EU citizens with multiple statuses: the case of the student-worker. Comments on Case C-46/12, L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte

EU CITIZENS WITH MULTIPLE STATUSES: THE CASE OF THE STUDENT-WORKER

Comments on Case C-46/12, *L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte**

Alexander Hoogenboom**

1. INTRODUCTION

The case of *L.N. v. Styrelse for Videregående Uddannelser og Uddannelsesstøtte* is unlikely to go into the history books as one of the 'founding cases' in free movement law. On the surface, the case seems to be mostly an affirmation of what was already known from previous case law, hence also the decision to dispense with an Opinion of the Advocate-General. It revolves around the question whether a student enrolled in a full time course of study at a higher education institute, and whose 'primary intent' is to study, can nevertheless as a result of his part-time work next to his studies be considered a 'worker' for the purposes of EU law. The Court, as no doubt many foresaw in advance, answers this question in the affirmative. Nevertheless, on a deeper level, the case is an important affirmation of the 'student-worker' position, especially in the light of recent attempts by Member States to circumscribe this phenomenon and, moreover, continues the trend of the Court in which it seeks to integrate its EU Citizenship jurisprudence with its case law concerning the classic free movement of persons provisions. Finally, it is also important in the tension it reveals in the recent case law of the Court as regards lawful residency in the light of Directive 2004/38[1] and the concept of lawful residency in the context of applying the principle of non-discrimination on grounds of nationality.

* Judgment of the Court (Third Chamber) of 21 February 2013, not yet reported.

** PhD Researcher at the Faculty of Law, Maastricht University and Visiting Fellow at the Faculty of Law, University of Western Australia.

2. BACKGROUND

The constellation of facts that lead to a reference to the Court of Justice in this case is quite peculiar and somewhat formalistic in nature. L.N. is an EU citizen of undefined nationality who, so the facts tell us, entered Denmark on the 6th of June 2009 and soon after found full time employment as a clerk in an international wholesale firm. He continued to work for this firm until he enrolled in a course of full-time study at the Copenhagen Business School in September 2009, after which he resigned and took up part-time employment instead.

He applied to the *Styrelse for Videregående Uddannelser og Uddannelsesstøtte* (the Danish Agency for Higher Education and Educational Support,[2] here after '*Styrelse*') for maintenance aid in the form of a study grant, arguing that he was a worker within the meaning of Article 45 TFEU and thus, on the basis of EU law, entitled to equal treatment with the host Member State nationals as regards study grants. The *Styrelse* however, rejected his application. It based itself in this regard on an assessment by the regional governmental authority (the responsible *Statsfortvaltning*[3]) tasked with the administration of the Danish implementation of Directive 2004/38.[4] Initially, the responsible *Statsfortvaltning* found that L.N. was a worker and issued a residency certificate reflecting that status. However, subsequently, in light of the fact that LN had applied to study at the Copenhagen Business School already in March of 2009, it amended that designation to residency for the principal purpose of study. The *Styrelse* subsequently took that designation on board and concluded that as a student, rather than a Union worker, L.N. could not rely on equal treatment as regards study grants. L.N. appealed to the *Ankenævne for Statens Uddannelsesstøtte* who referred the following question to the Court of Justice:

Does Article 7(1)(c), read in conjunction with Article 24(2) of the Directive 2004/38, mean that a Member State (host Member State), in the assessment of whether a person must be deemed to be a worker entitled to education assistance, may take account of the fact that the person entered the host Member State for the principal purpose of following a course of study, with the result

---

1 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L 158/77.

2 Translation obtained from http://www.su.dk last visited 2 September 2013.

3 The relevant authority is not identified, but can be assumed to be *Statsforvaltningen Hovedstaden*.

4 See for the applicable (administrative) guidelines as to the implementation of this Directive in Denmark *Vejledning til Statsforvaltningerne vedr. ophold efter EU-opholdsbekendtgørelsen (2009)*, available at: http://www.nyidanmark.dk/resources.ashx/Resources/Publikationer/Vejledninger/2009/vejledning_til_statsforvaltningerne_vedr_ophold_efter_eu_opholdsbekendtgoerelsen.pdf last visited 2 September 2013.

that the host Member State is not obliged to grant education assistance aid for studies to that person (see aforementioned Article 24(2))?

3. JUDGMENT OF THE COURT

The Court decided to proceed without an Opinion of the A-G. From the very beginning, the CoJ seemed to be caught in a peculiar dichotomy: the student-worker, consisting of a student-as-EU-citizen and a worker-as-EU-citizen. After having established that Article 20 TFEU confers on any person holding the nationality of a Member State the status of EU Citizenship,[5] it held that:

> 'Both students from Member States other than the host Member State who follow a course of study in that State and nationals of Member States having the status of 'worker' within the meaning of Article 45 TFEU have that status, provided that they hold the nationality of a Member State.'[6]

The Court then went on to repeat several settled points in its case law, referring to its famous mantra that EU citizenship is 'destined to be the fundamental status of nationals of the Member States' and that such EU citizens can rely on the principle of non-discrimination on grounds of nationality in all situations falling within the scope, *ratione materiae*, of EU law, which include the exercise of free movement rights (either as a worker under Article 45 TFEU or under Article 21 TFEU).[7]

After having laid the groundwork, it dealt with the submissions of Denmark. Denmark, supported by Norway in this regard, contented that L.N. was resident as a student on the basis of Article 7(1)(c) of Directive 2004/38. In their view, this meant that since L.N.'s primary purpose for residency was to study he could not simultaneously qualify as a Union worker. As such, Denmark would be able to rely on Article 24(2) of Directive 2004/38 which provides that Member States may refuse maintenance aid in the form of study grants or study loans to those individuals who have not yet obtained permanent residency (normally obtained after five years of residency).[8] Implicitly, Denmark was thus relying on the assumption that Union citizens can only have one (residency) status under EU law at any one time, either student or worker, which is decisive or determinative for the right of equal treatment the EU citizen can derive from EU law.[9]

---

5 Case C-46/12, *L.N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, [2013] nyr., para. 25.
6 *Ibid.*, para. 26.
7 *Ibid.*, para. 27–30.
8 *Ibid.*, para. 31.
9 See also *ibid.*, para. 38.

The Court responded by holding, as it did in *Commission v. Austria*,[10] that the derogation in Article 24(2) must be narrowly interpreted, with due regard to the Treaty provisions on EU citizenship and those relating to the free movement of workers.[11] It then pointed to the fact that Article 24(2) itself specifies that the derogation may not be applied to those individuals, and their family members, who have the status of worker, self-employed person or persons who retain such status.[12] It followed that where the student with an EU nationality qualifies as a worker, the derogation cannot be relied upon.

The CoJ then proceeded to firmly (re-)establish that EU citizens are capable of holding more than one status in EU law. The fact that a student came to the host Member State with the principal intention of studying does not preclude him from having the status of 'worker'.[13] Rather, as is settled case law, Union worker is an EU concept and is made up of elements of an objective nature.[14] It then referred to the national court to establish whether L.N. was in the requisite employment relationship, although it suggested that would be the case on the facts, and for the determination whether he was engaged in an a genuine economic activity.[15] The Court rounded up by repeating its settled case law that should the national court find that L.N. qualified as a worker under EU law, he would be entitled to equal treatment as regards study grants following the fact that such grants constitute 'social advantages' within the meaning of Article 7(2) of Regulation[16] 492/2011.[17]

4. ASSESSMENT

4.1 Substantive outcome

In terms of substantive outcome the case is clear: a student who studies full-time at a higher education institute can nevertheless still qualify as a 'Union worker' if he is in a relationship of employment[18] and the scale of his activities, taken as a whole, is such as to constitute a genuine and effective economic activity. His intention to primarily devote his time to his studies (rather than his employ-

[10] Case C-75/11, *Commission v. Austria*, [2012] nyr., para. 54.
[11] Case C-46/12, *L.N.*, [2013] nyr., para. 33.
[12] *Ibid.*, para. 35.
[13] *Ibid.*, para. 36, 47.
[14] *Ibid.*, para. 39–40.
[15] *Ibid.*, para. 45.
[16] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union OJ [2011] L 141/1 (formerly: Regulation 1612/68/EEC). This regulation has as its purpose to specify the rights that Union workers can derive from Article 45 TFEU, which includes a right to 'enjoy the same social and tax advantages as national workers'.
[17] *Ibid.*, para. 48–50.

ment) is irrelevant in this regard.[19] The judgment therefore confirms the possibility of the 'student-worker' position: an EU citizen with more than one status who can benefit from the rights attached to both. For the student-worker this in particular means that he or she can rely on equal treatment as regards social advantages offered by the host Member State,[20] a concept which includes maintenance aid in the form of study grants.[21] Technically, this is the first time the Court has explicitly stated this: the facts underlying previous case law never revolved around this position but rather concerned either the ex-worker-turned-student[22] or the children of the (frontier) Union worker (who have a derivative right of equal treatment in this regard[23]).

In terms of when the scale of activities are sufficiently encompassing so as to not to be purely marginal and ancillary, the traditional assessment looks to the number of hours that the individual works:[24] case law suggests that 10 hours a week is sufficient in this regard.[25] However, at the same time it should be stressed that no 'hard lower limit' has been set by the Court: recent judgments underline, as does the present case,[26] that even where the number of hours worked are (very) low, this does not preclude the finding upon overall assess-

---

[18] The essential feature of which is that the person in question 'for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration': Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*, [1986] ECR 2121 para. 17.

[19] Case C-46/12, *L.N.*, [2013] para. 36, 47.

[20] See Article 7(2) of Regulation 492/2011.

[21] Case 39/86, *Sylvie Lair v. Universität Hannover*, [1988] ECR 3161, para. 22–24.

[22] See Case 39/86, *Lair*, [1988] ECR 3161 and Case 197/86, *Steven Malcolm Brown v. The Secretary of State for Scotland*, [1988] ECR 3205. The worker who has engaged in a genuine and effective economic activity will retain the status of worker for the purpose of obtaining study grants if there is a link between the previous work and the studies pursued: Case 39/86, *Lair*, [1988] ECR 3161, para. 36–37. In case, however, of involuntary unemployment, such a link is not necessary: Case 39/86, *Lair*, [1988] ECR 3161, para. 37. The fact that a contract was concluded from the outset as a fixed term contract does *not* mean that subsequent unemployment was voluntary: rather the employment relationship as a whole and the labour market context should be examined to determine whether the unemployment was voluntary or involuntary: Case C-413/03, *Ninni-Orasche*, [2003] ECR I-13187, para. 42–47.

[23] See Case C-3/90, *M. J. E. Bernini v. Minister van Onderwijs en Wetenschappen*, [1992] ECR I-1071, para. 23 ff. (concerning the fact that the child of a frontier worker can rely on Article 7(2) of Regulation 492/2011 to claim study grants in the Member State of employment of the worker-parent where the parent continues to support the child).

[24] The other factors having been held to be irrelevant by the Court, see Case C-188/00, *Bülent Kurz, né Yüce v. Land Baden-Württemberg*, [2002] ECR I-691, para. 32: neither the '*sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law*'.

[25] Case C-444/93, *Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz*, [1995] ECR I-4741, para. 18–20.

[26] Case C-46/12, *L.N.*, [2013] para. 41.

ment of the employment relationship that the person in question is engaged in genuine and effective economic activity. As such, in *Genc*, the Court left it to the national Court to find whether an individual working some 5,5 hours per week could nevertheless be considered a worker, having regard to:

> '(…) not only to the number of working hours and the level of remuneration but also to the right to 28 days of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, in conjunction with the fact that her contractual relationship with the same undertaking has lasted for almost four years.'[27]

It therefore seems that the Court is prescribing a dual test: Where the number of hours worked per week are equal to or over 10 hours, there seems to be presumption that the individual is engaged in a genuine economic activity: A student studying full time and working 4 nights per week in a bar for about 2,5 hours each would thus be a Union worker. Should, in the alternative, the number of hours worked per week dip below that number, the CoJ nevertheless requires the national court to take into account the employment relationship as a whole to determine whether the individual can nevertheless be seen as part of the 'workforce', using the indicative elements set out above.

Overall, on the one hand, the decision in this case explicitly recognising the position of student-worker is to be welcomed as an important restatement and clarification of the Court's case law in this regard, which may moreover be used to challenge recent attempts by Member States to undermine this position. Consider for example that the Netherlands is defining the student-worker position as someone who works for 56 hours a month[28] (some 14 hours per week), which, in the light of the case law cited above, is likely to be too restrictive an interpretation of the worker concept.

On the other hand, these trends do not come wholly out of the blue: study grant systems are not cheap[29] to maintain and it is hard not to feel some sympathy for Member State concerns with migrant EU students claiming study grants on the basis of their part-time work from the moment of arrival. Consider, for example, the Danish position in this case. Some 17600 students with an EU, EEA or Candidate Country nationality are currently enrolled in tertiary education in Denmark, with only 5500 Danish citizens studying abroad. Denmark is thus a net recipient of students to the amount of 12100 students, which represents about 5 % of its total student population.[30] Moreover, since no tui-

---

[27] Case C-14/09, *Hava Genc v. Land Berlin*, [2010] ECR I-931, para. 27.

[28] Beleidsregel van de Minister van Onderwijs, Cultuur en Wetenschap van 13 december 2012, nr. HO&S/463528, inzake het controlebeleid migrerend werknemerschap op grond van artikel 2.2, eerste lid, onder b, van de Wet studiefinanciering 2000 (Beleidsregel controlebeleid migrerend werknemerschap), *Stcrt.* 2013, 6218.

[29] Key Data on Education in Europe (EACEA P9 Eurydice, 2012), p. 100 ff.

tion fees are imposed and the *SU-Bekendtgørelse*[31] provides for generous study grants (some 5753 Danish Krona a month; about 768 euro[32]) it follows that public spending by Denmark on tertiary education is high (some 95 %[33]) and thus the foreign student expensive.[34] In that context one can perhaps understand a degree of reluctance on the part of Denmark to provide EU citizens engaging in relatively minor employment with a full set of study grants: unbridled influx of foreign students may put significant pressure on the financial sustainability of the system to the detriment of all tertiary students in Denmark.[35] Such financial concerns may weigh heavily on the minds of politicians, especially in times of economic crisis.

At the same time, however, it is not clear whether the appropriate response would be to try and circumscribe the eligibility of foreign students to such grants. A recent study carried by the Dutch Central Planning Agency calculated that the migrant EU students in the long term rendered a net benefit to the Dutch public purse to the amount of 652 million euro a year.[36] This positive balance was largely due to foreign students staying after their studies to take up employment in the Netherlands (estimated at 1 in 5 graduates).[37] While the situation of the Netherlands is not fully comparable as it employs a relatively high tuition fee (€1835 euro for the academic year 2013–2014) and provides less generous study grants,[38] the benefits of the EU-foreign-student-turned-worker can still be expected to be significant even for the situation of Denmark. As

---

30 Figures obtained from EUROSTAT 2010 values of tps00064 and tps00062, available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/education/data/main_tables last visited 2 September 2013; foreign student percentage is based on own calculations.

31 Bekendtgørelse af lov om statens uddannelsesstøtte LBK 2009/661.

32 See http://www.su.dk/SU/satserSU/videregaaende/Sider/default.aspx last visited 2 September 2013.

33 See Education at a Glance 2012 (OECD, 2012) Indicator B3, available at http://www.oecd-ilibrary.org/education/education-at-a-glance-2012/indicator-b3-how-much-public-and-private-investment-in-education-is-there_eag-2012-18-en last visited 2 September 2013.

34 Eurydice estimates the cost per year for students at the ICSED 5–6 level in Denmark to amount to some 13500 euro: Key Data on Education in Europe (EACEA P9 Eurydice, 2012), p. 92.

35 In fact, the current political trend seems to be in favour of cutting the generous system as the costs for maintaining the current system are increasingly becoming unaffordable, see http://www.sydsvenskan.se/danmark/politikerna-vill-banta-generost-studiestod/ last visited 2 September 2013.

36 Calculated from CPB Notitie of 18 April 2012, *The economische effecten van internationalisering in het hoger onderwijs*, Report for the Ministry for Education, Culture and Science, p. 32 available at: http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2012/05/16/de-economische-effecten-van-internationalisering-in-het-hoger-onderwijs/de-economische-effecten-van-internationalisering-in-het-hoger-onderwijs.pdf last visited 2 September 2013.

37 *Ibid.*, p. 21, 37.

38 See for the amounts Article 3.18 WSF 2000.

such, rather than devising ways to cut costs, Denmark should perhaps look to develop policies to try and retain the higher education graduate for its economy.

4.2 EU citizenship and its relationship to the classic economic free movement rights

It is interesting to note that the nationality of L.N. is fully unknown: all we know is that he is an EU citizen. As such, the case is of somewhat symbolic importance in that, to the knowledge of this author, for the first time the point of departure in a preliminary reference case is the 'nameless EU citizen' and the rights that he or she can derive from EU law. This may somewhat explain the strange paragraph quoted above, in which the Court seems keen to affirm that whatever the status, purpose of residency or occupation, a national of a Member State of the European Union 'abroad' is foremost an EU citizen. Moreover, it is also significant that even though the case essentially concerns free movement of workers and the concept of a 'Union worker', the Court nevertheless starts its reasoning from a citizenship perspective.[39]

This case thus cements the feeling that the 'pure' Union citizen increasingly takes the centre stage in free movement cases. This Member State national enjoys the right to move and reside in a Member State other than that of his nationality and can rely on the principle of non-discrimination to claim equal treatment with the host Member State nationals.[40] These rights are, however, are not unconditional: as is well known Directive 2004/38 concerning the free movement of EU citizens in the European Union sets out some limitations as regards residency in this regard. Following Article 7(1)(b) and (c) an EU citizen who wishes to reside in a Member State other than that of his nationality for more than three months must (in principle) have sufficient resources and comprehensive medical insurance so as not to become an unreasonable burden on the social assistance system of the host Member State. As such, at the moment they claim social assistance in the host State, foreign EU citizens start to 'eat away' their right of residency. Moreover, in any case, Member States can legitimately circumscribe the beneficiaries of such assistance: whereas the principle of non-discrimination found in Article 18 TFEU (of which Article 24 of Directive 2004/38 is merely a specific expression[41]) can be relied upon by migrant EU citizens to claim social assistance under the same conditions as host Mem-

[39] See also I. Solanke, 'Union Citizenship comes of age: Case C-46/12, LN v. Styrelsen for Videregaende Uddannelser og Uddannelsesstotte', contribution to EUTopia Law, available at: http://eutopialaw.com/2013/03/06/union-citizenship-comes-of-age-case-c-4612-ln-v-styrelsen-for-videregaende-uddannelser-og-uddannelsesstotte/ last visited 2 September 2013.

[40] On the basis of Article 21 and 18 TFEU respectively.

[41] Case C-75/11, *Commission v. Austria*, [2012] nyr., para. 54.

ber State nationals, Member States are only obliged[42] to provide such assistance to individuals who have demonstrated a certain degree of integration or a degree of attachment with the host State.[43]

From this basic starting point the Court then proceeds to analyse the other status that the EU citizen may have accumulated, which may give rise to additional rights ('EU Citizenship +'). For example, by qualifying as a worker, the Union citizen gains a right of residency in the host State divorced from considerations of sufficient resources and the like,[44] as well as full equal treatment as regards the social advantages offered by the host State.[45] The reason for the latter, as *Commission v. the Netherlands* clarifies, is that the Union worker must be presumed to have a genuine link with the host State by reason of his or her economic contribution to the host State.[46] The approach in this case illustrates this scheme:

1. L.N. is established as an EU citizen, capable of deriving some rights directly from the Treaties and potentially able to claim additional rights depending on any additional status he or she may have.
2. Denmark counters by holding that the 'pure EU citizen' can be denied eligibility to study grants for the first five years of residency on the basis of Article 24(2) of Directive 2004/38. It relies, in that context, on a 'single status' interpretation: EU citizens are only capable of having one status at the time, in this case, L.N. is a student as this is his prime pursuit.
3. The Court responds by holding that EU citizens can have multiple, interlocking status: student ánd worker. As such, where a full time student nevertheless manages to work sufficient hours etc. to qualify as engaging in a genuine economic activity, he or she can thus also be a worker. And, as is settled case law, such workers have a right of equal treatment as regards study grants from the outset.[47]

---

[42] Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, para. 44.

[43] Case C-209/03, *The Queen, on application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, [2005] ECR I-2119, para. 57–59. In more recent case law the Court also refers to the 'real and effective degree of connection': Case C-503/09, *Lucy Stewart v. Secretary of State for Work and Pensions*, [2011] nyr., para. 95.

[44] See Article 7(1)(a) Directive 2004/38, see classically also Case 139/85, *R. H. Kempf v. Staatssecretaris van Justitie*, [1986] ECR 1741, para. 8 ff.

[45] For the definition of social advantages, see Case 207/78, *Criminal proceedings against Gilbert Even et Office national des pensions pour travailleurs saleriés (ONPTS)*, [1979] ECR 2019, para. 22.

[46] Case C-542/09, *Commission v. the Netherlands*, [2012] para. 63, 65–66.

[47] The Court explicitly rejected the possibility for Member States to require the completion of a period of employment prior to being eligible for study grants: Case 39/86, *Lair*, [1988] ECR 3161, para. 42.

As such, this case is a reaffirmation (if one was needed) that EU citizenship increasingly takes a central place within the free movement jurisprudence, with the classic, economically oriented free movement of persons provisions relegated to 'add-ons' to that status. Moreover, even for economically non-active EU nationals the case law is evolving: recent case law makes clear that Member States must choose their 'genuine link indicators' carefully, ensuring that the indicator or proxy used reflects the nature and purpose of the benefit claimed[48] and that its operation is not too blunt (eg. where it excludes individuals with valid ties to the host State not captured by the indicator or proxy used).[49] These developments indicate yet again that the separation between EU citizenship case law and the classic economic free movement of persons jurisprudence is increasingly fading and that the Court rather seems to be moving towards a more integrative whole, combining the two areas.

4.3 Diverging concepts: residency and equal treatment

An issue that the Court did not address in this case, however, concerns the right of residency of L.N. in this regard: is he resident in Denmark as a student or a worker (should the national court find him to qualify as one)? It may be that the Court considered the issue irrelevant: either way, he had a right of residency under EU law.[50] At the same time, this lack of clarification is regrettable, especially as the rights of family reunification for the student are more limited than that of a worker (no right to bring dependent relatives in the ascendant line);[51] moreover the latter also has some special provisions applying to it in case of loss of employment (right of residency continues in case of involuntary employment, illness etc.[52]) as well as regards the attainment of permanent residency. The latter is usually obtained after five years of lawful residency,[53] whereas workers in particular circumstances may qualify after shorter residency periods.[54]

More generally, this on-going disconnect, of which this case is symptomatic, between the Court's evolving jurisprudence as regards residency under Directive 2004/38 and the line of case law concerning residency for the purposes of claiming equal treatment under Article 18 TFEU is worrying. From an equal treatment perspective, any EU citizen *lawfully resident* in the host Member

[48] Case C-75/11, *Commission v. Austria*, [2012] nyr., para. 63–64.
[49] Case C-503/09, *Lucy Stewart v. Secretary of State for Work and Pensions*, [2011] nyr., para. 92–102.
[50] See Articles 7(1)(a) and (c) of Directive 2004/38 respectively.
[51] See Article 7(4) of Directive 2004/38.
[52] Article 7(3) Directive 2004/38.
[53] Article 16 Directive 2004/38.
[54] See Article 17 Directive 2004/38.

State can rely on the non-discrimination principle found in Article 18 TFEU.[55] In this context, the Court has always insisted on a broad interpretation of what constitutes 'lawfully resident': whether the residency right was derived from EU law or national law is irrelevant.[56] In contrast, the situation under Directive 2004/38 is different. Article 16 provides that:

> Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

As such, when permanent residency is attained, the migrant EU citizen no longer has to fulfil the conditions for residency set out in Article 7 (eg. have sufficient resources or be a worker). However, the Court in a set of recent case law has interpreted 'legally residing' in this context very restrictively: it only includes periods of residency on the basis of the Directive 2004/38 itself, or its predecessors which it was designed to replace,[57] excluding therefore other EU law instruments and periods of residency based solely on national law.[58]

The difficulty arises, as it did in this case, where residency status starts to determine or 'matter' for the (extent of) the right of equal treatment: because L.N. was considered to reside as a student rather than a worker, he was denied equal treatment. This was resolved by the 'multiple status' approach of the Court for the purposes of equal treatment. Nonetheless, issues remain. If we consider the situation of L.N., but now as a pure EU citizen with no connection the labour market and for whatever reason resident solely on the basis of national law. Since he or she is lawfully resident in the host State, L.N. would be able to rely on Article 18 TFEU. On that basis, L.N. could claim equal treatment with host nationals with a view to obtain maintenance aid in the form of study grants.[59] However, as seen above, Member States may make the award of such grants conditional on the individual having obtained a genuine link with the host State. In the case of *Förster*, the Court upheld a five year residency requirement as proportionate to assess this 'genuine link' between the student and the host Member State for the purposes of receiving maintenance aid.[60]

---

[55] Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para. 32.

[56] Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, [1998] ECR I-2691, para. 60–61. Case C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)*, [2004] ECR I-7543, para. 43. See further C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, (OUP, 2010), p. 444–445.

[57] Case C-162/09, *Secretary of State for Work and Pensions v. Taous Lassal*, [2010] ECR I-9217, para. 29–40.

[58] Joined Cases C-424/10 and C-425/10, *Tomasz Ziolkowski, Barbara Szeja, Maria-Magdalena Szeja, Marlon Szeja v. Land Berlin*, [2011] nyr., para. 31–50, Case C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v. Secretary of State for the Home Department*, [2013] nyr., para. 36–47.

[59] Case C-209/03, *Bidar*, [2005] ECR I-2119, para. 30–42.

Which 'types' of residency are relevant here? Following the Court's case law in equal treatment cases, as set out above, all forms of lawful residency must count towards these five years, which would thus include five years' residency on the basis of national law.

In contrast, if we instead look to Article 24 of Directive 2004/38, the situation would change: paragraph 2 of that Article provides for derogation from the general principle of equal treatment and provides that Member States may make the receipt of study grants conditional on the EU citizen having obtained *a right of permanent residency*.[61] This is also obtained after five years of residency, but only the specific types of residency set out above (eg. on the basis of the Directive 2004/38 itself or its predecessors) count towards that goal. Here, L.N., would not be entitled to study grants after five years as his or her residency, in the modified case, is solely on the basis of national law (or mixed periods).

Thus, if an administrative agency where to take Directive 2004/38 as the starting basis, he or she would in essence be tying the right of equal treatment in the area of study grants to the attainment of a certain residency status (permanent resident or not). The outcome of such a move, however, could be incompatible with the case law of the Court of Justice as regards Article 18 TFEU.[62] Since Article 18 TFEU is primary law and Directive 2004/38 secondary law, the interpretation of the latter should in principle trump the interpretation of the former, but as of yet the Court has not pronounced itself on the issue. One may thus expect such issues to arise in the future.

---

[60] Case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, [2008] ECR I-8507, para. 48–59.

[61] It will be reminded mere that the derogation cannot be invoked against workers, self-employed persons and their family members.

[62] It should be noted that in Denmark this not likely to occur, as reference is made to a residency period of five years in Article 67(5) *Bekendtgørelse om statens uddannelsesstøtte* rather than permanent residency. Notwithstanding this, the issue is far from illusory as for example in Article 5 *Studiestödslag* SFS 1999:1395 (Sweden) and Article 2.2 (1b) *Wet Studiefinanciering 2000* jo. 3(1b) *Besluit Studiefinanciering 2000* (the Netherlands) reference is made to the acquisition of permanent residency prior to equal treatment as regards study grants for 'pure' EU students.