Newsletter on European Free Movement Issues for Judges

2024/2

NEFIS

Quarterly update (since 2019) of a full overview of

- *Legislation and*
- *Jurisprudence*

on

- *European*
- *Free Movement Issues*

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Latest judgments, AG opinions and new pending cases

§ 1 Exit and Entry

CJEU AG	7 May	2024	C-4/23	*Mirin*	TFEU Cit. Dir.	Art. 2+8+21 Art. 27

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§ 2 Residence

CJEU	20 June	2024	C-540/22	*S.N. a.o.*	TFEU	Art. 56+57

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§ 3 Equal Treatment

CJEU (GC)	21 Mar	2024	C-61/22	*R.L. v Landesh. Wiesbaden (DE)*	Cit. Dir. ID Cards Reg.	Art. 4(3) Art. 3(5)

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§ 4 Loss of Rights

CJEU	13 June	2024	C-62/23	*Pedro Francisco*	Citizens	Art. 27
CJEU	25 Apr	2024	C-684/22+C-685/22+C-686/22	*S.Ö.*	TFEU	Art. 20
CJEU	18 Apr	2024	C-716/22	*E.P. v Prefet du Gers, INSEE ()*	WA TFEU	Art. 2(c) Art. 20

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§ 5 Family Members

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§ 6 Procedural Rights

CJEU	25 Apr	2024	C-420/22+C-528/22	*N.W. & P.Q.*	TFEU	Art. 20

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About

NEFIS is designed for judges who need to keep up to date with EU developments on EU citizenship and free movement.
NEFIS contains EU legislation and ALL relevant case law on EU citizens and their family members in relation to:
* exit and entry * residence * equal treatment * loss of rights * family members * procedural rights and * Brexit.
NEFIS does not include case law on regular migration or asylum.
We would like to refer to separate Newsletters on these issues: NEMIS and NEAIS.

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CMR Centre for Migration Law

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Editorial

Welcome to the first issue of NEFIS in 2024.
In this issue we would like to draw your attention to the following.

New Judgments
Equal treatment
In ***R.L. v Landeshauptstad Wiesbaden*** (C-61/22) the question is whether the obligation to take fingerprints and store them in identity cards in accordance with Art. 3(5) of Reg. 2019/1157, on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, infringe higher-ranking EU law? According to the GC of the CJEU the limitation on the exercise of the rights guaranteed in Articles 7 and 8 of the Charter resulting from the inclusion of two fingerprints in the storage medium of identity cards does not appear to be of a seriousness which is disproportionate when compared with the significance of the various objectives pursued by that measure. Accordingly, such a measure must be regarded as being based on a fair balance between those objectives and the fundamental rights involved. But Regulation 2019/1157 itself is *invalid* in so far as it was adopted on the basis of Article 21(2) TFEU. However, the effects of Regulation 2019/1157 are to be maintained until the entry into force of a new regulation based on Article 77(3) TFEU and intended to replace it.

Loss of Rights
The joined cases ***S.Ö. et al.*** (C-684/22 to C-686/22), concern the compatibility of German nationality law with EU citizenship (Article 20 TFEU), which allows for the automatic loss of German nationality upon the voluntary acquisition of another nationality. The applicants are former naturalised German citizens of Turkish origin who, following naturalization in Germany, have reacquired Turkish nationality without requesting the permission of the competent national authorities to retain their German nationality. This condition was introduced in law as of 1 January 2000, while cases up to 31 December 1999 were covered by different rules. All applicants lost ex lege their German nationality when the authorities became aware of their reacquisition of Turkish nationality. The CJEU was asked to rule on the compatibility with Article 20 TFEU of:
(a) the German advance permission procedure for retaining nationality upon voluntary acquisition of another nationality, and
(b) the fact that in this permission procedure the consequences of the loss of German and EU citizenship are not examined from the perspective of EU law. Rather, what is examined is the existence of a special reason for acquisition of another nationality while retaining the German one.
The CJEU ruled that protecting the special bond of nationality by prohibiting dual nationality is a legitimate interest for EU states which they can pursue if their laws do not violate the principle of proportionality. Automatic loss of nationality and the requirement of an advance permission were not considered inconsistent with the principle of proportionality as long as they allow for an individual examination of the consequences of loss of EU citizenship. The effectiveness of the rights of EU citizenship require that the person is duly informed about the possibility to request an examination and the time limit for it, which is for the national court to examine. Relevant factors include the fact that naturalization required the applicants to give up their Turkish nationality and the context in which they reapplied for Turkish nationality, namely the reform of German nationality law which may have had a negative impact on the possibility to effectively initiate the advance permission procedure. If the applicants were not duly informed, there should be a possibility to carry out the individual examination as an ancillary issue in the context of an application for a travel document or any other document showing nationality, including the possibility to order the ex tunc recovery of nationality.

In ***Pedro Francisco*** (C-62/23) the CJEU ruled that in its assessment whether a right of residence enjoyed by a third-country national family member of an EU citizen can be restricted, a Member State can take into account the fact that that family member was previously subject of an arrest, provided that there is an overall assessment of that conduct, in which the facts on which the arrest was based and the possible legal consequences thereof are considered expressly and in detail. To merit the conclusion that a previous arrest represents 'a genuine, present and sufficiently serious there to one of the fundamental interests of society' MS have to establish that there are 'consistent, objective and precise factors which allow for the reliability of the suspicions weighing on that person as a result of that arrest' (cons. 36). In the admissibility assessment, the CJEU confirms that where MS decide to extend the scope of EU law, in Spain Dir. 2004/38 also applies to Spanish nationals who have not – previously - exercised free movement rights, it is competent to answer preliminary references made by national courts to ensure uniform application of those rules.

In ***E.P / Prefet du Gers*** (C-716/22) the CJEU confirms that following the entry into force of the Withdrawal Agreement between the UK and the EU, British nationals who have exercised their right to free movement no longer benefit from a right to vote and to stand as a candidate in elections to the European Parliament in their Member State of residence. Member States are not required to grant that right to persons who are no longer Union citizens. The fact that such former EU citizens have not been able to vote in the Brexit

referendum was judged irrelevant since it was based on electoral law choices made by the UK, thus not linked to EU law. Furthermore, the validity of the Withdrawal Agreement is not called into question by the fact that it fails to recognise a right to vote in EP elections or a right to stand as candidate to former EU citizens.

Procedural rights

In ***N.W. & P.Q.*** (C-420/22 & C-528/22) the CJEU established that though MS are not obliged to examine systematically and on their own initiative whether there is a relationship of dependency that requires them to issue a residence permit to an EU citizen's third-country national family member, they do have to ascertain, when they are considering whether to withdraw a residence permit issued to a family member on the basis of national law whether this will mean that the EU citizen is forced to leave the EU as a whole if the MS authorities are familiar with the fact that the third-country national has family ties with an EU citizen. The principle of national procedural autonomy and Art. 47 Charter apply to decisions to withdraw a third-country national family member's residence permit to protect national security. Where this is the case, the person concerned has to be able to acquaint himself with the reasons why the MS has invoked national security either by reading the decision himself, or by communicating those reasons to him upon request. This right is without prejudice to the court's right to be informed of the reasons underlying the decision by the competent authorities. It does not preclude MS from using information that has been provided to them by their national security authorities, as long as the decision withdrawing the residence permit provides reasons and it is evident that the decision has been taken after a specific assessment of all relevant facts, in the light of the principle of proportionality and fundamental rights have been observed, including, where appropriate, the best interest of the child. Art. 47 Charter requires MS to inform the person concerned or that person's representative of – at the very least – the substance of the grounds on which the decision taken against his or her is based. MS may decide to restrict the disclosure of some or all of the information in the file. However procedures ensuring access to classified information 'together with a complete prohibition on using the information thus obtained for the purposes of the administrative procedure or any judicial proceedings' (cons. 98) amounts to a breach of the rights of defence. Likewise, it is insufficient that the court hearing the case on the withdrawal of the right of residence has access to the information. Art 47 Charter does not require that the national court assessing the legality of a decision based on classified information is competent to assess whether the classification is lawful and provide access to all or the essence of the information where it considers that the classification is unlawful. Respect for the rights of defence does, however, require that that court draws 'the appropriate conclusions from any decision taken by the competent authorities not to disclose all or part of the grounds for that decision and the evidence relating thereto' (cons. 116).

Residence

In ***S.N. a.o.*** (C-540/22) the issue is whether the free movement of services guaranteed by Art. 56 and 57 TFEU include a right derived therefrom of residence in a MS for third-country workers who may be employed in that MS by a service provider established in another MS without an individual residence permit? In this case a Slovak undertaking had posted Ukrainian workers to a Dutch company in order to carry out work in the Netherlands. The Ukrainians hold temporary residence permits issued by the Slovak authorities. In accordance with Dutch law, the Ukrainians must also obtain Dutch residence permits after the expiry of a 90-day period. In addition, fees are collected for each permit application. In its judgment, the Court holds that the obligation, for service providers established in another Member State, to apply for a residence permit for each posted third-country worker, so that that worker may have a secure document, proving that the posting is lawful, constitutes a measure appropriate for attaining the objective of increasing legal certainty for such workers. That permit is proof of their right to reside in the host Member State. The objective to check that the worker concerned does not represent a threat to public policy is also capable of justifying a restriction on the freedom to provide services. The amount of the fees cannot be excessive or unreasonable and must approximately correspond to the administrative costs.

New Opinions

Exit and Entry

Mirin (C-4/23) concerns the intersection between EU free movement law and Member States' competences in civil status issues. The applicant is a dual Romanian and British national who was registered female at birth. While living in the UK, the applicant had his name and title changed from female to male and was issued with a new driving licence, passport, and a gender recognition certificate in accordance with UK laws. The applicant requested the Romanian authorities to amend his birth certificate concerning his first name, sex and personal numeric code to reflect his male gender and to issue him with a new birth certificate. This request was denied by the administration since it requires a final judicial decision by a Romanian court. The applicant complains that this condition amounts to an obstacle to the exercise of his EU rights under Articles 20, 21 and 18 TFEU in conjunction with Articles 1, 20, 21 and 7 EU Charter. His argument is that the Romanian procedures have been found by the ECtHR as lacking clarity and foresee ability making a different decision from that of the UK authorities possible.
AG De La Tour advises the Court to rule irrelevant the fact that the request for the birth certificate was made when EU law was no longer applicable in the UK. On the substance of the claim, the AG advises the Court to rule that EU law precludes the authorities of a Member State to refuse to recognise and register in the birth certificate of one of its own nationals the first name and gender identity that were lawfully declared and acquired in another Member State. Judicial or administrative procedures for change of sex or gender cannot constitute obstacles to what should be an automatic recognition. The AG proposes to limit the automatic recognition of such identity details to the birth certificate without necessarily extending it to other civil status issues such as marriage and parentage. The legal argument used is that the automatic recognition stems from Article 21 TFEU and is needed for the exercise of the right to free movement since the identity details in the birth certificate are necessary for the issuance of an ID card or passport.

The case ***Pensionsversicherung*** (C-323/23) was withdrawn after reference to CJEU 2 Feb. 2024, C-488/21. Also case ***Kinderrechtencoalitie*** (C-280/22) was withdrawn after reference to CJEU 21 Mar 2024, C-61/22.

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Nijmegen, June 2024,

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