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Funding the Life of Brian: Jobseekers, Welfare Shopping and the Frontiers of European Citizenship

ECJ, Judgment of 23 March 2004, Case C-138/02, *Brian Francis Collins* v. *Secretary of State for Work and Pensions*, n.y.r.

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1. Introduction

In a string of recent cases, the European Court of Justice (ECJ) has quite rapidly put flesh on the bones of European citizenship. Article 17 EC confers that status upon 'Every person holding the nationality of a Member State […].' One important right enjoyed by citizens of the Union is enshrined in Article 12 EC, which prohibits discrimination on the basis of nationality. The still embryonic case law is now slowly maturing, and as a result the concept of citizenship is taking shape and the rights associated with it are becoming more and more visible.

It is perhaps noteworthy to recall that for some time, expectations about the practical value of European Union (EU) citizenship were low. At the outset, scholarship tended to regard European citizenship as an empty shell, a notion devoid of legal meaning or significance: in effect, a new garment sewn for a non-existing Emperor.[1] It was nevertheless clear that its introduction could provoke legal impact if the ECJ were inclined to take a favourable stance. The ECJ then, after initially having dodged[2] or repudiated[3] questions on the exact scope and consequences of the new Treaty Articles, opened the

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1. See *inter alia* J.H.H. Weiler, *The Constitution of Europe: Do The New Clothes Have An Emperor?*, Cambridge University Press 1999, p. 324 ff.; J. Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 *ELRev.* 554. Excellent testimony also offers e.g. H.U. Jessurun d'Oliveira, 'European Citizenship: Its Meaning, Its Potential', in R. Dehousse (ed.), *Europe after Maaastricht: An Ever Closer Union?* (Deventer, Kluwer 1994), p. 147: 'Citizenship is […] nearly exclusively a symbolic plaything without substantive content'.
2. See Case C-378/97, *Criminal proceedings against Florus Ariël Wijsenbeek* [1999] ECR I-6207.
3. See Joined cases C-64/96 & 65/96, *Land-Nordrhein-Westfalen* v. *Uecker* and *Jacquet* v. *Land Nordhrhein-Westfalen*, [1997] ECR I-3171.

floodgates at the end of the 1990's with its *Sala* judgment.[4] In particular, the rights of the not economically active have since been progressively developed. A quick glance at recent case law reveals that persons who are not employed, due to the newly inserted provisions on citizenship, now enjoy the right:

- of equal treatment as regards conditions for access to child-raising allowance, provided that its beneficiary has been lawfully resident in the recipient state for a notable period of time (*Martínez Sala*[5]);
- to remain in the Member State in which they have ceased to be economically active, even though their health insurance does not cover emergency treatment in that state (*Baumbast*[6]);
- to a 'tideover allowance' in the period between the completion of post-secondary education and their first employment on non-discriminatory terms (*D'Hoop*[7]);
- to temporary solidarity by means of access to minimum subsistence grants on the same conditions as nationals of the recipient state, during their final period of study and on the condition that they lawfully reside in the recipient Member State, provided that they do not unreasonably burden that state's social security system (*Grzelczyk*[8]);
- to apply successfully for a change of surname of their minor children if they possess dual nationality, and their home state entitles their children to bear a different surname than the one they would normally have borne under the law of the recipient Member State (*Garcia Avello*[9]);
- equal treatment in respect of the right to have criminal proceedings instituted against them conducted in a language that is not the principle language of the recipient Member State (*Bickel and Franz*[10]).

All these cases have created a notable stir, mainly because they are products of judicial activism. The scope of the free movement of persons has been stretched by including those who 'merely' enjoy the status of citizen of the Union whereas classic case law on the free movement of persons focused on the economically active. However, in its previous judgments, the ECJ seemed

4. Case C-85/96, *María Martinez Sala* v. *Freistaat Bayern,* [1998] ECR I-2691.
5. *Ibid*.
6. Case C-413/99, *Baumbast and R.* v. *Secretary of State for the Home Department*, [2002] ECR I-7091.
7. Case C-224/98*, Marie-Nathalie D'Hoop* v. *Office nationale de l'emploi*, [2002] ECR I-6191.
8. Case C-184/99, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193.
9. Case C-148/02, *Carlos Garcia Avello* v. *Belgian State*, judgment of 2 October 2003, n.y.r.
10. Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, [1998] ECR I-7637.

somewhat one-sided in its approach, focusing on the *expansion* of the notion of citizenship and the interpretation of the rights attached. *Collins* adds new perspectives to the debate by focusing on public interest concerns of Member States, which may *limit* these rights. As always in the context of negative integration, the progressive dismantling of barriers to free movement fosters the debate on the boundaries of movement rights. Although the ECJ addressed possible justifications for remaining barriers *in obiter* in the case of *D'Hoop*, successful appeals to public policy defences had so far not been made.[11] The *Collins* judgment provides insights as to which restrictions on free movement rights Member States are still permitted to impose when they wish to delimit the exercise of rights based on Article 17 in combination with the non-discrimination clause in Article 12 EC. The ECJ once again resorts to its vested principle that restrictions on the fundamental freedoms may be imposed if they are '[…] based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.'[12] With this observation, the application of what is better known as the mandatory requirements doctrine also appears to have gained definitive foothold in the field of citizenship rights.

Collins does leave certain important questions unanswered, however. Uncertainty remains regarding the ground and intensity with which Member States are still allowed to protect their national interests.

Apart from the issue of citizenship, the case also sheds light upon the notion of 'worker', employed, *inter alia*, in Article 39 EC, Regulation (EEC) No.1612/68[13] and Directive 68/360/EEC.[14] Regarding this notion, *Collins* appears to overrule the *Lebon* judgment[15] at least partially. In that judgment of 1987, the Court crafted a shrewd distinction between workers entitled to the full range of rights conferred by EC law, including access to social benefits, and those who move in search of employment and only benefit from the

11. In various Opinions of Advocates General the issue was explored in considerable detail already. See *inter alia* AG Cosmas in *Wijsenbeek*; AG Jacobs in *Bickel and Franz* and *Garcia Avello;* AG Geelhoed in Case C-413/01, *Franca Ninni-Orasche* v. *Bundesminister für Wissenschaft, Verkehr und Kunst*, Judgment of 6 November 2003, n.y.r.
12. *Collins*, para. 66. Although the ECJ finally awards an appeal to the mandatory requirements doctrine in the citizenship context in *Collins*, the issue featured of course prominently in the less successful attempt in *D'Hoop* (para. 39).
13. Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ (1968) L257/2*, as amended, hereinafter: Regulation 1612/68.
14. Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ (1968) L257/13*, hereinafter: Directive 68/360.
15. Case 316/85, *Centre public d'aide sociale de Courcelles* v. *Marie-Christine Lebon*, [1987] ECR 2811.

principle of equal treatment outside the realm of social and tax advantages. Here, too, additional pieces of the puzzle have yet to slide into place.

2. Facts

The facts underlying the present case are relatively straightforward. Mr. Brian Francis Collins is a United States (US) citizen who possesses both US and Irish nationality.[16] His past connections with the EU have been rather weak: he studied in the United Kingdom (UK) during one semester in 1978. He returned home, but came back to the UK to work part-time for a period of ten months in 1980-1981. He subsequently returned to the US and worked there, as well as in Africa. He left the US for the UK again in 1998, this time with a view to finding employment there. Within eight days after his arrival, he claimed a 'jobseeker's allowance', a social benefit available to people in search of work, under the Jobseekers Act 1995 and the Jobseeker's Allowance Regulation 1996. The competent authorities refused to grant Mr. Collins a jobseeker's allowance on the ground that he was not habitually resident in the UK, a prerequisite for eligibility to this non-contributory social security benefit. Mr. Collins filed appeal against this decision with a Social Security Appeal Tribunal, which upheld the initial decision. It argued that Mr. Collins was not habitually resident in the UK because, first of all, he had not been resident for an appreciable time,[17] and he was not a worker in the meaning of Regulation 1612/68 and, furthermore, that he did not fall within the scope of Directive 68/360 which grants residence rights to Community workers.

Mr. Collins appealed again, this time to the Social Security Commissioner. The latter referred three questions to the ECJ for a preliminary ruling. The national court asked guidance concerning the question of whether persons in Mr. Collins' situation qualify as a worker for the purposes of Regulation 1612/68, and second, in case the answer to the first question were in the negative, whether the claimant would have a right to reside in the UK pursuant to Directive 68/360. Regulation 85 (4) of the 1996 Jobseeker's Allowance Regu-

16. Mr. Collins had no actual links with Ireland, other than his nationality and the fact that he visited the country on three occasions, but never longer than ten days consecutively. In the words of AG Colomer, however: '[…] it is of little matter […], that, as a United States citizen, he also acquired Irish nationality, never having lived nor worked in Ireland; that he can only claim to have worked in one of the States of the European Union; and that it has been 17 years since he lived or pursued any activity in the United Kingdom, where he is intending to seek employment'. The mere fact that Mr. Collins possesses the nationality of a Member State brings him within the scope of Community law. See Case C-369/90, *Mario Vicente Micheletti and others* v. *Delegación del Gobierno en Cantabria* [1992] ECR I-4239.
17. The required duration of residence is not specified further: *cf.* Opinion of AG Colomer, footnote 32.

lation expressly refers to these two Community law measures; persons who fall within their scope are eligible for a jobseeker's allowance on the same terms as claimants who are habitually resident in the UK.[18] The national court could have left it to these two questions, but cleverly proceeded to ask if, in case the answer to the second question were also not in the affirmative, there were 'any other provisions or principles of European Community law [that] require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case'.[19]

3. The judgment

3.1. The first question

The ECJ starts off answering the first question by reiterating that the notion of 'worker' should be broadly interpreted.[20] It includes those who have had an employment relationship in a Member State in the past but have subsequently lost their job, provided that there is a link between the previous employment and their later search for work. According to the ECJ, the application of this rule to Mr. Collins' case leads to the conclusion that a link between his brief employment in the EU in 1980-81, and his search for work seventeen years later is insufficient for him to qualify as worker in the broader sense of the notion. Mr. Collins does satisfy the definition of work-*seeker,* but that does not entitle him to receive the benefits stipulated in Article 7 (2) of Regulation 1612/68. On this point the ECJ refers to its earlier case law in *Lebon* and *Commission* v. *Belgium*,[21] holding that: 'The concept of 'worker' is […] not used in Regulation No 1612/68 in a uniform manner. While in Title II of Part I of the Regulation this term covers only persons who have already entered the employment market, in other parts of the same regulation the concept of 'worker' must be understood in a broader sense.'[22] This means that only those who are or have been employed can exercise their rights to social and tax advantages under Article 7(2)[23] of Regulation 1612/68; those who move in

18. The Jobseeker's Allowance Regulation does also refer to Regulation 1251/70 and Directive 73/148/EEC, but these can be considered inapplicable here. See, however, footnote 29 of the Opinion of AG Colomer.
19. *Collins*, para. 20.
20. With reference to Case C-85/96, *María Martínez Sala* v. *Freistaat Bayern* [1998] ECR I-2691, para. 32.
21. Case C-278/94, *Commission* v. *Belgium*, [1996] ECR I-4307.
22. *Collins*, para. 32.
23. Which can be found in the second title of the first part of Regulation 1612/68.

search for work can only benefit from equal treatment regarding *access to employment*. Since Mr. Collins is treated as a person seeking first employment in another Member State, given that the link with his previous employment in the EU is so weak that it is deemed non-existent, Regulation 1612/68 leaves him empty-handed. Nevertheless, the ECJ does not close the door on him entirely, suggesting that the national judge determine whether the notion of worker as used in the relevant UK legislation, is congruent with the terms of Regulation 1612/68. Apparently, it leaves open the possibility that that notion has a broader meaning under the Jobseekers Act, i.e. that it includes work-seekers.

3.2. The second question

The second question concerns the applicant's possibility to derive a right of residence from Directive 68/360. It is remarkable that the ECJ begins its answer by establishing the applicant's right to free movement, this issue not having been raised by the national court. With reference to *Tsiotras*,[24] which confirms that Article 39 (ex 48) of the EC Treaty grants residence rights to persons who seek paid employment, the ECJ concludes that the applicant's residence right stems from the Treaty, rather than secondary legislation. By contrast, Advocate General Colomer had clung to a more orthodox scenario, discussed secondary law first and only then sought recourse to 'catch-all provisions' of primary EC law. The ECJ seems to stray from this path, possibly because it helps to illustrate that the division between the rights of workers and work-seekers maintained in Regulation 1612/68, is also to be read in Directive 68/360. Its Articles 1-3 facilitate the free movement of workers as well as work-seekers. However, the fact that Article 4 of the Directive grants residence rights to Community workers on two conditions, the possession of a valid residence permit and, moreover, the worker being able to produce a document in which an employer in the recipient State confirms that the holder of that document is or will be engaging in active employment, leads the ECJ to the conclusion that this provision only extends to people who have successfully applied for a job. This conclusion is strengthened by Article 8 of the Directive, which provides an exhaustive list of circumstances in which residence rights may be recognized without the worker possessing a residence permit, but *not* without the employer's declaration. Since the applicant cannot produce a document stating that he will certainly be employed in the recipient Member State, he does not enjoy a right to stay in the UK on the basis of Directive 68/360, but derives his right of residence directly from Article 39 EC.[25]

24. Case C-171/91, *Dimitrios Tsiotras* v. *Landeshauptstadt Stuttgart*, [1993] ECR I-2925.
25. At least, this implicit assumption appears to be present in remainder of the judgment. AG

3.3. The third question

When turning to the, perhaps somewhat uncomfortably broad, but precautiously framed third question, the ECJ therefore starts from the premise that Mr. Collins legally resides in the UK. In light of *Sala* this is an important point of departure since: '[…] a citizen of the European Union […], lawfully resident in the territory of the host Member State, can rely on Article [12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law […].'[26] Following *Grzelczyk*, this may imply that the UK accept: '[…] a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.'[27] Before the citizenship provisions, the basis for the award of Mrs. Sala's and Mr. Grzelczyk's claims, are addressed, however, the ECJ attempts to apply Regulation 1408/71 and concludes that the applicant cannot benefit from its Article 10a.[28]

Since no other secondary law measures appear to be applicable, the ECJ decides that the issue can only be resolved on the basis of the principle of equal treatment expressed in Articles 12 EC and 39 (2) EC. With reference to *Antonissen*,[29] it reiterates that Collins, being a work-seeker, falls under the terms of the first paragraph of Article 39 (1) EC and, therefore, enjoys the right to equal treatment laid down in its second paragraph. However, even though the principle of non discrimination in Article 39 (2) EC is applicable, applicant's rights to receive benefits are obstructed by *Lebon*, in which the ECJ explicitly held that the right to equal treatment only extends to access to *employment*, not to access to *financial benefits*. Nevertheless, the ECJ examines whether the more general principle of non-discrimination, laid down in Article 12 EC, may fill the void *Lebon* left in Article 39 (2) EC in relation to work-seekers. It thus attempts to re-establish the scope *ratione materiae* of Article 39 EC in view of recent developments in its case-law, in particular *Grzelczyk*. A clear parallel with that case is that the Belgian 'minimex', which Mr. Grzelczyk applied for, was also non-contributory, as is the UK jobseeker's allowance.

Colomer was more explicit in his Opinion, ascribing Mr. Collins' residence rights directly to *Antonissen* (*infra*, note 29).

26. *Sala*, para. 63.
27. *Grzelczyk*, para. 44.
28. That provision prescribes that if entitlement to benefits is made dependent on completion of periods of employment, self-employment or residence, completion of such periods in other Member States than the recipient should be taken into account. Since Mr. Collins has not resided, let alone worked, in any Member State, Article 10a is not applicable.
29. Case C-292/89, *The Queen* v. *Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, [1991] ECR I-745.

Consequently, according to the ECJ, the principle of non-discrimination also extends to the latter kind of benefit.

In principle, no condition discriminating nationals of other Member States can be imposed for access to non-contributory allowances. However, the ECJ explicitly rules in paragraph 63 that only the grant of benefits that 'facilitate access to employment' cannot be made conditional upon the satisfaction of discriminatory criteria. This restriction is repeated in paragraph 64, in which *Lebon* is partially overruled: benefits that are somehow connected with 'access to employment' now come under the scope of Article 39 (2) EC in combination with Article 12 EC. *Lebon* is apparently not overruled entirely, because, in a strict reading of that case, jobseekers would not be able to claim equal treatment as regards social benefits since they would not qualify under part II of Regulation 1612/68. This reading must be adjusted as follows: Article 7 (2) of Regulation 1612/68 is split up into benefits that relate to access to employment (no discrimination) and other social and financial benefits (no right to equal treatment as yet).

Since the 1996 Jobseeker's Regulation bases the distinction between the eligible and the non- eligible on a habitual residence test, it is classified as an indistinctly applicable measure; it is clearly more difficult for non-nationals to pass it than for UK subjects. The ECJ already held in *D'Hoop*[30] and *Bickel and Franz*[31] that a measure of this type can be justified only: '[…] if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions […].' It had also ruled that it is legitimate for national legislators to ensure that there is a genuine link between the beneficiary of a social security benefit and the geographic employment market.[32]

The important addition in *Collins* is that for jobseekers the existence of such a link can be established by determining whether the person concerned has in fact genuinely sought work in the recipient Member State. In this respect, a residence requirement is deemed appropriate for ensuring a connection between the work-seeker and the domestic employment market. Moreover, regarding proportionality *sensu stricto*, the ECJ attaches important conditions to the validity of the UK's public policy defence. In a general fashion, the application of the residence criterion must '[…] rest on clear criteria known in advance and provision must be made for a means of legal redress of a judicial nature.'[33] Of particular interest is the third and more detailed condition that: '[…] if compliance with the requirement demands a period of residence, the

30. *D'Hoop*, para. 36.
31. *Bickel and Franz* was somewhat less instructive on this point because there (para. 27), the path to Article 12 EC was cleared by following Article 49 EC.
32. *D'Hoop*, para 38.
33. *Collins*, para. 72.

period must not exceed what is necessary in order for the national authorities to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.'[34] The effective search for a job thus establishes a sufficient link between a work-seeker and a geographic employment market. The existence of such a link demands that Member States respect the principle of equal treatment in the context of social benefits which intent to facilitate access to employment.

4. Commentary

4.1. The notion of worker; the rights of work-seekers

The first interesting aspect of *Collins* is that it sheds additional light on the notion of worker in EC law: an indication is given concerning its 'expiry date'. The ECJ had already ruled in *Sala* that: 'Once the employment relationship has ended, the person concerned as a rule loses his status of worker […],' but it immediately added that: '[…] that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker.'[35] It is now clear that that status cannot be retained indefinitely; the Advocate General and the ECJ agree on this point, and both conclude that the 17-year interval between Mr. Collins' last effective employment in the EC and his renewed search for a job in 1998 is too long for him still to be considered a worker. This is, of course, not an exact refinement, but it nonetheless offers some guidance for the future.

The expansion of the rights of Community work-seekers to include access to certain financial benefits on equal terms as Member State nationals is a second novelty. Some authors had already concluded that earlier judgments had torn down this wall. Indeed, a broad reading of *Sala* seems to suggest that anyone who lawfully resides in the territory of another Member State has access to social benefits on equal footing with nationals of that state. This would largely overrule *Lebon*, in which a separation between the rights of work-seekers and workers was made, along the somehow fictitious line drawn between Parts I and II of the first Title of Regulation 1612/68. In 1999, O'Leary even argued that the division between workers and the not-economically active was erased either by *Sala*, or, in relation to jobseekers, possibly earlier, by *Antonissen*.[36] In retrospect, these conclusions have been somewhat

34. *Ibid*.
35. *Sala*, para. 32: In retuning of Case 66/85, *Deborah Lawrie-Blum* v. *Land Baden-Württemberg*, [1986] ECR 2121, and Case 39/86, *Sylvie Lair* v. *Universität Hannover*, [1988] ECR 3161.
36. S. O'Leary, 'Putting Flesh on the Bones of European Union Citizenship,' (1999) 24 *ELRev*. 68, 76.

premature. *Collins* provides at least two important indications that a narrow view on the rights of the not-economically active is the more apposite. First, there is the limitation in paras. 63-64 of the judgment:

> '63 In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39] (2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article [12] of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.
> 64 The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon and in Case C-278/94 Commission v Belgium.'

The ECJ explicitly narrows down its ruling to a benefit of a specific nature and then confirms that *Lebon* is only overruled in regard to that type of benefit. The demarcation line in Regulation 1612/68 has shifted and now appears to run through Article 7 (2) rather than between its Articles 6 and 7. Only those benefits that intend to facilitate access to employment are included in the package of rights enjoyed by those in search for employment.[37] Which benefits are included in the identified category remains opaque: do financial benefits in general facilitate finding a job, other than through providing the recipient with the financial means to reside within the host Member State? Moreover: do all Member States have social security schemes of the type of the jobseekers allowance?[38]

A second indication, which underscores the limited impact of *Sala,* is provided by Advocate General Colomer in *Collins*. He distinguishes the latter case by explicitly contending that the passage, which supports a broad reading of the former case, should not be taken out of its context.[39] He identifies no less

37. In that respect, the position of Jacqueson has been somewhat rash: ' […] it seems that as long as they are lawfully residing in the host state, they can claim all advantages granted to the workers granted by Community law, relying either on their status as a worker […] or, at least, on their status as citizens of the Union according to the *Sala* ruling'" C. Jacqueson, 'Union citizenship and the Court of Justice: Something new under the sun? Towards social citizenship.' (2002) 27 *ELRev*. 260, 277.
38. The difficulties that could arise will no doubt be similar to the problems the *Raulin* case posed for Dutch student allowances, where the basic grant could not be split according to the various cost elements. See Case C-357/89, *V.J.M. Raulin* v. *Minister voor Onderwijs en Wetenschappen*, [1992] ECR I-1027, paras. 26 and 27. After *Collins*, a similar artificial distinction between the access-related components and the remaining ones could prove hard to construct for Member States.
39. *Collins*, Opinion of AG Colomer, para. 65.

than five conditions that render *Sala* context-specific. The ECJ does not copy these but does appear to follow the spirit of the Opinion by supporting a restrictive approach to the citizenship provisions here, probably because of their still residual character. Nevertheless, one should be cautious in stating that the impact of *Collins* is limited. The reasoning behind the judgment is potentially explosive: lavishly awarding non-discrimination claims to the benefit of the economically inactive may put severe strain on national social security systems. It is therefore remarkable that the ECJ does not analogously apply the two limiting principles recognized in *Grzelczyk*; the temporal nature of solidarity and the possibility that the recipient of a benefit may become an unreasonable burden on the finances of the host Member State.[40]

4.2. Mandatory requirements in citizenship

Collins definitively confirms the applicability of the 'rule of reason' in the context of Article 12 EC.[41] Thus, rather than putting flesh on the bones of Community citizenship, the case removes a rib and hands it back to Member States. The ECJ thus awards them discretion to pursue their policy objectives, yet articulates the parameters itself. Since appeals to the rule of reason had so far systematically failed, this was work cut out already. After all, in citizenship cases, the rules employed by Member States to protect their national interests had hitherto either been discriminatory in the formal sense, or the connecting factor opted for still contained covert elements that almost amounted to formal discrimination.[42] It has now become clear that appeals to profoundly non-discriminatory criteria will stand the test and that, therefore, requirements apt for establishing a genuine link between the geographic labour market and the individual concerned are lawful in principle.[43] A demand that certain periods of residence have been completed is well suited in this respect.[44] Nevertheless, such periods must be restricted to what is absolutely necessary for attainment

40. Albeit established in the context of Directive 93/96 and in light of the '[…] specific characteristics of students' residence.' See *Grzelczyk,* para. 44.
41. The mandatory requirements test is confirmed and constructed in *Collins* (para. 66) with reference to Case C-274/96, *Bickel and Franz*, para. 27 (which itself was based on Case C-15/96, *Schöning-Kougebetopoulou*, para. 21, which in turn relied on Case C-237/94, *O'Flynn*) and follows the familiar reasoning that these 'can be justified only if [they are] based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.'
42. Formal discrimination: *Grzelczyk*, *Bickel and Franz*; less direct, but touching upon formal discrimination: *D'Hoop*. *Cf.* C. Barnard, *The substantive law of the EU: The four freedoms*, Oxford, Oxford University Press, 2004, p. 418–9.
43. As was already advocated by AG Geelhoed in his Opinion in *Ninni-Orasche*, para. 96.
44. *Collins*, paras. 47 and 69.

of the objective, which in the vast majority of cases will be the financial balance of the benefit scheme at hand. For Mr. Collins this obviously means that the UK has the right to verify whether he lawfully resides within its territory. As soon as he does and he fulfils the other criteria for eligibility,[45] he cannot be refused a jobseeker's allowance.

The financial consequences of the ruling may be quite significant, as from the Opinion of Advocate General Colomer it is apparent that the jobseekers allowance can be attributed for an indefinite period, at least until the jobseeker is actually employed.[46] This means that the only period during which an allowance can be refused is the period needed for the UK authorities to check whether a jobseeker is genuinely seeking paid employment, i.e. whether he is available and actively looking for work. The natural corollary is then the assimilation of his situation with a national who is habitually resident in the host Member State. The only reason why a benefit related to access to employment such as the jobseeker's allowance can be refused, would be the proven fact that the person concerned had not been actively looking for work within and after this period. But then this itself can only be established after this period, in which he possibly had already been receiving the allowance under the presumption of qualifying as one genuinely seeking employment. If one assumes that the status of work-seeker can be verified retroactively, then the benefit could also be claimed retroactively from either the moment of entry, or from the moment it has become clear to the national authorities that the entrant has become a work-seeker, dependent on the national criteria.

Extrapolation of the principle of non-discrimination may lead one to conclude that migrant work-seekers will never become more of a burden on a social security system than nationals of the host state. It remains to be seen then whether the limiting principles of *Grzelczyk* would not apply, i.e. whether transnational solidarity to the advantage of jobseekers can find its borders in any timeframe. Whether, in the words of Barnard, taking her cue from *Grzelczyk,* national taxpayers pay their taxes to help provide benefits for their fellow nationals in need *and* for migrant EU citizens who are in temporary need.[47] Rather than lending force to this presumption, *Collins* exhibits a Janus-like quality here. Member States, after having been given discretion in *D'Hoop*, now have guidance on when and how to invoke the mandatory requirements doctrine in the citizenship context. At the same time, however, their most important weapon, a distinctly applicable temporal cap on the award of the relevant benefit, is disarmed.

45. These require the claimant to be available for and actively seeking employment and not to have income exceeding the applicable amount or capital exceeding a specified amount; *Collins*, para. 68.
46. *Collins*, Opinion of AG Colomer, footnote 4.
47. See Barnard (*supra*, note 42), p. 414 (original emphasis).

4.3. Welfare shopping after Collins: prospectives

Taken in general perspective, *Collins* explores the frontiers of welfare shopping, although Member States' fear of social tourism is far from omnipresent in the judgment itself. Only the German and UK governments proceeded to intervene. Moreover and quite surprisingly, it is the Commission who brought forward the term 'benefit tourism', showing no hesitance to touch the true sore spot. The ECJ seems not to pay much regard to the possible explosive content of its ruling, tailoring the outcome to the facts of the case. But it is this ongoing inattention for the broader picture that may become worrying as the ECJ continues to be reluctant to assess the potential cumulative effect of many such individual cases.[48] Even though the 'unreasonable financial burden' is implicitly avoided in the present case, multiple Mr.'s Collins genuinely seeking employment may well draw heavily on the resources of at least certain benefit schemes. It is left to Member States to either scale down their the welfare sums in height or duration, or to put the tools handed down by the ECJ to good use, and pursue social security policy that can meet the challenges of citizenship. It is soothing to know that in the case of Mr. Collins, the genuine nature of his search for work was not in dispute, as 'it appears that he had remained continuously employed in the United Kingdom ever since first finding work there shortly after his arrival.'[49] But future concerns do remain legitimate as the ECJ's reasoning does indeed not accommodate the potential of cumulative, less meritorious claims.

The new Citizenship Directive will not immediately affect the situation of persons in the circumstances of the case under review. It leaves the position of jobseekers largely untouched, especially since Regulation 1612/68 is not repealed upon its entry into force.[50] Thus, the thrust of the *Lebon* case law, together with the recent expansion of its content by *Collins*, remains forceful. The political institutions have sought to curtail some of the recent judicial activism by proposing that equal treatment will no longer extend to social assistance for migrant students, a retrogression in respect to *Grzelczyk*.[51]

48. 'It may well be true that the double bill arising from one Baumbast and one Grzelczyk cannot really constitute an unreasonable burden upon the public purse – but ten-thousand Baumbasts and ten-thousand Grzelczyks might well have some more appreciable effect on the welfare resources of the host state.' M. Dougan and E. Spaventa, 'Educating Rudy and the (non-) English Patient: A double-bill on residency rights under Article 18 EC,' (2003) 28 *ELRev*. 699, 707.
49. *Collins*, para. 50.
50. Article 35 of the proposal for a Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM (2003) 199 fin. (Approved without amendment by EP on 10 March 2004) only deletes Articles 10 and 11 from Regulation 1612/68.
51. *Ibid*., Article 21. Interestingly, it originally also excluded entitlement to social assistance for persons other than those engaging in gainful activity in an employed or self-employed capacity

Whether the ECJ will concede to this encapsulation and smother the vanguard of its quiet revolution is uncertain. Who will assume power? Harbinger for the future may be *Pusa*,[52] possible headsman *Piliego*.[53]

until they had acquired a permanent right of residence (i.e. after four years). Parliament rejected this proposed exclusion.

52. Case C-224/02, *Heikki Antero Pusa* v. *Osuuspankkien Keskinäinen Vakuutusyhtiö*, judgment of 29 April 2004, n.y.r., in which an appeal to the mandatory requirements doctrine in respect to the Finnish tax system was largely upheld.
53. Case C-95/03, *Vincenzo Piliego* v. *OCMW* (pending), in which a Belgian judge asks whether the provisions on citizenship should be interpreted such that a citizen of the Union, lawfully residing in the territory of another Member State, should receive social welfare under the same conditions as nationals of the host state, despite generally restrictive national rules.