

Chapter 10

EU Inclusion and Exclusion: from Workers to Citizens to People

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10.1. *Workers*

The EEC Treaty of 1957 included as an objective the free movement of persons which was included in Article 3. However, this was only given form in the treaty as regards the economically active – workers, the self employed and service providers. The right of free movement of those who are economically active was extended by the Court of Justice (CJEU) to include those who consume services – service recipients in the 1980s. In today's world where the separation of workers into 'desirable' the highly skilled, highly qualified and highly paid (the main criteria of the Blue Card Directive) are welcome but the 'undesirable' workers are to be excluded (low skilled, low qualified and low paid) the choice of what is now the EU in 1957 seems unimaginable.¹ However, as many commentators have examined, myself included, in 1957 the priority as regards the work force was to acquire enough workers to fuel industrial development, it was not to exclude workers. Many northern European states had employment recruitment agreements with countries in the south Germany with Greece and Turkey, the Netherlands with Turkey and Morocco etc. Along the same lines, Germany, the Netherlands and Belgium had bilateral recruitment agreements also with Italy. European countries with colonial territories turned to the people living in those territories to fulfil their labour market needs (France – Algeria, UK Indian sub-continent, Caribbean).² Looking backwards over the past 20 years from 2016, one thing which is surprising is how much more rapidly the nationals of those EU states which joined the EU in 2004 have been recognised as full EU citizens in comparison with Italian nationals after the creation of the EEC (as then was).

¹ Guild, E. (2002), 'The Single Market, Movement of Persons and Borders', in: J Scott & C Barnard, *The Law of the Single European Market*, Hart: Oxford, p.295-310.

² Guild, E. (2011), *Immigration Law in the European Community*, The Hague: Kluwer Law International.

Even in the late 1980s references were being made to the Court of Justice of the EU (CJEU) regarding expulsion of Italian nationals from Germany which exemplified just how limited the sense of these fellow EU nationals were perceived in comparison with own nationals.

There has been some academic work on the degree to which state authorities were directly involved in recruiting migrant workers (common practice of the German labour ministry in the 1960s) or left it open to companies, often owned by the state to carry out recruitment in overseas territories.³ However, this inquiry often asks a question: whether states have a greater moral obligation to treat the descendants of migrant workers in accordance with principles of equality or not if these states have actively recruited the workers in the first place instead of merely allowing them or failing to prevent them from arriving and settling in. This debate is now in the past. Most of the descendants of migrant workers to EU countries from the 1960s and 1970s have acquired citizenship, usually by birth on the territory in combination with the immigration status of their parents. What seemed even 20 years ago to be an issue of migration is now an issue of citizenship.⁴ Those who regret this change of status are usually among those most vocal about the need to have strong laws to deprive people of citizenship when they behave badly in the eyes of the authorities (eg the Netherlands, UK and current debate in France).

In 1957 the division between desirable and undesirable workers did not rest on whether they were highly qualified or paid or not. Instead it was calculated on whether the workers were healthy (hence medical checks at various points in the migratory trajectory) and whether they were compliant (eg not too active in trade unions and workers' rights – an indication of possible communist tendencies) and with no criminal convictions. The idea which in today's language is expressed as circular migration was very popular – though in the language of the time it was *Gastarbeiter*. This world of competition for workers on the basis of their health and willingness to work fuelled a very specific approach to free movement in the EU (EEC as it then was). The distance between state control of the migration process or migration as a choice of the individual which is then confirmed by state authorities did not seem so distant. One seemed just to be a flip side of the other. The fixation on migration control and management would

3 Guild, E. (2005), 'Who is Entitled to Work and Who is in Charge? Understanding the Legal Framework of European Labour Migration', in: E. Guild & D. Bigo (eds), *Controlling Frontiers: Free Movement into and within Europe*, Farnham: Ashgate, p.100-139.

4 Guild, E. (1996), 'The Legal Framework of Citizenship of the Union' in: D. Cesarani & M. Fulbrook (eds), *Citizenship, Nationality and Migration in Europe*, London: Routledge.

arrive in a few decades – around the time that the CMR was established.⁵ The gradual control of labour migration began in Europe in the late 1960s – the UK which was not yet a Member State was an early advocate of greater state control as de-colonialisation resulted in turbulence in East Africa.⁶

The consequence of the differences in preoccupation of the EU authorities in 1957 and those in 2016 is revealed in the EU's legal regime of free movement of workers, the self employed and service providers and recipients.⁷ The idea of free movement of workers bears reflection. It re-sets the clock with a completely different default position from that of migration control and management. It is based on the principle that people know where their best interests lie and should be entitled to choose where to sell their labour or set up their business. It is inimical to the idea that state authorities have a right to decide whether to admit or refuse a foreign national on the basis of criteria which that administration has constructed. Instead the power is in the hands of the person who moves and it is for the state to carry out a test after the fact and in the event that the state authorities decide that they do not actually want the individual to be present on their territory to come up with reasons for this which would justify requiring the person to leave. This reversal of the relationship of power has taken on more and more importance both for those Member States anxious to control movement of persons on their territory but also among those Member States (often the more recent arrivals) who recognise the popularity among their citizens of achieving free movement of workers for them.⁸

The interests of these two groups of Member States often coincide – where in some Member States like the Netherlands and the UK political parties have sprung up which focus on the adverse consequences of being unable to control migration for instance from Poland or Romania⁹ – and in other Member States,

5 Guild, E. (2001), *Immigration Law in the European Community*, The Hague: Kluwer Law International.

6 Guild, E. (1990), 'British Nationality and East African Independence', *I&NL&P*, July.

7 Guild, E. (1998), 'The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union', in: P. Craig & C. Harlow (eds), *Lawmaking in the European Union*, Dordrecht: Springer, p.65-88.

8 Guild, E. (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International.

9 Van Heerden, S., *et al.* (2014), 'The immigration and integration debate in the Netherlands: Discursive and programmatic reactions to the rise of anti-immigration parties', *Journal of Ethnic and Migration Studies* 40.1, p.119-136. Davis, A. (2012), *The impact of anti-immigration parties on mainstream parties' immigration positions in the Netherlands, Flanders and the UK 1987-2010: Divided electorates, left-right politics and the pull towards restrictionism*, diss. European University Institute (SPS), Florence.

state authorities and political parties express concern about the loss of young workers in whose hands the future of the country rests (for instance Greece and Spain after the economic slumps of 2008).¹⁰ Yet while various political voices express concern and demand action, the reality of free movement of workers, the self employed and service providers and recipients appears to bring many benefits to everyone in the economy.¹¹

This may be reflected by the nature of the challenges and cases which reach the EU's court in the field of free movement of workers. The vast majority of these cases are around social benefits of one kind or another. Hundreds of cases have been referred to the CJEU on regulation 1408/71 and its successor 883/2004¹² on the coordination of social security systems. Many cases have been referred, though at a less startling rate, on the entitlement of workers to equal treatment in social advantages. What does this tell us about the principle of shifting the burden of proof from the individual to prove he or she fulfils the requirements to enter and work to the state to prove that the individual can be excluded on limited grounds? It would seem that money and profit is very much in question. States seem to be reluctant to enforce equal treatment in wages and working conditions for migrant workers and even more reluctant to treat them in the same way as nationals of the state when it comes to doling out social benefits, even in the case of contributory benefits. What is good enough for workers who are citizens of the state seems to be far too generous when it comes to workers who are not citizens.¹³ The CJEU has taken a fairly consistent position (until recently – which I will come back to at the end) to privilege the entitlement of the EU worker to social benefits and to listen, with a healthy degree of scepticism, to the justifications put forward by states for the necessity of differential

¹⁰ Mrozowicki, A., A. Krasowska & M. Karolak (2015), 'Stop the Junk Contracts! Young Workers and Trade Union Mobilisation against Precarious Employment in Poland', in: A. Hodder & L. Ketsos (eds) (2015), *HoYoung Workers and Trade Unions*, Palgrave Macmillan UK, p.123-141; Spyridakis, M. (2013), *The Liminal Worker: An Ethnography of Work, Unemployment and Precariousness in Contemporary Greece*, Ashgate Publishing, Ltd.; Meardi, G. (2013), *Social failures of EU enlargement: a case of workers voting with their feet*. Vol. 25. Routledge.

¹¹ Minderhoud, P.E. & N. Trimikliniotis (2009), *Rethinking the free Movement of Workers. The European Challenges ahead*, Nijmegen: Wolf Legal Publishers.

¹² Fuchs, M & R. Cornelissen (2015), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009* Baden-Baden: Beck/Hart/Nomos. Cantillon, B., H. Verschueren & P. Ploscar (eds) (2012), *Social inclusion and social protection in the EU: interactions between law and policy*, Antwerp: Intersentia.

¹³ Guild, E., S. Carrera Nunez & K. Eisele (2013), *Social benefits and migration: a contested relationship and policy challenge in the EU*, Brussels : CEPS.

treatment in social benefits between their citizens and workers from other Member States.¹⁴

The EU approach of establishing a right to equal treatment for workers wherever they are in the Union against which right any Member State wishing to provide worse treatment must justify that choice, has had substantial consequences for the way in which we think about migration of all kinds. The normal position, and one which the trade unions have been eager to support, is that all workers need to have the same rights in respect wages and working conditions.¹⁵ There are a number of reasons for this among them: (1) this is the only way to ensure that employers do not undercut wages and working conditions by hiring cheaper non-national workers and thus freeze out workers from the state; (2) wages and working conditions can only be maintained if everyone in the workplace is able to enjoy the same standards and ensure its enforcement; (3) protection of wages and working conditions have a social purpose which applies to everyone in the labour market irrespective of their status as a citizen or foreigner.¹⁶ The CJEU approved these arguments in its judgment *Tumer*¹⁷ in 2014 when contemplating whether a Turkish worker without permission to reside in the Netherlands should still be entitled to compensation for wages lost as a result of the insolvency of his employer. The outcome was to reinforce the entitlement of everyone in the labour market to wage and working conditions equality and protection¹⁸ – but I am getting ahead of myself here and will come back to this in due course.

The tenacity of EU workers to claim equal treatment in wages and working conditions is also a credit to the original treaty. By giving the power to choice to the worker against which any state effort to exclude him or her from the labour market or territory requires a great amount of effort and justification, a group of

14 Cornelissen, R. & G. Van Limberghen (2015), '14. Social security for mobile workers and labour law', in: F. Pennings & G. Vonk, *Research Handbook on European Social Security Law*, Cheltenham: Edward Elgar, p.344-384. Pennings, F. (2012), 'EU citizenship: access to social benefits in other EU member states.' *International Journal of Comparative Labour Law and Industrial Relations* 28.3, p.307-333.

15 Visser, J. (2013), 'ICTWSS: Database on institutional characteristics of trade unions, wage setting, state intervention and social pacts, 1960-2011', Amsterdam Institute for Advances Labour Studies (AIAS), University of Amsterdam <www.uva-aias.net/207>.

16 Connolly, H., S. Marino & M. Martinez Lucio (2014), 'Trade union renewal and the challenges of representation: Strategies towards migrant and ethnic minority workers in the Netherlands, Spain and the United Kingdom' *European Journal of Industrial Relations*, March 2014 vol 20, nr. 1 p.5-20.

17 C-311/13

18 Crépeau, F. & B. Hastie (2015), 'The Case for 'Firewall' Protections for Irregular Migrants', *European Journal of Migration and Law* 17.2-3, p.157-183.

migrant workers came into being with the confidence to make and pursue their claims to equality. As their continued residence and employment did not depend on a state's generosity in extending their work and residence permits every now and then a sense of entitlement to equality could come into existence.¹⁹ Migrant workers whose work and residence status is constantly up for grabs and can be extinguished easily by the state are much less vocal about their rights. The fear that state authorities and employers are working together and any effort to establish a right to equal treatment may result in non-renewal of a residence permit or the curtailment of the right to work is constantly present. Legislation in a number of Member States which requires employers to provide information on third country national workers' immigration status continuously to state authorities creates close relationships between employers and state immigration authorities (such as in the Netherlands and the UK).²⁰ It becomes easier and easier for employers to get rid of troublesome employees through immigration procedures thus avoiding the nuisance of employment protection legislation.²¹

The second bone of contention among EU workers, self employed and service providers and Member State authorities has been family reunion with third country national family members. This always seems to be a peculiar debate not least as so many international human rights instruments state as the IPPCR does that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 23(1) ICCPR.²² Yet, for some EU states, national law is constructed so that the family entitled to protection means the family composed exclusively of nationals of the state.²³ Those citizens who acquire third country national family members appear to be excluded from the entitlement to protection. But not only is protection of the family not on offer, but in these cases some states seem to be falling over themselves to think up ever greater obstacles to family life where one or more

19 Collett, E. (2013), *The integration needs of mobile EU citizens: Impediments and opportunities*, Brussels: Migration Policy Institute Europe.

20 Anderson, B. (2015), 'Precarious Work, Immigration, and Governance', in: C-U. Schierup, R. Munck, B. Likic-Brbobic & A. Neergaard (eds), *Migration, Precarity, and Global Governance: Challenges and Opportunities for Labour*, Oxford : Oxford University Press, p. 68.

21 Guild, E., C. Gortázar Rotaèche & D. Kostakopoulou (eds) (2013), *The reconceptualization of European Union citizenship*, The Hague: Martinus Nijhoff Publishers.

22 Desmond, A. (2015), 'The Triangle that could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review,' *European Journal of Migration and Law* 17.1, p.39-69.

23 Heinemann, T., & Th. Lemke (2012), 'Suspect Families: DNA Kinship Testing in German Immigration Policy', *Sociology* 47.4, p.810-826.

members of the family is a third country national. One only needs to reflect on the development of language requirements, income thresholds, integration tests, age limits and the like to recognise this restrictive tendency, the volition to create obstacles ever more insurmountable for their citizens.²⁴ This is a form of punishment by the state of citizens for acquiring the wrong sort of family members.²⁵

EU workers are protected by EU law against these tendencies – first in the form of secondary legislation dating from the 1960s and only ever extended not reduced, setting out the right to family reunion with their family members (defined in the EU secondary legislation not left to Member States' imagination) and secondly by the CJEU's interpretation of the worker's right to family reunion as an inherent part of the internal market.²⁶ The consequence of various struggles between Member States and EU workers from other Member States regarding the entitlement to family reunion has taken unexpected paths. The first has been regarding constitutional issues in some Member States where citizens must always have the best rights available to anyone on the territory (eg Austria).²⁷ As national immigration laws regarding family reunion for citizens of the state became increasingly hostile to third country national family members, the right of EU workers to these family rights became ever more incongruent.²⁸ State authorities had an increasingly complicated time of it to explain to their citizens why they could not have the same generous family reunion rights as those which their EU worker neighbours from another Member State were entitled to enjoy. The second has been a rear-guard action by some Member States, the Netherlands and the UK among them, to roll back EU family reunion rights for

24 Van Oers, R., E. Ersbøll & D. Kostakopoulou (eds) (2010), *A re-definition of belonging?: language and integration tests in Europe*, The Hague: Brill.

25 Groenendijk notes that in the parliamentary debates on the Dutch integration abroad test, the government sought to justify the new obstacles on the grounds that the children of Moroccan and Turkish immigrants to the Netherlands should marry someone already in the Netherlands rather than someone from their parents' country of origin. Groenendijk, K. (2011), 'Pre-departure integration strategies in the European Union: Integration or immigration policy?', *European Journal of Migration and Law* 13.1, p.1-30.

26 CJEU 25 July 2008, C-127/08 *Metock*. Wiesbrock, A. (2012), 'Granting Citizenship-related Rights to Third-Country Nationals: An Alternative to the Full Extension of European Union Citizenship?' *European Journal of Migration and Law* 14.1, p.63-94.

27 Messinger, I. (2013), 'There is something about marrying... The case of human rights vs. migration regimes using the example of Austria', *Laws* 2.4, p.376-391.

28 Lenaerts, K. (2015), 'EU citizenship and the European Court of Justice's "stone-by-stone" approach', *International Comparative Jurisprudence* 1.1, p.1-10.

EU workers both in law and practice.²⁹ When one examines the number of cases which have come before the CJEU on this subject, a predominant number of them involve the Netherlands and the UK and in almost all of them (though with some surprising exceptions) these two states if not immediately party have intervened against the EU worker.³⁰

The third field in respect of which the CJEU has reined in Member States' enthusiasm to limit EU workers' rights has been in respect of expulsion. Very much an issue of the early days of free movement of workers in the EU, the temptation of Member States to expel EU workers when they became unemployed was great. This ground of expulsion was specifically prohibited by the secondary legislation so particularly as unemployment rose in the 1970 Member States began to examine the grounds on which they could expel EU workers and to test their residual powers. Once again the position of the CJEU was central.³¹ Doing no more than interpreting the Treaty and subsidiary legislation faithfully it pointed out to the Member States that they had agreed a high level of protection for EU workers which could only be displaced by a real danger to public policy or public security. As far as public policy is concerned this requires a conviction by a criminal court in addition to evidence of a future threat to public policy on the basis of the individual's continued residence. Efforts to diminish this standard have not so far been successful – but at the time of writing in Spring 2016 are back on the table in the context of the UK government's demands for revision of the EU.³²

As workers, nationals of the Member States have gradually extended and consolidated their rights entering into prolonged struggles with some Member States. The three fields which are outstanding in this regard are social security and benefit rights, third country national family members and protection from expulsion.

29 Groenendijk, K. (2004), 'Legal concepts of integration in EU migration law,' *European Journal of Migration and Law* 6.2, p.111-126.

30 Explicitly, this policy seems to have been motivated in both countries by concerns about their nationals who have an immigrant background and thus in the eyes of the authorities too many links with countries abroad. Guild, E., C.A. Groenendijk & S. Carrera (eds) (2009), *Illiberal liberal states: immigration, citizenship, and integration in the EU*. London: Ashgate Publishing.

31 Guild, E. (2014), *The Social Impact of Migration and the Notion of Citizenship for the EU. Ensuing challenges and opportunities for the Union*. CEPS Commentaries, 13 March 2014.

32 Kostakopoulou, D. (2014), 'When EU citizens become foreigners,' *European Law Journal* 20.4, p.447-463.

10.2. *Citizens*

Enlargement of the EU has had a profound impact on the rights of EU nationals. The enlargement in 1973 to include Denmark, Ireland and the UK took place amid concerns about migration from the UK in particular to the continent which would include workers with no history of minimum wages (which did not exist in the UK at that time).³³ At that time in the Dutch parliament fears were expressed explicitly about the risks of allowing free movement to the Netherlands to Black British workers. The 1980 enlargements (Greece, Portugal and Spain) had a more profound impact on the rights of people – first in a negative manner – for the first time transitional restrictions were applied to free movement of workers for periods of up to seven years from accession of each of the countries.³⁴ For Portugal and Spain there was an adjustment of the transitional restrictions lifting them a year before the end date on account of German reunification.³⁵ On the positive side, Spain championed the creation of citizenship of the Union introduced in the Maastricht Treaty in 1991 – a new dimension of free movement which according to the treaty provision swept up all the rights of movement and residence into the new status of citizen.

When the Maastricht Treaty came into force and all nationals of the Member States became citizens of the Union there was joy in some countries and dismay in others.³⁶ According to an anecdote of a Commission official at the time, a number of British (and other national) citizens wrote to the Commission advising that they did not want this new citizenship. The automatic acquisition of a second citizenship by everyone who was a Member State national also undermined the principle of only one citizenship – a dearly held principle in some Member States. It was no longer possible for any national of a Member State to remain other than a dual citizen. Economically inactive Member States nationals had already won the right to move and reside elsewhere in the EU by virtue of a series of three directives in 1990.³⁷ The consolidation of rights in the

33 Bohning, R. (1972), 'The Problems of Immigrant Workers in West Germany', in: N. Deakin (ed), *Immigrant in Europe*, London: Fabian Society, p.18-29 ; Wallace, H. (2013), 'The UK: 40 Years of EU membership', *Journal of Contemporary European Research* 8.4, p.531-546.

34 Preston, Chr. (1995), 'Obstacles to EU enlargement: the classical Community method and the prospects for a wider Europe', *JCMS: Journal of Common Market Studies* 33.3, p.451-463.

35 Royo, S. & P.Chr. Manuel (eds) (2003), *Spain and Portugal in the European Union: the first fifteen years*, Oxford: Taylor & Francis.

36 Wiener, A. & V. Della Sala (1997), 'Constitution making and Citizenship Practice—Bridging the Democracy Gap in the EU?', *Journal of Common Market Studies* 35.4, p595-614..

37 Guild, E. (1996), 'The Right to travel: three new directives from the European Commission', *I&NL&P* Vol 10 No 2.

new citizenship brought together under one heading all nationals of the Member States irrespective of whether they had exercised a free movement right and where they had exercised such a right irrespective of the basis on which they had done so.³⁸

But what did these new citizens want from their citizenship? For about ten years it was not entirely clear as the CJEU consistently resisted interpreting the meaning of the new citizenship provision.³⁹ A number of these new citizens sought to use their new status to claim rights that they would acquire only through the exercise of a free movement right without actually doing the free movement act. But either these cases never went to the CJEU or the CJEU found no link to EU law.⁴⁰

Citizenship of the Union as a new status began to take hold just as a number of cases about marginal movement and the escape from national citizenship were favourably considered by the CJEU.⁴¹ In the marginal movement cases, *Chen* stands out – a Chinese woman resident in the UK who went to Northern Ireland to give birth so that her daughter would be an EU citizen (At the time, Irish citizenship was accorded to all people born on the territory of the island or Ireland, not just the Republic of Ireland, this was changed following the decision of the CJEU).⁴² The decision in 2004 recognised that the baby Chen was entitled as an Irish national (although never having set foot in Ireland) to reside in the UK as an EU citizen and in order to exercise this right was entitled to have her third country national mother live with her. That the family was economically self-sufficient and had health insurance was a factor (the economically inactive right of residence directives all require health insurance and sufficient resources not to become a burden on the social assistance system of the host Member State). Citizens apparently want to live in the state where they are born enjoying EU rights. They no longer wanted to exercise a free movement right in order to enjoy the flanking rights such as family reunion, which come into existence through the

38 Mantu, S. (2008), *The boundaries of European social citizenship*, Nijmegen: Wolf Legal Publishers.

39 Fries, S. (1998), 'Citizenship of the Union: First steps in the European Court of Justice', *European Public Law* 4.4, p.533-559.

40 Shuibhne, N.N. (2002), 'Free movement of persons and the wholly internal rule: Time to move on?', *Common Market Law Review* 39.4, p.731-771.

41 Berneri, C. (2014), 'Protection of Families Composed by EU Citizens and Third-country Nationals: Some Suggestions to Tackle Reverse Discrimination', *European Journal of Migration and Law* 16.2, p.249-275.

42 Ryan, B. (2004), 'The Celtic cubs: The controversy over birthright citizenship in Ireland', *European Journal of Migration and Law* 6.3, p.173-193.

exercise of a treaty free movement right. This new demand, to enjoy EU rights without moving would become something of a clarion call from EU citizens. By 2011 the demand was recognised by the CJEU as valid in *Zambrano* a particularly important case about moving from national of a Member State to citizen of the Union without having to exercise a free movement right for more than three months.⁴³ Once again it revolved around a child who had acquired citizenship of the country where he lived (Belgium) but whose parents were third country nationals subject to expulsion procedures (which had been stopped by a court and over the effective period of 10 years had not been carried out). The CJEU found that the child had a right to have his parents live with him in Belgium and those parents had the right to work. These rights even extended to the right of a third country national older sister to remain with him in the host Member State. It looked as if citizenship of the Union might be about to acquire the key characteristics of citizenship in international law – the right to enter and live in the country of one’s nationality, though these indications were quickly scotched. In a series of cases which have followed *Zambrano* and have been fully discussed in the legal literature, the CJEU withdrew somewhat from its position which seems at the moment to apply specifically to children, taking into account their vulnerable position. For adults the only solution is to exercise a free movement right to go and live in another Member State.⁴⁴

Another development of the power of EU status to counter national citizenship came early in the 1990s in the *Surinder Singh* judgment though it was not argued on the basis of EU citizenship as the provision had not come into force yet.⁴⁵ Here a British citizen exercised her free movement right and worked in Germany then returned to the UK with her third country national husband. The UK authorities sought to apply national UK immigration law to the husband. He claimed that EU law must continue to apply to him even though he and his wife had now returned to her country of underlying citizenship – the UK. The UK authorities claimed Mrs Singh as their national and with that claim the entitlement to treat just as disadvantageously as they treated all their other citizens in respect of family reunion. The CJEU found against the UK authorities. Effectively the Singh family which had set out from the UK as British citizens had become EU citizens while working in Germany and retained that status and all its consequential rights on their return to the UK. Mrs Singh did not revert back to her British citizen status

43 Tryfonidou, A. (2012), ‘Redefining the outer boundaries of EU law: the *Zambrano*, *McCarthy* and *Dereci* trilogy’, *European Public Law* 18.3, p.493-526.

44 Lenaerts, K. (2015), ‘EU citizenship and the European Court of Justice’s “stone-by-stone” approach’, *International Comparative Jurisprudence* 1.1, p.1-10.

45 CJEU 7 JULY 1992, C-370/90 *Surinder Singh*, ECR [1992] I-04265.

on returning to the UK with her third country national husband. She remained an EU citizen and he remained protected by EU family reunion law, which was much more generous than its British counterpart.⁴⁶

While the claim was specifically about rights to family life it can also be seen as a sign of emancipation of EU status from nationality of a Member State. Although the latter was and continues to be an necessary characteristic to enjoy EU citizenship, once an EU citizen has started to acquire EU based rights through the exercise of a free movement right he or she is entitled to continue to enjoy the benefits of that EU status when returning to his or her state of underlying nationality. The starting place is the same – a national of a Member State at home cannot access rights attached to free movement but once they have been accessed then they can be enjoyed back in the state of nationality.⁴⁷

Further citizens of the Union appear to want equal treatment in respect of social rights.⁴⁸ The reluctance of Member States to afford real equality to EU workers as regards benefits available to their own nationals has been even more pronounced when it comes to EU citizens. The claim to the right to move and reside for more than three months has been carefully restricted in EU secondary legislation to apply only to those who have rights as workers or self employed or those who are self sufficient and have health insurance. Member States really object to extending their social benefits to EU citizens on the basis of their common citizenship (see *Dano*, *Alimanovic* etc)⁴⁹. While there is a grudging acceptance of states' obligation to extend such rights to workers, citizens are certainly not considered equal enough for this purpose.⁵⁰

46 Groenendijk, K. (2006), 'Family reunification as a right under community law,' *European Journal of Migration and Law* 8.2, p.215.

47 Oosterom-Staples, H. (2012), 'To What Extent Has Reverse Discrimination Been Reversed?', *European Journal of Migration and Law* 14.2, p.151-172.

48 Guild, E. (2013), 'Does European Citizenship Blur the Borders of Solidarity?', in: E. Guild, C. Gortazar & D. Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship*, The Hague: Brill, p.189.

49 CJEU 11 November 2014, C-333/13 *Dano*; CJEU 15 September 2015, C-67/14 *Alimanovic*. Verschueren, H. (2015), 'Preventing "benefit tourism" in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?', *Common Market Law Review* 52.2, p.363-390.

50 Peers, S. (2015), 'Benefits for EU-Citizens: A U-Turn by the Court Of Justice?', *The Cambridge Law Journal* 74.02 p.195-198; Van der Mei, A.P. (2015), 'Overview of recent cases before the Court of Justice of the European Union (October-December 2014)', *European Journal of Social Security* 17.1, p.103.

The question also remains whether EU citizenship is a real citizenship. The fact that EU citizens can still be expelled from one Member State to their state of underlying nationality and the limitations on their voting rights⁵¹ are indications that this citizenship is incomplete as regards international law. I have argued elsewhere that the only way around this problem is to suggest that expulsion from one part of the EU to another is the equivalent of an internal residence restriction. But the EU law still calls expulsion 'expulsion' not a residence order.⁵² The violence inherent in expulsion still applies to EU citizens when they are being pushed back to their country of underlying nationality by the authorities of a host Member State. It would be difficult, in good faith, to suggest that this is anything but expulsion.⁵³ As the expression goes, if it quacks like a duck and it walks like a duck it probably is a duck.

The EU legislator attempted to reduce the power of Member States to expel EU citizens from their territory in the negotiations which led to Directive 2004/38. The Member States insisted on retaining the expulsion power but they did agree to the creation of a new status of permanent residence and the limitation of expulsion powers by ever increasingly strict requirements with the passage of time. Serious reasons of public policy must be established by the Member State to expel an EU citizen with a right of permanent residence, after ten years residence or in respect of a child imperative grounds of public security are need to justify expulsion. Sadly, the CJEU saw fit to interpret these two new protections in a vague manner not particularly conducive to the intention of additional protection.⁵⁴ The creation of a right of permanent residence for a citizen is a very odd idea in itself. Citizens are entitled to residence by their citizenship – how odd

51 In EU law, EU citizens living in a Member State other than that of their underlying nationality can only vote and stand for election in municipal and European Parliament elections. Groenendijk, K. (2008), *Local voting rights for non-nationals in Europe: What we know and what we need to learn*, Brussels: Migration Policy Institute.

52 Guild, E. (2004), *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International.

53 Genova, N. De & N. Peutz (eds) (2010), *The deportation regime: sovereignty, space, and the freedom of movement*, Duke University Press. Guild, E. (2016), 'Understanding Immigration Detention in the UK and Europe', in: M.J. Guia, R. Koulis & V. Mitsilegas (eds), *Immigration Detention, Risk and Human Rights*. Springer International Publishing, p.141-155.

54 Kostakopoulou, D. (2014), 'When EU citizens become foreigners.' *European Law Journal* 20.4 p.447-463; Kochenov, D. (2012), 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe', *Columbia Journal of European Law* 18(1), p.55-109.

that they should be able to acquire a more permanent form of it by residing in their territory of citizenship for five years.⁵⁵

So the EU has citizens who lack an essential characteristic of the international law status of a citizen.⁵⁶ But, on the other hand, they have acquired a whole series of rights which are highly portable and can be taken 'home' when the EU citizen goes back to his or her state of nationality.⁵⁷

Perhaps the most important aspect of the move to citizenship of the Union is the shift away from an economic conceptualisation of rights for people in the EU. However, in widening the concept of citizenship to include a supra national entity which is not a state, it may be that the EU has also weakened the concept.⁵⁸ While at Member State level, citizenship is based on the idea of allegiance between the citizen and the state what is the link at the EU level? It may be that the new ways of thinking about citizenship have been relevant to its increasing fragility. In 1999 eight years after nationals of the Member States obtained their new status as EU citizens they lost a right in international law which is tied to 'real' citizenship – the right to seek international protection in any country as soon as one is outside one's state of nationality.⁵⁹ By virtue of the Aznar Protocol to the Amsterdam Treaty EU citizens are presumed not to be in need of international protection (though in theory the presumption can be rebutted).⁶⁰ The logic goes that EU Member States respect human rights and do not create refugees. Thus citizens of the Union do not need a right to seek asylum elsewhere in the EU. The consequence has been that EU citizens seek (and receive) asylum outside the EU, notably but not only in Canada.⁶¹ While EU citizens can be expelled back to their countries of underlying nationality they cannot seek

55 Kochenov, D. (2013), 'The right to have what rights? EU citizenship in need of clarification', *European Law Journal* 19.4, p.502-516.

56 Guild, E. (2007), 'Citizens without a Constitution, Borders without a State: EU Free Movement of Persons' in: A. Baldaccini, E. Guild & H. Toner, *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart, p.25-56.

57 Douglas-Scott, S. (2014), 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis', *CML Review* 43, p.629.

58 Askola, H. (2012), 'Tale of two citizenships? Citizenship, migration and care in the European Union', *Social & Legal Studies* 21.3, p.341-356.

59 Guild, E, and K. Zwaan (2014), 'Does Europe Still Create Refugees-Examining the Situation of the Roma', *Queen's LJ* 40, p.141.

60 Guild, E. & M. Garlick (2010), 'Refugee Protection, Counter-terrorism, and Exclusion in the European Union', *Refugee Survey Quarterly*, 4, p.63-82.

61 Carrera, S., E. Guild & M. Merlino (2011), *The Canada-Czech Republic Visa Dispute Two Years on: Implications for the EU's Migration and Asylum Policies*, Brussels: Centre for European Policy Studies.

asylum on the basis of a fear of persecution, real risk of torture, inhuman or degrading treatment or punishment in another Member State.⁶²

An increasing number of Member States like the Netherlands and the UK have passed legislation which permits them to withdraw citizenship from unsatisfactory citizens, usually described as those involved in terrorism though the UK legislation permits this on the basis that their continued citizenship is not conducive to the public good.⁶³ The idea that citizenship is difficult to get rid of and states are responsible for the citizens they have has been changing.⁶⁴ That citizenship might be a privilege which the state can take away from anyone is a complicated way of defining the polity. In EU law, the protection of the EU citizen from the coercive state has taken numerous forms, some set out above. That the EU citizen always has the right to enter the territory of the EU has been a given. The CJEU refused to permit Member States to include EU citizens among the people whose details are entered on the Schengen Information System for the purpose of excluding them from the territory (refusal of entry).⁶⁵ The reason for this was that Article 96 of the Schengen Implementing Agreement (CISA) when read in conjunction with Article 1 defining an 'alien' prohibits the registration of EU citizens for the purposes of exclusion from the territory of the Member States. EU citizens can be registered for other purposes such as for surveillance.

But now that some states, such as the UK, Belgium and others, have passed legislation which permits the authorities to withdraw the privileges of citizenship granted by international law – the right to enter one's state. The UK legislation permits this exclusion of citizens for periods of up to two years (The Counter Terrorism and Security Act 2015 – temporary exclusion orders). Thus it would seem that ideas which have seemed permanent are actually changing. The use of the term 'foreign fighters' to describe EU citizens who have gone to the Middle East to engage in the regional war there seems an anomaly. How foreign are these fighters if they are British, French, Belgium, Dutch citizens? Is their foreignness somehow an attribute associated with the deep characteristic of citizenship – allegiance? Also in the terminology of foreign fighters may be embedded the

62 Byrne, R., G. Noll & J. Vedsted-Hansen (2004), 'Understanding refugee law in an enlarged European Union', *European Journal of International Law* 15.2, p.355-379.

63 Mantu, S. (2015), *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*, The Hague: Brill.

64 Mantu, S. (2015), 'Citizenship in times of terror: citizenship deprivation in the UK', *Change* 36.5, p.735-751; Baldaccini, A. (2008), 'Counter-terrorism and the EU strategy for border security: Framing suspects with biometric documents and databases', *European Journal of Migration and Law* 10.1, p.31-49.

65 Brouwer, E. (2008), *Digital borders and real rights: effective remedies for third-country nationals in the Schengen Information System*, Den Haag: Brill.

assumption that these people are dual nationals – the children of migrant workers from elsewhere and so their EU citizenship is somehow an extra, or a luxury acquired by reason of accident of birth and immigration status of their parents. In the debates around citizenship from the 1980s and before particularly in Germany, one of the key arguments for refusing to permit dual nationality was that in the event of hostilities between the two countries of nationality the dual national would find him or herself in a position of treason in respect of one of them and this should be avoided at all costs.⁶⁶ The loyalty of the dual national is the matter in issue – can a state really rely on the allegiance of a dual national? States with long colonial pasts have often been less concerned about dual nationality as the assumption of links between the independent former colonial state and the former master state is only reluctantly abandoned. However, the changing world of disaffected young people appears to be changing that assumption. These young people are now framed as the problem of their ‘other’ citizenship and country not the EU Member State where they have often been born and lived most of their lives.

There are some indications that in discussions among EU working groups on counter-terrorism and organised crime there are efforts afoot to find ways to use the SIS system to signal which EU citizens should be excluded from entering the EU altogether even if, formally, they still hold the nationality of a Member State.

10.3. *People*

The division of the world into citizens and foreigners depends on a profound belief in the magic which borders perform. International borders can transform people from citizens in their own state to foreigners in some one else’s state and the reverse.⁶⁷ This extraordinary capacity of an international border is determinant of the rights of those who cross it – to stay, to work to enjoy equal treatment etc. It is founded in the idea of the citizen as the legitimate participant in the polity and the foreigner as someone who might be tolerated.⁶⁸ It is in

66 Hailbronner, K. (1989), ‘Citizenship and nationhood in Germany’, in: R. Brubaker (ed), *Immigration and the politics of citizenship in Europe and North America*, American University Press, p.67.

67 Guild, E. (2006), ‘Danger – borders under construction: assessing the first five years of border policy in an area of freedom, security and justice’ in: J de Zwaan and F Goudappel, *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* Asser Press, The Hague, pp 45 – 72.

68 Guild, E. (2011), ‘Equivocal Claims? Ambivalent Controls? Labour Migration regimes in the European Union’ in: E. Guild & S. Mantu (eds) (2007), *Constructing and Imagining Labour Migration: Perspectives of Control from Five Continents*, Ashgate, Farnham, p.207-228.

constitutions and constitutional settlements that this relationship of the citizen and the state is inscribed.

Yet, there is a parallel universe of rights which is based not on citizenship but on human rights.⁶⁹ This universe has developed rapidly in the post WWII period moving from aspirational declarations (UDHR) to binding commitments and increasingly binding supranational adjudication of rights (ICCPR etc).⁷⁰ The regional form of this is the ECHR and as a late comer the EU Charter of Fundamental Rights. What is common to these obligations is that they are cast in the form of universal duties to people, not limited to citizens. Thus while the standard is often lower than that which national constitutions provide to their own citizens, human rights set a threshold below which the actions of no signatory state should fall. Where human rights are at stake the beneficiaries are everyone and anyone. There are few human rights which are limited by a nationality restriction, usually around voting and electoral rights.⁷¹ Even the right to enter one's country in Protocol 4 ECHR is not defined in terms of citizens and there has been a lively academic debate about whether long term resident foreigners can claim a country as their own.

The EU was slow in developing its Charter of Fundamental Rights, the consequence of its traditional task as being the creation and completion of an internal market (not protecting human rights).⁷² The road to the creation of the convention mandated to write the Charter began in the 1990s and the work commenced seriously in 2000.⁷³ Yet, the Charter did not acquire legal binding effect as a tool capable of providing rights to individuals until the entry into force of the Lisbon Treaty in 2009.

The language of the Charter is that of human rights applicable to everyone with few exceptions. These exceptions are: Article 12 which provides that political parties express the political will of EU citizens. Article 15 provides a right to

69 Falk, R.A. (2000), *Human rights horizons: the pursuit of justice in a globalizing world*. New York: Routledge; Donnelly, J. (1998), 'Human rights: a new standard of civilization?', *International Affairs* 74.1, p.1-23.

70 Baldinger, D. (2015), *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law*, Den Haag: Martinus Nijhoff.

71 Groenendijk, Kees. "Local voting rights for non-nationals in Europe: What we know and what we need to learn." *Migration Policy Institute* (2008).

72 Von Bogdandy, A. (2000), 'The European Union as a human rights organization? Human rights and the core of the European Union.' *Common Market Law Review* 37.6, p.1307-1338.

73 Peers, S., et al. (eds) (2004), *The EU Charter of fundamental rights: a commentary*, Bloomsbury Publishing.

employment for EU citizens; Articles 39 and 40 entitled EU citizens to stand for election and vote in European Parliament and municipal elections wherever they live in the EU. Articles 42, 43, 44 and 45 set out the rights to access to documents, to use the services of the Ombudsman and to petition the European Parliament but all of them are expressly stated to be available to any natural or legal person residing or having its registered office in the EU. Article 45 extends the right of free movement only to EU citizens (though extendable to third country nationals). Article 46 entitles only EU citizens to diplomatic and consular protection when in third countries. The rest of the fifty articles creating rights apply to everyone (within the jurisdiction of a Member State).⁷⁴ For the moment the pressing legal conundrum in respect of the Charter relates to its scope – what exactly is covered by the Charter as within the scope of EU law and what is excluded as within the competence of the Member States. This is a perennial fixation of EU law which has nothing particularly revelatory about it in this field. However, in respect of people, those who have been most discussed in the decisions of the Court of Justice which rely on the Charter have been migrants, refugees and asylum seekers, by definition not citizens of the Union.⁷⁵

On the scope issue, so long as the action comes within the scope of EU law then an individual whether a citizen or third country national is entitled to claim Charter rights in respect of it.⁷⁶ It seems apparent that the Charter does not affect the right of Member States to expel from their territory nationals of other Member States. The Charter includes a right to asylum but all the EU secondary legislation on international protection exclude from their scope nationals of the Member States hence the scope issue might be at play. So, for instance, it is not clear whether the Charter reinstates the right of EU citizens to seek asylum in another Member State.

The Charter only resolves issues of EU citizens right to respect to family life in so far as this is covered by the ECHR and its jurisprudence. In one recent CJEU judgment an Advocate General (Sharpston)⁷⁷ suggested that the rights of EU citizens returning to their home Member States after working in another and having acquired third country national family members should only have Charter

74 Guild, E. (2004), 'The variable subject of the EU constitution, civil liberties and human rights.' *European Journal of Migration and Law*, 6.4, p.381-394.

75 Ippolito, F. (2015), 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?', *European Journal of Migration and Law* 17.1, p.1-38.

76 Dougan, M. (2015), 'Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law"', *Common Market Law Review* 52.5, p.1201-1245.

77 CJEU 12 March 2014, C-456/12, *O & B*.

and ECHR family life rights regarding taking their family members home with them. This would have diminished dramatically the family reunion rights of EU citizens. The CJEU did not follow the A-G in this regard. Similarly, the Charter does not provide EU citizens with better rights as regards equality in access to social benefits. However, it does set a floor which applies to everyone including in its social chapter.⁷⁸ Increasingly the CJEU has invoked the charter to examine claims to equality of third country nationals resident in the EU with EU citizens – often with positive outcomes.⁷⁹

The sequence of developments which have taken place in the EU from 1961 (when the first directive on rights of EU workers including regarding family members) to 2016 in family reunion law has revealed only movement in one direction – the widening of rights. No EU right has yet been reduced though national family reunion laws have been dramatically restricted. This has left an increasingly wide gap between what is available to EU citizens who move to another Member State and the offer of their home state makes to them. Such a bifurcation may also take place in respect of the Charter though only time will tell. This same process is also evident in the protection of Turkish workers and self employed under the EC Turkey Association Agreement in comparison with the treatment of other third country nationals in the EU. What seemed normal for migrant workers and self employed in the 1970s and 1980s and was thus included in the EC Turkey Association Agreement and the secondary legislation made under it now seems extremely generous in relation to national legislation of many Member States.⁸⁰

With time, the Charter may come into its own increasingly providing a common threshold of rights valuable not only to third country nationals but also to EU citizens. The ‘everyone’ of the Charter may in fact become everyone if the rights of EU citizens continue to be interpreted in a restrictive manner and the rights of third country nationals catch up.

78 Prassl, J. (2012), ‘Book Review of: N. Bruun, K. Lörcher & I. Schömann (eds), *The Lisbon Treaty and Social Europe*, (Oxford: Hart Publishing, 2012)’, *Common Market Law Review* 52.1, p.310-311.

79 Minderhoud, P.E. (2015), ‘Nr. 61. Kamberaj. Equal treatment of long-term resident for housing benefit and Article 34 Charter; annotation with CJEU 24 April 2012, C-571/10’, in: S.G. Kok, C.H. Slingenbergh & K.M. Zwaan (eds), *Landmark cases on Asylum and Immigration Law*, Nijmegen: Ars Aequi Libri; Acosta Arcarazo, D. (2015), ‘Civic Citizenship Reintroduced? The Long Term Residence Directive as a Post National Form of Membership’, *European Law Journal* 21.2, p.200-219.

80 Rogers, N. (1999), *A Practitioner's Guide to the EC-Turkey Association Agreement*, The Hague: Martinus Nijhoff Publishers.

10.4. *Conclusions*

In this chapter I have examined the development of the status of people in EU law from workers with rights to EU citizens with rights to everyone irrespective of nationality or status as economically active or self sufficient. This process appears to have been fairly fluid, a continuous movement of rights acquired and retained with each revision of the Treaties. However, things may now be changing. From the 2015 general election in the UK, the government there has been committed to holding a referendum on the UK's membership of the EU. The date was set for 23 June 2016. In anticipation of this referendum the UK government sought concessions from the other Member States in a variety of areas including free movement of persons, an issue of some political salience in the UK.⁸¹ Among those concessions agreed at the European Council meeting 18-19 February 2016⁸² four stand out as particularly relevant to the discussion of this chapter. All of the concessions with which I will finish here would result in a reversal of the process of acquisition of rights by people in the EU moving from one Member State to another. Not all of the concessions agreed are of immediate interest to the UK so there is some scepticism that some other Member States have slipped in their pet concerns particularly in the social benefits area.⁸³ Should the UK vote to remain in the EU then these concessions will be implemented. Should the vote go the other way then there is no obligation on the remaining EU to go ahead with the measures, indeed, considering the controversial nature of some of them which appear to require the reversal of decisions of the CJEU, it might be contrary to EU law to do so. The four areas also reveal the concerns and anxieties of some Member States as regards the current state of rights of people in the EU.

Four areas stand out as specifically revelatory the February 2016 European Council Agreement on a new relationship with the UK:

(1) Equality in social benefits.

EU workers even in 2016 are better protected in a host Member State as regards equality in treatment on social benefits than anyone else. This has been a sticking point for the UK Government in its 2016 demands for a new relationship between the EU and the UK – the UK has insisted on the right to an emergency break to exclude EU workers from access to in work benefits for at least four years from

81 Geddes, A. (2016), *Britain and the European Union*. Basingstoke (UK): Palgrave Macmillan; Koutrakos, P. (2016), 'Brexit and International Treaty-making', *European Law Review* 1, p.1-2.

82 <www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions> [1 April 2016].

83 Steve Peers: <eulawanalysis.blogspot.com/2016/02/the-draft-renegotiation-deal-eu.html> [1 April 2016].

their arrival and succeeded in getting an assurance for this from the Council. But this agreement may be particularly welcome for a number of other Member States such as the Netherlands and Germany.

(2) Family reunion with third country national family members

A handful of Member States have a problem with third country national family members of EU citizens, both those of other Member States and their own nationals returning home. This point of friction has also arisen in the UK Government's demands for a new relationship with the EU where it has demanded that third country national family members of EU citizens must enter a Member State in the first instance via its national immigration rules on family reunion not on the basis of EU rules.⁸⁴ Further British citizens coming back to the UK after working in another Member State must fulfil UK national rules on family reunification even if this means leaving in the former host Member State their third country national family members. These demands appear to have been accepted by the Council.

(3) Expulsion

The Member States have resolutely hung on to the right to expel EU citizens from their territory. In the UK Government's negotiations on a new relationship with the EU again it has insisted that it have the right to expel EU citizens on less robust grounds than currently apply in EU secondary legislation and its interpretation by the CJEU. The UK does not want to be bothered with having to check whether an EU citizen is a future risk to public policy after completing a prison sentence, it wants to be able to expel them automatically on general preventive grounds. In fact it wants to be able to expel EU citizens even without a criminal conviction. Once again, the Council appears to have accepted this demand.

(4) Bad Boys

Finally there is the issue of the EU citizens which Member States no longer want – the 'bad boys' they have designated as foreign fighters.⁸⁵ For the moment it remains unclear how various measures which fall short of full deprivation of citizenship (such as the UK measures on temporary exclusion from the territory for up to two years and the like) will be reconciled with EU citizenship. Will the Member States once again cede to demands by the UK (and other Member

84 Tryfonidou, A. (2016) [1 April 2016]

<eulawanalysis.blogspot.com/2016/03/whats-wrong-with-uk-immigration-rules.html>.

85 Mantu, S. & E. Guild (2013), 'Acts of citizenship deprivation: ruptures between citizen and state', in: Isin, E.F. (ed), *Enacting European Citizenship*, Cambridge: Cambridge University Press, p.111-131.

States) that British citizens in respect of whom the UK has placed a temporary exclusion order are excluded from the whole of the EU even though they continue to be EU citizens?

EU inclusion and exclusion of people has a trajectory very different from that of immigration law in most Member States. Instead of the story being one of increasing exclusion and the application of ever more exclusionary rules and tests on foreigners seeking to move to their territory, as has happened in many Member States, it is one of opening up ever more to nationals of other Member States. Nationals of the Member States have moved from being workers to being citizens but retained their rights as workers. People (EU citizens and everyone else) have acquired status and rights in EU law beyond the scope of the Member States' national rules. Some have even gained access to the whole of the EU territory and labour market.⁸⁶ The outcome of this steady line of ever increasing liberalisation of movement of persons in the EU has been that the percentage of the EU population which lives in a Member State other than that of their underlying citizenship has remained fairly constant between 2.5 and 3% of the total EU population (according to the EU's statistical agency EUROSTAT).⁸⁷ Although the EU has got larger from six Member States in 1957 to 28 in 2016, the percentage of people who move to live in another Member State has remained remarkably stable. Yet, free movement of persons is one of the rights most cherished by those who enjoy it.⁸⁸ The idea and practice of freedom is most easily lived and understood by people in Europe through their entitlement to travel, reside and work anywhere they want in the 28 Member States.

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86 Guild, E. 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration' in Costello, C. & Freedland, M. (ed.), *Migrants at work. Immigration and vulnerability in labour law*, Oxford, Oxford University Press 2014 pp. 98-118.

87 http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migrant_population [1 April 2016].

88 <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2101> [1 April 2016].

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