judicial references

References by courts to the Ibrahim and Teixeira judgments are mentioned in the *Austrian* and *UK* reports.

6. ZAMBRANO (C-34/09)

6.1. 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 minor 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.

6.2. Concluding on Zambrano

The present writers would like to point out at the outset that some of the national reports dealt with possible impacts of Directive 2004/38/EC on the respective national legislations, policies and judicial proceedings regarding Zambrano-like cases. In doing so, the reports misunderstood that the Court explicitly stated that the directive does not apply to a situation such as that at issue in Zambrano. Furthermore, some reports did not make it clear whether Zambrano-like cases (child with nationality of the MS and both parents third-country nationals) may occur in their country or not.
Based on the national reports on Zambrano (annex 5) the following can be concluded.

No reference
The *Lithuanian, Luxembourg's, Maltese, Slovenian* and *Spanish* reports do not go into the details of Zambrano. According to the *German* rapporteur Zambrano is much too early to conclude on.

No impact
A nationality law equivalent to the Belgian Nationality Code dealt in the Zambrano case does not exist in *Austria, Cyprus, Denmark, Estonia, Romania* and *Sweden*. Cyprus and Romanian law are dominantly based on ius sanguinis.

Under *Cypriot* law a Zambrano situation could occur, but it is exceptional. If a rare situation like that were to occur, the Zambrano judgment might presumably apply.

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.

Were a Zambrano situation to occur in *Sweden*, the parents could be granted a residence permit under the Aliens Act based on "exceptionally distressing circumstances".

Existing legislation questionable
It is questionable if the existing legislation in Member States: *Czech Republic, Denmark, France* and *the Netherlands* is in conformity with the Zambrano case.

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 *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. It is furthermore not clear whether an issued residence card grants the right to work as well.

In *France* the issuance of a residence card doesn't go as far as the Zambrano judgment. For instance, the parent must (also) have actual custody, support his child and have sufficient resources and social security covering himself and his child to prevent from becoming a burden on public finances. Once these conditions are met, the parent is granted either a residence permit or a work permit. At the same time, the French target group exceeds Zambrano, as these permits are not granted only to third-country national parents of a minor French child but also to third-country national parents of a minor child of any other nationality of a Member State of the European Union.

In *the Netherlands* the Minister of Immigration and Asylum's perception of the Zambrano judgment is questionable as he sees the concise explanation offered by the Court for its Zambrano judgment as a justification for the conclusion that the intention of the Court was to offer a tailor-made solution for the case at hand. However, the Dutch judiciary appears to disagree with the Minister, considering a Utrecht District Court's and a Roermond District Court's judgment[2] arguing both that a difference in facts does not automatically mean that the Zambrano judgment does not apply.

Existing legislation in contradiction

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 like Zambrano shall only be issued with a residence card if they are dependent on – in this case – their Greek children. Therefore, Greek legislation is - as the rapporteur clearly noted - not in line with the Zambrano judgment.

Hungarian law at present would qualify a situation like the one in the Zambrano case in the same way as Belgian law did. In Hungary a parent like Zambrano is not entitled to a right of residence nor to access to the labour market. Lastly, Hungarian law provides for unemployment benefits only if the previous employment was lawful and the person has a right to search for work.

At first glance *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

[2] Rechtbank 's-Gravenhage zp Utrecht, 1 June 2006, Awb 10/34857 VK, Awb 10/34859, Awb 10/34860 VL a.o., LJN: BQ7068, cons. 2.30-32, and Rechtbank 's-Gravenhage zp Roermond, 26 March 2011, Awb 10/37591, LJN: BQ0062, JV 2011/234, cons. 12. However, as the applicant had not rebutted the defendant's claim that one of the parents is a Dutch national and therefore the Zambrano judgment does not apply, the child is considered not to have been withheld the effective enjoyment of his rights as an EU-citizen. The Groningen District Court, however, ruled in an injunction procedure that considering the facts of the case - a third-country national parent responsible for the care of her minor Dutch child - expulsion (of the parent) had to be stayed until it had been determined whether, in the light of Articles 7 and 24 of the EU's Charter on Fundamental Rights, an expulsion measure is a proportional infringement of the child's EU-rights as it can be assumed that a child under the age of two will have to accompany its parent who is the primary caretaker when expelled (Rechtbank 's-Gravenhage zp Groningen, 6 May 2011, Awb 11/3449, LJN: BQ3576, cons. 3.12.)

card for family members. According to the rapporteur, however, the law itself is clear but its application is not. In the rapporteur's view, only EU parents of an Italian minor are entitled to a residence card, leaving out non-EU parents of an EU minor and EU parents of an EU minor.

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 grants temporary and permanent residency permits to third-country national parents of minor Latvian citizen.

The *Polish* Act on entry is not applicable where there is no transnational situation (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.

Under *Slovak* legislation the fact that third-country national parents have children, who are Slovak citizens, will not make them entitled to the right to reside in Slovakia, unless they are dependent on them.

Existing legislation in conformity

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.

The *Portuguese* system might be in line with the Zambrano judgment as well. Although the rapporteur notes that the mandatory application of the Zambrano judgment is strengthened by the Portuguese Constitution as it establishes a fundamental and in no way to be restricted right for every Portuguese national to stay and reside in the Portuguese territory. It stays unclear to the present writers whether this would also mean that third-country national parents of a Portuguese minor child could derive a residence right and/or a work permit from that constitutional right of their child.

It is the *Swedish* rapporteur's opinion that a Swedish court would not have any problems following the Zambrano judgment in cases similar to the Zambrano case.

Legislative and/or policy amendments

Already in 2006 the *Belgian* Nationality Code was modified in order to restrict the access to the Belgian nationality iure soli. Another (direct) consequence of the Zambrano judgment will be to verify the compatibility of reinstating reverse discriminations with the Zambrano judgment. The Constitutional Court will possibly be asked to look into this question.

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. It will also review cases which are currently in the residency application process, where there is a possibility of deportation, and examine cases where Irish citizen children have already left the State because their parents were refused permission to remain.

The *UK* Border Agency is yet to comment on the Zambrano judgment or give guidance on its implementation. A recent interpretation of domestic law strengthened the rights of citizen children to live in the UK with their non-citizen parents. However, the findings in the Zambrano judgment go further and it is likely that policy towards such children will have to be substantially reviewed.

Judicial references

References by national courts to the Zambrano judgment are mentioned in the *Austrian, Bulgarian, Irish* and *Dutch* reports. In *Austria* the Zambrano judgment was also mentioned in one academic article.

7. COMPARATIVE CONCLUSIONS

The "concluding" paragraphs of the sections 2, 3, 4, 5 and 6 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.

7.1. No reference

No follow up case law report was received from Germany. The German rapporteur referred for Vatsouras and Metock to his previous 2009-2010 follow up report which is here quoted again. As Vatsouras concerned, this information is more or less identical as provided in the 2010-2011 German national report.

The *Belgian, French, Greek,, Maltese, Slovakian, Slovenian, Spanish* and *Swedish* reports did not go into the details of ***Vatsouras***. The *Luxembourg's* report did not cover Vatsouras either but provides an extensive overview of the benefits EU job seekers can have in Luxembourg.

The *French, Irish, Lithuanian, Luxembourg's, Maltese, Slovenian, Spanish* and *UK* reports did not go into the details of ***Bressol***.

The ***Metock*** decision is mentioned in all the reports, except the *Luxembourg's* one.

The ***Ibrahim and Teixeira*** decisions are not mentioned in the *Luxembourg's* and *Spanish* reports and not elaborated in the *Greek* report.

The *Lithuanian, Luxembourg's, Maltese, Slovenian* and *Spanish* reports do not go into the details of ***Zambrano***.

7.2. No impact

Vatsouras:
Financial benefits equivalent to the one which was in question in Vatsouras do not exist in *Italy, Latvia* and *Poland*. In *Romania* the judgment has only a theoretical importance for future legislation. While Article 24 of the Directive 2004/38/EC is not transposed in *Slovakia* the Vatsouras judgment is not relevant for Slovakia either.

Bressol:
According to the *Austrian* rapporteur the Bressol case has no specific influence on the Austrian situation. Austria has an agreement with the Commission on access to medical

studies for Germans. There is little bearing on the *Cypriot* context either. According to the *Danish* rapporteur there is currently no information available on possible developments. The case had not had and is not likely to have any influence in *Finland* and *Greece*. According to the *Slovakian* and *Swedish* rapporteurs the Bressol case has no impact on the situation in their countries.

Metock:
As far as the Metock judgment is mentioned in the national reports the decision did not have any impact on *Belgium*, *Bulgaria, Estonia, Greece, Hungary, Latvia, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain* and *Sweden* as the existing legislation and administrative practice are already in line with the decision, in particular while no previous lawful residence of the third country family member in another Member State is required.

Ibrahim and Teixeira:
The Ibrahim and Teixeira judgments do not have any impact yet in *Austria, Belgium, Malta, Romania* and *Sweden*.

Zambrano:
A nationality law equivalent to the Belgian Nationality Code dealt in the Zambrano case does not exist in *Austria, Cyprus, Denmark, Estonia, Romania* and *Sweden*. Cypriot and Romanian law are dominantly based on ius sanguinis. Under *Cypriot* law a Zambrano situation could occur, but it is exceptional. If a rare situation like that were to occur, the Zambrano judgment might presumably apply. 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. Were a Zambrano situation to occur in *Sweden*, the parents could be granted a residence permit under the Aliens Act based on "exceptionally distressing circumstances".

7.3. Existing legislation questionable

Vatsouras:
Irrespective of the Vatsouras judgment allowances for job seekers are in *Bulgaria* still considered as 'social assistance' in de meaning of Article 24(2) Directive 2004/38. The same applies most probably for *Ireland* and the *UK*. EU national job seekers who do not have habitual residence (Ireland) or the right to reside (UK) are still excluded from access to social benefits, even if these benefits are designed to assist individuals to get into or back into work. In the *Netherlands* too the benefit based on the Work and Social Assistance Act is seen as "social assistance", despite its work incentive. Only an economic active EU citizen who has fulfilled effective and genuine activities and has become involuntary unemployed has a right to such a benefit in the Netherlands during the six months period he holds his status as a worker. Also the *Portuguese* solidarity allowances are seen as social assistance. Although entitlement to such allowances require

'the active availability to work' the Portuguese rapporteur is of the opinion that EU national job seekers are not entitled to these allowances while they are not intended to facilitate access to the labour market but to grant minimum living conditions. Doubts are expressed by the *Danish* rapporteur as well. Social assistance ('kontanthjælp') under the Act on Active Social Policy, is considered as 'social assistance' within the meaning of Art. 24 (2) of Directive 2004/38. But certain other benefits under the Danish Act on Active Social Policy should be considered as facilitating access to employment. The provision according to which 'first-time job seekers' are excluded from these benefits is most probably not in conformity with EU law. Also in *Estonia* it is still unclear whether benefits to facilitate access to the labour market are excluded from the notion of "social assistance". In *Cyprus* the issue of access to work and benefits after 3 months for job seekers has not been tested in Cypriot courts. In *Germany* it is still controversial whether the benefit concerned does qualify as social assistance or as social benefit in order to facilitate the access to the labour market. There is as yet no official pronouncement on the issue.

Ibrahim and Teixeira:
It is questionable whether the relevant legislation is in conformity with the Ibrahim and Teixeira cases in the following Member States: *Czech Republic, Estonia, Finland* and *Slovenia*. Although "study" is a reason for residence in the Czech Republic, the definition of study is unclear and the notion may be limited to secondary and higher education only. Although theoretically a parent could have a right to stay in Estonia because his child is studying, the law should be amended in this respect. In Finland no information was found on any arrangement that would guarantee persons like Ibrahim and Teixeira a right of residence. The Czech, Estonian and Slovenian rapporteurs explicitly mention the direct applicability of Regulation 1612/68 as last resort.

Zambrano:
It is questionable if the existing legislation in Member States: *Czech Republic, Denmark, France* and *the Netherlands* is in conformity with the Zambrano case.
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 *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. It is furthermore not clear whether an issued residence card grants the right to work as well.
In *France* the issuance of a residence card doesn't go as far as the Zambrano judgment. For instance, the parent must (also) have actual custody, support his child and have sufficient resources and social security covering himself and his child to prevent from becoming a burden on public finances. Once these conditions are met, the parent is granted either a residence permit or a work permit. At the same time, the French target group exceeds Zambrano, as these permits are not granted only to third-country national

parents of a minor French child but also to third-country national parents of a minor child of any other nationality of a Member State of the European Union.
In *the Netherlands* the Minister of Immigration and Asylum's perception of the Zambrano judgment is questionable as he sees the concise explanation offered by the Court for its Zambrano judgment as a justification for the conclusion that the intention of the Court was to offer a tailor-made solution for the case at hand. However, the Dutch judiciary appears to disagree with the Minister, considering a Utrecht District Court's and a Roermond District Court's judgment arguing both that a difference in facts does not automatically mean that the Zambrano judgment does not apply.

7.4. Existing legislation in contradiction

Ibrahim and Teixeira:
The existing legislation and/or administrative practice are in contradiction to the Ibrahim and Teixeira judgments in the following Member States: *Bulgaria, Cyprus, France, Hungary, Italy, Latvia, Lithuania, Slovakia* and *UK*. Access to sufficient resources to care for the child and himself/herself is still a precondition in *Bulgaria, Cyprus, France, Latvia* and *Slovakia*. In *Hungary* the right of residence for primary carers is limited to the period of parental supervision (up to majority of the descendant). In this context the education is only a subsidiary condition. In *Italy* a clear basis is lacking in the administrative guidelines for residence of the primary carer. The same applies to *Lithuania*: residence purely on the ground that the child is engaged in education is not part of the existing list of residence grounds. In the *UK* the current guidance does still not recognise the right of a child to remain for education in accordance with Article 12 of Regulation 1612/68 as explained by the CJEU in Ibrahim.

Zambrano:
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 like Zambrano shall only be issued with a residence card if they are dependent on – in this case – their Greek children. Therefore, Greek legislation is - as the rapporteur clearly noted - not in line with the Zambrano judgment.
Hungarian law at present would qualify a situation like the one in the Zambrano case in the same way as Belgian law did. In Hungary a parent like Zambrano is not entitled to a right of residence nor to access to the labour market. Furthermore, Hungarian law provides for unemployment benefits only if the previous employment was lawful and the person has a right to search for work.
At first glance *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. According to the rapporteur, however, the law itself is clear but its application is not. In the rapporteur's view, only EU parents of an Italian minor are entitled to a residence card, leaving out non-EU parents of an EU minor and EU parents of an EU

minor.
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 grants temporary and permanent residency permits to third-country national parents of minor Latvian citizen.
The *Polish* Act on entry is not applicable where there is no transnational situation (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.
Under *Slovak* legislation the fact that third-country national parents have children, who are Slovak citizens, will not make them entitled to the right to reside in Slovakia, unless they are dependent on them.

7.5. Existing legislation in conformity

Vatsouras:
No problems with the Vatsouras judgment are foreseen by the *Czech* rapporteur. EU citizens and their family members are in general treated equally with Czech nationals and the provision stipulating concrete preconditions for receiving unemployment benefits does not contain any restrictions in this regard. The same applies to *Austria*. EU job seekers are treated as Austrians and have access to the same benefits. Also the *Finnish* system is in line with the Vatsouras judgment. *Hungarian* law too makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant. In *Lithuania* unemployment benefits are applicable to nationals of other EU Member States as well, although there might be a problem while the applicant should have a work record of 18 months within the last 36 months.

Bressol:
According to the Bulgarian, Czech, Estonian, Hungarian, Italian, Latvian, Polish and Portuguese rapporteurs the legislation on higher education is in line with the Bressol judgment.
According to the *Bulgarian* legislation on higher education EU nationals are treated equally to Bulgarian nationals concerning admission to higher education.
The *Czech* Act on University Education uses the words "a condition of admissions of foreigners that must respect obligations which are resulting from binding international treaties". Even if the term "international treaties" may be seen as aimed at students who are admitted under development cooperation agreements, it may at the same time be

interpreted as including commitments under EU law. Thus it can be argued, prima facie, that the relevant Czech legislation can be regarded as being fully in compliance with the Bressol judgment, as it does not stipulate any limitations on free movement of university students, but on the contrary, it reaffirms the obligation to comply with international commitments.
According to the *Estonian* legislation there is no restriction in order to enter the universities. According to the Universities Act everyone, who has graduated the secondary school or has an equal education can apply for studies at the university. There are no restrictions based on citizenship. The only requirement is the ability to understand the language of instruction.
The enrolment in *Italian* university courses is open to EU and Italian students on an equal footing. A foreign secondary school qualification is considered as equivalent to an Italian one, if it allows access to the university in the State that awarded it. Italy operates a numerus clausus system for regulating access to a limited number of university courses, but in that case again, equality of treatment is granted.
The *Latvian* Education Act provides the right to education to a Union citizen without requirements on the possession of a residence permit.
In *Poland* the numerus clausus for medical studies applies equally to Polish citizens and EU citizens and members of their families, irrespective the length and legal basis of their stay in Poland.
The application of Bressol in *Portugal* is not problematic. The numerus fixus policy for medical and paramedical courses is based on objective criteria.

Ibrahim and Teixeira:
The existing legislation and regulations in the *Netherlands* and *Portugal* are considered to be in conformity with the Ibrahim and Teixeira judgments.

Zambrano:
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.
The *Portuguese* system might be in line with the Zambrano judgment as well. Although the rapporteur notes that the mandatory application of the Zambrano judgment is strengthened by the Portuguese Constitution as it establishes a fundamental and in no way to be restricted right for every Portuguese national to stay and reside in the Portuguese territory. It stays unclear to the present writers whether this would also mean that third-country national parents of a Portuguese minor child could derive a residence right and/or a work permit from that constitutional right of their child.
It is the *Swedish* rapporteur's opinion that a Swedish court would not have any problems following the Zambrano judgment in cases similar to the Zambrano case.

7.6. Reported legislative and policy impacts of the judgments

***Vatsouras*:**

In the *Netherlands* the Vatsouras decision led to questions in Parliament. According to the government the Dutch benefit based on the Work and Social Assistance Act (Wet Werk en Bijstand, WWB) should be seen as a social assistance benefit and not as a benefit to facilitate access to employment like the German benefit as disputed in Vatsouras.

***Bressol*:**
On 31 May 2011, the *Belgian* Constitutional Court issued its judgment in the Bressol case. The limitation of 30 per cent of non-resident students is confirmed in the curricula of physiotherapy and veterinary medicine (the two most important curricula in terms of number of students), but invalidated in the other medical and paramedical curricula. The current Belgian Minister for Higher Education has welcomed this decision.
The *Netherlands* has not witnessed any legislative or policy amendments in 2010, but the case influenced the jurisprudence on the drawing system for medical studies. The Secretary of State for Higher Education announced this summer (2011) in the Strategic Agenda for Higher Education that he will gradually abolish the drawing system.

***Metock*:**
Legislative and/or policy amendments due to Metock were reported in *Austria, Cyprus, Czech Republic, Denmark, Germany, Finland, France, Ireland, Italy, Lithuania and United Kingdom*.
In *Austria* the Metock decision led to an amendment of the relevant provisions of the Settlement and Residence Act 2005. In recent decisions the Constitutional Court and the Administrative Court changed their previous case law and followed the Metock judgment. There is no need for legal stay in another Member State anymore and the date of starting the relationship is irrelevant.
In *Cyprus* the director of the Civil Registry and Migration Department issued a circular, which discussed the legal significance of Metock: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in Cyprus or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the CJEU decision.
Although the *Czech* legislation is mainly in compliance with the Metock judgment, an eventual problem which might have caused non-compliance was solved in 2010 by an amendment to the Immigration Act (see for details the national report).
In *Denmark* the Metock judgment resulted in a significant change of administrative practice. In addition to abolishing the requirement of previous lawful residence, the personal scope of application of the EU rules concerning a residence right for third-country national spouses of Danish citizens was widened. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means. Thus, although this issue was not expressly dealt with in the Metock judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the

Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.
Section 153 of the *Finnish* Aliens Act was amended so that the requirement of previous lawful residence, which was previously contained in this provision as a precondition for the residence of EU citizens' family members, is no longer applied. The amended provision entered into force on 1 July 2010.
In *France* a Circular of 10 September 2010 has particularly clarified the scope of the Metock judgment according to the French authorities. The provisions of CESEDA does not subordinate the right of residence of a family member to the legality of his entry into France. Nevertheless, there is still conflicting case law concerning the requirement of legal entry into France in order to obtain a residence permit as spouse of an EU citizen.
In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the Metock judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. All family relatives of Union citizens possess a right of entry and residence provided that they can prove their status as family relatives and fulfill the requirements laid down in Directive 2004/38. Therefore, a third-country national family relative of a Union citizen must not fulfill the general requirements of the Aufenthaltsgesetz (basic knowledge of German etc.).
In *Italy* too the law has been put in line with the Metock judgment by the amendments brought by Decree-Law no. 89 of 2011. Before the amendments, the entry visa had to be attached to the request for residence card, in case of residence for more than three months or of permanent residence, and compliance with the requirements for entry was necessary for residence for up to three months. The amendments repealed the requirement for the entry visa, and a valid passport will be the only document that the non-EU family member will need. Contrary to France, the first instance courts followed the Metock judgment from the beginning and annulled the decisions of refusal of residence due to the absence of an entry visa, or in case the applicant overstayed in the country.
The *Irish* Government reacted swiftly to the Metock judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed.
The *Lithuanian* legislation was unclear and implied indirectly the requirement of a previous stay in another EU country, however the authorities were motivating that this provision only applied to Lithuanian citizens who did not yet exercise their freedom of movement. The draft new aliens law of 2010 provides explicitly in Article 100(2) that family members of Lithuanian citizen who are not EU nationals are entitled to obtain EU temporary residence card if they arrive together with or join a Lithuanian national who has exercised the right of free movement in the EU.
The *United Kingdom* authorities have finally amended the EEA Regulations to reflect properly the Metock judgment as regards spouses, minor children, descending and ascending dependent relatives in the direct line.
A possible retrospective application of Metock was discussed in the *Cypriot* and the *Irish* reports. In Cyprus a retrospective application is denied. In Ireland negative decisions will be reviewed from 28 April 2006 on (the coming into force of Directive 2004/38).

The issue of reverse discrimination in this respect is explicitly discussed in the *Austrian* and *Italian* reports.
Finally, due to Metock the focus shifted in some Member States to measures to prevent abuse and fraud, particularly in *Denmark, France, Hungary, Ireland, Lithuania, the Netherlands* and *Sweden.*
Initiatives for an amendment of Directive 2004/38 are reported in the *Danish, Dutch* and *Irish* reports.

Ibrahim and Teixeira*:*
Legislative and/or policy amendments due to Ibrahim and Teixeira are reported in *Denmark* and *Poland*.
In *Denmark* Section 14 (4) of the EU Residence Order already provides for the residence right of the child and the parent in such situations. The adjustment of the administrative practice affects mainly the issue of sufficient resources. The precise scope of the adjustment does not seem to have been officially clarified, just as the criteria for reconsideration of applications rejected under the past practice appear less than clear.
In *Poland* a new Article 19a has been added to the Act on entry, which came into force on May 25, 2011. According to the new provision, a child of an EU citizen, who has been working on the territory of Poland but has not retained his right of residence, shall still have a right to stay in Poland until the end of his/her studies. In such a case, a parent who has custody over the EU citizen's child, shall have the right to accompany the child until his/her majority or even longer, if the child still needs assistance of the parent in order to continue and to finish his/her studies.

Zambrano:
Already in 2006 the Belgian Nationality Code was modified in order to restrict the access to the Belgian nationality iure soli. Another (direct) consequence of the Zambrano judgment will be to verify the compatibility of reinstating reverse discriminations with the Zambrano judgment. The Constitutional Court will possibly be asked to look into this question.
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. It will also review cases which are currently in the residency application process, where there is a possibility of deportation, and examine cases where Irish citizen children have already left the State because their parents were refused permission to remain.
The *UK* Border Agency is yet to comment on the Zambrano judgment or give guidance on its implementation. A recent interpretation of domestic law strengthened the rights of citizen children to live in the UK with their non-citizen parents. However, the findings in

the Zambrano judgment go further and it is likely that policy towards such children will have to be substantially reviewed.

Concluding:
With the exception of the Metock judgment in several Member States and to a lesser extent the Ibrahim and Teixeira judgments (in Denmark and Poland) and Zambrano (in the former ius soli countries Ireland and UK), 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.

7.7. Reported references by national courts and other judicial bodies

***Vatsouras*:** Germany (MS of referring court) and Spain.

Bressol: Belgium (MS of referring court), Italy and the Netherlands.

***Metock*:** Austria, France, Hungary, Ireland (MS of referring court), Italy and the UK.

Ibrahim and Teixeira: Austria and the UK (MS of referring court).

***Zambrano*:** Austria, Bulgaria, Ireland and the Netherlands.

Concluding:
According to the national reports the selected CJEU decisions (with the exception of the Metock judgment) do only play a limited role in the national case law of the Member States. Their influence is mainly limited to the country in which the referring court is situated. 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.

ANNEXES: NATIONAL REPORTS BY JUDGMENT

1. National reports on Vatsouras (C-22/08)

According to the *Austrian* report the Vatsouras case was not subject to academic discussion nor to media news. This might be an indicator for the fact, that the problems of this case are not relevant for Austria. Labour law experts and social law experts confirmed that this ruling is not a specific topic for Austria. It is not possible to list the benefits for EU job seekers; they are treated as Austrians and have access to the same benefits.

The follow up in *Belgium* is unclear. However, according to the rapporteur, it is necessary to insist on the wide definition of the notion of worker given by the Court in this case. Although the notion is generally well respected in practice, it is sometimes necessary to repeat the wide definition of the notion.

The *Bulgarian* rapporteur notes as a preliminary remark that there is no transposition in Bulgarian law of Article 14 (4) (b) of the EU Citizens Directive providing that "Union citizens and their family members may not be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged".

Under the Bulgarian Law on Social Assistance allowances for job seekers are considered 'social assistance', irrespective of the interpretation of the CJEU in the Vatsouras case that "benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting social assistance". So far in the database of the Supreme Administrative Court of Bulgaria there are no related cases involving EU citizens and their family members. nor the doctrine in the CJEU's decision in *Vatsouras* has been raised as an issue. The practice in this matter will continue to be an object of follow-up reporting.

The case of Vatsouras has not been referred to by Bulgarian courts in 2010/11.

The question of how *Cypriot* authorities claims to public assistance by job-seekers and those who have limited amount of the remuneration and/or the short duration of a professional activity, which is insufficient to ensure its holder a livelihood is an open one. The Vatsouras case may be illuminating in clarifying possible confusion in the practices by Cypriot authorities: work which had lasted barely more than one month was considered to be professional activity, following an overall assessment of the employment relationship, which may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 45 TFEU. The issue of access to work and benefits after 3 months for job-seekers has not been tested in Cypriot courts. It is not clear how long job-seekers may stay

without complying with formalities; presumably indefinitely so long as they do not seek recourse to public funds. Social security officers claim that the principles do not really have bearing on contributory unemployment benefits, as these refer to general public benefit provisions to job-seekers.

Under the *Czech* legislation, the level of remuneration and duration of the activity are not decisive for the status of a person as a worker; additionally the Czech courts would have to apply the EU understanding of the notion of „worker". As to the right to receive benefits in favour of job-seekers, under the law applicable to unemployment benefits (Act No. 435/2004 Coll., Employment Act), EU citizens and their family members are in general treated equally with Czech nationals (Sec. 3) and the provision stipulating concrete preconditions for receiving unemployment benefits (Sec. 39) does not contain any restrictions in this regard.

A job-seeker is entitled to other – social – benefits too.

According to Section 12 a of the Danish Act on Active Social Policy, EU/EEA citizens residing in *Denmark* as first-time job seekers on the basis of Community law, as well as persons with a right to stay until 3 months without administrative formalities, are entitled to no other economic assistance than coverage of costs related to the return to their home country. Furthermore, Section 3 (2) of the Act makes it a precondition for entitlement to benefits of longer duration – defined as more than half a year, cf. Section 3 (3) – that the recipient be either a Danish citizen or an EU citizen or a family member who has a right of residence under EU law, or have such entitlement under an international agreement.

The decisive question is whether these provisions are administered on the basis of a correct understanding of the EU rules on residence right, in particular the criteria for acquiring the status of worker and the delimitation of the category of 'first-time job seekers'. If so, this legislation should not give rise to violations of Articles 24 (2) or 27 of Directive 2004/38 or of Article 7 (2) of Regulation No. 1612/68. Against the background of the Vatsouras judgment there would seem to be situations in which certain benefits under the Act on Active Social Policy could be considered as facilitating access to employment, so that extensive application of Section 12 a on the basis of a wide understanding of 'first-time job seekers', resulting in refused applications for social assistance, might not be compatible with EU law.

According to the National Labour Market Authority ('Arbejdsmarkedsstyrelsen'), the Danish authorities have analysed the impact of the Vatsouras judgment and reached the conclusion that it will not necessitate any modifications of the Danish social assistance system, and therefore no amendment of Section 12 a of the Act on Active Social Policy is foreseen. As regards social assistance ('kontanthjælp') under the Act on Active Social Policy, the National Labour Market Authority holds that this benefit must likewise be considered as 'social assistance' within the meaning of Article 24 (2) of Directive 2004/38.

This ministerial assessment appears to be appropriate as far as the general social assistance system under the Act on Active Social Policy is concerned. Thus, provided that Section 12 a of the Act is applied exclusively to genuine 'first-time job seekers', this provision does not affect those job seekers having established 'real links with the labour market' in Denmark. At the same time, it should be mentioned that certain benefits under

the Act on Active Social Policy, or under related legislation providing for activation measures for unemployed persons, may be considered as facilitating access to employment in the Danish labour market and may therefore be accessible also to EU job seekers who established such links.

As the impact of the Vatsouras judgment on the application of the Act on Active Social Policy has apparently not yet been considered in cases decided by the National Social Appeals Board, there may be need for clarification towards the municipalities in charge of the administration of the Act.

In *Estonia* the Vatsouras judgment could have an impact in two situations. In the first place by the definition of "worker" in the meaning of the EU treaty. Although the main criteria for determining an employee are more or less the same, the broad meaning of a worker differs from that applied in Estonia. So far the Estonian case law is not confronted with the broad meaning of a worker in the context of the TFEU. The second important impact concerns the interpretation what a social assistance benefit is. If a benefit is intended to "facilitate" access to the employment market this benefit should be excluded from the social assistance benefit. There could be the case where the local government can guarantee the different benefits also for providing the better access to the labour market. The Vatsouras judgment would lead to the situation where such benefits are not any more viewed as social assistance benefits and should be granted to everyone.

According to the information received from the Finnish Social Security Institute, the *Finnish* system is in line with the Vatsouras judgment. Section 1 of the Act on Unemployment Security (Työttömyysturvalaki 1290/2002), defines the aims and scope of the unemployment security system. Already short term employment guarantees access to the benefits covered by this Act, provided that the person concerned resides in Finland.

The *French* report does not cover the Vatsouras judgment, but only mentions the Circular of 10 September 2010 concerning the implementation of the Antonissen judgment. Job seekers will receive a residence permit "EC-Job Seeker" for a period of three month renewable. It is not clear from the report whether and to which extent the holder is entitled to social benefits.

In *Germany* the Vatsouras judgment has not solved the diversity among German social courts on the issue whether unemployment benefits must be granted to Union citizens even though they fall under the exclusion clause whereby foreigners who are staying in Germany exclusively for the purpose of seeking labour are excluded from unemployment benefits as well as social assistance. It is still controversial whether the benefit concerned does qualify as social assistance or as social benefit in order to facilitate the access to the labour market. There is as yet no official pronouncement on the issue.

There is no particular influence of the Vatsouras judgment in *Greece*. Most social benefits do not depend on residence, but on employment in Greece. On the other hand, Article 1 of Law 1296/1982 provides that Greek citizens or people of Greek origin older than 68 years and not having sufficient income are entitled to a special pension and to free medical care. Therefore this entitlement is conditional on Greek nationality and

constitutes a discrimination between Greek and EU citizens concerning the conditions of entitlement to this allowance and to medical care.

Hungarian law makes no distinction as regards the receipt of unemployment benefits on the basis of the legal status of the migrant. If the person had a legal employment and obtained the registration certificate, s/he is eligible for benefits.

The *Irish* job seekers allowance is regarded as a social assistance payment which is subject to the habitual residence condition. Five factors have been set down by the Court as relevant in determining whether a person is habitually resident:

- Length and continuity of residence in Ireland or in any particular country;
- Length and purpose of any absence from Ireland;
- Nature and pattern of employment;
- Applicant's main centre of interest;
- Future intentions of applicant as they appear from all the circumstances.

There is a presumption under the relevant legislation that a person is not habitually resident where he or she has not been present in the State or any other part of the Common Travel Area for a continuous period of two years. However, notwithstanding this presumption, all the circumstances of the case, in particular the five factors listed above, are to be taken into account. A person coming to seek employment (rather than to take up an actual job offer) is unlikely to be habitually resident. The application of the condition in individual cases is opaque. Cases are not routinely published, although "cases of note" on the application of the condition have been published on the Internet. It is clear that even long periods of residence (5 years or more) will not be regarded as habitual where the family of the individual seeking support remains outside Ireland, even if a couple are effectively separated.

With the Vatsouras case, it has to be asked whether obtaining the job seeker's allowance can be subject to a habitual residence condition in Ireland. If, as a matter of EU law, it is to be regarded as "a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State", any requirement that a "genuine link" or connection be established between the applicant and the Irish employment market can only mandate a waiting period long enough for the authorities to be sure that the applicant is genuinely seeking work. The question does not seem to have been raised in the national courts or otherwise addressed in Ireland.

Italy does not provide job seekers with benefits comparable to the one discussed in the Vatsouras case. In general, Italy prefers to encourage employers to hire particular groups of job seekers by granting them tax exemptions. In addition to that, instead of paying economic benefits to job seekers, Italy offers them benefits in kind, such as occupational retraining, reinstatement or re-employment. Putting in place a comprehensive unemployment benefit system is not by chance one of the Council's recommendations to Italy contained within the broad guidelines for the economic policies of the Member

States and the Community and on the implementation of Member States' employment policies.[3]

Latvian law too does not provide for any benefits in favour of job-seekers.

With regard to the Vatsouras judgment, the *Lithuanian* Law on Unemployment Social Insurance of 2003 provides for an unemployment benefit, which would be applicable also to nationals of other EU Member States. There might however be problems of access if the foreigner does not have a work record of 18 months within the last 36 months.

The *Luxembourg* Employment Code (Code du travail) provides in article L.521-3, point 2, among other conditions, that the job seeker who applies for unemployment benefits must have had his residence on the Luxembourg territory at the moment of notification of the dismissal in case of an open-ended contract and at the latest 6 months before the end of the contract in case of a fixed term contract, and have lost his last job in Luxembourg, notwithstanding rules of EU regulation or bi- or multilateral conventions. Thus, an EU citizen who is a Luxembourg resident and who has lost his employment under the aforementioned conditions can get the same benefits as a national, be it unemployment benefits or health care.

As a consequence, the very numerous commuters who are currently employed in Luxembourg cannot profit from Luxembourg unemployment benefits, since they are not Luxembourg residents. In case of dismissal, their benefits will be paid by the authorities of their residence Member State (France, Germany and Belgium).

Concerning EU job seekers who are recognised as such in their home Member State and who wish to seek employment in Luxembourg are allowed to do so under EU Regulation 883/2004 of 29 April 2004. This means that Luxembourg authorities will pay his benefits as long as he is entitled to unemployment benefits under the legislation of his home Member State (place of residence), and up to three months. The benefits paid by Luxembourg authorities will be reimbursed by the authorities of the residence country. This possibility is subject to the condition that the job seeker has been registered with employment authorities in his home country for at least 4 weeks, except if the home country provides for a shorter period.

After this period of three months, the job seeker loses his right to benefits in Luxembourg, so that he must make sure to return to his home country before this period expires in order to continue to get the benefits.

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

In the *Netherlands*, the Vatsouras decision led to questions in parliament (TK 2009-2010 Aanhangsel van de Handelingen No. 684). The benefit enjoyed under the Dutch Wet

[3] See on Vatsouras L. Raimondi, Cittadini dell'Unione europea in cerca di lavoro e principio di non discriminazione: osservazioni in margine alla sentenza Vatsouras, *Il diritto dell'Unione europea*, 2010, 443-462.

Werk en Bijstand (WWB) is classed as a social assistance benefit and not as a benefit that facilitates access to employment, like the German benefit. The government confirmed that an economic active EU citizen who has performed effective and genuine activities and has become involuntary unemployed has a right to a WWB benefit during the six months period he retains his status as a worker (according to Article 7(3)(c) Directive 2004/38/EC). After that period the Immigration and Naturalisation Service decides on an individual basis whether a WWB benefit justifies termination of the right of residence because the EU citizen has become an unreasonable burden on the financial means of the host-Member State. In April 2011 there was an announcement that the rules on expulsion of EU nationals on the ground of reliance on social assistance (laid down in Aliens Circular B.10/4.3) will be made more restrictive (TK 29407, no 118).

Poland does not provide financial allowances for job seekers who have not worked for a certain period and therefore who may not be qualified as unemployed (and seeking a job simultaneously). As regards non-financial support for job seekers, such support is granted to both Polish and EU citizens on an equal footing.

In *Portugal*, according to Article 20(3) of Law 37/2006, which transposes Article 24(2) of Directive 2004/38/CE, EU citizens and their family members are not entitled to solidarity allowances during the first three months of residence or during a longer period, if the EU citizen entered the Portuguese territory to seek employment. Since, on one hand, the Portuguese legal order does not specifically foresee job seeker's allowances. Furthermore, the allowances established by Law 13/2003 - on the so-called social income for insertion - are globally considered as 'social assistance', although it is not excluded that they can also be granted to job seekers. According to the rapporteur the fact that Article 6(1)(c) of Law 13/2003 also enumerates as prerequisite for the entitlement to such allowances 'the active availability to work' does not seem sufficient to lead to the conclusion that Portugal is obliged to confer entitlement to these allowances to EU nationals seeking employment for the longer period during which they have the right to reside, even if it has been possible to establish a real link between the job seeker and the Portuguese labour market and as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. As a matter of fact, the constituent elements of the "social income for insertion", created by Law 13/2003 and in particular its purposes and the conditions subject to which it is granted, even if analysed according to its results and not according to its formal structure, are not intended to facilitate access to the labour market but to grant living conditions with a minimum of dignity.

In *Romania* the Vatsouras judgment presents a theoretical importance for future regulations. No litigation or complaints related to benefits of a financial nature intended to facilitate access to the labour market are reported.

Article 24 of the Directive 2004/38/EC was not transposed in *Slovakia*. Therefore, according to the rapporteur, the Vatsouras judgment is not relevant for Slovakia.

According to the *Slovenian* rapporteur the factual assessment of real and genuine activities is to the national court. The regulation in the field of social security sufficiently guarantees the elimination of "benefits tourism".

In *Spain* the Vatsouras judgment was cited in a Decision of the High Court of 1 June 2010 in order to annul any expressions which limited the rights or benefits of the family members of citizens of the EU, EEA and Switzerland.

Concerning Vatsouras, in *Sweden* the crucial matter is if the applicant as job seeker was considered to be entitled to benefits reserved for workers or national job seekers. So far – and still in 2011 – the cases have not been commented on in the Swedish debate. Until there is administrative or legal practice going in another direction, the rapporteur does not find there is a risk for incongruence between the CJEU case law and Swedish law on the matter.

The position is unclear as to how the *United Kingdom* authorities are dealing with the relationship between social advantages under Article 7(2) and social assistance under Directive 2004/38 and considered in Vatsouras.

The general situation as regards Article 7(2) Regulation 1612/68 is that it is claimed by EEA nationals primarily in respect of social benefits. On 1 May 2004 the UK authorities introduced a test of the 'right to reside' which EEA nationals must pass before they can claim social benefits. All EEA nationals are affected by the test which may apply to exclude them from benefits when they are unable to work because of illness, disability or childcare responsibilities unless they can show that they are a 'qualified person' with a right to reside under EEA law as applied in UK law. The UK courts have held that lawful presence in the UK is not the same as a right to reside. The courts have also rejected the principle that EEA nationals can acquire a right to reside directly from EU law as citizens of the Union. This means that EEA nationals are likely to be refused social benefits in the UK unless they can show that they have a positive qualifying right to reside within the terms of the relevant benefit regulation. Job seekers are unlikely to satisfy that test.

Further, an EU citizen/EEA national job seeker in the UK is not eligible for social housing or homelessness assistance, Housing Act 1996, ss 160A and 185, and the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294, Regs 4, 6. In addition, s 54 and Schedule 3, paragraphs 1 and 5 of the Nationality, Immigration and Asylum Act 2002 provide for the exclusion of an EU citizen/EEA national (job seeker) from receiving assistance (including assistance with accommodation) under s 17 of the Children Act 1989 where he or she would fall to be assisted together with a child, though there is an exception under paragraph 3(b) if this exclusion would lead to a breach of a person's rights under the EU Treaties. In a 2005 judgment, R (Cone) v Lambeth LBC, the England and Wales High Court held that 'The fact that a person is an EU national does not automatically apply [the exclusion]. The exception in 3(b) should always be noted. For a work seeker, as opposed to a worker, in housing and Children Act cases it is likely that there will be no material right which has to be taken into account which overrides the exclusion in paragraph 5. But for a worker, and specifically for a worker who for whatever reason loses his job and thus needs to fall back on some sort of benefit, the situation is different. Indeed, Article 7(2) of 1612/68

explicitly refers to that possible situation.' The findings in the case of R(Conde) v Lambeth as regards work seekers/job seekers may require to be revisited in the light of the Vatsouras judgment.

2. National reports on Bressol (C-73/08)

In *Austria* there have been a few annotations to the Bressol decision.[4] But neither these articles nor the Austrian Federal Ministry for Science nor the Heads of the Austrian universities see specific influence on the Austrian situation. Austria has an agreement with the Commission as regards access to the medical studies because a lot of Germans want to study that in Austria (and the Germans are a majority in a few studies (e.g. Psychology at the University of Salzburg). In autumn 2011 Austria expects an enormous influx of Germans because of the abolition of military duties in Germany and reducing the compulsory education in some German Laender. To be able to do a little bit of planning, the University Act was amended: everybody who wants to start to study at an Austrian university has to do an online inscription until the end of August. This counts for Austrians as well as for other Union citizens or third-country nationals. In Austrian newspapers and at the universities´ homepages there is a hint on that limitation of access to studies. Irrespective of that procedure Austria has to negotiate with the Commission about a prolongation (or extension) of the agreement regarding the possibilities to limit access to the universities for Non-Austrians.

The *Belgian* rapporteur recalls the Opinion of Advocate General Sharpston in which she pushed for a negotiated solution, complying with the Treaty, between the host Member State and the home Member State in situations where particularly high volumes of student mobility cause real difficulties to the host Member State.

While the Bressol case was still pending before the Belgian Constitutional Court, the French Minister for Higher Education, Ms Valérie Pécresse, visiting Belgium, gave several interviews to the Belgian press. She detailed the long-term policies she wants to implement to deter French students from studying in the French Community of Belgium. The studies of medicine and pharmacy – and, in a more distant future, all paramedical studies - could be merged into a curriculum of "Health". Thus, those not getting the top spots in the competitive entrance examination (leading to the studies of medicine, pharmacy and midwifery) could be redirected to study nursing or physiotherapy. Bridges back to medicine would also be created. The Minister also wants to encourage the development of multidisciplinary curricula in health law, health economics. Notwithstanding these declarations, no formal negotiations took place in 2010-2011 between France and Belgium.

On 31 May 2011, the Constitutional Court issued its judgment in the Bressol case. The limitation of 30 per cent of non-resident students is confirmed in the curricula of physiotherapy and veterinary medicine (the two most important curricula in terms of number of students), but invalidated in the other curricula (see for the curricula concerned: footnote 1).

The current Belgian Minister for Higher Education, Mr. Jean-Claude Marcourt, has welcomed this decision. The Federation of French speaking students (FEF) has

[4] *Kaupa/Topal-Gökceli*, Aktuelle Rechtsprechung zur Regulation des Hochschulzugangs, ZfRV 201, 244 pp; *Winkler*, Unionsrecht und Hochschulzugang nach dem Urteil Bressol des EuGH, Festschrift Klecatsky (2010) 847 pp; *Ruhs*, Die belgische Quotenregelung und das Urteil des Gerichtshofs in der Rechtssache Bressol, zfhr 2010, 99 pp; *Balthasar*, "Nichtdiskriminierung und Unionsbürgerschaft" in einem Staaten-verbund", ZÖR 2011, 41 pp.

judged it "balanced" since it ensures much of the principle of free movement and protects public health and finances of the French Community. The FEF even advocates for an extension of the Regulation's scope to cover medicine, also facing an influx of foreign students.

According to Article 8 (7) of the *Bulgarian* Act on Higher Education, the admission of students, doctoral students and researchers who are citizens of EU Member States or of EEA states, is realized under the conditions and procedure provided for Bulgarian nationals. No exceptions on public health grounds are envisaged in this regard.

Universities in Bulgaria adopt autonomous rules on their functioning, including admission of students. So far however there is no case law indicating practical problems in this regard.

The case of Bressol has not been referred to by Bulgarian courts in 2010/11.

There is little bearing on the *Cypriot* context by the principle established in Bressol. It does not have any significant immediate relevance to the Cypriot context. It may have a broader application in the case of Greek-speaking students in limited course number, where mainland Greeks or other Greek-speaking union citizens wish to take up. So far there have not been any such restrictions.

In the *Czech Republic* the relevant legislation is the Act on University Education. Its Sec. 48 – Sec. 51 deals with admission of students. There are no restrictions for admission of students to universities based on their nationality or citizenship, but there might be admission criteria determined by the schools (Sec. 49 (2). The school may determine different criteria for those who studied abroad or at other schools in the Czech Republic (it applies to all students regardless of their citizenship). The school must also respect obligations resulting from binding international treaties when it admits foreign students. The Act uses the words "a condition of admissions of foreigners that must respect obligations which are resulting from binding international treaties", so it may be said that the law distinguishes between two categories of students – foreigners and others. However, neither the Sec. 49(2) nor any other provisions of this or any other law contain the categorisation into resident-students and non-resident students. Even if the term "international contracts" may be seen as aimed at students who are admitted under development cooperation agreements, it may at the same time be interpreted as including commitments under EU law. Thus it can be argued, prima facie, that this section and also the relevant Czech legislation can be regarded as being fully in compliance with the Bressol judgment, as it does not stipulate any limitations on free movement of university students, but on the contrary, it reaffirms the obligation to comply with international commitments.

According to the *Danish* rapporteur there is currently no information available on possible developments.

The case Bressol would not have any impact in *Estonia*. According to the Estonian legislation there is no restriction in order to enter the universities. According to the Universities Act § 21 everyone, who has graduated the secondary school or has an equal education can apply for studies at the university. There is no restrictions based on citizenship. The only requirement is the ability to understand the language of instruction.

As the majority of lectures and seminars will held in Estonian, the ability of understanding the Estonian language is demanded.

Whether in the light of the Bressol case the Estonian Government will establish some restrictions based on the principle of public health or national security is doubtful. At the moment the legislation in force does not foresee any restrictions based on nationality (directly or indirectly).

In *Finland* there are no arrangements like that at issue in the Bressol case and therefore this case has not had and is not likely to have any influence in Finland.

The *French* report did not go into the details of Bressol.

No report covering Bressol was received from *Germany*.

There is no particular influence of the Bressol judgment on *Greece* as students are admitted to universities if they succeed to particular exams. European citizens are entitled to participate to these exams.

In *Hungary* access to Hungarian-language high-level education is granted to EEA nationals and their family members without discrimination. In free of charge medical education almost 100 percent of the students are Hungarians – because of the language.

The *Irish* report did not cover Bressol.

The enrolment in *Italian* university courses is open to EU and Italian students on an equal footing. A foreign secondary school qualification is considered as equivalent to an Italian one, if it allows access to the University in the State that awarded it.

Italy operates a numerus clausus system for regulating access to a limited number of university courses, but in that case again, equality of treatment is granted. It has been pointed out that the Italian system differs from the Belgian one in that in Italy the yearly quota for access to medicine courses depends only on the objective of ensuring the training quality standard of university education, and not on the future availability of professionals within the territory.[5]

For courses whose access is limited, the quota annually assessed by Ministerial Decrees is reserved to Community citizens (which encompass both Italian and EU citizens), and to third country nationals resident in Italy. On the contrary, a foreign students' quota is allotted yearly to non-EU nationals residing abroad. Therefore, a citizens of the Union even not residing in Italy has the right to apply on an equal footing with Italian nationals.

[5] S. Foà, Numero chiuso universitario in area medica e quote riservate per residenti: la previsione deve essere indispensabile per la qualità del servizio pubblico sanitario, *Foro amministrativo: Consiglio di Stato*, 2010, 1808-1817 (survey of the judgment and analysis of its implication for Italy). See also: C. Spinelli, Studenti non residenti nello Stato membro e accesso all'istruzione superiore medica e paramedica, *Il lavoro nella giurisprudenza*, 2010, 716-719 (brief survey of the judgment).

The administrative court of first instance decided that a student enrolled in a medicine course in another EU Member States can be enrolled in the second year of an Italian course provided that free places are available, without passing any admission exam.[6]

Article 3 of the *Latvian* Education Act provides the right to education to a Union citizen without requirements on the possession of a residence permit. [7]

There are no other measures restricting access to any of the study programmes in Latvia on the grounds of residency in Latvia.[8]

As appear form the facts of the Bressol case the reason for the adoption of special measures was 'the influx of French students who turn to the French Community, because higher education there shares the same language'.[9] In Latvia the language is the main obstacle for foreign students. The studies in Latvia are carried out almost exclusively in Latvian. Consequently there has been no need in Latvia for implementation of the measures discussed in the Bressol case.

The *Lithuanian, Luxembourg's* and *Maltese* reports do not cover Bressol.

In the *Netherlands* 2010-2011 has not witnessed any legislative or policy amendments to conform to the CJEU's ruling in the Bressol case, but the judgment played an important role in the decision of 7 September 2011 of the Judicial Division of the Council of State. The case concerned the following. The average final grade of Dutch diplomas determines the drawing class. Anyone who has an 8 or higher, is in class A and is therefore directly admitted. Someone with a foreign diploma is always assigned to drawing class C, which corresponds to an average grade between 7 and 7.5, regardless of school performance. An applicant with an excellent Belgian secondary school diploma wanted to study medicine in Maastricht and went to court when she was excluded.

The admittance procedure penalizes prospective students, who received their qualifications with very good results in another Member State than the Netherlands, since they are not entitled to direct access to a training. This difference in treatment between students with a secondary school diploma in the Netherlands and students who have graduated in another Member State thus leads in some cases to indirect discrimination. Accordingly the district court ruled that there was indirect discrimination on grounds of nationality. If they can demonstrate that their final grade average is comparable to an 8 or higher in the Netherlands, this should be tested by the Dutch authorities. This would require a legislative change.

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[6] Tribunale amministrativo regionale, Abruzzo, judgments 22-12-2010 no. 862; 18-1-2011 no. 9.

[7] OG No.343/344, 17.11.1998., as amended until 2010 OG No.205, 29 December 2010.

[8] Telephone interview with the head of Department of Policy of Higher Education of Ministry of Education and Science (21 June 2011).

[9] Paragraph 18 of the judgment.

So far the Ministry of Education would not go. On appeal, it argued that it is not practical to assess each degree from another EU Member State individually, also in view of the limited period between registration and the start of the academic year.

Nevertheless, the Council of State confirmed the decision of the district court and ruled that there is indirect discrimination. Practicality is no justification for this, because an accurate individual assessment is not necessary. The ministry could also assume a generic comparison of the figures.

The Secretary of State for Higher Education, Zijlstra, announced this summer (2011) in the Strategic Agenda for Higher Education that he will gradually abolish the drawing system.[10]

The *Polish* Act on higher education contains provisions that entitle the Minister of Health to issue a regulation limiting the number of students for medical studies. The restriction is a consequence of the educational possibilities of particular higher medical universities and the demand for graduates (Art.icle 6.3 of the Act). The Minister of Health publishes every year a regulation on the limits of students. The current Regulation was issued on 2 July 2009 (with amendments of February 21, 2011)[11]. There are limits for both Polish citizens and foreigners, but they differ substantially. The rule is that limits for foreigners are generally several dozen lower than for Polish citizens (as regards for instance general regular medical studies – as for June 2011 the limit for Polish citizens is 2942 and for foreigners 81). However, not all foreigners are subjected to these limits. The definition of foreigner shall be understood within the meaning of Article 43.3.3 of the Act on higher education. This provision covers foreigners other than EU citizens and members of their families. Also EU students and members of their families that do not possess a right for a permanent stay are not included in the restriction concerning foreigners. Therefore, the limits for Polish citizens apply equally to EU citizens and members of their families, irrespective length and legal basis of their stay at the territory of Poland. However, there is a residence requirement for migrant workers and members of their families. The Act on higher education states that migrant workers and members of their families may enroll, follow and pursue higher education in Poland according to the same rules as Polish citizens, if they are or have been employed in Poland and if they reside in Poland.

The application of the Bressol judgment, by which the CJEU accepts that Member States may protect themselves against large net-inflow of students, is not problematic in *Portugal.* First of all because medical and paramedical courses at higher education establishments are subject to a numerus fixus policy based on objective criteria. As a matter of fact the problem of the Bressol case arises especially where such courses are subject to an open admission policy. Furthermore, the Portuguese medical and paramedical higher education establishments, due to their geographical situation, cannot normally be attended by non-resident students from a neighbouring Member State with a similar language, like Germany-Austria, Belgium-France or Belgium-Netherlands.

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[10] Kwaliteit in verscheidenheid, Strategische Agenda Hoger Onderwijs, Onderzoek en Wetenschap, Ministerie van OCW, August 2011, p. 21.

[11] Journal of Laws of 2009, no 109, item 914.

There is no numerus clausus for enrolment by non-resident students in any programmes of study in *Slovakia*, therefore, the Bressol case has no impact on the situation in the country.

The *Slovenian* and *Spanish* reports do not cover the Bressol case.

Concerning *Swedish* law on the matter as well as considering the in-flow of foreign students to higher education, the rapporteur does not find the situation relevant for Sweden.

The *United Kingdom* report does not cover the Bressol case.

3. National reports on Metock (C-127/08)

In 2007 the *Austrian* Constitutional Court explicitly stated that Directive 2004/38 applies to third-country nationals only if he/she possesses a residence title and is within the country before he/she starts a relationship with a Union citizen. In 2008 the CJEU decided in its Metock-decision differently. There is no need for legal stay and the date of starting the relationship is irrelevant. As a consequence of the ruling, there have been amendments to the Austrian Immigration Law in the context of an Aliens Act Amendment ("Fremdenrechtsänderungsgesetz 2009" [FrÄG 2009]; Federal Law Gazette I 122/2009) becoming effective on the 4.12.2009 (especially Sect. 51-57 Settlement and Residence Act).
The Administrative Court mentioned the Metock judgment a few times. The Court stated that according to the Metock-judgment, it is not requested that a third country national married a (British) Union citizen before he came to Austria (Administrative Court 14.12.2010, 2008/22/0175). Directive 2004/38/EC is applicable to third country nationals, who came to Austria alone and started their family life with a (non-Austrian) Union citizen only after immigration (Administrative Court 14.12.2010, 2008/22/0846). But there are limits to that interpretation: a Turkish national married a German spouse but after a few months she left her husband and moved to Germany. The man referred to Directive 2004/38/EC; he argued that his status of "family member" is continued as long as they are not divorced. The Administrative Court (2.7.2010, 2007/09/0194) pointed on the specific facts of the case. According to the Metock-case, prior family relationship is no prerequisite for (re)unification. But what happens if the Union citizens leaves the country? The Administrative Court mentioned the Directive´s system: Chapter III residence, Chapter IV permanent residence. The later requires five years of permanent residence. The Turkish national was not able to proof permanent residence. But Chapter III-provisions do not grant a right of residence independent of the existing relationship or the Union citizen´s presence (except Article 12(3) Directive 2004/38/EC). Therefore the Court stated that the husband is not able to refer to Article 23 Directive 2004/38/EC. In another case the Administrative Court (9.11.2010, 2007/21/0558) overruled a residence ban: a Nigerian national married a Dutch woman in April 2005 (in Austria) and they lived together in Austria until September 2007 when she died. The Administrative Court confirmed that according to Article 12(2) Directive 2004/38/EC the widower is entitled to stay in Austria.

The Constitutional Court also referred to the Metock decision a few times. It followed the Metock judgment explicitly in its decision of 16 December 2009 (G244/09) as regards family members of Union citizens or Swiss citizens. But as regards third-country nationals with a relationship to an Austrian, it is a prerequisite that the Austrian stayed abroad before and made use of his/her free movement rights. According to the Constitutional Court this is a justified differentiation.

It seems that in the meantime the authorities are used to the Metock judgment and the new law.

There is no specific follow up in *Belgium* relating to the Metock judgment, as Belgium already applied this case-law to family members, irrespective of where the marriage was concluded (in Belgium or abroad). A regular residence permit abroad was not required when applying for family reunification. The Government Office for Aliens (GOA) does

not require, when applying the provisions of Directive 2004/38 implemented in the Belgian Aliens law, that family members of a EU citizen have a legal residence. Consequently, a third country national in irregular stay who marries, e.a., a EU citizen can achieve family reunification with him/her as far as s/he satisfies all the conditions of Directive 2004/38.

In *Bulgaria* the regulation of the entry and residence rights of the family members of EU citizens in Bulgaria 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)**.** Family members of Bulgarian citizens are excluded from the scope of that law. There is no explicit requirement in LERD of previous lawful residence in Bulgaria or in another Member State. According to Article 12(3) of LERD, the only documents that are required in order to be issued a residence card are a valid national passport, a document proving the family relationship, a document proving the residence of the EU citizen in Bulgaria and a paid administrative fee.
The judgment in the Metock case has not been explicitly cited by Bulgarian courts so far.

The Metock judgment had profound influence in legal and administrative practices in *Cyprus*. In January 2009 the director of the Civil Registry and Migration Department issued a circular[12], which discussed the legal significance of Metock: non-European spouses of EU citizens fall within the scope of implementation of the right of citizens of the Union and their family members to move freely and reside in the area of the Republic and therefore have a right to apply for a residence card, irrespective whether the marriage took place in Cyprus or abroad. Instructions were given to all officers of the Civil Registry and Migration Department for the immediate implementation of the CJEU decision; however in correspondence with the author the Ministry of Interior stated that "implementation of the decision did start."[13] The residence card is valid for five years. The Ministry of Interior[14] notes that according to the decision C-206 of CJEU, dated 12.2.2008, the Administration is not obliged to re-examine applications filed prior to the decision of the CJEU concerning the matter. The question "retrospective application of Metock" may not be in issue but there is a strong case for correcting situations and reconsidering cases where previous legal residence was considered to be a necessary requirement, as is happening in Ireland. Individuals may well use the Metock case for the courts to reopen their cases, not by claiming retrospective application of Metock but for correcting the current and future status.

According to the *Czech* report the Czech legislation is in compliance with the Metock judgment. The Czech Republic does not require a third country national who is a spouse of an EU citizen to have resided previously in another Member State before arriving to the Czech Republic in order to benefit from the provisions of the Directive 38/2004. A eventual problem which might have caused non-compliance with the judgment was solved by law No. 427/2010 Coll., which changed FoRa (a residence permit to third

[12] 30/2004/IV.

[13] Communication to the author from the Ministry of Interior, 9.9.2009.

[14] Communication to the author from the Ministry of Interior, 9.9.2009.

country national family member was issued only upon the condition that he/she was not recorded in the register of undesirable persons to which he/she might have been placed for reasons of illegal entry or stay in the past). Compliance of previous practice with the judgment was ensured by an Instruction of Minister of Interior. References to the Metock judgment were largely used in the explanatory report to the amendment of the Act on Residence of Foreigners in 2010 (then adopted as Act. No. 427/2010 Coll.).

In *Denmark* the Metock judgment resulted in significant change of administrative practice. In addition to abolishing the previous requirement of previous lawful residence, the personal scope of application of the EU rules concerning residence right for third-country spouses of Danish citizens was widened. Accordingly, the EU rules can now be invoked by a Danish citizen who has resided in another Member State as worker, self-employed person, service provider, as a retired worker or self-employed or service provider, or as a seconded person, student or person with sufficient means. Thus, although this issue was not expressly dealt with in the Metock judgment, the adjustment of administrative practice in this regard was decided as an indirect consequence of the judgment, probably in order to prevent further political and legal controversy over the Danish implementation of the EU rules pertaining to the exercise of free movement rights by citizens upon return from another Member State.

At the same time various measures were taken to prevent abuse of the EU rules on residence rights, in particular those concerning third country national family members. As regards Danish citizens returning from another Member State, it is stipulated that the principal person applying for a registration certificate or residence card for family members must declare to have established genuine and effective residence in the host country. If there are reasons to assume that this is or was not the case, the Danish citizen is required to submit evidence of the residence established in the other Member State. A non-exhaustive list of possible documentation has been laid down in administrative guidelines, and in principle the requirement should not become unreasonable or insurmountable. In practice, however, in some cases forms of documentation appear to be requested that can be difficult to meet.

The Metock judgment is not directly applied in *Estonia*. At the same time there are no obstacles for non-Member States' citizens to join the migrant worker without any requirement to stay or reside legally in another Member State. As the Citizen of European Union Act in this context is the direct translation of the Directive, this means that the interpretation should be in line with the Metock decision. This means that Estonia has to apply the principle according to which, third country nationals can directly join the migrant worker of the EU without any requirement to be legal resident in another Member State of the European Union. On the website of Citizenship and Migration Board (CMB) there is no official link to the Metock decision or at least an explanation of the decision and its consequences.

Section 153 of the *Finnish* Aliens Act was amended so that the requirement of previous lawful residence, which was previously contained in this provision as a precondition for the residence of EU citizens' family members, is no longer applied. The amended provision entered into force on 1 July 2010.

According to information received from the Legal Department of the Ministry for Foreign Affairs, the visa authorities have since the 5th of April 2010 applied Chapter III of the Visa Handbook 2010, which is considered to reflect the Metock judgment correctly. Hence, the requirement of previous lawful residence is no longer applied as a precondition for being treated as an EU citizen's family member in the context of visa procedures

In *France* a Circular of 10 September 2010[15] has particularly clarified the scope of the Metock judgment according to the French authorities. The provisions of CESEDA does not subordinate the right of residence of a family member to the legality of his entry into France.

The circular reminds the prefectural services that, in case they have doubts about the sincerity of the marital union between a citizen of the EU and third country nationals, they have the opportunity to conduct an investigation to determine whether the conclusion of this union is not intended only to obtain a residence permit.
Although the lack of cohabitation between the spouses is not, under Community law, an enforceable condition, the prefectural services are competent to determine whether the application for residence is not based on an act or intention of a fraudulent nature.
Finally, the right of residence of a family member of a third country national can be withdrawn when the marriage is dissolved by divorce or annulled under the conditions set by Article 2 of the Immigration Code R.121-8. This article states that if the marriage lasted less than three years before the start of legal proceedings for divorce or annulment, third country nationals are not entitled to maintain their right of residence, except in special circumstances.

The Administrative Court of Appeal of Marseille rendered apparently contradictory judgments applying Metock. The debate seems to focus on the need to have visa to enter France.

In a decision dated 18 November 2010[16], the judges of this court still required a regular entry in the territory. An alien, who is not himself a community national is not exempt from the requirement to have a visa and can only obtain a residence permit as spouse of EU citizen if he entered France legally, but irrespective the date he entered or married. The decision does not refer explicitly to Metock.

The Administrative Court of Appeal of Marseille decided along the same lines on 28 March 2011[17], but added in this decision that this provision does not contravene the objective of Articles 5 and 10 of Directive 2004/38 as interpreted in the Metock judgment.

In its decision of 12 May 2011 the Administrative Court of Appeal of Marseille referred more in detail to Metock.[18] Under Article L.121-3 of the Immigration Code

[15]Circulaire n°NOR/IMIM/1000/116/C, not published in the Official Journal

[16]CAA de Marseille, 18 novembre 2010, n°08MA03953, Ramos Martins c Préfet de la région Provence Alpes-Côte-D'azur.

[17] CAA Marseille, 28 mars 2011, n°09MA01719, Trapani c Préfet du Vaucluse.

[18] CAA Marseille, 12 mai 2011, n°09MA02203, Mballa Ze c Préfet de la région Provence-Alpes-Côte-D'azur.

"unless his presence is a threat to public order, the family member referred to in 4 ... of Article L.121-1 ... national of a third party has the right to stay on the whole French territory for longer than three months ... ". The Administrative Court of Appeal of Marseille indicates that under the Metock decision the terms for persons accompanying or joining an EU citizen within the meaning of Directive 2004/38 should be interpreted as meaning that a national of a third country, joining a Union citizen residing in a Member State of which he has not the nationality, who accompanies or joins that Union citizen, enjoys the provisions of that directive, irrespective of the place and date of their marriage and how the national of a third country entered the host Member State.

In its decision of 18 February 2010 the Administrative Court of Appeal of Paris still decided to the contrary: an alien, who is not himself a community national is not exempt from the requirement to have a visa and can only obtain a residence permit as spouse of EU citizen if he entered France legally, irrespective the date she entered or married.[19] The Administrative Court of Appeal of Paris based its decision on the Metock judgment. But this reference is only partial. In fact, the Administrative Court of Appeal still requires that the entry in France is regular. However, the Court stressed in its ruling that the right of residence should be recognized irrespective of the place and date of the marriage. Nevertheless, due to the requirement of a legal entry a full application of community law according to Metock is not achieved yet at the Paris Court of Appeal.

In *Germany* the Administrative Instructions of the federal government of 27 July 2009 refer under no. 3.0.3 to the Metock judgment confirming that a right of entry and residence of family relatives is independent of a previous lawful stay in another EU Member State. Therefore, the previous distinction with regard to family reunion of Union citizens between a first move into the Union territory and freedom of movement within the Union is abandoned. All family relatives of Union citizens possess a right of entry and residence provided that they can prove their status as family relatives and fulfill the requirements laid down in the Union Citizens Directive. Therefore, a third-country national family relative of a Union citizen must not fulfill the general requirements of the Aufenthaltsgesetz (basic knowledge of German etc.).

According to Article 6(2) of *Greek* Presidential Decree (P.D.) 106/2007 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 Article 7(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 previous residence in another member state is required and the Metock judgment do not have impact on Greece.

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[19] CAA Paris, 18 février 2010, n°09PA04280.

In *Hungary* the Office for Immigration and Naturalization (OIN) confirmed that a residence card is issued without the requirement of previous lawful residence. However, to get a visa for family reunification is often quite difficult. To assess a marriage of convenience (Article Directive 2004/38/EC) is a joint task of the OIN and the consular office but the shared responsibility has not been defined clearly in practice. Issuance of visa for third country national family member is a discretionary decision of the OIN upon proposal of the consular officer. For instance, the Ombudsman received a complaint from a Hungarian national whose Egyptian partner living in Egypt could not obtain visa although there is a valid marriage. According to the complaint the visa refusal was explained by "supposed false marriage" but without personal scrutiny and reasoning.

The *Irish* Government reacted swiftly to the Metock judgment, adopting Regulations amending the offending part of the 2006 Regulations only four working days after the Court delivered its judgment. In respect of family members who are not Union citizens, the requirement of prior lawful residence has now been removed and it is now stated that the Regulations apply to "qualifying family members of Union citizens, who are not themselves Union citizens" who seek either: (i) to enter the State in the company of the Union citizen family member/s; or (ii) "to join those Union citizens, in respect of whom they are family members, who are lawfully in the State". The same approach is now taken to "permitted" family members, including those who are not Union citizens.

The Department of Justice, Equality and Law Reform stated that all applicants who had applied since 28 April 2006 for a residence card and had been refused because they did not have prior lawful residence would have their applications reviewed. It was envisaged at the time that this process would take three or four months to complete, though it is understood that it may have taken longer.

Although the Irish Government therefore sought to address the Metock ruling in an impressively short time frame, it also started to campaign for an amendment to amend the Directive. It was joined in this campaign by Denmark and the issue has been debated in the JHA Council and is the subject of a Council Resolution. This issue of abuse and fraud has been addressed in the 2009 Commission Communication, and is a key element in the Stockholm program. The Irish Government has now focused on the issue of marriages of convenience.

There is no publicly available information on the number of cases reviewed following the Metock ruling, or on the outcome of such reviews. However, in one case brought in 2010 by an applicant affected by the review following Metock[20], the Court declared that, in giving a decision in March 2010 on an application for residency already made in October 2008, the Minister for Justice had failed to render a decision on the fresh application for residency within a reasonable time.

One of the main problems in *Italy* is the treatment of non-EU family members of Italian nationals. Italy decided to avoid reverse discrimination by extending to non-EU family members of Italian nationals the same treatment granted to non-EU family members of EU citizens. Since there are far more non-EU nationals than EU nationals, the case-law of Italian judges deals very often with non-EU nationals. The Metock case is therefore very

[20] Tagni v Minister for Justice, Equality and Law Reform, (2009) JR 598.

important and often quoted. The law now in force has been put in line with the Metock judgment by the amendments brought by Decree-Law no. 89 of 2011. Before the amendments, the entry visa has to be attached to the request for residence card, in case of residence for more than three months or of permanent residence, and having complied with the requirements for entry was necessary for residence for up to three months. The amendments repealed the requirement for the entry visa, and a valid passport will be the only document that the non-EU family member will need.

Even before the amendments, the Ministry of the Interior issued a second circular letter (after circular letter of 28-8-2009, quoted in last year's Report) addressed to local authorities, pointing out that the law in force was not in line with EU law and should be disregarded.[21]

As in the previous years, first instance courts are ready to follow the Metock judgment and annul the decisions of refusal of residence due to the absence of an entry visa, or in case the applicant overstayed in the country.[22]
On the contrary, the Supreme Court rendered two judgments that seem not in line with EU law and with the lower courts case-law: Cassazione, Civil Branch, judgment 23-7-2010 no. 17346 and Cassazione, Criminal Branch, judgment 28-4-2010 no. 16446. In both judgments the Supreme Court stated that the residence card for non-EU family members, provided for by Legislative Decree no. 30 of 2007, transposing Directive 2004/38/EC, does not have declaratory value but gives rise to the rights laid down by the law.

The first case (no. 17346) is worthy of closer attention. The Court holds that the non-EU family member of an Italian national is within the scope of Legislative Decree no. 30 of 2007 only after s/he has been issued with a residence card. Until then or when the residence card has not been issued for not fulfilling the prescribed conditions (for instance, as in the present case, for lack of a valid entry visa), the presence of the person concerned in the country is regulated by Italian law. In that case, Article 19 of the general legislation on immigration applies: the spouse of an Italian national shall not be expelled, and shall be issued with a residence permit for family reasons, only if the spouses live under the same roof.[23]

There are no implications of the Metock judgment in *Latvia*, because Latvian legal regulation on residence rights of family members of the Union citizens has never contained the condition of previous lawful residence in another EU member State.

Concerning the applicability of Metock judgment, *Lithuania* seems to follow the CJEU rule established in this judgment. There is certain unclarity as concerns third-country nationals who are family members of Lithuanian citizens. The Aliens' Law (Article 101(2)) requires that third-country national family member of Lithuanian citizens who

[21]Circular letter 10-11-2010 no. 7645.

[22]Court of first instance of Vicenza, decree 6-4-2010; Court of first instance of Asti, decree 30-7-2010; Court of first instance of Vicenza, decree 7-10-2010.

[23]See on the judgment of the Supreme Court no. 17346 of 2010: P. Morozzo della Rocca, Sul coniuge di cittadino europeo (italiano) la Cassazione non si conforma alla giurisprudenza della Corte di giustizia, Corriere giuridico, 2010, 1582.

applies for EU residence permit has exercised the right to freedom of movement in the EU or has arrived from another EU Member State's territory. This indirectly implies the requirement of a previous stay in another EU country, however the authorities are motivating that this provision only applies to Lithuanian citizens who did not yet exercise their freedom of movement. In this respect, the draft new aliens law of 2010 provides in Art. 100(2) that family members of Lithuanian citizen who are not EU nationals are entitled to obtain EU temporary residence card if they arrive together with Lithuanian national who has exercised the right of free movement in the EU, arrive to live in the Republic of Lithuania from another EU Member State or arrive from such a country to reside with Lithuanian citizen for a period of more than 3 months. The amendments to the by laws implementing the Aliens' Law of 2010-2011 introduced the requirement to present the document proving that Lithuanian national has exercised the right to free movement in the EU while applying for a residence permit for a family member.

The *Luxembourg's* report does not cover the Metock case.

The Metock judgment appears to be applied by the *Maltese* authorities. In the case of a married couple, irrespective of when and where the marriage took place, a non-European Union spouse of a citizen of the European Union can reside with that citizen in Malta without having previously been resident in another Member State.

In 2010-2011 the *Netherlands* did not witness any legislative or policy amendments to conform to the CJEU's ruling in the Metock case. In October 2010 the coalition government has announced its intention to open negotiations at the European level with a view to put a halt to the so-called 'Europe route', if necessary through amendment of Directive 2004/38/EC. The proposals are specified in a position paper of March 2011 and in a letter of the Minister of Social Affairs to the Second Chamber of April 2011. They include inter alia the proposal that family reunification with third-country national family members of EU migrants would be subject to the rules of the Family Reunification Directive 2003/86/EC, and that those rules should be made more restrictive on eight points; previous irregular stay in the Member State should be a ground for refusal of family members of EU migrants. In its decision of 7 September 2010 the Judicial Division of the Council of State ruled that the Metock case does not apply to cases concerning family members of a Dutch national invoking Directive 2004/38/EC as the legal basis for their right of residence in the Netherlands.[24] The ruling in the Metock case, that no prior residence can be required to benefit from the aforementioned Directive, so it argued, concerns the situation in the host-Member State and not the rights of family members in the Member State of which the EU-citizen is a national (so-called return cases).

As regards family members of a Union citizen, no provision of the Act on entry makes the application of the Act conditional on requirement to be previously and lawfully resident in *Poland*. Therefore, the Polish Act implements Art. 3 para 1 and Art. 2 point 2 of the Directive 2004/38 correctly. According to Art. 9 para 1 and 2 of the Act, Union citizen may enter the territory of Poland on the grounds of a valid travel document or

[24]ABRvS, 7 September 2010, 201000085/1/V1, LJN: BN6683, JV 2010/438, cons. 2.1.4.

other valid documents confirming their identity and citizenship. A family member who is not a Union citizen may enter the territory of the Republic of Poland on the grounds of a valid travel document and visa (except for cases where visa is not required). Art. 10 para 1 of the Act on entry states that a family member who is not a Union citizen shall be issued an entry visa for stay or to join a national of the Member State. The Polish Act does not require that a family member shall previously lawfully reside in another Member State before entering Poland in order to make use of free movement rights as established in Directive 2004/38.

The application of the Metock judgment in *Portugal* is not problematic. Law 37/2006 does not oblige a national of a non-member State who is the spouse of a EU citizen residing in Portugal, but who does not possess Portuguese nationality, to have previously been lawfully resident in another Member State before arriving in Portugal, in order to benefit from the provisions set forth in that law. Moreover, the rights foreseen in Law 37/2006 are granted to a national of a third country who is the spouse of an EU citizen residing in Portugal and who accompanies or joins that EU citizen, irrespective of when and where their marriage took place and of how the national of a non-member country entered the country. Accordingly, the Portuguese administration has never interpreted that law as subjecting the grant of a resident permit to a third country national who is a family member of a EU national exercising his or her free movement rights in Portugal to the condition of a previous legal residence in another Member State.

The *Romanian* regulation - Government Emergency Ordinance no.102/2005 - doesn't require prior lawful residence in another Member State for third country national family members. No cases or complaints of this type are reported.

In the *Slovak* legislation, the right of residence of family members (both, citizens of EEA countries and citizens of third countries) is not conditioned by prior lawful residence of those family members in another Member State. Therefore, the Metock judgment has no relevance in Slovakia either.

From the viewpoint of the Metock judgment, the *Slovenian* legislation as regards conditions under which third-country family members can enter and reside in Slovenia may be considered as in conformity with EU law.

The *Spanish* legislation does not require a national of a non-member State who is the spouse of a Union citizen resident in Spain, to have previously been lawfully resident in another Member State before arriving in Spain. This is also the case regarding the second question treated in Metock: that is, whether the spouse of a Union citizen who has exercised his/her right of freedom of movement by becoming established in a Member State whose nationality he or she does not possess, benefits from the provisions of Directive 2004/38 irrespective of when and where the marriage took place and the circumstances in which s/he entered the host Member State.

Two Spanish judicial decisions were based i.a. on the Metock case in order to annul the decision of the Spanish authorities to refuse a residence permit as a family member of a Community citizen. The first decision is of the High Court of Justice of

Castilla y León, 66/2010, of 29 January 2010. The second is the decision of the Contentious-Administrative Court, 29/2010, of 29 January 2010.

The *Swedish* Migration Board's practice concerning immigration of family members is in line with the Metock case. The regulation referred to is the Aliens Act ch. 3a § 10, section 3, from which it follows that the third-country national as a family member to an EU citizen should apply for a residence card not later than three months after the arrival in Sweden.

Further, in an internal message at September 17, 2008, in the Migration Board it was stated that the Metock case should not have influence on the Board's practice, since the Aliens Act should be applied already in line with the Metock judgment.

In a decision in 2010, the Swedish Tax Agency referred to Metock and confirmed that a relationship could have been established even after the entry to Sweden. Hence, it was stated by the agency that it was not possible to make a request meaning that the parties should have been living together abroad before.[25]

The matter is closely related to the question concerning marriage of convenience. In accordance with the Aliens Act ch. 5 § 3a (1), a foreigner that has the intention to marry or to be a cohabiting partner to a person in Sweden, should be granted a residence permit if the relationship is considered to be serious and if there are no particular circumstances against the arrangement. Further, in accordance with ch. 5 § 17a (1) and (2), a residence permit may not be granted if the application is based on false information or if a marriage or a cohabiting relationship is a relationship of conveniences and fraud.

The problem is to decide whether the information provided is correct or not. Concerning fraud or marriage or partnerships of conveniences, which should not be accepted in accordance with the Aliens Act ch. 5 §17a (2). The starting point should be that the information presented concerning a marriage etc. is correct. However, if the Migration Board suspects that a marriage could be a pro forma marriage, a deeper examination should be carried out. Regarding the burden of proof, it is the State authority that must prove that the marriage is a pro forma marriage etc. The investigation should be made in the same way as when investigating whether a marriage is serious or not. That is, an examination concerning for instance the establishment of the relationship and the parties' familiarity etc. Concerning the criteria of a pro forma marriage, the preparatory works explicitly refer to the practice in the CJEU.
Recently the Migration Board has been commissioned by the Government to present statistics concerning residence permits and marriage of conveniances and fraud including child marriages. In a communication to the Government, the Board in 2011 presented an account for 53 cases that had been dealt with by the Board.[26]

In the communication the Migration Board also pointed at certain shortages concerning the regulations on the matter. For instance, it does not follow from the act that

[25]Skatteverkets ställningstaganden, Folkbokföring av EES-medborgare och deras familjemedlemmar (2010-06-01). Dnr/målnr/löpnr: 131 380303-10/111. Accessible at http://www.skatteverket.se/rattsinformation/stallningstaganden/2010/stallningstaganden2010/13138030310111.5.1a098b721295c544e1f80005173.html

[26]Skrivelse 2011-02-15 till Justitiedepartementet, Enheten för migration och asylpolitik, *Delredovisning av Migrationsverkets uppdrag att föra viss statistik* (Ju2010/5032/EMA). Available (in Swedish) at: http://www.migrationsverket.se/download/18.46b604a812cbcdd7dba800021229/GD-mall+uppdrag+vers2.pdf

a person must be at least 18 years old, if he or she has the intention to come to Sweden for marriage. However, applications for residence permits when partners having the intention to marry are minors, should regularly be rejected by the Migration Board. Even if a couple already is married, both parties should be at least 18 years old, but in accordance with praxis, the Board approves the application for residence if there are exceptional situations, for instance if a young woman is pregnant or if the couple already have children.

The *United Kingdom* authorities have finally amended the EEA Regulations to reflect properly the Metock judgment as regards spouses, minor children, descending and ascending dependent relatives in the direct line. The UK courts have found that other family members, applying under Article 3(2), are covered by the finding in Metock and prior lawful residence within the EEA is not a requirement, the UK government does not accept this.

4. National reports on Ibrahim (C-310/08) and Teixeira (C-480/08)

The Teixeira-case and the Ibrahim case haven´t been subject to academic discussion nor to detailed media news in *Austria*. The Austrian Administrative Court quoted these rulings only once.[27] Until now legal amendments are not foreseen.

According to the *Belgian* rapporteur, the cases underline that, if needed, the status of worker can prevail on the status of EU citizen if the former allows for the enjoyment of more rights, even though the latter "is destined to be the fundamental status". As the Court stated, article 12 of Regulation 1612/68 was not repealed by Directive 2004/38. In Belgium, these could be used in the context of the automatic requirement of cohabitation for the right to family reunification of workers. Currently, the Council for Aliens Dispute (CCE) considers that Directive 2004/38 must not be interpreted in the light of the case-law related to Regulation 1612/68 (*Diata*). As yet, the CCE has refused to request a preliminary ruling from the Court of Justice on this question.

Bulgarian law has no provision that allows for a parent of a child in education in Bulgaria to be allowed to reside in the country on that ground.
The Law on Foreign Nationals in the Republic of Bulgaria provides for a right of permanent residence of a third country national who is parent and carer of a Bulgarian child and has sufficient resources to care for the child and himself/herself. That right is not conditional on the child's education. In order to receive the residence permit the third country national should have obtained a long-term visa from the Bulgarian embassy in the country of his/her nationality.
Article 44, Paragraph 2 of the Law on Foreign Nationals generally requires from authorities to take into account family and social ties of the person with the host country and the country of origin when imposing a return decision.
The cases of Ibrahim and Teixeira have not been referred to by Bulgarian courts in 2010/11.

The Ibrahim and Teixeira cases are of particular relevance to the *Cypriot* context. The basic principle in Ibrahim contains that the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer can claim a right of residence in the latter State on the sole basis of Article 12 of Regulation 1612/68, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State being required. The actual practice at the moment, at least as reported, is that of activating the provisions of Article 7 of Directive 2004/38 relating to "sufficient resources"; hence the Union citizen and/or their spouses and children would be expelled accordingly if they lack sufficient resources.

Like the case of Ibrahim, the case of Texeira is relevant to Cyprus. The immigration authorities would need to change current practice in cases where a national of a Member

[27] Austrian Administrative Court (Österreichischer Verwaltungsgerichtshof) 2 July 2010, no. 2007/09/0194.

State who was employed in another Member State, in which his or her child is in education, can claim, in the capacity of primary carer for that child, a right of residence in the host Member State on the sole basis of Article 12 of Regulation 1612/68, without being required to satisfy the conditions laid down in Directive 2004/38/EC. The current practice of the immigration authorities does not appear to be in line with the provisions of Article 12 of Regulation 1612/68. It seems that a new circular by the authorities would be warranted.

The Cyprus equality body is examining such complaints at the moment.

The *Czech* Act on Residence of Foreigners does not deal explicitly with a situation comparable to the Ibrahim and Teixeira cases. "Study" is mentioned as a reason for the issue of a residence certificate to an EU citizen, and his/her family members may thus apply for a residence permit. Basically, such a child is dependent and there is a right of his/her family members to reside with him till 21 years of his/her age on the basis of family reunification. But several questions remain. Firstly, there is no definition of "study" in the part of the law which is aimed at EU citizens and their family members, while there is a definition in the other part of the law, which is aimed at third country nationals. If this definition is used, then only secondary or higher education is taken into account. Secondly, there seems to be no link between Regulation 1612/68 and the right of residence in this case, so the approach would be the same to those who were workers and those who were not. But while the law contains references to the Regulation in many provisions, a direct application should in any case prevail. Compliance of the Czech legislation with the relevant case law is questionable, but seems to be assured.

The Ibrahim and Teixeira judgments have resulted in *Denmark* in adjustment of the administrative practice concerning residence rights for children in education as well as the parent having actual custody. The adjustment may also impact the derived residence right of third-country spouses of Danish citizens upon return from another Member State. The precise scope of the adjustment does not seem to have been officially clarified, just as the criteria for reconsideration of applications rejected under the past practice appear less than clear.
It should be noted that Section 14 (4) of the EU Residence Order already provides for the residence right of the child and the parent in such situations. Against this background, the adjustment might seem to affect primarily the issue of the requirement of sufficient resources. Furthermore, the judgments may have to be taken into account in the administration of social assistance according to Sections 3 and 12 a of the Act on Active Social Policy.

So far the decision did not have any influence in *Estonia*. The decisions may have an impact in order to concretise the conditions of residence in Estonia and to introduce the rules for independent residence of the child. At present the Citizen of the European Union Act § 20 foresees the following conditions in order to guarantee a right of residence:
- the citizen of the European Union with whom the person wishes to take up residence, is employed or self employed in Estonia;
- the citizen of the European Union with whom the person wishes to take up residence has sufficient funds to maintain himself or herself and his or her family members, and he

or she is a person insured pursuant to the procedure provided by the Health Insurance Act, or
- the citizen of the European Union with whom the person wishes to take up residence is studying in Estonia and has sufficient funds to maintain himself or herself and his or her family members, and he or she is a person insured pursuant to the procedure provided by the Health Insurance Act.

Theoretically it could be possible also, that a parent will have a right to stay in Estonia, because of the fact that his or her child is studying. According to the rapporteur it would be desirable to change the legislation in line with case law of the CJEU.

In *Finland* no information was found on any arrangements that would guarantee that persons in comparable situations like the applicants in the Ibrahim and Teixeira cases would be entitled to stay in Finland on the basis of Article 12 of the Regulation 1612/68 without meeting the preconditions flowing from the Directive 2004/38.

New *French* laws and regulations have not implemented the consequences of the Ibrahim and Teixeira decisions yet. Indeed, there is no reference to the possibility offered to a relative of the European Union citizen having the custody of a child in school to enjoy a right of residence. There are no exceptions to the requirement to have sufficient resources and health insurance for a stay of more than three months for inactive citizens of the European Union, including a parent of a child in school. Evictions of Roma parents of children attending school are still continuing.

It should be emphasized that under Article L131-1 of the Education Code, "Education is compulsory for children of both sexes, French and foreign, between six and sixteen." The legality of the residence is not a condition of enrolment of children. Circular No. 2002-063 of 20 March 2002 on rules for registration and enrolment of foreign students of primary and secondary education provides that it is not for the Ministry of Education to monitor the regularity of the situation of foreign students and their parents under the rules governing their entry and stay in France. As a result, enrolment in a school of a student of foreign nationality, regardless of age, shall not be subject to the submission of a residence permit. But that obviously does not confer any right of residence to the child, or to the persons having custody. Expulsion is still possible.

No report covering Ibrahim and Teixeira was received from *Germany*.

The situation in *Greece* is not clear from the report.

Hungarian law provides special rules for the primary carer. Article 7(3) of Act I of 2007 (FreeA) lays down that the primary carer of a minor Hungarian national is entitled to the right of residence even if s/he does not fulfil the conditions for legal residence (sufficient resources and comprehensive sickness cover). Furthermore, Article 11(4) provides that the spouse of a Hungarian national having the nationality of a third country shall retain unconditionally the right of residence if the spouse also exercises the right of parental supervision over a child born of the marriage. This regulation provides the right of residence in Hungary for the parent with supervision over a minor even in case the minor

is self-sustaining because parental supervision exists until the full age of the child who was born from the marriage. If the minor is not a Hungarian, only Article 12 is applicable. Accordingly, if the EEA national dies, or loses or surrenders his/her right of residence, the right of residence of his/her children shall be retained, regardless of age, until they have completed their education, if they have already commenced their education and continue it without interruption, and the other parent with the right of parental supervision over the children shall retain the right of residence until the children have completed their education. However, according to the Explanatory Note to the Bill (FreeA): "*Article 12 follows the judgment of the CJEU in the case of Echternach & Moritz (C- 389-390/87.) reserving the right to residence respecting for the integration of the minor into the Hungarian public education system".* In this way the right of residence for primary carers is limited to the period of parental supervision that is applicable up to the majority of the descendant (on the basis of his/her personal law of nationality). It is a bit controversial that the right of residence for the parent with supervision power is preserved "regardless age" of the child until the end of education. The original intention was to provide an unconditional right of residence only for the parent with parental supervision over the children exclusively – while the others have to prove sufficient resources and comprehensive sickness cover (see the general conditions in Article 11(3) of FreeA). In this context the education is a subsidiary condition. This seems not to comply with the Teixeira judgment.

In *Ireland* the implications of these judgments have very recently (mid-June 2011) been addressed in the revised Guidelines for Deciding Officers in the determination of the Habitual Residence Condition by clearly stating that a direct lineal ascendant (i.e., parent or grandparent) of a student has a right to reside in Ireland on the basis of the student's right to education.[28] No specific reference is made to the judgments and the issue has not yet been addressed in material directly targeted at individual citizens.
It should be stressed that these Guidelines address the issue of residence for the purposes of application of the Habitual Residence Condition. Legal residence is a precondition for the application of the Condition itself.
No reference is made to the question of sufficient resources. It appears that persons have the right to reside on this basis will still need to satisfy the Habitual Residence Condition in order to access social welfare payments.

Italy seems not prepared to grant a right to stay under Article 12 of Regulation 1612/68 to the parent who is the child's primary carer, because the case is not envisaged in the administrative guidelines addressed to the public administration.[29]

In the case of Ms. Ibrahim (non-EU national, mother of EU-national minors), Art. 31, para. 3 of the consolidated legislation on immigration (Legislative Decree no. 286 of 1998) could be resorted to. It establishes that the Juvenile Court can grant the relative of a

[28] http://www.welfare.ie/EN/OperationalGuidelines/pages/habres.aspx

[29] Comments on the cases: D. Serrapede, Diritto al soggiorno, a fini di studio, dei figli di (ex) lavoratori migranti ed esigenze di integrazione: la decisione della Corte di giustizia dell'Unione europea nel caso Ibrahim, *Diritti umani e diritto internazionale*, 2010, 434-438.

minor living in Italy leave to enter or stay in Italy, for serious reasons linked to the psychological and physical development of the minor concerned and to his/her age. The foreigner shall stay in Italy for a fixed-term period and the leave is repealed when the conditions for its grant ceased. The provision is intended to protect the minor from being separated from the relative who has taken care of him/her until then. The Supreme Court has made it clear that parents of very young children can be granted leave to stay.[30] Therefore, the case of Ms Ibrahim can be deemed to be within the scope of the provision. But the Court has also stated that the mere fact that the minor is attending school is not an exceptional circumstance.[31]

The Teixeira case (EU national, mother of a daughter, holding EU nationality) could probably not be solved under Article 31 quoted above, because EU citizens are expressly excluded from the personal scope of application of the consolidated legislation on immigration (Article 1, para. 2, of the consolidated legislation on immigration).

Latvian law does not cover situations comparable to Ibrahim and Teixeira. It does not provide explicitly for the right of a Union citizen to reside in Latvia if she/he has no sufficient resources for not to become a burden on the social assistance system but he/she is a primary carer of the child which is in education in Latvia.
Point 57.1 of the Regulation No.243[32] provides that a Union citizen and his/her family members may not be expelled from Latvia even if they constitute burden on Latvian social security system, if a Union citizen has the status of worker or self-employed person in Latvia.
At the same time Point 48 of the Regulation No.243 requires the social assistance authorities (municipalities) to provide the Office of Citizenship and Migration Affairs (OCMA) with information on requests for social assistance by a Union citizen or his/her family member within 10 working days. However even if a Union citizen whose child is in education in Latvia has no status of worker or self-employed person in Latvia according to Point 57.1 the administrative authorities are under the obligation to assess the following individual factors: the length of the residence in Latvia, amount of allowances requested, frequency and reasons for such requests.

With reference to the Ibrahim and Teixeira judgments, there could be similar problems in *Lithuania* as concerns residence purely on the ground that the child of the person in question is engaged in education. This is not part of an exhaustive list of residence grounds in the Aliens' Law (Art. 101: if the person is not employed, seeking employment, 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. The new draft version of the Aliens' Law of 2010 does not also envisage the transposition of this article and the CJEU jurisprudence.

[30] Corte di Cassazione, judgments of the grand chamber no. 21799 and no. 21803 of 2010.

[31] Corte di Cassazione, judgments no. 3991 of 2002; no. 17194 of 2003; no. 396 of 2006.

[32] OG No.58, 13 April 2011.

The *Luxembourg's* report does not cover the Ibrahim and Teixeira judgments.

In 2010-2011 *the Netherlands* did not witness any legislative or policy amendments to conform to the CJEU's rulings in the Ibrahim and Teixeira cases. Nevertheless, the legislation should be considered in conformity with the judgments. Although the general rule concerning the continuation of residence of third country national family members requires that they are workers or self-employed, or having sufficient resources for themselves and their family members not to become a burden on the social assistance system, the Aliens Decree 2000 formulates an exception in Article 8.15(5) in conjunction with Article 8.15(2)(b) and (3).
See Alien Circular 2000 B10/5.4.3 (Third country national family member):
" Article 8.15, paragraph 5, Alien Decree read in conjunction with Article 8.15, second paragraph, sub b, and third paragraph, Aliens Decree contains with regard to continued residence and call on the public funds an exception for student children and their custodial parent."

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

In *Poland* there has been an amendment to the Act on entry which inter alia changed the hitherto provisions on the right of residence of a child and/or parent who has actual custody over the child in case of an EU citizen's departure from the host Member State or his/her death. Article 19(3) of the Act on entry states that a Union citizen's (who has a right to stay at the territory of Poland) departure or death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in Poland and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies. Therefore this provision implemented correctly Article 12(3) of the Directive 2004/38. However, after the judgments in Ibrahim and Teixera, the Polish legislator took the view that art. 19(3) of the Act on entry contains only a partial regulation of the right of residence of a studying child and his/her parent. According to the government, it has been necessary to add to the Act on entry other possibilities of residence of a studying child and his/her parent, since such a right has not been directly based on the wording of Article 12 of the Regulation 1612/68, but is based on the interpretation given by the Court of Justice. Therefore, a new Article 19a has been added by the Act of April 1, 2011, that came into force on May 25, 2011[33]. According to the new provision, a child of an EU citizen, who has been working on the territory of Poland but has not retained the right of stay on basis of Article 17[34], shall still have a right to stay in Poland until the end of

[33] Journal of Laws 2011, no. 92, item 1532.

[34] Article 17 of the Act to which this new provision 19a refers, defines the situations in which an EU citizen retains the right to stay at the territory of Poland even if he is not longer engaged in an economic activity as a worker or a self-employed persons:
(1) when he/she is temporarily unable to work as the result of an illness or accident;
(2) where he/she is in duly recorded involuntary unemployment in accordance with the unemployment register kept by the local Employment Office;

his/her studies. In such a case, a parent who has custody over the EU citizen's child, shall have the right to accompany the child until his/her majority or even longer, if the child still needs assistance of the parent in order to continue and to finish his/her studies.
The sole reason of the amendment and introduction of art. 19a of the Act on entry is to adjust Polish provisions to the interpretation of the Regulation 1612/68 as stated in the Ibrahim and Teixeira case law.

Nothing in the *Portuguese* law works against the direct application of Article 12 of Regulation 1612/68 – now Article 10 of Regulation 492/2011 – as interpreted by those rulings of the CJEU. Even if that were the case, the principle of primacy of EU law would lead to the non-application of any national provision contrary to them. The eventual reverse discrimination implied in such a solution has to be corrected in the framework of the national legal order.

At this moment, in *Romania* no further measures such as legislative changes are reported and no court cases or complaints are filled regarding the principles established by the CJEU in Ibrahim and Teixeira. In some academic circles these cases were presented critically as examples when the CJEU can - trough its judgments - indirectly modify provisions of EU law.

In connection with the Teixeira case, children (EEA citizens) attending general education courses in *Slovakia* will not be entitled to reside in Slovakia in situations envisaged in that case, unless they have financial means to secure their stay and health insurance in Slovakia. In addition, parents, EEA citizens, of children studying in Slovakia are considered as having a residence permit, only if they have sufficient resources not to become a burden on the social assistance system, work, have business activities, study themselves, are job seekers, or if they are dependent on their children. 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.
Similarly, in cases such as the one in the Ibrahim case, parents, third country nationals, 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 with regard to the Zambrano case, i.e. parents, third country nationals, of children who are Slovak citizens.

According to the *Slovenian* rapporteur applicants should rely on the direct applicability of Regulation 1612/68.

The *Spanish* report does not deal with the Ibrahim and Teixeira cases.

As far as the *Swedish* rapporteur is aware of, there is no judgment in Swedish case law contrary to the CJEU rulings in these cases.

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(3) where he/she embarks on education or vocational training.

The current *United Kingdom* guidance does not recognise the right of a child to remain for education in accordance with Article 12 Regulation 1612/68 as explained by the CJEU in Ibrahim. It does not acknowledge that the right to remain for education crystallises when the child installs him or herself as a family member of an EU worker and continues even if the worker subsequently ceases to work. The Upper Tribunal recently found that, for the purposes of the right to permanent residence, time runs from the time education begins while seeking employment was insufficient to engage Article 12 1612/68.[35]

[35] MDB and others v SSHD [2010] UKUT 161 (IAC).

5. National reports on Zambrano (C-34/09)

No report was received from *Germany*. The decision is not mentioned in the *Lithuanian, Luxembourg's, Maltese, Slovenian* and *Spanish* reports.

According to the *Austrian* Federal Ministry of Interior Affairs the Zambrano judgment has no impact in Austria, because the Austrian nationality law is different from the Belgian law. However, in a few rare constellations the same situation as in the Zambrano judgment could occur in Austria too. Then it is up to the authorities to apply the law in a correct way. Furthermore, there was one academic article on the Zambrano judgment.[36] To clarify some questions posed by the ruling, the Administrative Court asked for a preliminary ruling as regards family members of Union citizens (C-256/11).

In *Belgium* it is too early to measure what the consequences of the Zambrano case will be. The main question will be to find out what should be understood as "the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizens of the Union". However, two consequences may already be drawn. The first one being a restricted access to the Belgian nationality iure soli by refusing to attribute the Belgian nationality when a simple birth statement of the child at the consulate of the parents' country of origin (and of which they are nationals) is enough to attribute this nationality. A modification to the Belgian Nationality Code was made to that effect, in 2006, before the Zambrano judgment. The second consequence will be to verify the compatibility of reinstating reverse discriminations with the Zambrano judgment. There is a strong possibility that the Constitutional Court will be asked to look into this question, maybe requesting a preliminary ruling from the Court of Justice.

In *Bulgaria* the problem of reverse discrimination has persisted since accession to the EU and currently the issue is an object of a pending application against Bulgaria before the European Court of Human Rights, as well as on the agenda of the national institutions. 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, Article 1, paragraph 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.

According to Article 24 LFRB a foreigner can receive a permit for continuous residence (valid for up to one year) only after entering Bulgaria with a long-term visa (D-visa). 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 have deportation orders pending against them. In order to complete the legal requirements of Article 24 LFRB they need to go out of Bulgaria and re-enter with a D-visa. However, such a visa is refused to these persons,

[36] R. Feik, Das (neue) Aufenthaltsrecht der eltern von (minderjahrigen) Unionsburgern, FABL 1/2011-II, 5 pp).

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. 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 left 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 will be subject to a new long process of judicial appeal over two judicial instances. In the meantime family members are separated.

The Zambrano judgment has already been invoked before the national court in a pending case on reverse discrimination, but the judgment is yet expected at the moment of writing the report.

In *Cyprus* the Zambrano judgment would have important implications in the Cypriot context, provided that citizenship is granted to children of foreign nationals. However, the procedure of granting nationality/citizenship can hardly be considered smooth. The question of granting citizenship is very much entangled with the disputed population issue in the negotiations to resolve the Cyprus problem, which complicates matters. In any case, the Cypriot law on citizenship is dominantly based on ius sanguinis principles. The law also provides for acquisition of citizenship via naturalization and there are exceptional situations where citizenship may be granted. 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 naturalization 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. In the rare situation where a child is granted citizenship and the parents are not, the principles of the Zambrano judgment might presumably apply.

The rapporteur of the *Czech Republic* notes that in some edge cases there might be problems with a correct application of the Zambrano judgment.
The legislation of the Czech Republic does not allow deprivation of the Czech citizenship. Also, at the same time a child has a right to family reunification. The definition of a family member in the Foreigners Residence Act (FoRa) covers the Zambrano situation. A problem may occur when a person does not have an accommodation ensured and does not live together with a child in a common household (e.g. a child entered a foster care). The definition in Sec. 15a FoRa of a family member is a person who lives with a child in a common household. Another problem concerns the conditions for issuance of a residence card. A residence card will not be issued in case a parent becomes a burden on the social system. 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 - in a non-typical situation - a person does not have a residence card, or not even a residence permit, access to the labour market becomes complicated and he/she may be unemployed. That person becomes an unreasonable burden on the social system. Therefore, the residence permit and the residence card will not be issued.

According to the *Danish* 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. As a general rule children only obtain Danish citizenship at birth if at least one of the parents is a Danish citizen.
The Ministry assumes that residence right under EU law will only have to be granted in situations where a third-country national is the only parent on whom the minor child is dependent. This means, there is no other parent residing in the Member State who is capable of taking care of the child. 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 (national) parent would in effect require the child to follow the parent to his or her country of origin.

The *Estonian* rapporteur notes that the Zambrano-principles are not directly applicable in Estonia. According to the Estonian constitution (paragraph 8) every child of whose parents one is an Estonian citizen has the right to Estonian citizenship by birth. The question that could be raised taking into account the circumstances of the case, is the question of double citizenship. Here again the Estonian legislation sets the limits – it is not allowed to have double citizenship. It is for the parent to decide which citizenship the child could have.

In *Finland* the Zambrano case is not expected to have major influence. Pursuant to the Aliens Act, section 50, family members of Finnish citizens living in Finland, as well as minor unmarried children of the family members, are issued with a residence permit on the basis of family ties. In such cases, the issuing 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 *French* rapporteur notes that according to the circular of 10 September 2010[37] a right of residence must be recognized in favour of a third-country national parent of a European national child. The circular requires that the parent has actual custody, supports his child and has sufficient resources and social security covering himself and his child so that he doesn't become a burden on public finances of the Member State Home. If the parent meets these conditions, the prefecture should grant him a residence permit or a work permit.

According to Article 61 of the *Greek* Act 3386/2005, family members of Greeks or other EU Member State citizens, who are third-country nationals and accompany them or wish to meet them, provided that they lawfully reside in Greece and their length of residence

[37] See footnote 15.

exceeds three months, shall be issued with a "Residence Card for family member of a Greek or another EU Member State citizen". The holder of this card shall be entitled to work. Family members of a Greek or another 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. The Greek rapporteur therefore concludes that Greek legislation is not in line with the Zambrano judgment.

Based on Article 2 paragraph bg of *Hungarian* Act I of 2007, a person who is the official primary carer of a minor Hungarian national qualifies as 'family member' in terms of EU Directive 2004/38. In can be stated that no independent right of residence has been established in Hungarian law for family members who are, in fact, third-country national parents of a minor EU national whom they care for as primary carers.

As regards free (without work permit) access to the labour market in the abovementioned situation, Hungarian law does not provide free access to the third-country national parents on the basis that they are the primary carers of a minor third-country national. Free access can be enjoyed only by the third-country national spouse and the child of an EU national. Hungarian law provides for specific exemptions for specific categories but this is 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. Additionally, hence the third-country national would not have a right to free access per se, he/she would not be able to search for work either.

Consequently, Hungarian law at present would regulate the whole situation in the same way as the Belgian law did in the concrete case.

The *Irish* rapporteur notes upfront that free movement cases rarely get to courts in Ireland. Furthermore, it is not clear that the Court of Justice's case law is systematically reviewed at official level to ascertain what, if any, implications this case law has for Irish law and policy.

Furthermore, the Zambrano judgment will have 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. To the extent that such children are not Irish citizens under the relevant legislation, the Zambrano case will not be applicable.

Shortly after the judgment the Minister for Justice and Law Reform announced that his Department would examine all cases before the courts involving Irish citizen children where the Zambrano judgment would be relevant and, where appropriate, decisions would be taken by the Department without necessitating a Court ruling. There are approximately 120 such cases currently before the courts.

The Department will also review cases which are currently in the residency application process, where there is a possibility of deportation. Cases where Irish citizen children have already left the State because their parents were refused permission to remain will also be examined. Since 2005, there have been 20 such cases. According to recent newspaper reports, there are approximately 1,057 cases being reviewed in relation to the Zambrano judgment and the Department has issued decisions in 135 cases so far, with all cases being granted permission to remain.

According to the *Italian* rapporteur the Zambrano case would have been decided under Italian law. In fact, the parents of an Italian minor living in Italy can be issued with a residence card for family members, even though they do not satisfy with 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 (Article 30 Legislative Decree no. 286 of 1998). Under Article 19, para 2, lit. c of the same act a non-EU foreigner who is the spouse or relative within the second degree of kinship of an Italian citizen, and lives under the same roof, is protected from expulsion. The law is clear. That is not always the case for its application, as is shown by the following case.

This case concerns an applicant who is a non-EU national and father of two minors holding Italian nationality. His application for refugee's status had been rejected and he has been subsequently expelled for lack of a residence permit. Whether or not he worked, it cannot be detected from the text of the judgment. The applicant challenged the expulsion decision, and the justice of the peace upheld the claim.[38] The reasoning of the court is not without flaws, but for our purposes it is worthy to recall that it stated the right of residence of the father of an Italian minor as a right of EU origin. In the present rapporteur's view, Article 30 examined above could be resorted to in case of EU parents of an Italian minor, but not by non-EU parents of an EU minor, nor by EU parents of an EU minor. In fact, EU nationals are not within the scope of the consolidated legislation on immigration (unless when the legislation expressly states that it applies also to EU nationals), therefore preventing an interpretation by analogy in favour of the parents of EU minors.

In *Latvia* the Zambrano judgment has had no impact on the legislator or the national courts. The rapporteur notes that the following is a hypothetical situation.

The situation in the Zambrano case is not regulated in Latvian law. Under the Latvian Citizenship Act a child born in Latvia after 21 August 1991 is entitled to Latvian citizenship only if his parents are stateless or non-citizens[39] of Latvia. Consequently, Latvian law does not grant Latvian citizenship to a child whose parents are third-country nationals.

It is not precluded that parents change their citizen status from stateless or non-citizen to third-country national after their child is granted the Latvian citizenship. In case a parent has been a non-citizen of Latvia before becoming a third-country national

[38] Giudice di pace of Torino, decree 10-2-2011, in *Diritto immigrazione e cittadinanza*, 2011, 1, 165-168).

[39] According to the Citizenship Law, chapter 1, a non-citizen is "a person who, in accordance with the Law On the Status of those Former U.S.S.R. Citizens who do not have the Citizenship of Latvia or that of any Other State, has the right to a non-citizen passport issued by the Republic of Latvia".

he (already) has an individual right to permanent residence permit in Latvia. However there are problems with a parent who has been stateless before acquisition of citizenship of a third country.

The Immigration Act does not cover situations of a minor Latvian child and his third-country national parents. The Immigration Act does recognize the right of residence to parents of Latvian citizens, but only after they have reached the pensionable age and under the condition that they will not require any social assistance in Latvia. Consequently, until third-country national parents attain a pensionable age, they are not granted a residence right in Latvia on account of that their minor child is a Latvian citizen. At the same time, according to the Citizenship Act it is possible for a stateless child to obtain Latvian citizenship while his parents remain third-country nationals.

In the light of the Zambrano case there are no problems in the administrative practice[40] (of granting third-country national parents a residency permit). OCMA grants either temporary or permanent residency permits to third-country national parents of minor Latvian citizen. Most frequently third-country national parents are granted a residency permit based on Article 23 (3)(2) – human considerations. A number of these parents are citizens of the Russian Federation. In most cases 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. Very frequently this group of persons retain both status, which is illegal. Consequently they deprive themselves the right to claim permanent residency permit in Latvia as former non-citizens of Latvia. However, OCMA nevertheless grant them a residency permit.

In *the Netherlands* the Minister of Immigration and Asylum argues at the outset that the purpose of EU-citizenship is not to extend European law to include internal situations. He then acknowledges that the Zambrano judgment may mean that European law has to be applied although no free movement rights have been exercised. To him the concise explanation offered by the Court for its decision in the Zambrano case is a justification for the conclusion that the intention of the Court was to offer a tailor-made solution for the case at hand. However, unlike Belgian law, Dutch law does not provide for Dutch citizenship at birth to avoid children becoming stateless. Their parent(s) on their behalf can opt for Dutch citizenship after three years of lawful residence. Therefore, the Minister considers the implications of the Zambrano judgment for the Netherlands to be limited. In cases where the parents of a child born without a nationality have opted for Dutch citizenship for that child in accordance with Dutch law, the third-country national parent will be granted residence permission if the child is dependent of its third-country national parent. The Dutch rapporteur notes that time will reveal whether the Minister's assessment of the implications of the Zambrano judgment for the Netherlands is correct. Several national courts have made references to the Zambrano judgment. In particular, the Utrecht District Court argued that a difference in facts does not automatically mean that the Court ruling in the Zambrano case does not apply. [41] Furthermore, the Groningen

[40] Regarding the correct application of Article 20 TFEU.

[41] Rechtbank 's-Gravenhage zp Utrecht, 1 June 2006, Awb 10/34857 VK, Awb 10/34859, Awb 10/34860 VL a.o., LJN: BQ7068, cons. 2.30-32. However, as the applicant had not rebutted the defendant's claim that one of

District Court ruled[42] in an injunction procedure that considering the facts of the case - a third-country national parent responsible for the care of her minor Dutch child - expulsion (of the parent) had to be stayed until it had been determined whether, in the light of Articles 7 and 24 of the EU's Charter on Fundamental Rights, an expulsion measure is a proportional infringement of the child's EU-rights as it can be assumed that a child under the age of two will have to accompany its parent who is the primary caretaker when expelled.

The *Polish* Act on entry (that implements Directive 2004/38) lays down the rules and conditions governing the entry, residence and exit on Polish territory of EU citizens and members of their families. Therefore the Act shall not be applicable where there is no transnational situation. Consequently, in Poland the situation similar to the Zambrano case would not fall within the scope of the application of the Act on entry as a wholly internal situation. Additionally, a parent like Zambrano shall not be released from the obligation, laid down in Article 87 of the Act on promotion of labour and employment institutions, to obtain a work permission before entering into an employment contract. Although the right to take up employment is granted to (among others) members of family of an EU/EEA citizen or third country national (foreigner) who has a right to free movement of workers based on international agreements concluded between his/her country and the EU and its Member States. The definition of a family member covers only a spouse of an EU or a Polish citizen as well as descendants of a Polish citizen or a foreigner (as mentioned above) who is under 21 years of age or is dependent. Therefore, the definition does not cover ascendants of a (minor) EU citizen who has custody over that minor EU citizen.

The mandatory application of the Zambrano judgment is strengthened by the *Portuguese* Constitution. Article 33(1) of the Constitution establishes 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 like that one may in no way be restricted.

In *Romania* there has been no practical application of the imperative indicated in the Zambrano judgment. The strict application of the ius sanguinis citizenship principle precludes in most cases the possibility of a minor obtaining Romanian citizenship while his parents have another (third-country) citizenship. According to Romanian regulation on citizenship (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 the lineage from both parents was established as non-Romanian.

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the parents is a Dutch national and therefore the Zambrano judgment does not apply, the child is considered not to have been withheld the effective enjoyment of his rights as an EU-citizen. The same conclusion was reached by the District Court in Roermond regarding Dutch children whose father is a Dutch citizen and mother a third-country national (Rechtbank 's-Gravenhage zp Roermond, 26 March 2011, Awb 10/37591, LJN: BQ0062, JV 2011/234, cons. 12.).

[42] Rechtbank 's-Gravenhage zp Groningen, 6 May 2011, Awb 11/3449, LJN: BQ3576, cons. 3.12.

According to current *Slovak* legislation in force parents, third-country nationals, in situations similar to the Zambrano case will not be entitled to reside in Slovakia. A right to reside for these parents cannot be derived from the right of their children, who are Slovak citizens, to reside, unless the parents are dependent on them.

In *Sweden* the Zambrano case has - as far as the rapporteur knows - not been observed in the Swedish debate. In particular, concerning the circumstances it is the rapporteur's opinion that a Swedish court would not have any problems in following the Zambrano judgment. However, a precondition would be - like in Zambrano - that the children were citizens of the Member State. In the same situation as was present in the Zambrano case, in Sweden the children would not have been Swedish citizens. Hence, they would not have been union citizens based upon a national citizenship obtained by their birth in Sweden.

However, according to the Aliens Act chapter 1 paragraph 10, "particular attention must be given to what is required with regard to the child's health and development and the best interests of the child in general". Furthermore, according to chapter 5 paragraph 6 of the same act a foreigner should be allowed to stay in Sweden if there are "exceptionally distressing circumstances". If this would be applied under the circumstances that were present in the Zambrano case, the outcome could be the granting of a residence permit.

The *UK* Border Agency is yet to comment on the Zambrano judgment or give guidance on how it is to be implemented. The rights of citizen children to live in the UK with their non-citizen parents was strengthened through a recent interpretation of the domestic law (ZH (Tanzania) v SSHD [2011] UKSC 4). However, the findings in the Zambrano judgment go further and it is likely that policy towards such children will have to be substantially reviewed. It can only be assumed that the officials will be concerned about the possible repercussions of the case, particularly if it is given a meaning which would widen European citizenship (and therefore European rights) to British citizens, other than just British children in the UK. There is the potential for undermining much of the current restrictive domestic immigration regime controlling the entry of spouses and other relatives although presumably it would be necessary to show that the presence of these relatives is necessary to ensure the citizen's enjoyment of their EU citizenship rights.