Minimum requirements for worker status and discrimination towards foreign workers – is it a real problem?

Taika Lapintie
602006
Re-examing the Foundations
of EU Law
University of Turku
Faculty of Law
August 2017

UNIVERSITY OF TURKU
Faculty of Law

TAIKA LAPINTIE: Minimum requirements for worker status and discrimination towards foreign workers – is it a real problem?

Pro Gradu, 73 p.
European Law
August 2017
The originality of this thesis has been checked in accordance with the University of Turku quality assurance system using the Turnitin OriginalityCheck service.

– –

In this dissertation is examined the free movement of workers in the EU. Workers moving in the EU get benefits based on the article 45 TFEU, that other moving EU Citizens are not entitled to. The moving worker shall not cause an excessive burden for the receiving Member State. Closely linked to the principle of free movement of workers is the principle of non- discrimination on grounds of nationality. When the discrimination is objectively justified, a Member State can legally hinder the movement of foreign EU workers.

The right for workers to move within the EU is originally developed to benefit the employers and the economic movement within the EU. Workers from Member States with high unemployment of highly educated people could work in other Member States with a lack of qualified workers. During the latest years there has been increased criticism against EU and moving persons within the EU. Moving workers are often called welfare tourists, being accused for abusing the system. The new trend is also seen in the fresh ECJ decisions. From the beginning the general ambiance has been moving-friendly, but lately the ambiance has taken a turn and is becoming more hostile. In the dissertation old and new law cases are examined, so that this new trend can be observed.

The research method in this dissertation is dogmatic. A lot of case law concerning the subject is also examined.

Key Words: EU law, free movement of workers, discrimination on grounds of nationality

TURUN YLIOPISTO
Oikeustieteellinen tiedekunta

TAIKA LAPINTIE: Minimum requirements for worker status and discrimination towards foreign workers – is it a real problem?

Pro Gradu, 73 s.
Eurooppaoikeus
Elokuu 2017
Turun Yliopiston laatujärjestelmän mukaisesti tämän julkaisun alkuperäisyys on tarkastettu Turnitin OrginalityCheck –järjestelmällä.

– –

Tutkielmassa tarkastellaan työntekijöiden vapaata liikkuvuutta EU:n sisällä. Muuttavat työntekijät saavat etuuksia SEUT 45 artiklan nojalla, joita muut liikkuvat EU kansalaiset eivät saa. Työntekijän liikkuminen ei saa aiheuttaa vastaanottavalle jäsenvaltiolle kohtuutonta haittaa. Periaate syrjimättömyydestä kansalaisuuden perusteella on kytketty tiiviisti periaatteeseen vapaasta liikkuvuudesta. Tutkielmassa selvitetään minkälainen syrjintä on oikeutettua, eli milloin valtion harjoittama syrjintä voi olla perusteltavissa.

Oikeus työntekijöiden vapaaseen liikkuvuuteen on kehitetty alun perin ajatellen työnantajien taloudellista etua ja EU:n liikkuvuuden edistämistä. Ajatuksena oli, että työntekijät voisivat liikkua maista, joissa on paljon korkeasti koulutettuja työttömiä maihin, joissa on työvoimapulaa.

EU kriittisyys on viime vuosina lisääntynyt ja liikkuvia työntekijöitä syytetään usein niin sanotuiksi hyvinvointituristeiksi. Tämä uusi trendi on havaittavissa myös EU:n tuomioistuimen päätöksissä. EU:n kansalaiset mielipiteet ja tuomioistuimen päätökset ovat alusta asti painottuneet suosimaan liikkuvuutta, mutta viime vuosina tämä suuntaus on muuttunut. Tutkielmassa käydään läpi oikeustapauksia, joissa suunnanmuutos näkyy.

Tutkintamenetelmä on oikeusdogmaattinen. Pääasiallisina lähteinä ovat alan kirjallisuus sekä lukuisat EU:n tuomioistuimen päätökset.

Avainsanat: EU oikeus, vapaa liikkuvuus, syrjimättömyys

Contents

References

Literature

Aarnio, Aulis: Luentoja lainopillisen tutkimuksen teoriasta. Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisut. Helsinki 2011.

Andrijasevic, Rutvica – **Sacchetto**, Devi: From labour migration to labour mobility? The return of the multinational worker in Europe. Transfer volume 22(2) 2016.

Arnull, Anthony: The European Union and its Court of Justice. Oxford University Press. New York 1999.

Barnard, Catherine: The substantive Law oh the EU: The Four Freedoms. Fifth Edition. Oxford University Press. Glasgow 2016.

Barnard, Catherine – **Ludlow**, Amy: Free movement of services, migration and leaving the EU. National Institute economic review no. 236 May 2016. Downloaded 23 September 2016.

Barnard, Catherine – **Peers**, Steven: European Union Law. Oxford University Press. United States of America 2014.

Bhabha, Jacqueline: Enforcing the Human Rights of Citizens and Non-Citizens in the Era of Maastrich in the book Globalization and Identity edited by Meyer, Birgit and Geschiere Peter. Blackwell Publishing. 1999.

Blanpain, Roger: European Labour Law. Thirtheenth Revised Edition. Kluver Law International BV. The Netherlands 2012.

Burrows, Noreen – **Greaves**, Rosa: The advocate General and EC law. Oxford University Press. United States of America 2007.

Coleman, Stephen: Cutting out the middle man: from virtual representation to direct deliberation. In the book by Hague, Barry N. – Loader, Brian S. Digital Democracy: Discourse and Decision Making in the Information Age Routledge, 2005.

Craig, Paul – **de Búrca**, Gráinne: EU Law. Text, Cases, and Materials. Sixth edition. Oxford University Press. Italy 2015.

Davies, Gareth: Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law. German Law Journal. Vol. 11 No. 08.

Dorf, Michal C. – **Sabel**, Charles F.: A Constitution of Democratic Experimentalism. Columbia Law Review. Volume 98 March 1998.

Downey, Blair: The Bosman Ruling: European Soccer – Above the Law? Asper Review. Volume 1 2001.

Egan, Michelle P.: Single Markets Economic Integration in Europe and the United States. Oxford University Press, United Kingdom 2015.

Hellsten, Jari: On the Social Dimension in Posting of Workers. Publication of Labour Administration. Hakapaino Oy, Helsinki 2006.

Isiksel, Turkuler: Europe's Functional Constitution A Theory of Constitutionalism beyond the State. Oxford University Press. United Kingdom 2016.

Ivanus, Catalina-Asriana: Justification for Indirect Discrimination in EU. Perspectives of Business Law Journal. Volume 3 Issue 1. November 2014.

Jacqué, Jean Paul: The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms. Common Market Law Review 48. Kluwer Law International. United Kingdom 2011.

Jorgensen, Ellen Brinch: Union Citizens – Free movement and non-discrimination. Jurist- og Okonomforbundets forlag, Denmark 1996.

Kraamwinkel, Margriet: The Imagined European Community: Are Housewives European Citizens. In the collection edited by Conaghan, Joanne – Fischl, Richard Michael – Klare, Karl. Labour Law in an Era of Globalization Transformatiove Practices and Possibilities. Oxford University Press, New York 2004.

Loenen, Titia – **Vickers** Lucy: More is Less? Multiple protection of Human Rights in Europe and the Risks of Erosion of Human Rights Standards. In the collection by Morano-Foadi, Sonia – Vickers, Lucy. Fundamental Rights in the EU A Matter of Two Courts. Hart Publishing. Oxford and Portland, Oregon, 2015.

Maas, Willem: Democratic Citizenship and the Free Movement of People. Martinus Nijhoff Publishers. (Belonging to the collection edited by Maas, Willem: Immigration and Asylum Law and Policy in Europe, volume 30). Lieden – Boston 2013.

Minderhoud, Paul **– Oosterom-Staples**, Helen: Obstacles to the free movement of young workers. European network on free movement of workers. January 2011.

Morano-Foadi, Sonia – **Vickers**, Lucy: Fundamental Rights in the EU A Matter of Two Courts. Hart Publishing. Oxford and Portland, Oregon, 2015.

Oliver, Peter – **Roth**, Wulf-Henning: The internal market and the Four Freedoms. Common Market Law review 41. Netherlands 2014.

Paanetoja, Jaana: The Broadening Interpretation of "worker" in the European Union. In the collection Developments on labour law from a comparative perspective by Izabela Florczak, Zbigniew Góral. Publisher Univeristy of Lódz. Poland 2015. Finnish translation in Lakimies 3-4/2015.

Pennings, Frans: Non-Discrimination on the Grounds of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR? Utrecht Law review Volume 9 Issue 1 January **2013**.

Pickup, D.: Reverse Discrimination and Freedom of Movement for Workers. Common Market Law Review, volume 23 1986.

Riso Sara – **Eurofund**; Secher, Johan Ernest Oliver and Andersen, Tine (Danish Technological Institute (DTI)). Labour migration in the EU: Recent trends and policies. Eurofund, Publications Office of the European Union. Luxembourg 2014.

Rolfe, Heather **– Hudson-Sharp**, Nathan: The impact of free movement on the labour market: case studies of hospitality, food processing and construction. National Institute of Economic and Social Research. London 2016.

Ruffert, Matthias: European Economy and People's Mobility. Mohr Siebeck. Germany 2016.

Siltala, Raimo: Oikeustieteen lait. Lakimies 1/2010.

Snell, Jukka: The notion of Market Access: A Concept or a Slogan. Common Market Review Volume 47 issue 2 2010.

Thorson, Bjarte: Individual Rights in EU Law Springer. Oslo 2016.

Tuori, Kaarlo – **Tuori**, Klaus: The Eurozone Crisis A constitutional Analysis. Cambridge University Press Cambridge 2014.

Verschueren, Herwig: Free Movement or Benefit Tourism: The Unreasonable burden of *Brey*. European Journal of Migration and Law 16 2014.

Weiss, Friedl – **Wooldrige**, Frank: Free Movement of Persons within the European Community. Second edition. Kluwer Law International BV, The Netherlands 2007.

White, Robin C. A.: Revisiting Free Movement of Workers. Fordham International Law Journal Volume 33 Issue 5 2011.

Legislation and other official sources

Primary Law

Treaty on the Functioning of the European Union, OJ C 326 of 26 October 2012.

Treaty of Lisbon, OJ C 306 of 17 December 2007.

Treaty on the European Union/The Maastricht Treaty of 7 February 1992, OJ C 191 of 29 July 1992.

Secondary Law

Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013.

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

Commission Implementing Decision 2012/733/EU of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES (notified under document C(2012) 8548) (OJ L328, 28.11.2012).

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

Council Directive 2004/114/EC of 13 december 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Case Law

Case 73/63 **Hoekstra** v Bestuur der Bedrijfsverreniging voor Detailhandel en Ambachten [1964] ECR 177.

Case 152/73 **Sotgiu** v Deutche Bundespost [1974] ECR 153.

Case 167/73 **Commission** v French republic [1974] ECR 359.

Case 2/74 **Reyners** v Belgium [1974] ECR 631.

Case 36/74 **Walrave** and Koch v Association Union Cycliste Internationale [1974] ECR 1405.

Case 32/75 **Cristini** v SNCF [1975] ECR 1085.

Case 46/75 **Royer** [1976] ECR 497.

Case 13/76 **Donà** v Mantero [1976] ECR 1333.

Case 53/81 **Levin** v Staatssecretaris van Justitie [1982] ECR 1035.

Case 249/83 Vera **Hoeckx** v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout [1985] ECR I-973.

Case 293/83 Françoise **Gravier** v City of Liège [1985].

Case 66/85 **Lawrie-Blum** v Land Baden-Wüttenberg [1986] ECR 2121.

Case 139/85 **Kempf** v Staatssecretaris van Justitie [1986] ECR 1741.

Case 316/85 Centre public d'aide sociale v Marie-Christine **Lebon** [1987] ECR 281.

Case 39/86 Sylvie **Lair** v Universität Hannover [1988] ECR 3161.

Case 197/86 Steven Malcolm **Brown** v Secretary of State for Scotland [1988] ECR 3205.

Case 292/86 **Gullung** v Conseil de l'Ordre des Avocats [1988] ECR 111.

Case 196/87 **Steymann** v Staatsecretaris van Justitie [1988] ECR 6159.

Case 344/87 I. **Bettray** v Staatssecretaris van Justitie [1989] ECR I-1621.

Case 379/87 Antia **Groener** v Minister of Education and the City of Dublin Vocational Educational Committee [1989] ECR 3967.

Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospodia Syllogon Prossopikou v Dimotiki Etairia Pliroforssis and Sotirios Kouvelas (**ERT**) [1991] ECR I-2925.

Case C-288/89 **Gouda** v Commissariaat voor de Media [1991] ECR I-4007.

Case C-292/89 R v Immigration Appeal Tribunal, ex parte Gustaff Desiderius **Antonissen** [1991] ECR I-745.

Case C-357/89 **Raulin** v Minister van Onderwijs en Wetenschappen [1992] ECR I-1027.

Case C-3/90 M. J. E. **Bernini** v Minister van Onderwijs en Wetenschappen [1992] ECR I-1071.

Joined cases C-267 and 268/91 Criminal proceedings against **Keck** and Mithouard [1993] ECR I-6097.

Case C-415/93 Union rovale Belge des sociétés de football association ASBL et al. v Jean-Marc **Bosman** [1995] ECR I-4921.

Case C-177/94 **Perfili** [1996] ECR I-161.

Case C-237/94 **O'Flynn** v Adjudication Officer [1996] ECR I-2617.

Case C-278/94 **Commission v Belgium** [1996] ECR I-4307.

Case C-43/95 **Data Delecta** and Forsberg v MSL Dynamics [1996] ECR I-4661.

Case C-57/96 **Meints** v Minister van Landbouv [1997] ECR I-6689.

Cases C-64 and 65/96 Land Nordrhein-Westfalen v Kari **Uecker and** Vera **Jacquet** v Land Nordrhein-Westfalen [1997] ECR I-3171.

Case C-85/96 Maria Martinez **Sala** v Freistaat Bayern [1998] ECR I-2691.

Case C-350/96 **Clean Car** Autoservice GesmbH v Landeshauptmann von Wien [1998] ECR I-2521.

Case C-337/97 C.P.M. **Meeusen** v Hoofddirectie van de Informatie Beheer Groep [1999] ECR I-3289.

Case C-190/98 Volker **Graf** v Filzmozer Maschinenbau GmbH [2000] ECR I-493.

Case C-281/98 Roman **Angonese** v Cassa si Risparmio di Bolzano SpA [2000] ECR I-4134.

Case C-43/99 Ghislain **Leclere** v and Alina Deaconescu v Caisse nationale des prestations familiales [2001] ECR I-4265.

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

Case C-55/00 **Gottardo** v INPS [2002] ECR I-413.

Case C-438/00 Deutcher Handballbund e V v Maros **Kolpak** [2003] ECR I-4135.

Case C-100/01 Ministere de l'interieur v **Olazabal** [2002] ECR I-10981.

Case C-253/01 **Krüger** v Directie van de rechtspersoonlijkheid bezittende Dienst Wegsverkeer [2004] ECR I-1191.

Case C-413/01 Franca **Ninni-Orasche** v Bundesminister für Weissenschaft, Verkher und Kunst [2003] ECR I-13187.

Case C-138/02 Brian Francis **Collins** v Secretary of State for Work and Pensions [2004] ECR I-2703.

Case C-200/02 Kunquian Cathrine **Zhu and** Man Lavette **Chen** v Secretary of State for the Home Departement [2004] ECR I-9925.

Case C-456/02 Michel **Trojani** v Centre Public d'aide sociale de Bruxelles (CAPS) [2004] ECR I-7573.

Case C-209/03 Dany **Bidar** v London Borough of Ealing and Secretary of State for Education and Skills [2005] ECR I-2119.

Case C-403/03 Egon **Schmepp** v Finanzamt München V [2005] ECR I-6421.

Case C-137/04 **Rockler** v Försäkringskassan [2006] ECR I-1441.

Case C-185/04 Ulf **Öberg** v Försäkringskassan, länskontoret Stockholm [2006] ECR I-1453.

Case C-208/05 **ITC** Innovative Technology Center GmbH v Bundesagentur für Arbeit [2007] ECR I-181.

Case C-212/06 Government of Communauté française and Gouvernement wallon (**Wallon Government**) v Gouvernement flamand [2008] ECR I-1683.

Case C-94/07 Andrea **Raccanelli** v Max-Planck-Geselleschaft zur Förderung der Weissenschaften eV [2008] ECR I-5939.

Joined cases C-22/08 and C-23/08 Athanasios **Vatsouras and** Josif **Koupatantze** v Arbeitsgemeinschaft (ARGE) Nürnberg 900 [2009] ECR I-4585.

Case C-34/09 Gerardo **Ruiz Zambrano** v Office national de l'emploi (ONEm) [2011] ECR I-1177.

Case C-434/09 Shirely **McCarthy** v Secretary of State for the Home Departement [2011] ECR I-3375.

Case C-202/11 Anton **Las** v PSA Antwerp NV ECLI:EU:C:2013:239.

Case C-367/11 Déborah **Prete** v Office national d'emploi ECLI:EU:C:2012:668.

Case C-140/12 Pensionsversicherungsanstalt v Peter **Brey** EU:C:2013:565.

Case C-46/12 **L.N.** v Styrelsen for Videregående Udannelser og Uddannelsestötte ECLI:EU:C:2013:97.

Case C-456/12 O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B. (**O & B)** EU:C:2014:135.

Case C-457/12 S. v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v G.(**S & G)** EU:C:2014:136.

Case C-333/13 Elisabeta **Dano**, Florin Dano v Jobseeker Leipzig EU:2014:2358.

Case C-354/13 Fag og Arbeje (**FOA**) v Kommunernes Landsforening (Kaltoft) EU:C:2014:2463.

Case C-67/14 Jobcenter Berlin Neukölln v Nazifa **Alimanovic**, Sonita Alimanovic, Valentina Alimanovic, Valentino Alimanovic ECLI:EU:C:2015:597.

Case C-165/14 Alfredo Rendón **Marín** v Administación del Estado ECLI:EU:C:2016:675.

Case C-218/14 Kuldip **Singh and Others** v Minister for Justice and Equality ECLI:EU:C:2015:476.

Case C-299/14 Vestische Arbeit Jobcenter Kreis Recklinghausen v Gracia-**Nieto** and others ECLI:EU:C:2016:114.

Case C-304/14 Secretary of State for the Home Department v **CS**. ECLI:EU:C:2016:674.

Case C-558/14 **Khachab** v Subdelegación del Gobierno en Álava ECLI:EU:C:2016:285.

Case C-15/15 New **Valmar** BVBA v Global Pharmacies Partner Health Srl ECLI:EU:C:2016:464.

Case C-115/15 Secretary of State for the Home Department v **NA** ECLI:EU:C:2016:487.

Case C-157/15 Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v **G4S** Secure Solutions NV ECLI:EU:C:2017:203.

Case C-188/15 Asma **Bougnaoui** Association de defense des droits de l'homme (ADDH) v Micropole SA ECLI:EU:C:2017:204.

Advocates General's opinions

Case C-2/74 **Reyners** v Belgium, opinion of Advocate General **Mayras**, delivered on 28 May 1974.

Case C-118/96 **Safir** v Skattemyndigheten i Dalarnas län [1998] ECR I-1897, opinion of Advocate General **Tesauro**, delivered on 23 September 1997.

Case C-350/96 **Clean Car** Autoservice GesmbH v Landeshauptmann von Wien [1998] ECR I-2521, opinion of Advocate General **Fennelly**, delivered on 4 December 1997.

Case C-184/99 Rudy **Grzelczyk** v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, opinion of Advocate General **Alber**, delivered on 28 September 2000.

Case C-118/96 **Safir**, opinion of Advocate General **Tesauro**, delivered on 23 September 1997.

Case C-442/02 **CaixaBank** France v Ministère de l'Économie, des Finances et de l'Industrie, opinion of Advocate General **Tizzano**, delivered on 25 March 2004.

Case C-208/05 **ITC** Innovative Technology Center, opinion of Advocate General **Léger**, delivered on 5 October 2006.

Case C-22/08 and C-23/08 Athanasios **Vatsouras** and Josif **Koupatantze** v Arbeitsgemeinschaft, opinion of Advocate General **Wathelet**, delivered on 12 March 2009.

Case C-212/06 Government of the French Community and **Walloon Government** v Flemish Government the opinion of Advocate general **Sharpston**, delivered on 28 June 2007.

Case C-354/13 **Fag** og Arbeje v Kommunernes Landsforening the opinion of Advocate General **Jääskinen**, delivered on 17 July 2014.

Case C-165/14 Alfredo Rendón **Marín** v Administración del Estado the opinion of Advocate General **Szpunar** delivered on 4 February 2016.

Case C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v **G4S** Secure Solutions NV the opinion of Advocate General **Kokott** delivered on 31 May 2016.

Case C-188/15 Asma **Bougnaoui** Association de defense des droits de l'homme (ADDH) v Micropole SA the opinion of Advocate General **Sharpston**, delivered on 13 July 2016.

Other Sources

Al Jazeera 14 March 2017 "Employers allowed to ban the hijab: EU court - Hijab targeted as court rules workplace bans on political and religious symbols are not discriminatory" http://www.aljazeera.com/news/2017/03/employers-allowed-ban-headscarves-eu-court-170314092627483.html. Accessed 16 May 2017.

BBC 4 March 2016 "Migrant crisis: Migration to Europe explained in seven charts" http://www.bbc.co.uk/news/world-europe-34131911. Accessed 15.4.2017.

BBC News 9 June 2017 "Election results 2017: What does it mean for Brexit?" http://www.bbc.co.uk/news/election-2017-40215511. Accessed 5 July 2017.

EU Free Movement: https://www.freemovement.org.uk/hubs/eu-free-movement/ accessed 27.5.2017; https://www.freemovement.org.uk/whether-the-right-to-reside-test-complies-with-eu-law-when-applied-to-family-benefits. Accessed 11 July 2017.

European Commission: http://ec.europa.eu/social/main.jsp?catId=459&langId=en. Accessed 2 January 2017.

European Commission Directorate-General Economic Crisis in Europe: Causes, Consequences and Responses. **European Economy** 7/2009 Luxembourg 2009. Available on http://ec.europa.eu/economy_finance/publications/pages/publication15887_en.pdf. Accessed 15.4.2017

Eurostat: Migrant integration statistics – employment http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:EU_citizenship_-_statistics_on_cross-border_activities. Accessed 1 April 2016; http://ec.europa.eu/eurostat/statistics-explained/index.php/Migrant_integration_statistics_-_employment#cite_note-4. Accessed 15 July 2016; http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics. Accessed 18 June 2017.

Independent 20 April 2017 “Theresa May says she still aims to reduce immigration to under 100,000 'We believe sustainable numbers are the tens of thousands,' says Prime Minister” http://www.independent.co.uk/news/uk/politics/theresa-may-immigration-target-100000-reaffirms-commitment-still-aims-reduce-a7694021.html. Accessed 16 May 2017.

The European Parliament, Fact Sheets on the European Union, Free movement of workers: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.3.html. Accessed 29 December 2016.

The Guardian 14 March 2017 “Europe's right hails EU court's workplace headscarf ban ruling” https://www.theguardian.com/law/2017/mar/14/employers-can-ban-staff-from-wearing-headscarves-european-court-rules. Accessed 16 May 2017.

The Telegraph 31 May 2017 “Theresa May claims Labour wants ‘uncontrolled migration’ post-Brexit after leak of party’s immigration plan” http://www.telegraph.co.uk/news/2017/05/31/theresa-may-claims-labour-wants-uncontrolled-migration-post/. Accessed 5 July 2017.

List of abbreviations

AG	Advocate General
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Agreement
ETUC	European Trade Union Confederation
EU	European Union
GPD	Gross Domestic Product
Ibid.	Ibidem, i.e. in the same place
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1 Introduction

1.1 The subject

The free movement of persons is one of the four cornerstones that form the basis of the EU, with the other freedoms being the free movement of goods, services and capital. In this context the free movement of persons includes the free movement of workers, and is a fundamental component within the TFEU.[1] The freedoms have existed since the very beginning of the coalition that formed the Union.

Within the last few years there has been increased criticism concerning the free movement of persons and people in Member States have started to question the extent of the free movement.[2] The timing of the criticism could be explained by the worldwide economic crisis that shook the economy of Europe especially hard. A couple of years later the refugee waves to Europe due to the other crisis in the Middle East, caused even more criticism to free movement in general in the EU. Although the fundamental EU freedom did not cause any of these problems, people started to question arrangements that could be a potential risk to their wellbeing.

The discussions of the free movement is politically charged and has been for a long time already very active. The interests of conflict are the interests of the Member State and social rights for the individual worker.[3] When the freedom of movement and establishment is given to a certain group of people, it should not reduce the rights of the people already living in the state. Therefore, the freedom has to be restricted in order to not to cause an unreasonable burden for the host state.

One way the free movement of workers is abused, is when persons claim they are using the right of workers to move to another Member State, but they are actually just using the right to move from their own state to take advantage from a state with better social benefits. The right to free movement of workers gives a person the same rights and social benefits as the

[1] For example Arnull p. 298.
[2] See for example Barnard - Ludlow p. 23; Rolfe – Hudson-Sharp p. 1.
[3] Hellsten p. 6.

people already working in the new host state. Strongly linked with the free movement is the principle of non-discrimination on grounds of nationality. Therefore, when a moving person gains the status of a moving worker, the person has the same rights as a national working in the host state. The discussion about welfare tourism often tend to be more based on feelings than on facts, like other similar politically charged discussions tend to be.

There is an increased criticism against EUs free movement of person's policy as well as a fear of more immigration-waves. An example of this was the result of the public referendum in the UK in June 2016, where the people voted to leave the EU, also known as Brexit. For the moment the EU is waiting to see how the other EU States will react to the results of the UK wanting to leave the Union, and whether the others will follow the example of the UK. Even before the Brexit the current path towards an even more integrated EU has been questioned in different forums.

In this dissertation I am examining more carefully what a Member State can do to stop the abuse of social welfare. I am also examining the shifting opinions of the ECJ and the active politically charged discussion about the pros and cons with the freedom of movement, mainly among economically active persons. The actual question to be answered is whether this really is an actual problem, or is it just something people want to blame on in a hard economic situation.

1.2 Research question, the restriction of the research field and the structure of the work

The main research questions are, what is required to be a worker and how can the status be abused. Is the abuse of the status a real problem and how are the foreign workers being discriminated against? To answer these questions first of all the rights of moving workers has to be defined. I am going through case law to see in which cases the Member State has been able to hinder the worker free access to the social benefits, when the "working" has been an excuse to enter a state and enjoy the advantages thereof. Other relevant questions are what does the right provide, what are the benefits that are so sought after, and why. Last I am examining how the states can "legally discriminate" moving persons to restrict the

right of free movement. In the chapter the terms that are in a central role are direct and indirect discrimination as well as the effects of market access. The objective justification allows the discriminating restrictions, and gives reason to some of the discriminations that exists.

I start the dissertation with some basic legal definitions and backgrounds that have to be clarified as well as the origins of the discussions about the free movement we have today. The legislation can be considered complex, the right is stipulated in the TFEU.

The following first main chapter defines the term worker that has the right under the Treaty provisions. The chapter considers also how workers can abuse the system. The term worker is being observed from different stages of the working life, before being employed, while working and after employment. A worker is economically active only when actually working, for the status the worker, the working must also be sufficient. Another legitimate question is then why the rights a worker gains has to be extended to economically inactive persons, after retirement and to job-seekers as well as their family members. This is also being discussed in the dissertation.

The second main chapter is from the angle of discrimination. The non-discrimination on grounds of nationality is one of the main principles in EU law and very central to this topic. The national court is the first instance a part feeling discriminated has to plead to. If the discriminatory national action[4] will never be questioned in the ECJ, the discrimination might never be caught.[5] In addition, if the accusation about the discrimination done by the state is brought in front of the ECJ, the ECJ can find an objective justification that allows the discrimination.

The last chapter shows through statistic numbers how common the movement of workers actually is in the EU. These numbers show whether the welfare tourism can be an actual problem. In the last chapter future aspects and shifting trends about the opinions on free

[4] This could for example be a national provision, criterion or practice.

[5] In addition the juridical constitution is very bureaucratic and the chances are good that a case brought by a sole plaintiff is never getting an EU judgment. Also when a person is a foreigner it can be harder to place a plead first in national court for to be able to proceed to the EU Court of Justice. It is possible that the plaintiff thinks it is just easier to give up and move back home. These people seldom have the support in their new State, end the procedure usually takes several years, and in that time it has maybe just been easier to move back home.

movement in general are also being considered. These shifting trends are explained also throughout in the dissertation, in the cases where the shifting can be observed. This last chapter gives the concluding words to this dissertation, just before the summary in the end.

1.3 Methods and sources

In this type of dissertations the main research method is dogmatic. That means that the angle the facts are being examined from is interpretative and the legal material relating to free movements of workers and discrimination on grounds of nationality is being interpreted, clarified and systemized in this dissertation.[6] In this dissertation I have examined and evaluated legal doctrine related to the subject.

I will start by examining the treaties that form the main legislation of the freedom. The secondary legislation are the regulations that clarifies the treaty provisions and are therefore the main source. The case law on how the ECJ has interpreted the regulations are also in the center of this dissertation. The Court decisions are in a central role, since these provide the direction of how the provisions are meant to be interpreted.[7]

The discussion on the topic is currently very active, politically charged and very sensitive. Therefore, there is a lot of non-academic material available in form of news and blogs.[8] These sources have been interesting to follow and helpful to find cases that provoke active discussions and reflects the general opinions towards migrants within the EU.

Some case law is analyzed to clarify the practical line and the ECJ interpretation of the freedom. The role of the ECJ is especially big since the term worker is not defined in the Treaty nor in the regulations. Therefore, the term has taken its form by the interpretation of the ECJ. I have tried to include both old and new cases. The old cases describes how the provisions have been interpreted in the beginning when the provisions where new, and the new cases shows how the interpretation of the situations has changed. The opinions of the

[6] Siltala p. 90.
[7] Aarnio p. 104.
[8] See for example EU Free Movement; The Independent; The Guardian and so on.

Advocate General have been examined and referred to in the more important cases to give a depth to the contentions and arguments in the case.

2 Legal framework and essential concepts

2.1 Introduction

The ongoing problems and crisis of today are leading causes to the core problems that are discussed in this dissertation. The free movement of workers and discrimination on grounds of nationality are questions that are current topics. The question of why the free movement has gained such an important status in the EU today is definitively relevant. An interesting question is whether the rights can be restricted without seriously hindering the EU to fill its purpose, the free movement between the Member States. Should the free movement have such an important status or is it possible to diminish the importance of the right without harming the meaning with the union?

To understand the EU of today, we need to know the original purpose of the Union. The precursor of the Union was the Coal and Steel Union founded after the Second World War as an economically dependent union to hinder the Member States to go to war against each other. After that the EU has developed in great leaps, from a six state coalition to multinational organization including 28 Member States, almost all the countries in Europe. With this increase of Member States it goes without saying that some changes has to be made to the co-operation within the Union. A significant problem has been that the development of the legislative environment has not kept up with the changes in the evolution of the Union.

In this chapter the regulatory framework as a background of the EU is analyzed and the different directives that regulate the free movement of workers is clarified. The right to free movement of workers is stipulated in article 45 TFEU. In this chapter the main points of the article is presented. The main regulations that give substance to the article, the Regulation

492/2011 on freedom of movement of workers and the Directive 2004/38 on the right of EU citizens and their family members to move and reside in EU, are also presented in this chapter. In addition to this, some main definitions are also being clarified here.

2.2 The background of free movement of workers

The idea with the free movement of workers was to make the workforce able to move between the different Member States, to where it was needed. A person from a Member State with high unemployment can move to a Member State that requires additional workforce. This possibility to free movement was foremost created to benefit companies and market economy. As a result of the free movement of workers, the employers have a larger range of potential workers to choose from.[9]

When an employer recruit new workforce there are many rules and regulations to take in consideration. There are strict non-discriminatory regulations to consider: the employer may not discriminate among other things on based of gender, disability, religious believes.[10] The principle of non-discrimination obliges the employer to choose a worker based on the workers merits and not on base of the persons nationality.[11] The free movement of workers is one of the four freedoms of the single market as is the free movement of goods, capital and services.[12]

In practice unemployed persons did not utilize the possibility to seek employment abroad as much as expected. Many unemployed workers chose to stay in their home countries as unemployed, rather than move abroad to find employment. To encourage moving to another Member State to find employment, the EU extended the same rights to move to the families of the worker. In this way leaving the family behind would not be an obstacle to accept work abroad. This was accomplished by the regulation on "free movement of

[9] Barnard p. 204.
[10] More about this in chapter 4.
[11] Barnard p. 204.
[12] Oliver – Roth p. 407.

workers"[13]. The regulation led to the Citizens Right Directive[14], since workers were no longer seen as only workforce but they were EU citizens.[15]

The Maastrich Treaty was the first step to change the nature of the EU from an economic union towards a more political one. There were already treaties of individual right such as equal treatment and right to residence, but the new treaty introduced the concept of EU Citizenship, which was meant to include all the already recognized individual rights.[16] The status of the EU citizenship has changed the chances of the possibility free movement of workers in many ways.[17] The EU Citizenship is said to be one of the most concrete things EU can give to its people. With other words the Maastrich Treaty gave name to this phenomena that is one of the most advantageous and precious things EU provides.[18]

The EU Citizenship has also been criticized because of the right to establishment that is gained by working in another Member State does not provide full citizenship, since there is the requirement of economic activity. Therefore, these two concepts, the concept of EU Citizenship and the concept of EU worker, should not be mixed.[19] The importance of the main principle, the principle of prohibition on discrimination on grounds of nationality was presented in the Lisbon treaty.

2.3 Legislation regulating free movement of workers

The legislation regulating the free movement can be considered complex and diffuse. In this chapter the aim is to analyze the legal framework of the freedom. The primary authority in EU law is the treaties. There are many regulations stating how the articles should be interpreted depending on the situation. The case law shows how the many regulations and provisions have been utilized in the practice.

[13] 492/2011, successor of 1612/68.
[14] Directive 2004/38.
[15] See also Barnard p. 204-206.
[16] Craig – de Búrca p. 852.
[17] Craig – de Búrca p. 744.
[18] Kraamwinkel p. 324.
[19] White p. 1563; see also later in this dissertation the chapter 2.4.2 Welfare tourism - the point of gaining the status worker and EU citizenship.

The primary legislation in EU Law regulating the free movement of workers is article 45 in the Treaty of Functioning of the EU. The EU regulations are directly binding to all Member States according to the foundational provision, the article 288 TFEU. In the article 45 TFEU it is stated that

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."

Article 49 gives the self-employed the same rights as article 45 gives employed persons.[20] In this dissertation the self-employed are not discussed except if they appear in some cases. Briefly could be said that the self-employed are allowed the same freedoms as the employed and publicly employed but there are some exceptions due to the nature of the employment relation.

In the beginning when the TFEU was new, the scope of article 45 was unclear. The question was whether the mention worker in the Treaty should also include workers with a nationality from a third country[21] but that resided and worked in a Member State. As we will see later on, now the scope is more restricted with the help of different regulations, there are still however a lot of discussions about the scope of the article.[22]

The principle of non-discrimination is very closely linked to the principle of free movement of workers and these two principles are even called twin principles.[23] The principle of non-discrimination is stipulated in article 18 TFEU. The wording in the first part of the article states the prohibition on grounds of nationality very clearly "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

[20] Barnard p. 237.
[21] Meaning a state that is not a Member State.
[22] Craig - de Búrca p. 748 here meaning the article 45(2) and the mention of "Worker of the Member State".
[23] Craig - de Búrca p. 746.

Both articles 45 and 49 TFEU consider situations where a person moves from their home state to a new Member State within the EU. Both these articles describe the legal perspective of the new host state. That means that the legislations of the new state are applicable on the person who just moved in. The regulations that apply on the person who is moving, are the rules of the new host state, as the opposite applies when considering other freedoms. Goods and services are not treated the same way as persons. Articles 56 and 57 TFEU, that regulates the free movement of services, are treated according to the law of the country of origin.[24] This difference can be seen in the articles. In article 45 for example the third paragraph says "It shall entail the right (…) to stay in a Member State for the purpose of employment in accordance with the provisions *governing the employment of nationals of that State* laid down by law, regulation or administrative action" while the wording in article 57 says "Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed *by that State on its own nationals*."[25]

The articles in the TFEU is primary legislation. The regulations and directives are secondary legislation to the primary. The article 46 TFEU gives the EU Parliament and Council the right to adopt the regulations and directives to the interpretation of article 45. With other words, article 46 TFEU gives the regulations and directives the power to codify and consolidate the law.[26]

There are two main regulations regulating the adoption of the articles. As already mentioned, the article 46 in the Treaty is the one to give the powers for the regulations to regulate the article, and are therefore as binding as the article. The main regulation governing the rule of free movement of workers is Regulation 492/2011. The original Regulation was 1612/68 and was later updated to 492/2011. This regulation was originally made to both facilitate the movement of workers and integrate them and their families to the new host state.

[24] Barnard p. 215.
[25] Both emphasis added by author.
[26] Graig – de Búrca p. 748.

The Regulation 492/2011 is divided into two parts. The first part is about so called eligibility on non-discriminatory rules and the second part is the right to equal treatment while doing the job, in other words "while exercising the right to free movement". This is regulated in the chapter 1 section 2 in this regulation. The equal treatment is in the Citizens Right Directive 2004/38 and applies to workers that moves from one state to another.[27] Regulation 492/2011 on freedom of movement of workers within the Union, the 1 chapter section 1 article 2:" Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom."

The Directive 2014/54 is supplementing the Regulation 492/2011 and is a measure facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, as the name of the directive implies.[28] The point with the Commission implementing Decision 2012/733 is to facilitate and fulfil the obligations of the Regulation 492/2011 by establishing the European network services, EURES. The Citizens Right Directive 2004/38 regulates the rights of movement and residence. Although it does not eliminate the distinction between economically active and non-economically active EU national. This difference stays important and they are in different EU law categories. This is because there are concerns of so-called "welfare tourism" that belong to the latter, the non-economically active EU citizens.[29]

The very essential Directive 2004/38 is also shortly presented here. The sixth article of the Directive sets the basic rule of EU Citizens residential rights up to three months. The Citizens Right Directive's third chapter regulates the Right of Residence of EU Citizens in another Member State to be up to three months. The first paragraph of the sixth article of the Directive gives the right to all EU Citizens to reside in any other Member State for three months without the need for any formalities or other requirements: "Union citizens shall have the right of residence on the territory of another Member State for a period of up to

[27] Barnard p. 244-245.
[28] The official name of the Directive is "Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers".
[29] Craig – de Búrca p. 853.

three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport." The second paragraph expands the right to the moving person's family, even if they are not EU Citizens: "The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen."

The seventh article of the Directive 2004/38 regulates when a person can stay in another Member State for more than three months. These situations are according to the first paragraph workers or self-employed persons in the host Member State or persons who

- "have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State" or

- "are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training" and "have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence" or

- "are family members accompanying or joining a Union citizen who satisfies the conditions [mentioned earlier]".

The second paragraph of the seventh article expends the rights provided by the first paragraph to the moving person's family members, even if they would not be EU Citizens.

The secondary legislation listed here is not complete. There are many rules and regulations that both directly and indirectly regulate the free movement of workers and the social benefits that the workers are entitled to.[30] The treaty article where the free movement of workers is stipulated is article 45 TFEU and the principle of non-discrimination is stated in

[30] See for example The European Parliament.

article 18 TFEU. The main regulation is Regulation 492/2011. The case law as well as the ECJ has a big role in formulating the EU Law. The power of the Court and the judges keeping to the limits of the treaties is a discussion that has been ongoing for a good while already.[31] Among other things the case law has formed the concept of a worker.

In addition to this the opinions of the Advocate Generals have a significant role, especially in forming the concept of EU Citizenship[32], this is more closely examined later in the dissertation. The judicial power of the Advocate Generals is stated in article 252 TFEU where it is said that the Advocates Generals shall assist the ECJ. The normal number of Advocates Generals is eight according to the TFEU article 252, but the number can be increased if the Court requests for it. The second part of the article states that "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement."

2.4 Essential concepts in this dissertation

There are some specific concepts that are especially important to this dissertation and they will be defined in this chapter. A very central concept in this dissertation is the worker. All workers enjoys the same benefits, despite of their nationality, in accordance with the principle of non-discrimination on grounds of nationality. The EU Citizenship is another central concept. The EU Citizenship does not alone provide the same rights as an economically active worker status does, even though the same principle of non-discrimination on grounds of nationality is applicable.[33]

Another very central group of people who are in the main focus of this dissertation are the so called welfare tourists. These are persons who claims to be workers in order to enjoy the protection of the Treaty and benefits of the worker status, but does not actually work. The welfare tourists can abuse all kinds of rights. The EU Citizenship is the key to free

[31] See for example the preface in Arnull.
[32] Burrows – Greaves p. 263.
[33] The prohibition of discrimination on grounds of nationality of workers is even more strict than discrimination of citizens. The discrimination and issues related to it are mainly examined under chapter 4.

movement within the EU,[34] and as mentioned, the advantages are even broader for workers. In this dissertation the right of free movement of workers is in main focus. The last chapter explains the problems and criticism that has been posed against this freedom. In the last chapter the question about what is the point of benefit tourism and what are the advantages that are worth abusing of the system for. All these concept are explained hereunder in their own subchapters.

2.4.1 The economically active worker

There is no definition of the term worker in the EU legislation, nor is it defined in any Treaty. The concept is formed by the ECJ rulings and developed according to new rulings.[35] The link between the general opinions and court rulings are more closely examined in the end of this dissertation. In the ECJ ruling in the case *Sala*[36] it is also stated that the term is not defined in the regulations. The meaning of the concept worker also varies depending on the context. This means that the term worker in EU law is a concept formed by the ECJ and national law cannot modify the concept, since that could risk the objectives of the TFEU.[37]

Through case law, the ECJ has defined what kind of work is required for the worker status, so that the worker can enjoy the protection of the article 45 TFEU. Some of the key cases concerning this are explained here in this chapter. The worker status can bring social benefits that would otherwise not be available for other economically inactive persons. Self employed people are also seen as workers in EU law. The non-economically active persons can enjoy the protection of free movement but are not classified as workers. Some of the persons enjoying a more limited range of benefits that are being more closely examined in this dissertation.[38] These persons include persons staying in another Member State for less

[34] Jorgensen p. 24.
[35] Paanetoja p. 368.
[36] C-85/96 Sala v Freistaat Bayern.
[37] Craig p. 748 – 749.
[38] These are being examined more closely in chapter 3.

than three months, job-seekers, students family members, retired persons and other persons.[39]

This power of forming definitions is a practical example of the important role of the Court and case law. The concept of worker and the fact that this is and should be a EU law concept, not a national classification, was first taken by the ECJ in one of the earliest decisions concerning this, the *Hoekstra*[40] case. This case is being more thoroughly analyzed later in the dissertation, but worth mentioning already now is that the court stated in this case that a worker could keep the status as a worker also as unemployed.[41]

There are mainly two early key cases, *Levin*[42] and *Kempf*[43], which came after the Hoekstra decision, which defines who is a worker under the article 45 TFEU.[44] The Levin case gave more substance to the definition of a worker by giving a role to the amount of income in defining a worker. In the case a British citizen was living and had a part-time employment in the Netherlands. She claimed that her income was sufficient for her and her husband's maintenance, who was not an EU citizen. The local court argued that she should not be considered a worker since her salary was not at least as much as the minimum legal wage in Netherlands. The Court on the other hand stated that a Member State cannot define a worker. The national issue about the legal minimum wage is therefore not an EU criteria, since the minimum wage varies in different Member States and is not an EU standard. Therefore, the measure in wage compared to the other nationals is not an accepted criteria. According to the paragraph 17 in the decision, part-time employment can be considered as enough for the worker to enjoy the rights under the Treaty, as long as the activities are effective and genuine and not in such a small scale that they are regarded as purely marginal and ancillary.

In the case *Kempf* the question was about the amount of work. How much work had to be done to considered a worker and enjoy the protection of the Treaty? The question was more specified in *Kempf* than in *Levin*. Mr. Kempf was a German music teacher giving about

[39] See more for example in Jorgensen p. 28-60.
[40] C-75/63 Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten.
[41] White (2011) p. 1565, unemployed meaning after injury/being ill or after retirement, although retirement was explicitly covered by article 48(3) (d) (old numbering, now (45)); see also Craig - de Búrca p. 749.
[42] C-53/81 Levin.
[43] C-139/85 Kempf.
[44] White p. 1568.

twelve music lessons a week. He was refused residence in Netherlands where he worked, because according to the national Government the work could not be considered genuine and effective when the worker needs to claim social assistance from public funds to manage. The ECJ was of a different opinion. According to the ECJ, the state could address its concerns about excessive burden because of the social assistance, but the status of a worker under EU law could not be denied because of a part-time employment.

We can conclude that the worker has to pursue a genuine economic activity to gain the worker status. This criterion cannot be defined in national legislation, as in being compared with the state's legal minimum wage, since that could jeopardize the objective of the Treaty. The criteria for the worker to be protected by EU law, the activity pursued has to be effective and genuine and not purely marginal and ancillary.

2.4.2 Welfare tourism - the point of gaining the status worker and EU Citizenship

In this dissertation a person who moves to another country under the protection of the article 45 TFEU as a worker, but does not actually have intensions of working, only to take advantage of the freedom and the benefits provided by the status, is referred to as a welfare tourist. Welfare tourism is one of the clearest negative aspects of a wide freedom of movement. The phenomenon is very closely linked to the free movement of workers, being the utilization of the freedom based on false claims.

According to case law the court has stated that if the work the worker claims to do is "merely ancillary", the person is considered abusing the system, and is not protected by the TFEU. The work can be seen as merely ancillary even if the criteria for working is fulfilled, and is therefore a welfare tourist.[45] Some significant cases where the question about the genuineness of the workers work have been considered are the cases *Lawerie-Blum*[46], *Ninni-Orachi*[47], *Vatsouras*[48] and some very recent important cases are *O and B*[49], *S and*

[45] Craig – de Búrca p. 755.
[46] C-66/85 Lawrie-Blum.
[47] C-413/01 Ninni-Orache.
[48] Joined Cases C-22/08 and C-23/08 see especially para 31.
[49] C-456/12 O & B.

G[50], *Brey*[51], *Dano*[52], *Singh and others*[53] and *Alimanovic*[54]. All these important cases are deeper analyzed later in the dissertation and are therefore not explained more here.

As mentioned previously, the status of a worker is very attractive. A legitimate question is why it is so wanted. Through case law the Court have given a broad meaning to the concept of social benefits. Some examples of the social benefits that occur in the court decisions are for example in the case *Cristini*[55] the social benefit was a question about reduced public transportation fares. In the case *Meeusen*[56] the social benefit in question was study grants. General social assistance was the issue in *Hoecks*[57] and *Lebon*[58]. In the case *O'Flynn*[59], that is analyzed deeper later on in the dissertation, the social benefit was funeral allowance and in the cases *Leclere*[60], *Rockler*[61] and *Öberg*[62] the benefit was the right to social security allowance.[63] This list is not complete but some examples of the width of the different social benefits that have been strived for in the ECJ. Some other more general benefits a worker status provides, are among others the freedom from immigration control, protection against deportation, the right to remain in the state of residence, as long as it is a Member State, after having finished working either as a result of retirement or disablement, the right to equal treatment with nationals, social and tax advantages in the host county and right to bring members of your family to the host state.[64]

Both EU Citizenship and the worker status are desired statuses. These two are closely linked with each other and therefore the EU Citizenship should be considered here. By being a national of a state that is a Member State of the EU, the person is also an EU Citizen. The case that is the authority for this principle and the first time it was stated in the

[50] C-457/12 S & G.
[51] C-140/12 Brey.
[52] C-333/13 Dano.
[53] C-218/14 Singh and others.
[54] C-67/14 Alimanovic.
[55] C-32/75 Cristini.
[56] C-337/97 Meeusen.
[57] C-249/83 Hoeckx.
[58] C-316/85 Lebon.
[59] C-237/94 O'Flynn. This case is being presented more thoroughly in chapter 4.
[60] C-43/99 Leclere.
[61] C-137/04 Rockler.
[62] C-185/04 Öberg.
[63] Versheureren p. 85.
[64] White p. 1569.

ECJ was in the *Grzelczyk*[65] case. In paragraph 31 in its decision the ECJ states that *"*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for." Here the principle of non-discrimination is clearly stated.

In the case *Grzelczyk* the Advocate General Alber has given a meaningful opinion. In the case the question was about a French national who went to Belgium to study and was part-time working at the same time. He was refused a monetary assistance for a minimum level of income, since he was a migrant student. According to the Directive of Students Rights[66], students has to have sufficient means to maintain themselves for the course of the studies.[67] The question was whether it was allowed to restrict the monetary assistance to a specific group of people, or if all the EU citizens should have the same possibility to be eligible to get the assistance. According to Advocate General Alber, Grzelczyk had two kinds of rights, one on base of his studies, the rights as an EU student, and the second based on his working, the rights as an EU worker. On grounds of his status as student Grzelczyk would not have the right to the monetary assistance, but with his worker status he should have the same rights as the nationals.[68]

The status of EU Citizenship is not enough in itself to gain all the benefits that an actual citizenship in the host state would provide. The requirement of economic activity to get the benefit from the host state the person moves to, prevents the EU Citizenship to be a complete Citizenship.[69] The prohibition of discrimination on grounds of nationality is the main principle in both EU Citizenship questions and in questions concerning the free movement of workers.[70]

Two very recent cases where the question about EU Citizenship has been discussed are *Marín*[71] and *CS*[72]. Advocate General Szpunar has drawn the conclusion in these cases that a

[65] C-184/99 Grzelczyk.
[66] Council Directive 2004/114/EC.
[67] See chapter 3.2.2 later in this dissertation right to vocational training and studies.
[68] Opinion of Advocate General Albert in the case C-184/99 Grzelczyk.
[69] White (2011) abstract.
[70] Craig - de Búrca p. 852.
[71] C-165/14 Marín.
[72] C-304/14 CS.

person cannot be expelled and be refused residence on the sole ground of him having a criminal record. In the case Maríns daughter was an EU Citizen, while Mr. Marín was not. Since the daughter was a minor, Mr. Marín had care and control over her, and him being expelled would lead to that she would have to leave the state also. National legislation of a Member State that allows a parent of a minor, who is an EU Citizen to be expelled, is contrary to EU Law and therefore prohibited.

Another question that has been considered in this context is in the case *Zhu and Chen*[73] where the question was about EU citizenship for a person who could not make decision on its own and thereby could not exercise the rights of the EU law, because of the fact that it was a baby. In this case the EU citizenship was rejected.[74]

As mentioned, the Advocate Generals have had an important role in shaping the concept of EU Citizenship.[75] According to the study made by Burrows and Greaves, none of the Advocate generals have had a "reductionist approach" to the opinions the Advocates has given to the Court, since the Maastrich Treaty and the concept of EU Citizenship was introduced in EU Law.[76] One of the most significant cases about the expansion and development of the rights to all EU Citizens during the crucial period for the integration in the end of the 1990's, was the opinion of Advocate General La Pergola in the case *Sala*[77].[78]

The case was about Martínez Sala, who was a Spanish national who lived and worked in Germany. The issue was raised when she was refused child allowance since she did not possess a valid residence permit. As a result of this, Martínez Sala argued that she was discriminated on grounds of her nationality which is against EU law. The problem was that Martínez Sala was not considered a worker, since she did not have the residence permit and was therefore not protected by the Treaty and the provision of free movement of workers. Advocate General La Pergola argued that the right to the benefit arises from the right to

[73] C-200/02 Zhu and Chen.
[74] See Craig – de Búrca p. 863-865
[75] See the previous pages 13-14.
[76] Burrows – Greaves p. 268. The influences and political awareness's of the Advocates Generals are discussed in Burrows - Greaves p. 263.
[77] C-85/96 Sala.
[78] Other cases Burrows –Greaves mentions in this context is the opinion of Advocate General Jacobs in *Bickel and Franz*, C-274/96 Horst Otto Bickel, Ulrich Franz [1998] ECR I-7637 and the opinion of Advocate General Cosmas in *Wijsenbeek*, C-378/97 Ariël Wijsenbeek [1999] ECR I-6207.

reside and not from the physical permit in itself. Therefore, the German legislation would be discriminatory.[79]

To summarize, the term worker is formed by case law. The persons who claim they are workers but do not actually work, and there through tries to access the same social benefits as the economically active persons are in this dissertation called welfare tourists. The worker status gives many benefits and rights, more than an EU Citizenship status. The worker status is harder to get than the EU Citizenship status, since the status has the certain requirements that needs to exist. The EU Citizenship is automatically gained by being a national of any Member State. The EU Citizenship is not a complete citizenship since it does not provide the same rights in any Member State as it provides to the country's own nationals.

2.4.3 The free movement of workers as a problem

The free movement of workers is one of the four freedoms of the EU. It has been established already in the very beginning of the existence of the institution in 1957. Foreign workers have politically been a very charged and sensitive discussion topic, not only in the EU but also worldwide.[80] Within EU the freedom has not gained a lot of more attention during the last ten years. According to Barnard and Ludlow the negative atmosphere against the free movement directives started in 2004 in France due to the French caricaturist Charlie Hebdo doing a satire about the polish plumber that came to France taking the all the jobs from the Frenchmen.[81] Also according to the empiric research Rolfe and Hudson-Sharp has made, the free movement of workers has started to interest politicians, policymakers, academics and journalists in a completely different way during the last five years.[82]

The fact that the citizens of the UK actually voted to leave the EU is a serious crisis, both for the EU and for the UK. According to the above mentioned study by Rolfe and Hudson-

[79] Deeper analysis of the opinion of Advocate General La Pergola see Burrows-Greaves p. 268-275.
[80] Egan p. 195.
[81] Barnard – Ludlow p. 23.
[82] Rolfe – Hudson-Sharp p. 1.

Sharp the migrants in the UK, especially those from Eastern Europe occupying low skilled jobs has caused negative opinions among UK citizens. Eastern European migrant workers have displaced native UK workers, and have had a negative impact on wages in the UK.[83] From the point of view of the employers Rolfe and Hudson-Sharp made the finding in their study that "In the last ten years, EU migrants have come to play an important role in the UK labour force. (…) Most employers have hired migrants and plan to continue to do so."[84]

As we will see later on in the dissertation the court has had a generous approach to social advantages for EU citizens that are moving from a country to another. This has led to increased friction in the Member States, obliged to provide benefits to the migrant workers. The UK is one of the countries that has been most critical to giving social benefits to migrant workers.[85] As a result of this there was the referendum in June 2016 where the people of the UK showed their dislike with the EU and voted for to leave the Union. If this trend of negativity towards the free movement continues with the other Member States, the results can be devastating for the existence of the Union. On the other hand, there has been positive aspects with the decision from UK to leave the Union. Many decisions to increase the powers of the EU have been stopped by UK, who traditionally has been conservative to give new powers to the EU. Without the UK in the EU, the EU can be reshaped more easily.

[83] Rolfe – Hudson-Sharp p. 1.
[84] Ibid. p. 4.
[85] See more Barnard p. 261-262.

3 Who enjoys protection of the Treaty: Minimum requirements for worker status

3.1 Introduction

As earlier mentioned, the free movement is one of the main principles of the EU and equal treatment and non-discrimination is crucial to the freedom. It is very important to define who is considered a worker, since that defines which rights the person has when he or she moves to work to another Member State. In chapter two "who is a worker" is defined, and in this chapter the focus of the examination are situations when the freedom has been abused by a fraudulent worker.

Article 45 TFEU brings many benefits to someone who has achieved worker status. One of the most important rights that the status brings is the right to equal treatment with nationals of the new host Member State. In this chapter, the focus lies on situations where the worker has been on the borderline to be able to be called a worker. In some cases it can be difficult to decide when a worker is a worker, and it is up for the Court to do the ultimate decision.

In this chapter there are many decisions by the ECJ that are analyzed, therefore it is accurate to comment on how the trend regarding the free movement of workers have been switching lately. The Court decisions seems to have approximately followed the same trend as the general ambiance of the people in the Union, regarding how hard it has been to gain the worker status. With a few exceptions, the general trend has been more and more open towards the free movement of workers, until just recently. The Court trend seems to have changed after 2010 first with the decision in the case *Brey*[86] and after that with the cases *Dano*[87] and *Alimanovic*[88].[89] The general opinion started to change already earlier. As mentioned, Barnard – Ludlov claimed that the general opinion started to change in 2004 in France. The research by Rolfe – Hudson Sharp showed that the general opinion has been under heated discussion during the last five years. The negative trend seems to have

[86] C-140/12 The case *Brey* is presented in chapter 3.4.
[87] C-333/13 Dano is presented in chapter 3.2.
[88] C-67/14 Alimanovic is presented in chapter 3.4.
[89] These cases are being analyzed more, later in the dissertation.

continued and now culminated in Brexit. It seems that the general ambiance has become less encouraging towards the persons enjoying the rights of free movements of workers protected by the Treaty.

Under the following chapters, I examine three different stages of being a worker. First, I consider the pre-working stage, meaning the time before a person has started working. There are job-seekers and students. Job-seekers are persons who are not yet employed, but looking for employment. They do not enjoy all the same rights as actual workers, but are to be considered under the article 45 TFEU. Students can be considered separately, since there is specific regulations concerning student rights under EU law. In this dissertation the study-related questions are not considered. In focus are situations where the students are working as a part of their studies; When can students be considered working and can they then enjoy the rights provided to workers, even if they are students?

The second stage of being a worker is the active-working stage, meaning when the worker is already employed and performing work. In this chapter the focus is on minimum requirements and the purpose of the employment. The observations are made through case law. When is the work "effective and genuine" as the worker status requires, and not "purely marginal and ancillary" and cannot therefore be considered real working. The purpose of the employment is also an important criteria to be considered while working. The third and last stage of being a worker is the post-work stage, meaning the time after that the worker has finished working due to retirement or disability caused by the work.

3.2 Pre-working stage: Job-seekers and students

The persons who are not employed in the state but are looking for a job, the so called job-seekers, do not have the same rights as workers, but have the right to stay in the country and are protected by the Treaty. Should they be protected by the Treaty, even though they are not economically active persons? When can it be determined whether a person is genuinely seeking employment, or is using the status to move to another Member State to enjoy the benefits?

Students that are working as a part of their studies, for example doing a vocational training or writing their thesis, can be seen as both studying and working. Students do not enjoy as extensive rights and benefits as workers do. If a student has the possibility to enjoy the same right as a worker, it seems natural to want it. In which situations should the students enjoy the protection of the Treaty article 45, the same rights as actual workers?

3.2.1 The rights of job-seekers

A job-seeker has the right to look for a job in another Member State, receive the same assistance from the national employment offices as nationals in the new host state and the right to stay in the host state long enough to look for work, apply for an employment and be recruited. A job-seeker cannot be expelled from the receiving state, if the job-seekers proofs that the job-seeking is continuous and he has a genuine chance of finding a job.[90] The reason for this extension of rights to non-economically active persons, is to enable the utilization of the rights provided by the article 45 TFEU. In practice it would be difficult to get an employment abroad, if the job-seeker could not move to the potential new host state to seek employment, due to economic reasons.[91]

The Court has stated in the case *Royer*[92] that it is the right of the nationals of a Member State to reside for the purpose of looking for or pursuing for an occupation or activities as employed.[93] In the case *Antonissen*[94] the Court stated why the article 45 TFEU should be extended to cover also economically non-active job-seekers in the following words: "Moreover, a strict interpretation of article 48(3)[95] would jeopardize the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective."[96] Through the decision Antonissen the Court expressed the need for a wider interpretation of the article 45 TFEU, so that its purpose would not be hindered.

[90] European Commission.
[91] See also Craig – de Búrca p. 757
[92] C-48/75 Royer.
[93] Ibid. para 31.
[94] C-292/89 Antonissen.
[95] Old numbering, now article 45 TFEU.
[96] Ibid. para 12.

Even though the Court had expressed that job-seekers should be protected by the Treaty, the job-seeker do not have the same rights as nationals or workers. The new host state has the right to expel a job-seeker who does not find employment after a reasonable time, as the situation was in *Commission v Belgum*[97] and in *Lebon*[98]. The Case Lebon paragraph 27 the Court ruled that "The equal Treatment with regard to social and tax advantages (…) operates only for the benefit of workers and does not apply to nationals of Member States who move in search of employment". Therefore the job-seekers are not according to the Court allowed the same advantages as actual workers would be on the grounds of equal treatment. On the other hand in the case *Meints*[99] the Court ruled in paragraph 42 that "the payment of which is dependent on the prior existence of an employment relationship which has recently come to an end, meets those conditions, since entitlement to the benefit is intrinsically linked to the recipients' objective status as workers." Meints was with other words allowed a payment, which in this case was comparable to a social advantage, although he was not anymore a worker and therefore a job-seeker using his right to reside in another Member State.[100]

The statement by the Court, that not giving the same social advantages to job-seekers as nationals who are looking for an employment, is not a breach of the fundamental principle of non-discrimination holds in the case C*ollins*[101]. Additionally the Court stated in this case that the job-seeker from another Member State has the same rights to apply for a job-seekers' allowance as a national of the Member State, if there is a genuine link to the employment market of that state. The Court stated in paragraph 73 that "the right to equal treatment laid down in article 48(2)[102] of the Treaty, read in conjunction with articles 6 and 8 of the Treaty, does not preclude national legislation which makes entitlement to a jobseeker's allowance conditional on a residence requirement, in so far as that requirement may be justified on the basis of objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions."

[97] C-278/94 Commission v Belgum.
[98] C-316/85 Lebon.
[99] C-57/96 Meints.
[100] See more about unemployment situations in chapter 3.4
[101] C-138/02 Collins
[102] Old numbering, now article 45 TFEU

In a fairly recent case *Dano,* the court ruled that the job-seeker who never had worked in the country, and did not actively look for a job was not allowed the social security allowance. This is an example of where the opinion of the Court has changed.[103] As conclusion the Court has shown a sign of expansion in the meaning of the article 45 TFEU to also include job-seekers. Not all benefits are provided to the persons looking for employment in another Member State, but the possibility to move to another state before getting employed is necessary in order to not jeopardize the purpose of the Treaty. When the self-proclaimed job-seeker cannot show after a reasonable time that he or she is actively and genuinely seeking for employment in the host Member State, the job-seeker is no longer protected by the Treaty.

3.2.2 The rights of working students and vocational training

The vocational training was already noticed in the Treaty of Rome in 1957. The educational rights were added to the Maastrich Treaty in 1992.[104] In article 165 under title XII that concerns education, vocational training, youth and sport, the treaty states in the first paragraph that "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity."

Originally the free movement that grounded on receiving a higher education was considered to be moving for the purpose of receiving a service. The right to move is now established under the Directive 2004/38, where it is stated that students have the right to reside in another Member State for more than the normal three months, if they have sufficient resources and medical insurance.[105] The same rules of non-discrimination on grounds of nationality concern students and higher education institutions in the same way

[103] More about the case *Dano* in chapter 5.3.
[104]http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.13.3.html accessed 3.1.2017.
[105] See more about the rights stipulated in the Directive 2004/38 in chapter 2 of this dissertation.

as workers. For an example of this was the case *Gravier*[106] where the Court stated in paragraph 26 that "the imposition on students who are nationals of other Member States, of a charge, a registration fee or the so-called 'minervai' as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to article 7 of the Treaty."

An EU national who moves to another Member State to study does not lose the EU Citizenship. This has been stated in *Grzelczyk*[107] where the Court stated that the concept of EU Citizenship was added to the TFEU and in the Title VIII of Part Three the new chapter 3 that was devoted to education and vocational training, "There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union."[108]. The same conclusion has been made in the more recent case *L.N.*[109], more closely examined hereunder.

According to EU case law, students can also be considered genuine workers. In the very recent case *L.N.*[110] the Court stated that "In order to qualify as a 'worker', the person concerned must nevertheless *pursue effective and genuine activities* which are *not on such a small scale as to be regarded as purely marginal and ancillary"*[111]. Therefore a student who is doing work that is under the same criteria work as a "normal" worker, even the student is protected as a worker. In the case *L.N.*[112] the Court held that maintenance aid for studies is a social advantage[113], therefore in paragraph 48 the Court ruled that "a refusal to grant that citizen of the Union maintenance aid for studies infringes his right to equal

[106] C-293/83 Gravier
[107] C-184/99 Grzelczyk.
[108] Ibid. para 35. See also previous chapter 2.4.2 Welfare tourism - the point of gaining the status worker and EU citizenship, where the case is explained. See aldo Bidar C- para. 34 "there is nothing in the text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union".
[109] C-46/12 L.N v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte. para 29 "There is no provision of the Treaty to suggest that when students who are citizens of the Union move to another Member State to study there, they lose the rights which the Treaty confers on citizens of the Union, including the rights conferred on those citizens when they are in employment in the host Member State".
[110] C-46/12 L.N.
[111] Ibid. para 42 emphasis added by author. See also Case 53/81 *Levin* para 17, and *Vatsouras and Kouptantze*, para 26.
[112] C-46/12 L.N.
[113] Ibid. para 50. the Court referd also to Case 39/86 Lair [1988] ECR 3161, paras 23 and 24, and Bernini, para 23.

treatment which he enjoys in his capacity as worker" and in paragraph 49 that "a citizen of the Union who has exercised his right of free movement of workers guaranteed by article 45 TFEU enjoys, in the host Member State, the same social benefits as national workers". This decision meaning that also a student should enjoy the same rights as nationals as a worker, if the working is effective and genuine and not purely marginal and ancillary.

Students are studying, but sometimes studies can be considered as working, especially when the question is about doctoral students. In the case *Raccanelli*[114] the Court ruled that also a student doing his doctoral thesis could be considered a worker. Therefore he was protected by the rules of free movement of workers, although the work was part of his studies. The same line is held in the case *Bernini*[115]. In the case the Court stated that when a training course is a part of the studies it can also be considered working and falls under the article 45 TFEU.

The case *Brown*[116] concerns also situations for students. In the case the question was about Mr. Brown who had dual French and British nationality. He lived in France until graduation [baccalauréat] and then moved to the United Kingdom to work for a company in Edinburgh as "pre-university industrial training, where after he studied at Cambridge University to a degree in electrical engineering. The Scottish Education Department had refused Mr Brown a student's allowance on various grounds based on national law. Mr Brown accepted these arguments, but he disputed he was entitled the allowance based on EU Law, with the reference to the case *Gravier*.[117] The Court ruled that universities are not regarded as vocational schools in EU Law and that the regulations concerning the payment by a Member State on behalf of students tuition fees charged by a university falls within the scope of EU Law but the payment for students' maintenance does not. Through this decision the Court ruled that the Directive do not automatically exclude a student from the social assistance, as long as the student does not become an "unreasonable burden" for the Member States public finances.[118]

[114] C-94/07 Raccanelli.
[115] C-3/90 Bernini.
[116] C-197/86 Brown. See also chapter 3.3.2 later in this dissertation.
[117] In the case Gravier the Court ruled that education that prepares for a qualification for a particular profession fulfills the conditions of work.
[118] C-1197/86 Brown. See also Burrows Greaves p. 276.

The right of a worker to have the same access to training in vocational schools and retaining centers as nationals of the host state has, is stipulated in article 7 paragraph 3 of the regulation 492/2011. In the case *Ninni-Orasche*[119] the question was about vocational training. In this case the worker kept the status of a worker, even if the working had ceased.[120] Earlier cases where the worker has retained worker status after finishing working to uptake a vocational training are *Bernini*[121] and *Raulin*[122]. The retention of the worker status is dependent on whether the vocational training has been related to the previous employment.[123] In *Lair*[124] the Court stated that vocational schools are institutions that relates to occupational activity and particularly during apprenticeship and therefore ruled that universities are not vocational schools.[125]

In this chapter we have seen situations when the worker is not yet working. Students are in a position where it is not clear to which social group they belong: they are still studying but they are also in some cases already working. Therefore it is natural from here to move on to the stage where the worker is actively working. In the case *L.N* the Court reminded about the narrow interpretation of the term worker that has been formed by the ECJ case law[126] earlier.[127]

The cases and concepts mentioned here are still going to be more closely examined in the next chapter. From these cases there is the conclusion to draw that as long as a student can claim the work related to the studies to be according to the same criteria as to other workers to be "effective and genuine" and "not purely marginal and ancillary" also study related work is considered as working. Therefore, also students can claim the right under the treaty article 45 TFEU.

[119] C-413/01 Ninni-Orache.
[120] See more under chapter 3.4.
[121] C-3/90 Bernini para 38.
[122] C-357/89 Raulin para 38.
[123] Craig – de Búrca p. 774.
[124] C-39/86 Sylvie Lair v Universität Hannover.
[125] See also Craig – de Búrca p. 780.
[126] Case 66/85 Lawrie-Blum para 16; Case C-197/86 Brown, para 21; Case C-3/90 Bernini, para 14; and Case C-413/01 Ninni-Orasche, para 23.
[127] C-46/12 L.N v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte para 39.

3.3 The active-working stage: minimum requirements and purpose

There are certain criteria that needs to be fulfilled enough so that the worker can enjoy the worker status. As already mentioned this is a wanted status due to the benefits it brings. How much work does a worker have to do to be considered a worker? When can the Member State intervene and claim that the worker is just there to enjoy the benefits without actually working? The ECJ has made a threefold test that helps the Member State to decide whether a worker can be considered a genuine worker according to EU law. Are there any concrete minimum requirements? Does the work have to be the main reason for the person to move? Does the purpose of the work matter? In the last subchapter the question is about sportsmen; can they be considered workers or are they just trying to get the status to get the benefits?

3.3.1 Minimum requirements - the test

As the necessary working hours are not defined in any law, the rules are defined through case law. Is it necessary to have limits on minimum working time or minimum salary for the legislation to be clear? Normally these lines are drawn in case law by ECJ, these minimum requirements did not exist in the beginning and are not stated in the article nor in the directives.

Already earlier in chapter two of the early important cases *Levin* and *Kempf* were mentioned. In these cases the court came to the conclution that national legislation cannot define the minimum wages by comparing it to the national minimum legal wage, since the minimum legal wage can vary in different Member States. The right for part-time workers to be protected by the Treaty, could also not be jeopardized by to strict limitations on working-time.

The actual key case that puts the defining criteria that is constituted by the ECJ “genuine and effective work” is established in the case *Lawrie-Blum*[128].[129] This was also the case that formed the formal test that is made by the ECJ. The test is to confirm that the person is a

[128] C-66/85 Lawerie-Blum.
[129] Craig - de Búrca p. 751.

worker according to article 45 TFEU. White has summarized the ECJ test after the paragraph 13 in the decision of Lawrie-Blum to three questions that need to be answered affirmably. The first question is "Is the person obliged to work for another?". This question means that a person cannot be for example self-employed as stated in article 49 TFEU. The second question "Is the work done for monetary reward or payment in kind?". To this question there is case law showing that only in exceptional cases the "monetary reward" can be some other kind of compensation for the work done. The third question is "Is the person subject to the direction and control of another." This test has been applied in the case Levin and some other newer cases. [130]

In the case *Lawrie-Blum* was about a teacher, Deborah Lawrie-Blum, a British national, who was refused admission on the grounds of her nationality, to a period of preparatory service leading to an examination that would qualify as teacher in secondary schools in Germany. The question posed by Mrs. Lawrie-Blum was if the rules concerning free movement of persons give nationals of a Member State the right to be appointed trainee teachers in the state school of another Member State under the same conditions as nationals of the host Member State, even where such trainee teachers, according to national law have civil service status, and where national law requires that persons appointed to the civil service must in principle be nationals of that Member State concerned.[131] The national Court on the other hand reasoned that since the trainee teacher was appointed as a civil servant, she should not therefore be regarded as a worker under EU law.

To this question the Court answered with the three-part "test" mentioned above. In the paragraph 17 "[…] the essential feature of an employment relationship, however, is that 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."[132] The ECJ decided that the teacher was an "EU-worker" during the trainee session, because the three criteria could be

[130] The test questions by White (2011) p. 1567. The other cases the test has been applied to according to Crag - de Búrca p. 752 are C-357/89 Raulin, C-3/90 Bernini, C-10/05 Mattern v Cikotic, C-109/04 Kranemann v Land-Rheinland Westfalen, C-228/07 Jörn Petersen v Landesgeschäftstelle des Arbeitsmarktservice Niederösterreich, C-94-07 Andrea Raccianelli para 14; C-232/09 Dita Danosa v LKB Lizings SIA.
[131] C-66/85 Lawrie-Blum para 9.
[132] Ibid. para 17.

answered affirmatory: the services was performed of an economic value, it was under the direction of the school and she received a compensation for her work.[133]

In the case *Steymann*[134] the question according to the test, whether a non-monetary remuneration would classify as compensation for the work, and therefore he would be considered a worker under EU law. Staymann was a plumber of German nationality, living and working in the Netherlands. He did his work for a religious community which answers affirmably to the first and the third question in the test; he was obliged to work for another and was the subject to the direction and control of another.

For the second question on the other hand, the problem was that he did not get any monetary salary for his work, but instead the religious community provided the material needs for its members, for those who participated in the life of the community. According to the Court ruling the work done for the community was essential, and therefore "may be regarded as being an indirect *quid pro quo* for their work".[135] Therefore Steymann fulfilled the second question of the test and could on that point be seen as a worker.

In the case *Lawrie-Blum*, as in the cases *Levin* and *Kempf*, the salary was less than a "full salary" this fact was of no importance because the work was of genuine economic nature and some monetary compensation was received for the work. In the case *Staymann* on the other hand the decision was pushed even further, because there was no need for any monetary compensation. With other words the fact that Steymann was unpaid, did not mean that he was not economically ineffective.[136]

The conclusion of this is that the legislation of receiving Member State cannot set the limit for the whole EU, and therefore EU law has decided the limits regardless of the national legislation. Due to this test there is a clear way for the Member State to define whether the self-proclaimed worker is seen to be a worker according to EU law.

[133] Craig - de Búrca p. 751-752.
[134] C-196/87 Steymann v Staatsecretaris van Justitie.
[135] C-196/87 Steymann para 12.
[136] See also conclusions Craig – de Búrca p. 752-753.

3.3.2 Purpose of the employment

The general rule is that the purpose of why the work is taken does not matter in the question if a person is considered as a worker under article 45 TFEU. The interest is instead lying on whether the employment is genuine and not purely marginal. Even if a worker would fulfill all the three criteria that was presented in the *Lawrie-Blum* case, the work is not genuine if the purpose of the work is not genuine. In this chapter a couple of these situations are presented. This is still one life line for the state to claim against a prospective welfare tourist. In the previous chapter the question was about minimum wage and working time and the focus was on the work to be economically effective. Here the focus lies on whether the employed person really is working, although the work is economically effective and formally fulfills the requirements of a genuine worker.

In the ECJ case *Bettray*[137] the question was that if a person undergoing drug rehabilitation could be considered as a worker since that person was in according to the rehabilitation taking therapeutic work. Mr. Bettray was a German national who had been rejected residence permit in the Netherlands. He claimed that he had the right to stay in the Netherlands because of "work as an employed person". The work he did was that he was employed because of his drug addiction, for an indefinite period under the Dutch Social Employment Law.[138]

The Court Stated in the paragraph 16 that "the nature of the legal relationship between the employee and the employer is of no consequence in regard to the application of article 48[139] of the Treaty"[140]. The conclusion was however, as the Court stated in paragraph 17: " work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the

[137] C-344/87 Bettray v Staatssecretaris van Justitie.

[138] Ibid. para 4. Paragrph 5 explains the Social Employment Law in the following meaning: "[T]he Social Employment Law constitutes a body of rules intended to provide work for the purpose of maintaining, restoring or improving the capacity for work of persons who, for an indefinite period, are unable, by reason of circumstances related to their situation (" ten gevolge van bij hen gelegen factoren "), to work under normal conditions. For that purpose, Netherlands local authorities are to set up, with financial support from the State, undertakings or work associations the sole purpose of which is to provide the persons involved with an opportunity to engage in paid work under conditions which correspond as far as possible to the legal rules and practices applicable to paid employment under normal conditions in so far as the physical and mental capacities of the workers do not justify a derogation in that regard."

[139] Old numbering, now article 45 TFEU

[140] The Court refers here to the earlier decision *Sotgiu* C-152/73 Giovanni Maria Sotgiu v Deutsche Bundespost.

persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.".[141] So although the legal relationship between the employer and the employee does not automatically null the possibility for the employee to be a worker under article 45 TFEU, is the work done under the Social Employment Law seen as rehabilitation and cannot therefore be seen as genuine and effective working, that would be protected by the Treaty.

The conditions in the *Bettray* case was similar to those in the *Lawrie-Blum* and the other cases referred to earlier, that the case would pass the test presented in the previous chapter; the person was obliged to work for someone else, the worker was rewarded monetary for the effort and the worker was subject to the direction and control of another. The salary in this case was lower than "normal" salary, but this was not a hinder for the application of article 45 TFEU.[142] The difference, however, to the cases mentioned in the previous chapter, was the purpose of undertaking the job.

In *Levin* it was explicitly stated that the reason for taking an employment does not matter, here in the *Bettray* case the situation was different. According to the court the sole purpose of the under the Social Employment Law was work was to rehabilitate the person, and therefore could not be seen as effective and genuine. The Court stated in paragraph 19 of *Bettray* that "persons employed under the Social Employment Law are not selected on the basis of their capacity to perform a certain activity; on the contrary, it is the activities which are chosen in the light of the capabilities of the persons who are going to perform them in order to maintain, re-establish or develop their capacity for work. Finally, the activities involved are pursued in the framework of undertakings or work associations created solely for that purpose by local authorities."[143] When the point was to find work suited to the capability of the worker end not to fulfill the genuine economic need, the result of the ECJ ruling was against Bettray. The *Bettray* decision has been criticized a lot, since when the

[141] In para 18 the Court states additionally that "the jobs in question are reserved for persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal conditions and that the social employment ends once the local authority is informed by the employment office that the person concerned will be able within a short period to take up employment under normal conditions".
[142] See earlier referred cases *Levin* and *Kempf*.
[143] See also Craig – de Búrca p. 753.

situation is compared to disabled people, this decision would exclude a lot of them from the rights to free movement under EU law. [144]

In another drug rehabilitation case, *Trojani*[145], the outcome was different. The Court claimed that the case *Trojani* differed from *Bettray* in a significant manner, since the work Mr Trojani did was more directly to the employer and not only because of the drug rehabilitation. The Court states in paragraph 22 "Having established that the benefits in kind and money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him for and under the direction of the hostel, the national court has thereby established the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration."

The Court left it for the national court to decide, whether the employment could be considered real and genuine, and that Mr Trojani therefore would be considered a worker and have the same benefits as national workers. The main point in this case is that the Court ruled that only because the main purpose of the work was social integration, it could not directly be said that it the applicant did not at all fall under the article 45 TFEU. The crucial factor here was instead whether the services "are capable of being regarded as forming part of the normal labour market".[146]

In the earlier described case *Brown*[147] the purpose of the employment played a meaningful role. The ECJ did not hold that the worker could claim all the rights provided to moving workers under the article 45 TFEU, since the work was purely undertaken for to prepare for a course of study, even if the work in itself was genuine and effective. In this case the meaning was not that everyone who worked in a genuine work before they went to study, would not be considered a complete worker under EU law. The point was that if the work that is done, is done purely for to prepare for study, instead of to prepare for an occupation or an employment, the work is then considered ancillary, and the worker is not entitled all the social advantages as the "real" workers would be.[148]

[144] Ibid.
[145] C-456/02 Michel Trojani.
[146] Craig – de Búrca p. 754.
[147] C-197/86 Brown.
[148] Craig – de Búrca p. 754-755.

The conclusion of this subchapter is that if the work is done because it is forced due to a program, then it is not voluntary. On the other hand the work does not have to be the sole purpose of moving, the person has the right to enjoy the protection of the treaty and the principle of free movement of workers anyways. Again, as long as the work is genuine and effective, the worker most likely enjoys the rights protected by the Treaty of free movement of workers.

3.3.3 Sportsmen as alleged workers

Sportsmen has here been handled separately because they can be seen as a separate group. Professional sportsmen have a status as workers but for them to fall under EU law is a question of its own. Because of the many rights the workers gain from the status worker in the EU law, the sportsmen wants naturally also to benefit from these rights, and if their status is interpreted to be a "real" worker, they should get the status. But in sports to gain the working status is different. In EU law the decisive point has been whether there is a big enough economic interest.

A situation concerning restrictions to free movement of workers cannot be considered as a breach of article 45 TFEU if the interest is purely sporting and not of economic interest. In the case *Walrave*[149] the actual question was "whether these Articles and Regulation must be interpreted in such a way that the provision in the rules of the Union Cycliste Internationale relating to medium-distance world cycling championships behind motorcycles, according to which 'L'entraîneur doit être de la nationalité de coureur' (the pacemaker must be of the same nationality as the stayer) is incompatible with them." The court ultimately ruled that "The prohibition on discrimination based on nationality (…) does not affect the composition of sport teams, in. particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity." The Court came to the same conclusion in the case *Donà*[150].

[149] C-36/74 Walrave and Koch.
[150] C-13/76 Donà.

In *Bosman* para 14 “The UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players.” The Court rules, however, in Bosman that there is an essential interest in protecting the right of free movement of workers and it is therefore considered to fall under EU law. In this case the Court rules in para. 120 “In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.”

And in a slightly more recent case *Kolpak*[151] with a dimension from a state outside of the EU para. 11 “Mr Kołpak, who had requested that he be issued with a player's license which did not feature the specific reference to nationals of non-member countries, brought an action before the Landgericht (Regional Court) Dortmund (Germany) challenging that decision of the Deutscher Handballbund DHB. He argued that the Slovak Republic is one of the non-member countries nationals of which are entitled to participate without restriction in competitions under the same conditions as German and Community players by reason of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.” The Court ruled in para. 49 that “conditions having the same scope as that which, in similar terms, nationals of the Member States are recognized as having by virtue of Article 48(2) of the Treaty, and that the rule in issue in the case in the main proceedings is similar to the nationality clauses in point in Bosman.”

Conclusion of this chapter is that since sports are often are of a national interest, there has to be an economic interest enough for sports to be considered as work and for the sportsman to be protected by the article 45 TFEU.

[151] C-438/00 Kolpak.

3.4 The post-working stage: retirement and disability caused by work

The right to the benefits after having finished working are stated in the Directive 2004/38. The third paragraph regulates situations when an EU Citizen, who is a former worker under EU Law, still enjoys some of the rights that actual workers do. The right is provided to the unemployed are stated in the seventh article of the Directive 2004/38. The Status of a worker remains, although the persons does not work anymore, according to the third paragraph of the seventh article of Directive 2004/38 if:

"1. he/she is temporarily unable to work as the result of an illness or accident;

2. he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

3. he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

4. he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment."

The fourth paragraph states that "By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner."

Times that are treated as a period of employment, although the worker has not been working are situations where the periods of involuntary unemployment that are registered at the unemployment office and absences due to sickness or accidents.[152]

According to Craig – de Búrca, since the Directive does not mention voluntary unemployment, a person who is voluntary unemployed does not retain the worker status.[153] This assumption seems logic, although Craig – de Búrca notes that this does not apply in all the cases. In the case *Ninni-Orasche*[154] it is shown that this assumption, that if a person becomes voluntarily unemployed, the status worker is still remained if the unemployment is because of vocational training.

In the case *Meints*[155], that was presented earlier, the issue was about the right to the social advantages, even though the employment relationship already had ceased. In the *Meints* case the outcome was profitable for the worker; the worker was allowed the social advantage since the employment relationship had not ended voluntarily. The question in the case *Hoekstra*[156] was about his right to stay in the Member State after having worked there. According to the Court the worker is allowed the social advantages if the work has ceased due to that the worker has fallen ill while residing and working in the host Member State with the words "had fallen ill while in the territory of the state to which the insurer belongs."

As earlier discussed, there are shifting trends in opinions regarding free movement within the EU. During the last years, the turn has been towards a more hostile trend regarding the free movement. Besides the media and political statements, this can also be indicated by some recent decisions taken by ECJ, like in the cases *Brey*[157], *Dano*[158] and *Alimanovic*[159] that all concerns free movement of persons. The cases *Alimanovic* and *Brey* are being examined hereunder, and the *Dano* case has already been presented earlier.

[152] Weiss – Woolridge p. 67.
[153] Craig – de Búrca p. 774.
[154] C-413/01 Ninni-Orasche.
[155] See chapter 3.2.1 about the rights of job-seekers.
[156] C-75/63 Hoekstra.
[157] C-140/12 Brey.
[158] C-333/13 Dano.
[159] C-87/14 Alimanovic.

In the *Alimanovic* case the Alimanovic family, including four Swedish nationals, mother born in Bosnia and her three children, all born in Germany. The family left Germany in 1999 for Sweden and returned to Germany in 2010. In July the same year all of them received a certificate that gave them right to permanent residence. Ms Alimanovic and her oldest child, worked between June 2010 and May 2011 in temporary jobs lasting less than a year.

The question in the *Alimanovic* case was about the right for German social benefits for Ms Alimanovic and her eldest child. During the period from 1 December 2011 to 31 May 2012, Ms Alimanovic was paid family allowances for her two youngest children and also allowances for the long-term unemployed plus social allowances for beneficiaries unfit to work. According to the German Job Center, Ms Alimanovic and the oldest child lost their status as workers half a year after becoming involuntarily unemployed, and therefore they were refused the social advantages, since the German law exclude job-seekers from the social benefits. The question posed by the German Court was whether these job-seekers should have the same right to social assistance as German nationals.[160]

The answer to this question was that the benefits in question would not be "characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State"[161]. Here the court also referred to the decisions *Vatsouras and Koupatantze*[162] where the Court stated that "Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of article 24(2) of Directive 2004/38."[163] The court also referred to the opinion of Advocate General Wathelet where the Court agreed that the benefits should be considered as social assistance, which are not the same as social advantages that are granted to workers.[164]

[160] https://www.freemovement.org.uk/whether-the-right-to-reside-test-complies-with-eu-law-when-applied-to-family-benefits/. Desmond Rutledge considers the Advocate General's Opinion (C-308/14) on the EU Commission's action against the United Kingdom's use of the right to reside test para 40.
[161] C-87/14 para 46.
[162] C-22/08 and C-23/08 Vatsouras and Koupatantze.
[163] Ibid. para 45.
[164] The reference is in the Court decision para 46 to the Opinion of the Advocate General Wathelet to paras 66 -71.

A very recent case that is about retired persons from another Member State is the case *Brey*[165]. In this case we can again see the negative trend in the conclusion. In the ECJ decision the Court states that after not anymore being a worker meaning that the person is no longer contributing economically to the society, the receiving state can limit the rights to social security. The retired cannot put an unreasonable burden on the host state social security system. In the case Mr Brey was a German national who moved with his wife to Austria. In Austria he was not entitled a "compensatory supplement" that he was allowed in Germany, since according to Austrian law, Mr Brey's retirement pension was too low for him to have sufficient resources to reside in Austria for more than three months. The ECJ ruled that it is up to the national Court to determine whether the compensatory supplement is likely to place an unreasonable burden on the national social assistance system.[166]

In this chapter the main conclusion is that a worker is no longer a worker protected by the article 45 TFEU after having voluntarily been unemployed. If a person is no longer a worker due to the reason of being retired or disabled caused by the work, the worker continues to enjoy the benefits of the work. If a worker has worked under 12 months, he or she is not entitled to the social advantages of that country.

4 Prohibition of discrimination on grounds of nationality towards foreign workers

4.1 Introduction

Discrimination on a very general level could be defined by saying that people in similar situations should be treated similarly. It is also considered as discrimination when people in different situations are treated in the same manner. The discrimination questions are the core questions within EU Law. It is an apparent point that is easy and clear to claim, when a person feels he or she is impartially treated. For persons who are deprived the rights nationals of a country has the breach of the non-discrimination is a strong defense for them.

[165] C-140/12 Brey.
[166] Ibid. para 79.

Also persons who are not considered serious workers and alleged for abusing the rights of free movement of workers, can most often argue for the rights on grounds of the non-discrimination principle. Therefore, the discrimination questions are crucial in this dissertation.

The EU Law prohibits both direct and indirect discrimination.[167] The authority for the prohibition is the article 18 TFEU by the wording "any discrimination on grounds of nationality shall be prohibited." While considering article 18 TFEU, while we have talked about article 45 TFEU that is about free movement of workers. When a person is a member of a member state the discrimination on grounds of nationality is prohibited, when it is a question of access or exercise of a profession. This thought is central within the free movement of workers.

This fourth chapter is therefore considering the possibilities of moving and working within the EU and being protected by the article 18 TFEU and for persons not to be discriminated on grounds of their nationality, that is nowadays the main idea within the EU. This chapter starts with considering direct and indirect discrimination. Direct discrimination is easier to detect and therefore often caught by the article 18 TFEU. There is not that much case law or other interesting questions concerning direct discrimination on grounds of nationality, but discrimination in other questions concerning religious matters or disabilities are very common, and therefore these are briefly introduced under this chapter. Indirect discrimination leads to the same result as direct discrimination, and is therefore as prohibited as direct discrimination. Both of these discriminations are separately considered in their own subchapters.

The chapter concerning indirect discrimination is divided into three subchapters. When considering indirect discrimination it most often occurs as double burden when the question is about free movement of workers. The double burden questions are examined in own subchapters; one considering residence and the other concerning language requirements. Under the chapter of indirect discrimination the obstacles to access the employment market are also examined. The greatest obstacle that hinder the access to the employment market are language barriers.

[167] Blanpain p. 578.

The third subchapter considers situations when the discrimination is allowed through objective justification. These are situations when the discrimination is can be accepted, if the justification for the discrimination is mentioned in the EU Law. In this chapter the justification is clarified, when it is allowed and when not. This is shown through some key cases. Even though the justification exists, the discrimination has to be proportionated and in accordance with human rights.

The last subchapter examines situations where reverse discrimination occurs. These are situations when nationals of the country in question are in a less profitable situation than workers with a foreign nationality. Reverse discrimination occurs rarely and is not always that easy to be caught by the non-discrimination regulations, even though they are a form of discrimination and should not be overseen.

4.2 Direct discrimination is forbidden in EU law

Discrimination on grounds of nationality is, when somebody is treated differently than somebody else of another nationality, although they should be treated similar because of the objective circumstances. In EU law direct discrimination can be referred to discrimination on religious believes, disabilities or gender discrimination. EU has also a directive that is meant to ensure equal treatment in employment and occupation. Therefore, the discrimination on grounds of religious believes and disabilities are briefly introduced in this chapter through the following three cases. The rest of the chapter is about equal treatment and non discrimination on grounds of nationality.

There are many ways potential abusers have tried to claim all kinds of discriminations some completely correctly, while others use them as main arguments to win a case although they abuse the system. Most recently it has been a very active discussion about religious discrimination that is increasing since the big immigration flows are coming from predominantly Muslim countries.[168] Pupils in public education does however not fall under EU law, since it does not relate to employment, whilst an employed person would be protected by the EU directives on equal treatment and non-discrimination in

[168] See for example The Guardian; Al Jazeera.

employment.[169] This could lead to a situation where a Muslim pupil would not be allowed to wear a headscarf in class, while the teacher, protected by the EU employment law, would be allowed to wear a headscarf.[170]

In two very recent cases *Bougnaoui*[171] and *G4S*[172] the question was about two women, a French and a Belgian, who were dismissed from their work when they refused to remove their headscarves. The Court ruled that it is not direct discrimination if the employer bans religious headscarves. The prohibition has to concern a prohibition of all visible political, philosophical or religious signs, so that the ban would not be directly discriminatory against any specific group of people.[173] The possibility of indirect discrimination was not excluded with this ruling. According to the opinion of Advocate General Sharpston the ban would have been discriminatory both directly and indirectly and should therefore be forbidden.[174]

Another common form of discrimination is disability. In a very recent case *FOA*[175], the Court found that obesity could be a form of disability, even though it is not in itself within the meaning of the Council Directive 2000/78/EC[176] that ensures equal treatment in employment and occupation.[177] According to Advocate General Jääskinen in this case he suggests that "EU law does not include a general principle prohibiting employers from discriminating on grounds of obesity in the labour market" and "Severe obesity can be a disability covered by the protection provided in Council Directive 2000/78/EC of 27 November 2000. The directive establish a general framework for equal treatment in employment and occupation if it, in interaction with various barriers, hinders full and effective participation of the person concerned in professional life on an equal basis with other workers. It is for the national court to determine if this is the case with respect to the plaintiff in the main proceedings".[178]

[169] Loenen – Vickers p. 166.
[170] More about the headscarf issue under EU law in Morano-Foadi – Vickers p. 162 - 169.
[171] C-188/15 Bougnaoui.
[172] C-157/15 G4S.
[173] Ibid. para 44 and C-188/15 Bougnaoui para 33.
[174] Opinion of Advocate General Sharpston in the case *Bougnaoui* para 136.
[175] C-354/13 FOA.
[176] The Council Directive 2000/78/EC.
[177] C-354/13 FOA para 59.
[178] Opinion of Advocate General Jääskinen in the case *FOA* para 61.

The discrimination is prohibited on many levels and is not acceptable, and already an accusation against a country of discriminating is very bad PR for the country. The role of discrimination is big and therefore it is a strong weapon to use. Although the discrimination questions are very current and really hot topic when it comes to EU law, this dissertation is concentrating on discrimination on grounds of nationality and in the context of getting employed or while employed.

A well-known example of direct discrimination on ground of nationality is the case *Reyners*[179]. The question concerning the discrimination on grounds of nationality was concerning Mr Reyners who was of Dutch nationality, although he was born and resident in Belgum and had made the Belgian "docteur en droit beige" law education there. Due to his nationality he could not be admitted to practice the Belgian lawyers profession, since the Belgian law stated that "No one may hold the title of avocat nor practise[sic!] that profession unless he is Belgian, holds the diploma of docteur en droit, has taken the oath prescribed by Law and is inscribed on the roll[sic!] of the Ordre or on the list of probationers."[180] In his opinion, Advocate General Mayras states that any discrimination on grounds of nationality is prohibited by the Treaty establishing the European Economic Community[181] and has direct effect in relation between Member States and the national courts are therefore bound to safeguard these rights the Treaty provides.[182] The court ruled also that the Belgian law breached the treaty since it stipulated that only Belgian nationals could be lawyers.

The question about discrimination on grounds of nationality was examined in the case *Data-Delecta*[183] when the Swedish Court referred the ECJ for a preliminary ruling, about a dispute of payment of delivered goods. The question about the discrimination on grounds of nationality concerned the situation whereas according to Swedish law, a foreigner, that will say a person with another nationality than Swedish, has to lodge security for costs, whilst a Swedish national does not have to do so. In the decision, the Court ruled that "In prohibiting "any discrimination on grounds of nationality", article 6 of the Treaty requires perfect equality of treatment in Member States of persons in a situation governed by

[179] C-2/74 Reyners.
[180] Facts in the judgement C-2/74 Reyners.
[181] Today article 18 TFEU.
[182] Opinion of AG Mayras in the case C-2/74 Reyners.
[183] C-43/95 Data-Delecta.

Community law[184] and nationals of the Member State in question. A provision such as the one at issue in the main proceedings manifestly constitutes direct discrimination on grounds of nationality."[185] The court found that this provision was against the non-discrimination principle in article 6 TFEU and was discrimination on grounds of nationality.

An example clear example of direct discrimination was the case *Commission*[186] where the French maritime code was a direct discrimination and against article 45 TFEU. The code required a certain proportion of the crew to be of French nationality. The French state failed to prove that this was necessary. After this decision, this ruling was applicable in several cases afterwards.[187]

Barnard thinks that the court is going towards a direction that allows more direct discrimination in the free movement of persons, as it can be seen in the court decision on free movement of goods. I agree with the point of view that Barnard has. In the recent decisions taken by the court, the trend has been towards a more discrimination-allowing direction. The same trend has already earlier started in the free movement of goods, and now it seems to have moved over to the free movement of persons. This observation is clearer when all free movement cases are examined, not only free movement of workers. The bigger amount of cases shows better how the trend has been fluctuating. Unfortunately, as said, the trend seems to go towards a direction that allows more discrimination.

4.3 Indirect discrimination is the same as direct discrimination

Indirect discrimination occurs when something has a greater impact on nationals of other Member States than nationals in the host state, even if the law looks objectively neutral. With other words it can be said that the measure is *prima facie* objective, which would therefore acceptable, but *de facto*, in practice, would lead to a discriminatory treatment.[188]

[184] Because of the terminological amendments of the Lisbon treaty, nowadays it is called EU law instead of community law.
[185] C-43/95 Data-Delecta paras 16-17.
[186] C-167/73 Commission v French republic.
[187] See for example the following cases C-185/96 Hellenic republic, C-94-08 Spain, C-318/05 Germany and C-460/08 Greece.
[188] Blanpain p. 578.

The indirect discrimination leads in the end to similar discrimination as the direct discrimination, and is therefore prohibited in the same way as direct discrimination.[189] An example of indirect discrimination is the *Sotigu*[190] case. There the Court articulates that all kind of discrimination is prohibited, meaning both direct and indirect discrimination, when it in fact leads to the same result, discrimination on grounds of nationality.[191] Another term for "indirect discrimination" used by the Court is "indistinctly applicable measures"[192].

Double burden is also a form of indirect discrimination that leads to forbidden discrimination. When a person who is not working in the state he or she is a national of, double burden situations occurs when this person has obligations that has more impact on him or her than on a national. This happens when the person has to some extent follow the rules of the country he or she is a national of, and to some extent the rules of the new host state. Often these situation are related to residential or language requirements. This can constitute a situation of double burden, which is indirectly discriminatory.

All the situations a moving worker is exposed to are not automatically indirect nor direct discriminatory, although they concern language or residential issues. The problem with language requirements is, that they are most often justified since they are necessary. Hereunder indirect discrimination is examined from the perspective of residential and language requirements since they are the most common forms of double burden. Indirect discrimination constitutes obstacles to access the employment market. Obstacles are often related to language requirements or geographical requirements. Therefore, different obstacles are examined more closely in the last subchapter of this chapter.

[189] Barnard p. 219.
[190] C-152/73 Sotgiu.
[191] Ibid. paras 10-11: "[A] prohibition not only against treating a worker differently because he is a national of another Member State of the EEC[EU], but also against treating him differently because he is resident in another Member State. The rules regarding equality of treatment, both in the Treaty and in article 7 of Regulation No 1612/68 , forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. (…) Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured 'in fact and in law'." The regulations and
[192] This is used for example in the case C-292/86 Gullung.

4.3.1 Indirect discrimination in concern of residence – can the place of living restrict your working life?

Indirect discrimination discriminates the moving worker in the same way as direct discrimination, and is therefore forbidden by the article 45 TFEU, unless it is justified.[193] Situations where indirect discrimination in concern of residence occurs are situations where employees are required some residence arrangements, which are not proportionate in accordance to the work that is made.[194] In these cases there is not a problem for nationals, since they are already living in the state in question, while workers from other Member States are discriminated. Situations where indirect discrimination appears are situations where the state that the worker moves to work to require a period of residence there before some benefits can be enjoyed.

An example of a situation with double burden in residential concerns is the case *Clean Car*[195]. The question in the case was if it was discriminatory that the Austrian law required managers to live in Austria before they worked there. The state claimed that the residence requirement was necessary for managers to be effective in business. The Court found that the Austrian regulation breached the article 45 TFEU and that the reasons that were performed by the state were not proportionate.[196]

Another case where the indirect discrimination occurs concerning residence is the case *ITC*[197]. In the case the residential dimension was when a worker was not allowed the same social security contributions from the employer, as the employees that lived in a certain territorial area.[198] The ECJ found that the person seeking employment is subject to the compulsory social security contribution in the state in question.[199] On the other hand, in the case *Collins*[200] the British indirectly discriminatory rule that a job-seekers allowance was conditional upon residential requirements, could be justified and the Court stated that it was

[193] Barnard p. 246. See also chapter 4.4 of this dissertation.
[194] Barnard p. 255.
[195] C-350/96 Clean Car Autoservice GesmbH v Landeshauptmann von Wien
[196] Ibid. paras 4 and 34.
[197] C-208/05 ITC.
[198] Ibid. para 15: …" The provisions governing compulsory social security contributions thus covered all persons who were employed within the scope of application of the SGB, that is to say, in Germany."
[199] C-208/05 ITC paras 42-45.
[200] C-138/02 Collins.

up to the national court to decide whether the requirement was proportionate. There are also many other cases concerning indirect discrimination in residential issues. [201] An example of this is the case *Commission v Italy*[202] the ECJ stated that it is discriminatory to give reductions to persons of a certain nationality and require that they are residents of a certain region. Even if regional authorities provided the reduction, the state was responsible for the procedure.[203]

Also in the case *O'Flynn*[204] there was a residential dimension with double burden. The case was about whether the British rule that they give state aid to funeral costs, if the funeral is held in the UK. In the case the court found that the British rules caused an unjustified indirect discrimination, but on the other hand it was not discriminatory to limit the aid if the burial was performed abroad. The conclusion from the *O'Flynn* case can be drawn that the national regulation is indirectly discriminatory if the national law causes extra efforts for nationals from other member states. In the *O'Flynn* case the court found that it was enough if there was a theoretical possibility that the law caused this indirect discrimination to the worker from abroad, the discrimination did not have to be proven in practice.[205]

The regulations of forbidding indirect discrimination is very broad and formulates potential breach of the article and is diffuse, as can be seen in the decision *O'Flynn*. Therefore it is not that easy to define the indirect discrimination, and when the double burden creates discrimination. The rules and regulations restricting free movement of goods is more concrete and more national rules are according to Barnard.[206] The residential regulations that create a disproportional double burden for workers from another member state are prohibited.

From the cases presented in this chapter, it seems that the states through their internal legislation favors their own nationals in order to help them get employed. The states use diffuse formulations in the legislation so that the rules would not seem to be directly

[201] See also Angonese para 41. Other cases where indirect discrimination occur are among others C-20/12 Giersch para 43.
[202] C-388/01 Commission v Italy.
[203] See also Angonese para 41. Other cases where indirect discrimination occur are among others C-20/12 Giersch v etat du grand duche de Luxembourg para 43.
[204] C-237/94 O'Flynn.
[205] -237/94 O'Flynn para 20.
[206] Barnard p. 220. See also more in chapter 5.

discriminatory on grounds of nationality. On the other hand the O'Flynn case raises the question why does the state not from the beginning use the objective justification with the limited costs that the Court approved as not discriminatory, but instead forbid the aid completely.

4.3.2 Indirect discrimination in concern of language requirements

The double burden in concern of language requirements creates discrimination when a national has to master both his or her own languages as well as the destination language. In the study made by Riso – Eurofund the language barrier is the biggest barrier to access the working market, especially when perfect language skills are needed.[207] The requirements of the state's national language is often justified, and therefore it is not always clear when the language requirements become disproportionally important.[208]

Language requirements are mentioned in the regulation 492/2011 on freedom of movement of workers within the Union. In the first chapter first section third article 1. subparagraph it is stated that: "Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply: (a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or (b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered. The first subparagraph *shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled*."[209]

In the case *Groener*[210] the question was raised by Mrs Groener, who was a national of the Netherlands. She was refused the full time post as an art teacher, since she did not pass the Irish language test. The Court held that such a permanent full time post in a vocational education institution is a post of such nature that it requires sufficient linguistic knowledge

[207] Riso – Eurofund p. 2.
[208] Barnard p. 246.
[209] Emphasis added by author.
[210] C-379/87 Groener.

and goes under the exception in regulation 492/2011 that is mentioned above. From this the can be seen that the requirement of equal treatment does not apply when it is a question about linguistic knowledge when the language skills are reasonably justified.[211] The exception when the language can be a hinder to work has to be proportionate and be applied in a non-discriminatory manner.

A case where the language requirements are in a central position is the case *Angonese*[212] where the question was about indirect discrimination because of the language requirements.[213] Mr Angonese was an Italian national whose mother tongue was German. He was resident in the province of Bolzano and went to study in Austria between 1993 and 1997. In the case *Angonese* the Court found that it is a breach of the article and therefore discriminatory to require a particular diploma issued in a particular province of a Member State to be eligible to a job. The Courts states that the article 45 TFEU forbids an employer to require a particular language test that the employer decides by the wording "exclusively by means of one particular diploma issued only in one particular province of a Member State".[214]

As remarked in *Angonese* the language requirements are considered as an indirect discrimination. Discrimination because of language could be equal to direct discrimination. This has been stated in the case *Las*[215], where the language requirement was not justified.[216] In this case the Court found that the Flemish law that required the employment contract to be in Dutch or else it would not be valid, was not in accordance with EU law.

A very recent case concerning the language requirements is the case *Valmar*[217]. The question was about the applicant to receive the documentation in his own language. This case was about free movement of goods, but is so recent and relevant for the principle in general in accordance to language requirements so it is also relevant here. The dispute was between a company established in Italy, GGPH, and the exclusive representative in Italy for

[211] Barnard p. 246. This motivation was used in C-379/87 Groener para 23.
[212] C-281/98 Angonese.
[213] The first case discussing this issue was The *Groener* case, where the *Angonese* was a development from. Barnard p. 246-247.
[214] C-281/98 Angonese para 48.
[215] C-202/11 Las; Barnard p. 247.
[216] In language C-379/87 Groener, explained above.
[217] C-15/15 New Valmar BVBA v Global Pharmacies Partner Health Srl.

the products of New Valmar. New Valmar broke the contract in advance due to unpaid bills. GPPH disputed Valmar's claim since the invoices failed to comply with the binding regulations that they should have been in Dutch since New Valmar was established in the Dutch-speaking region in Belgium.[218] The ECJ stated that the wrong languages on the invoice were discriminatory and that the invoices would be invalid if they were not in the right language.

As mentioned the indirect discrimination is hard to catch and the formulation of the breach is diffuse. The directive 492/2011 allows the unequal treatment when it comes to language requirements in employment. Because of the nature of the requirement, this is understandable; the employer is allowed to discriminate in some extent to get staff that is fulfilling the linguistic challenges of the work. On the other hand these requirements have to be motivated and significant, as was seen in the case *Las*.

4.3.3 Obstacles to the employment market

Obstacles are so called restrictions to free movement and are an issue that eventually concerns all the freedoms. The indirect discrimination creates obstacles and therefore hinders the free movement of workers. In general, there has been a lot of discussion about the scope of the EU Treaties on the free movement.[219] The Court has ruled in each case concerning obstacles that if the restriction causes an excessive obstacle to free movement, even though the restriction would be entirely non-discriminatory[220], it is a breach of the article 45 TFEU.[221] The connection between the terms obstacles and discrimination is very diffuse.[222] When discriminating actions are allowed, they are obstacles for the free movement of workers.

[218] Ibid. para 17.
[219] Davies p. 671.
[220] Meaning 'no discrimination either in law or in fact' as the court express the discrimination. This can be observed for example in the citation of the court in the chapter about non-discrimination.
[221] Craig – de Búrca p. 761
[222] Snell p. 437.

The first case where the problem was brought up in accordance to free movement of workers was the well-known *Bosman*[223] ruling.[224] In the case *Bosman*, the Court stated that the football transfer fee rule, that was not discriminatory, anyhow directly affected the players' access to the employment market in other Member States. Therefore, the transfer fee would be an unjustified obstacle to the free movement of workers as stated in the article 45 TFEU.[225]

In the context of obstacles to the free movement of workers, questions associated with sporting are present. In juridical doctrine the *Bosman* case is almost without doubt always as an example, and not by coincidence, it is a clear "obstacle"-case with a clear connection to restriction of free movement of workers. On the other hand a justified speculation is whether sportsmen should be included to the same group as other workers. Sports should be considered as work, but since there is not always an economic dimension it cannot automatically be considered as work under EU law, since work under EU law has to have an economic dimension. In sports the question is often about composition about national teams. The Court has also expressed its opinion concerning the question whether the economic issue in the current situation is important enough to be of sufficient economic interest to fall under EU law.[226] This question has already been discussed in chapter 3.3.3.

The obstacles of free movement of workers has been recognized largely within the EU and considered problematic among young persons. All Member States have rules that regulates the access of young workers to the labour market, to protect the young workers from certain conditions they could be more exposed to than more experienced workers.[227] The commission has made a Thematic report on obstacles to free movement of young workers in January 2011. Especially residence requirements are clear obstacle to free movement.[228] It is a positive sign that the problem is detected and recognized by the EU[229]. A specific report on the problem also shows signs of taking care of the problem. It also gives hope for future problematic situations that will come, and if all goes well the free movement of workers is continuing of being a high priority in the EU.

[223] C-415/93 Union Royale Belge de Société de Football Association v Bosman.
[224] See among others Craig – de Búrca p. 761-762; Downey and Dorf – Sabel p. 402.
[225] C-415/93 Bosman paras 103-104.
[226] Craig - de Búrca p. 751
[227] Minderhoud – Oosterom-Staples p. 17.
[228] Riso - Eurofund p. 1.
[229] Here meaning the institutions of EU, here more specific the Commission.

When discussion obstacles to accessing any market within the EU, the case *Keck*[230] is often brought up. In this case, the ECJ held that the measure restricted the market, but came to the conclusion that the restriction was not discriminatory. With other words, in this case the ECJ did not find that the restriction was a breach of the Treaty. Many Member State was of the opinion that the principle in *Keck* should be considered also in the *Bosman* ruling and other rulings concerning the free movement of workers. According to Barnard the same principle in *Keck* should apply to the free movement of workers, since when *Keck* is removed from its context of the specific selling arrangements and considered in terms of its purpose to remove non-discriminatory matters, the principle applied in *Keck* applies equally to free movement of persons.[231]

In the context of workers this Keck-principle has been applied in the case *Graf*[232]. In the *Graf* case there was a German national who worked for an Austrian employer. Graf ended his contract with the Austrian employer because he got another job in Germany. According to Austrian law he would have been entitled to a compensation upon his dismissal, since he had worked for the same employer long enough. He lost this right for claiming this compensation, since he moved to another state. Therefore Graf argued that the Austrian rule contravened article 45 TFEU. The Court stated that the Austrian rule did not breach the article, since the rule was applicable only if the worker was dismissed. Graf left the job voluntarily and did not therefore directly hinder access to the labour market.

In the opinion of AG Tizzano in the case *Caixabank*[233] he referes to the judgements of *Keck*, where he articulates that the national measures that prevents any access of a product from another Member State to the market more than it prevents national products, constitutes an obstacle to the freedom of movement of goods.[234] In paragraph 73 Adovcate General Tizzano states that the same applies to the free movement of persons.

As already mentioned in the chapter of direct discrimination, the discrimination in the free movement of persons is following the same trends as in free movement of goods. The same situation with double burden has also already occurred in cases with free movement of

[230] Joined case C-267 and 268/91 Keck and Mithourad.
[231] Barnard p. 221.
[232] C-190/98 Graf.
[233] C-442/02 CaixaBank.
[234] Opinion of AG Tizzano in the case Caixabank para 72.

goods.[235] The difference between the double burden situation in goods and in persons is that in movement of persons it is always the ultimate ruling the hos state and the one that ultimately controls the person who is moving.[236]

The biggest obstacles are the language requirements, but they are also most often justified since there is an objective reason for them. Geographical obstacles also appear frequently. On the other hand, these obstacles are understandable, and therefore more accepted than other discrimination obstacles, and cannot always be avoided. There are ways to hinder the negative effects of these obstacles. It is possible to take the family with you when you move to another state to work there, and different bodies are organizing language courses.

4.3.4 Reverse discrimination is also forbidden, when nationals are not treated as EU Citizens

The reverse discrimination, also called wholly internal situations, means situations where nationals of a country are enjoying less protection than workers from another Member State, since they are enjoying the protection of moving workers, provided by the article 45 TFEU. By claiming the right to non-discrimination, in reverse discrimination nationals that have not moved to another country to work can claim the right to equal treatment as a prohibition of reverse discrimination. Reverse discrimination is rare and does not occur often.[237]

The Union law protects the persons who moves within the EU to another member state to work. On the other hand, persons who have not used their rights that are provided from the mobility rules, meaning workers who are nationals of the country they are working in, do not benefit from the protection from EU law, since it is only for persons who are not nationals of that state. Therefore, nationals in their own country enjoy only the rights that are provided to them by national law, are in a less favorable situation than nationals who have moved to another country since they enjoy the benefits of both the national law and

[235] See more about the thoughts about the link between free movement of goods and free movement of workers and persons in chapter 5.
[236] Barnard p. 219.
[237] See opinion of Advocate General Sharpston in the case *Walloon Government.*

the Union law. This situation is called reverse discrimination.[238] As D. Pickup says it with other words: "Reverse discrimination arises when a national of a Member State is disadvantaged because he or she may not rely on a protective provision of Community law when a national of another Member State in otherwise identical circumstances may rely on that same provision"[239]. It has also been debated whether the reverse discrimination is a question of EU law at all, since it is an issue within the Member States themselves.[240] On the other hand there are also opinions that EU citizenship is a right for everyone, regardless of whether the person is using the right to move or not.[241]

A very typical case to show what reverse discrimination is, is the case *Walloon Government*[242]. The problem here was, that a person was allowed a certain state benefit provided by the Flemish government, the person had either to be resident in a Felmish-speaking region in Belgium or resident in another Member State, but working in a Flemish-speaking region of Belgium. This led to that a Belgian citizen living in the French-speaking region of Belgium, but working in a Flemish-speaking region, could not enjoy the benefit provided by the Flemish government. This is an example of reverse discrimination. The ones living in the French speaking area had less rights than the ones living in another Member State, even though both worked in a Flemish speaking area. To the case *Walloon Government* Advocate General Sharpston had a clear opinion. In his argumentation the importance of how many persons actually would get affected by the discrimination. As difference to the case *Graf*[243] the discrimination was not purely hypothetical in the *Walloon Government* case. AG Sharpston states clearly in the opinion to the case *Walloon Government* that the case in question should not be considered hypothetical by the following wording. "By contrast, it is clear in the present case that any migrant worker considering taking up employment in the Dutch-speaking region will potentially be affected by the residence requirements governing affiliation to the Flemish care insurance. This is not a hypothetical situation."[244]

[238] Barnard p. 213.
[239] Pickup p.137.
[240] Isiksel p. 198.
[241] Bhabha p. 110-112.
[242] C-212/06 Wallon Government.
[243] C-190/98 Graf introduced more closely in chapter 4.3.3.
[244] C-212/06 Wallon Government para 64 in the opinion of Advocate general Sharpston.

As earlier mentioned the worker-status brings many benefits. Some of the benefits and rights might even be better than them provided to the workers "originally" from the country where they are working.[245] From this the discussion started that if the EU law[246] gave a certain state of rights, this should be the minimum rights for all the members, despite if they exercised their right to move to another Member State.

Wholly internal linked with the term EU Citizenship. White poses a direct question about the existence of the problem whit the wholly internal question: "if all nationals of the Member States are thereby citizens of the Union, why should one not be able to rely on European Union rights merely by virtue of holding that European Union Citizenship?"[247] The answer to this question is given in the *Schmepp* case.[248] In wholly internal situations the ECJ has stated that there can be discrimination as long as there is only internal relations in the case. In the *Schmepp* case there was an external relation, so the EU law was applicable and "got more protection" than if the case would have been wholly internal.

The real question is how it is possible that EU law allows this kind of treatment. According to Barnard there is a jurisdictional and a political answer to the question. The jurisdictional answer is about how the legal protection is shared between Member States. The EU law is of the nature that it acts in situation where there is an inter-state dimension. National legislation is to protect in situations that are wholly internal to the Member State.

The political answer gives the persons that have moved to the country the minimum protection since they cannot participate in the same way in the national law making. In American scholars this is called "virtual representation" that is according to Barnard "migrants cannot necessarily gain access to the host state's political procession so Union law intervenes on their behalf to correct laws which discriminates against them. By contrast, nationals can and do enjoy access to the state's processes and so they can lobby to get the rules changed."[249]

[245] White (2011) p.1569 : "more generous than those accorded to workers within the Member State of residence"
[246] Union law is used here, even if at that time the right term for it was Community law. In December 2009 when Lisbon Treaty Community was replaced with the term Union.
[247] White p. 1584.
[248] C-403/03 Schmepp; White p. 1585
[249] Barnard p. 213.

According to Coleman the virtual representation got its start in 1796 in Britain when less than 5 percent could vote. Then allowed to vote was those who owned land. Voting was then considered something for the rich who had time to discuss things and have an opinion, whilst the poor did not even have an opinion and had hard times follow current matters since most of them were illiterate. In 1831 there was a minority of about 4 per cent that was voting. In 1868 the same number was 16 percent and in 1914 30 percent, these numbers were when the virtual representation ruled. When the voters voted for a representative that voted for them, the percentage of voters in 1921 was already 74 percent because of actual representation via universal franchise.[250] According to Barnard the court may have referred to the "virtual representation" and to this political "justification" of reverse discrimination in the joined case *Uecker and Jacquet*[251].

In for example the case *Angonese*[252] the court found that it was enough that there was a potential link to Union law to be enough, so that the wholly internal situation would not have to be applied. The Court has questioned the whole point of the wholly internal regulations, even though it has been given good legal and political reasons.[253] The point that it needs little to trigger union law, means that the Court wants to restrict the use of the wholly internal rule, and therefore it shows criticism to the rule. On the other hand there have also been cases where the use of the rule is more lightly used. Other cases where the connection to union law could have been questioned, but the court found a link and applied it to abolish the wholly internal rule, are *Deliège*[254]and *Carpenter*[255]. These cases were one big reason for the question about abolishing the whole concept of a wholly internal rule[256].

[250] Coleman p. 195-196.
[251] C-64 and 65/96 Uecker and Jacquet para 23: In that regard, it must be noted that citizenship of the Union, established by article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law. Furthermore, article M of the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State. See also case C-253/01 Krüger v. Directie van de rechtspersoonlijkheid bezittende Dienst Wegsverkeer para 36: As is apparent from the case-law of the Court, any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.
[252] C-281/98 Angonese.
[253] Barnard p. 214.
[254] C-Joined case C51/96 and C-191/97 para. 58. See also C-281/98 Angonese paragrphs 17-18.
[255] C-60/00 Carpenter
[256] Barnard p. 214.

The EU Citizenship questions are also closely linked to internal situations. As mentioned the EU law cannot be taken into consideration in internal situations, only when there is an inter-State situation. But how does EU Citizenship fit in here? In the same case *Walloon Government*, the court stated that it was a question of a "purely internal situation" and that the "citizenship case law does not change this view since"[257] "citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with [EU] Law".[258]

In conclusion of this reverse discrimination chapter the reverse discrimination is about situations when the national of the state has a more negative impact of a rule or regulation than a moving EU citizen, since they are protected by EU law. The reverse discrimination is forbidden in EU law but is very rare and seldom brought in front of the ECJ. There are discussion about the concept of reverse discrimination and arguments whether the reverse discrimination should not be an issue of EU law at all is posed, since it is a question about national legislation. The EU Citizenship is a concept that is very closely linked to this term in this discussion.

4.4 Objective justification gives reason to discrimination

When there is an objective justification, it is allowed discriminate, since there is a reason that is good enough for the discrimination to be justified. The term "objective justification" is used by the ECJ in the case *O'Flynn*. Other synonyms used in case law to this same term are "public or general interest" or "imperative requirements".[259] When talking about free movement of goods the term used is "mandatory requirements".[260]

With other words the justification is a consideration the ECJ has to do, between the rights and interests of the parties and the general or public interests. In these considerations, the Human Rights are very closely linked to the EU law, and in situations concerning

[257] Ibid.
[258] C-212/06 para 39 see also Case C-127/08 Metock para 77. See also the opinion of Advocate General Sharpston in the case Ruiz Zambrano v. ONEM C-34/09.
[259] Barnard p. 220. "Imperative requirements" is most often used in the field of establishment and services.
[260] Ibid. P. 220-221.

discrimination on grounds of nationality, the EU law and the Human Rights are in some situations in conflict.[261] The contradictions between EU law and Human Rights are even said to be one of the favourite topics of discussion between EU lawyers and academics.[262]

Reasons for when the discrimination can be justified, the ECJ has recognized that the "interest worthy of protection" are listed non-exhaustively.[263] All these justified exceptions are to protect other EU rights that are compatible with human rights rules and therefore justified to take precedence over the free movement provisions.[264] As already mentioned, the article 45 TFEU exists to ensure free movement of workers and both direct and indirect discriminations are prohibited in working conditions. Only indirect discrimination can be justified.[265] The only justifications to these indirect discriminations are when it is a question about public order, public safety or public health. The Regulation 492/2011 prohibits the discrimination on grounds of nationality for EU Citizen Workers, and here the justifications are only applicable when the interest of public order and public health is at stake.[266] The interpretation for when these discriminations are allowed has earlier been very narrow[267], but as already mentioned the ECJ policy has taken a more discriminating turn recently.

In the case *Österreicher Gewerkschaftsbund*[268] the ECJ expressed their view to a situation about objective justification, when the question was about free movement of workers. In the decision, the Austrian government claimed that the discrimination is justified since the public interest requires it and that it is consistent with the principle of proportionality. The same justification is made in a case concerning the free movement of goods in case *Safir*[269]. When there is a national interest worthy of protection, the indirect discrimination is justified. These interests have been shown through case law to be for example consumer

[261] Pennings 2013 p. 118.
[262] Jacqué p. 995.
[263] Case C-118/96 Safir v Skattemyndigheten i Dalarnas län, Opinion of AG Tesauro, para 29.
[264] Barnard p. 221.
[265] Ivanus p. 153.
[266] Pennings 2013 p. 126.
[267] Ibid.
[268] C-195/98 *Österreicher Gewerkschaftsbund* v Republik Österrich.
[269] C-118/96 Safir v Skattemyndigheten i Dalarnas Län para 25.

protection, worker protection on cultural policy[270]. In these cases the court found these kinds of interests, and the justifications was therefore found.[271]

A discrimination that is objectively justified has to be proportionate, so that it is in line with human rights. If the justification is objectively acceptable but not proportionate, it is not in line with the EU Law. In the cases *ERT*[272] and *Olzabal*[273] the question about the proportionality with the justification of the discrimination is been taken into consideration. In the case *ERT*[274] the court stated that the discrimination has also to be compatible with human rights, by concluding that the objective justification is not justified only because it is proportionate or objectively justified, the breach has to comply with the fundamental rights also. [275]

Within the EU, the aim for the last 50 years has been to abolish the barriers of free movement between Member States, but at the same time the Member States sabotage the work for this aim by building new barriers.[276] The integration in itself is not in crisis anymore, more of the opposite. More lately, the discussion of disintegration has started, and factual actions in this direction have been taken, as the Brexit in June 2016.[277] This discussion continues in the next chapter.

[270] The cultural policy justification is also called the public interest justification case C-288/89 Gouda v Commissariaat voor de Media. See more Barnard – Peers p. 399.
[271] Barnard p. 220-221
[272] C-260/89 ERT v DEP.
[273] C-100/01 Olzabal.
[274] C-260/89 ERT v DEP para 43: "…Thus the national rules in question can fall under the exceptions provided for by the combined provisions of articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court."
[275] Barnard p. 218.
[276] Barnard p. 214; opinion of AG Sharpston in case C-212/06 Walloon Government.
[277] Ruffert p. 167.

5 The increasing flow of foreign workers and benefit tourism – truth or a myth?

5.1 Introduction

In this chapter, I am analysing the question about the free movement of workers and how the system can be abused. This gives the angle and substance to this dissertation. The aim of this chapter is to analyse the general current opinion of EU citizens about foreign EU workers and how the situation reflects in the ECJ decisions.

The core first and most fundamental question that this topic brings to mind is if the welfare tourism is actually a real problem or is it just a lot of fuzz and something to blame when things are not going well. A question that is going to be answered is the welfare tourism actually is a significant problem between EU workers[278]. While it is impossible to get exact numbers of welfare tourists, and thereby the exact costs that they cause on the receiving Member State, we can determine limits to how big of a problem it can be. To quantify the maximum impact of the problem statistics from Eurostat are examined. The reason why welfare tourists wants to be welfare tourists have been answered earlier in this dissertation.

The second subchapter considers the shifting in the opinion about the free movement. The discussion is very politically charged and strong opinions are shown in the media. Throughout the existence of the EU the opinions, both opinions of the public and the court decisions, have shifted about the free movement. The general atmosphere has first been very open to free movement, but now lately the opinions has turned towards a more restrictive direction on free movement. The shifting opinions on free movement of persons follows the same pattern as the opinions on free movement of goods have had previously. Questions to be answered in this subchapter are whether the pro free movement period gave a chance for persons to be a non-productive part of the society of the new state the worker moved to? How has the minimum requirements of participating in the society in order to be accepted as not a burden and be allowed to change state? How has the decisions of the court changed and why?

[278] Here meaning workers of an EU State working in another EU State by using the right and protection provided by EU law of free movement of workers.

In the last subchapter, there are some thoughts about possible future aspects. The recent crisis until now has been defined as economic, financial and fiscal, but the upcoming EU-crisis are going to be much more political and fundamental. The underlying questions are finally put on the table, but the out coming can be a lot more devastating for the future of the EU than the crisis has been until now.

5.2 Is the benefit tourism actually a problem?

This chapter is quite statistic based and the problem is examined from the light of statistics. From the statistics it does not come through how many welfare tourists there are, because if we would know who the welfare tourist are, they would not be allowed to stay in the country as welfare tourists. But we can see from the statistics how many EU workers move and how many of them are unemployed. From the statistics we can also see if there are a lot of EU workers that move to other Member States.

The enlargement of the EU has happened quickly. It has grown from a 15 nation coalition to a 28 states multination in just a short time period. One of the biggest changes occurred when many of the Eastern Europe states joined the EU at the same time. This had a big impact on the movement of labour, since the migration from eastern states increased to the western "welfare" states. The legislation has not developed in the same pace. The fast enlargement has caused a lot of debate, and therefore the political discussion is still very sensitive. Andrijasevic and Sacchetto have researched the latest east-to-west movement of workforce in the EU and concludes that there are two perspectives in this discussion: the social dumping perspective and the integrationist perspective.[279] The Social dumpers sees the eastern migrants more as welfare tourists, while the integrationists sees them as a benefit for the economic growth in the EU.[280]

In the EU there are according to Eurostat statistics more than 15 million foreign workers in the EU.[281] That is about 7.4 % of the workforce in the EU.[282] A little bit less than half of

[279] Andrijasevic – Sacchetto p. 220.
[280] Ibid.
[281] These statistics are from 2012. Foreign workers here refers to persons who are working in a State of which they do not have the nationality. Eurostat http://ec.europa.eu/eurostat/statistics - explained/index.php/Archive:EU_citizenship_-_statistics_on_cross-border_activities accessed 1.4.2017

these are nationals of another Member State. According to the statistics about 8,5 million workers in the EU comes from a state outside of the EU.[283] This means that there are more workers from outside of the EU that comes to work to the Member States, than there are workers enjoying the right of free movement of workers provided by EU law. Whether the free movement of workers inside the EU is actually the real problem as the general opinion can interpreted as, is a statement that should be questioned. At least according to these statistics, the EU right of free movement of workers is not of such a scale that it should largely affect general citizens, and is unlikely affecting the rights provided by the Member State to a person with worker status.

When looking at the statistics the migration between Member States is fairly low.[284] Persons moving within EU, that is from a Member State to another, in the working age from 15 to 64 years old, was only 0,3 % in 2010, whilst the same rate for comparison in the USA was 1,2 %.[285] In a report about employment in Member States, Riso concludes that the mobility within the Member States is low in an international comparison. Reasons for these she has found can be linguistic and cultural barriers, which does not exists when comparing to movement inside of the US for example.

Another interesting correlation Riso found was by comparing the amount of movement with the GDP of the state. Riso concludes that the mobility between states with higher GDP per capita is higher than between counties with low rates of GDP. Examples with high mobility rates and high GDP are for example Germany, Scandinavia and the UK. At the same time it can be noted that the mobility rates are low between eastern European countries where the GDP is low per head. Therefore there is a correlation according to Riso, where it is indicated that there is a positive correlation between mobility and growth.[286] In this context can be mentioned that when taking in consideration foreign workers, the majority were from other Member States in nine countries.[287] The mobility of

---

Riso – Eurofund p. 1.

[282] Eurostat: http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics.

[283] Ibid.

[284] Riso – Eurofund p. 1.

[285] Ibid.

[286] Riso – Eurofund p. 33.

[287] These countries in order of amount with most EU workers are Luxemburg, Ireland, Belgium, Slovakia, Cyprus, Hungary, UK, Netherlands and Sweden. From 2012 from http://ec.europa.eu/eurostat/statistics - explained/index.php/Archive:EU_citizenship_-_statistics_on_cross-border_activities accessed 1.4.2016.

workers are also correlating to the economic situation in the region. In 2008-2010 when the effects of the economic crisis hit at hardest, the mobility reduced. The mobility started to turn towards a more active direction again in 2011, even though the rate remain lower than before when the economic crisis started in 2007.[288] Also the situation on the labour market during the financial crisis got worse for foreign workers than for workers of the nationality of the state in question. The unemployment rate for foreign EU workers increased by 5.5 % between 2008 and 2012 while it increased only 3.3 % for nationals.[289]

Riso notices in her research that the east–west mobility in the EU is more popular than the south–north moving, when people are moving to another state to work. The main destination states workers are coming to are Germany and the UK while the people moving from the most are Greece and Spain. The biggest moving flows are any ways the ones from eastern European states moving westwards.[290] Here it seems that people from poorer Member States moves to richer Member States in hope of getting a better life. This is fully legal. A point of consideration is that people may believe that this is the welfare tourism that it is not, and has misunderstood the concept.

According to Riso there is still a shortage of capable workforce in parts of the EU. This, even though the high rise in the unemployment due to the economic crisis. EU has a strategy, the Europe 2020 and, which aim is to create a sustainable and inclusive growth in among other things both economy and labour by the year 2020, which is actively followed.[291] This program focuses on sharing information about open vacancies in other countries and regions and could through that increase the mobility.[292] There is a contradiction in the way the EU sees the free movement of workers. Through these different programs and strategies, it is shown that the EU is aware of the practical challenges the free movement of workers actually has to face, and really tries to do things to increase the free movement for the worker. This shows that the commission is being a more and more people-friendly organization that thinks more of the people than purely the economic effects as it was before. But on the same time the ECJ has given these more

[288] Riso – Eurofund p. 19.
[289] Riso – Eurofund p. 27.
[290] Riso – Eurofund p. 33.
[291] See more http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm accessed 15.4.2017. See also the 2012 Employment Package launched 2012 http://ec.europa.eu/social/main.jsp?catId=1039 accessed 15.4.2017.
[292] Riso –Eurofund p.1

restrictive decisions where the free movement is even more restricted. It is understandable that the people becomes more insecure about the authority of the EU due to the contradictory behaviour.

Even though the commission and possibly other bodies at EU tries hard to encourage geographical movement of workers within the EU, the reception at a national level is however not that encouraging. There can be accusations of abusing the local welfare benefits by the receiving states and the immigrant being a burden for the receiving state. There can also be accusations for stealing the locals' jobs and make them unemployed.[293] Another question that raises is whether the worker status in itself is given to easily or not. In EU law the status can be retained relatively easily.[294] If the status provides more benefits, probably the status is more thrived than the actual activity. To prevent this, person abusing the EU law on purpose, are not allowed the social benefits.[295]

As the conclusion from the statistic it can be assumed that the welfare tourism cannot be such a big problem as it is made out to be. The rates of moving EU citizens is simply too low for this. As mentioned in the introduction to this chapter, the discussion is very politically charged and attracts a lot of media attention. Earlier in this dissertation the question about why some people want to be welfare tourists has been answered. The political opinions it is being more discussed in the next chapter.

5.3 Shifting trend - political opinions influenced by the economic crisis

In this chapter the focus lies on how the people's opinion on free movement and immigration have shifted. A shift in the general opinion and in the Court decisions has happened during the last years, and the next direction is unclear. Since there is so much criticism and challenges about the free movement of workers, there is also a strong need to defend such an important concept.

[293] See also Riso – Eurofund. More about this topic in the next subchapter.
[294] Jorgensen p. 290.
[295] Ibid.

The economic crisis that started in the EU in the summer of 2007[296], led to a rise of unemployment. A question that is going to be answered here is whether the crisis affected the movement of workers. As mentioned in the beginning the free movement of workers is a part of the EU strategy to increase geographical mobility in order to even out the excess of highly educated workers in certain states using the shortage of highly educated workers in other Member States. The financial crisis in the EU has partly caused a constitutional crisis for the EU.[297]

Unemployment is a problem in the EU and it has continued to increase since the beginning of the financial crisis. According to Eurostat, the unemployment rate in the EU was 9.3 % in April 2017.[298] That is about the same rate as it was in the beginning of this millennium, in early 2000 the unemployment rate in the EU was 9.2 %. The unemployment rate in the EU was as lowest, from year 2000 forward, in the beginning of 2005 to the beginning of 2008, when it was only 6.8 %. When the economic crisis started in the late 2007, the unemployment started to rise sharply. From the record-low 6.8 % in the beginning of 2008 it rose during 2008 and was still in mid 2010 record high with 9.7 %.[299]

The increased unemployment rates causes insecurities as well as economic issues. In difficulties it is common to cope with the situation by blaming somebody else for the misery. The states has to do something when the unemployment rates rises too high and the inhabitants becomes unhappy. These can be reasons for the shifting in the general opinion, and there through also possibly in the Court decisions. It feels that the states could intentionally challenges the rules of free movement and make regulations that are on the limit to be allowed. It is very seldom that a case is brought in front of the EU court. The trend towards more restrictive movement seems to coincide with the upswing of populistic parties. It is unclear if this trend will have a long term effect on the general ambiance in the EU, or is it a trend that will blow over soon.

As also mentioned in the chapter on direct discrimination the court decisions in questions of discrimination has also gone towards a more discrimination accepting direction. Also the

[296] European Economy 7/2009.
[297] Tuori – Tuori p. 205-206.
[298] Eurostat http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics accessed 18.6.2017.
[299] Ibid.

court rulings about who can be seen as a worker has become stricter. This can for example be seen in the earlier presented cases in this dissertation like *Dano, Alimanovic* and *Brey.* The effects of these decisions are not yet visible in the statistics of worker mobility. While we cannot yet see the effects in the statistics, it shows the current view of the Court.[300]

A fairly recent case that has woken a lot of discussion about the free movement of workers and the "welfare tourism" is the decision *Dano* that the court made in 2014. The decision was among the first ones to show a more restrictive approach towards the freedom of movement of workers, and in this decision the general ambiance of negative effects due to the economic crisis and refugee wave in Europe shines through. In this decision the court made clear that if it is obvious that the person does not have an intension to work, the new host state is not obliged to provide social assistance to the immigrant who claims to be a worker.

The ECJ has made a couple of other decisions after the *Dano* decision that show the same strict direction of decisions by the Court. In the case *Nieto*[301] the Court stated that economically inactive persons can be rejected social advantages, when residing in the member state for less than three months, again with the reasoning that non-economically active persons can become a unreasonable burden for the host Member State. In the decision the cases *Dano* and *Alimanovic* are referred to several times[302]. Two other very recent cases are the cases *Khachab*[303] and *NA*[304]. In these both cases there was a question about third country nationals, the former about the Spanish legislation about family reunification, and the latter about the right of residence after a divorce. The both cases show a negative direction on free movement from the ECJ.

The shifting trend and the more strict decisions in the Court rulings has already previously been demonstrated in decisions concerning free movement of goods. The reason why the free movement of goods is the trendsetter here could be that there are so many more cases that has been brought to the Court concerning goods than concerning free movement of persons. The economic aspect is bigger in the free movement of goods and thereby the

[300] See more about these decisions in chapter 3.
[301] C-299/14 Vestische Arbeit Jobcenter Kreis Recklinghausen v Gracia-Nieto and others.
[302] Ibid. paras 38-39, 42-43, 52 and 54.
[303] C-558/14 Khachab v Subdelegación del Gobierno en Álava.
[304] C-115/15 Secretary of State for the Home Department v NA.

interest in these cases are also bigger. As mentioned in the beginning the free movement of workers also got its start from the economic aspects, and the economic benefits are the reason for the regulations to have developed fastest where the economic interest has been the biggest.

As a proof of the political discussion it is shown that there are many different bodies that wants to be heard in the question of free movement of workers. One of the more serious ones is the ETUC[305]. ETUC is a trade union that represents different national trade union confederations in 39 different countries and was founded in 1973.[306] The ETUC have given a resolution[307] where they claim that the European commission and the Council meets the demands of ETUC that the increased mobility puts on it, but according to the ETUC they have however not listened and fulfilled all their requirements. As mentioned before, EU works to increase the worker mobility, and one reason is to reduce the differences of demand and supply on the labour market in the EU.[308] Unfortunately all the receiving states are not as happy to receive foreign workers as the EU[309] would hope they would be.

The ECJ new direction that is more restrictive towards the free movement in these recent decisions, are against the previous more liberal view of the freedom. These new opinions has created more confusion of the right to social benefits for economically inactive persons and is not helping the situation that the EU legislation already now seems very confusing and bureaucratic.[310] As can be seen from the recent decisions like *Dano, Alimanovic* and *Brey*, even the Court decisions have been more against the free movement than before. The effects of this cannot yet be seen in the statistics, since these decisions are fairly fresh, but the Court opinion has clearly shifted from earlier decisions. As also can be seen in the cases *Bougnaoui* and *G4S* the Court decision defers from the Advocate General's opinion[311].

[305] European Trade Union Confederation.
[306] https://www.etuc.org/composition-and-organisation accessed 9.4.2017.
[307] ETUC Resolution on conditions for free movement: more protection of workers and fair competition.
[308] Riso – Eurofund p. 1.
[309] Here meaning the council and commission and other regulating bodies of the EU.
[310] Verschueren p. 148.
[311] In G4S AG Kokott and in Bougnaoui AG Villaón.

5.4 What about the future?

A new political and financial crisis in the EU in 2017. The recent crisis has until now been defined more as a question of economic, financial and fiscal crisis, which has led to unemployment and further problems.[312] Since the problems are severe and affecting the general ambiance, people start to look for a scapegoat to blame it all on. Unfortunately the fundamental principles of the EU has been given this role, and therefore the crisis has become more of a constitutional crisis threatening the whole existence of the EU.

Just as the economic crisis was going towards brighter times there was another crisis in the EU. The huge refugee waves fleeing from war reached Europe in the summer of 2015.[313] Instead of seeing the refugees as only a negative phenomenon, they should be seen as an available resource, as a positive phenomenon in the EU.[314] Economically refugees should be seen as a resource in a similar way as moving workers who are EU Citizens. The EU and its Member States does not currently benefit from the resources that are provided, but instead sees it as a threat.

Undoubtingly discussion has taken a turn towards a more con free movement of workers direction. Already before the Brexit decision after the referendum of Britain leaving the EU in June 2016, the UK started the discussion about restricting the right to free movement of workers. Brexit could be seen as a sign of fear of foreign workers.[315]

As a fact this principle gives a lot of freedoms to the persons enjoying it. As earlier mentioned this freedom reaches out to workers families as well as job-seekers, students and other groups of economically dependent persons. The freedom gives these persons the same rights as the actual nationals gets, as long as they are nationals of a Member State. Therefore, the right of free movement actually is a very far-reaching freedom, in a way eliminating state borders within the EU. Opening of state borders is a political question. In my opinion, the free movement of workers should be an as widely extended freedom as the principle of free movement of goods. It is and it should be kept as one of the main ideas of a common union without borders.

[312] Tuori – Tuori p. 3.
[313] BBC. Statistics about the asylum seekers in 2015.
[314] See for example World Bank blog. The positive aspects of increased immigration to the EU.
[315] See more for example The Telegraph and BBC News.

The EU started as a coalition to avoid future world wars, founded just after the Second World War. The Union has since its creation slowly developed towards a supranational multination where the different state borders are fading. During the history of the EU, there has been different swings and opinions whether the EU should go towards a supranational multination or stay as an intergovernmental union.

There are still fields the Union can and have to develop in, like unanimous tax laws and stricter economical regulations. For now there are great crisis in the EU such as the economic crisis and refugee situation. With the crisis in mind, I do not think that the EU we live in today is ready for a one multination, currently the cultures are too far apart. I do not think that it would be necessary either. We can function as a Union with laws without having to become one nation.

6 Conclusion

In this dissertation I have answered the questions about what the minimum requirements for a worker to gain the worker status within EU law are, and how can foreign workers be discriminated in the new Host Member State. These questions are important to answer as the focus of this dissertation is to examine welfare tourism. I have looked into whether welfare tourism is a significant threat for the EU, or is it only something the public wants to blame on in an uncomfortable economic situation.

The term worker is defined in chapter 2, and especially what it means in the scope of EU law. Economically active persons, that will say workers, have wider rights to reside and enjoy benefits in Member States where they are not a national of than non-economically active persons. The term worker is not defined in the TFEU or any EU regulation, but is formed through case law.

I have examined if and how the Member States can hinder the abuse of the right of free movement of workers. In this dissertation I have used the term welfare tourist when referring to someone who abuses the right of free movement of workers to gain social benefits, although they should not qualify as economically active persons. I have looked

into the benefits of workers, what kind of benefits are available for moving workers and why are the benefits so important that they are worth immigrating for. Through case law I noticed that the most wanted rights are the rights relating to social assistance and the right to reside.

In the beginning I introduced the question "why the right has to be extended to economically inactive persons, after retirement and to job-seekers as well as family members". The answer to this is that the freedom was originally established for the economic interest of companies that could not find workers from the state in question, while there were high unemployment rates in other Member States. At first the right and benefits for moving workers were only for the workers themselves, but that caused a high threshold for the workers to move to another Member State. The idea was to lower the threshold to move by extending the right to social benefits to family members.

To define the size of the problem I have gone through some statistics. In order to be a successful long-term welfare tourist, the person needs to be able to pose as a worker, therefore, there are no accurate statistics about their numbers. Being a jobseeker allows a person to stay in a new host state for only three months as an economically inactive person. The absolute maximum number of possible abusers can be found by looking at the amount of foreign workers. The number of moving workers in the EU is not enormous, and since all of them are probably not abusers, the number of abusers is even less. Out of the approximate 200 million workers in EU, 15 million are foreign workers whereas only about 6,5 million of those are from another Member State.

This means that the absolutely highest percentage of welfare tourists of the entire EU workforce would be very small. If these all would be welfare tourists, and moving to the same State, it would be understandable that the welfare tourists would consume a lot of the state benefits. The fact is that only a fraction of the moving workers are actually abusers, and these are spread over many Member States. Therefore, the amount of welfare tourists in one Member State should not be so big that it would cause too much of a burden for a Member State. The freedom of movement is such an important value for the EU that the risk of a small amount of abuser is worth taking.

A founding principle of free movement in EU law is the non-discrimination on grounds of nationality. I have examined both legal as well as morally questionable measures states can take to hinder unwanted free movement. Legal discrimination is objectively justified, while morally questionable measures are unclear whether they are justified or not. Some of the discriminations are clearly objectively justifiable, while others are definitely not justifiable. The gray zone in between the clearly justifiable and the clearly non-justifiable discrimination, is where the states can do some morally questionable decisions. In this gray zone the ECJ rulings can be unpredictable, and the outcome is defined by the ECJ in the specific case. When the ECJ decides by a court ruling that a measure is justified, the discrimination is objectively justified.

As the EU construction can be considered quite bureaucratic many unlawful measures are never caught by the court due to the processing being so heavy. When the discrimination is caught by the ECJ and therefore defined as unjustified, it might have been ongoing for a long time. If the ECJ rules in favor of the person years after trying to utilize his rights as a moving worker in another Member State, the person might not necessary be in a position to take advantage of the ruling anymore. The foreign worker has seldom the knowledge or resources of how to process their case correctly in the new Member State. The moral question here is whether it is correct behavior by the state as a way to show the general opinion about free moving persons, and give a hint about whether immigrants are welcome or not.

There are many legitimate ways to hinder the free movement of workers, even if the free movement is and has been a well preserved value for the EU. Language and security are for example often used with good reason as a basis for justified discrimination. There are many negative opinions about the free movement of workers but the real scare is generally actually not about the economically active workers, but instead for the threat of the welfare touried social welfare systems.

The subject of free movement of workers is very sensitive and politically charged. The public criticism has a negative tone. Lately there has been many crisis in the EU that affects the ambiance in the EU. The economic crisis starting in late 2007, the immigration waves in summer 2015 and most recently the UK referendum about leaving the EU in 2016 as

well as other important political elections in Member States. The EU Citizenship is the key to the free movement in the EU, maybe this concept should be more questioned instead of the economically active worker rights.