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Interpretive legitimacy and the distinction between “social assistance” and “work seekers allowance”: Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v. ARGE Nurnberg 900*, Judgment of the Court (Third Chamber) of 4 June 2009, nyr

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Introduction

Despite the fact that the Court of Justice has gone beyond the literal text of the Citizens Rights Directive¹ and has subjected it to a “citizenship” reading, particularly in *Metock*² and previously *Collins*,³ ultimately being a worker still matters as regards obtaining many of the benefits of the Directive. The effects of *Martinez Sala*⁴ increasingly seem eclipsed and the so-called transformative statement of citizenship in *Grzelczyk*⁵ is now riddled with caveats in the wake of voluminous litigation, mainly about student benefits.⁶ So just what is the relationship between person, worker and citizen and the new Directive? And if Union citizenship is the new declared fifth freedom,⁷ how do we recast the first of the four others, namely the free movement of workers? The result is, to redeploy the now infamous catchphrase, a “Europe of bits and pieces”,⁸ in light of the plethora of caselaw, inconsistent Directive provisions,⁹ legal bases and national rules relevant to workers, persons and citizens, despite their inherent commonality, of people and their existence.¹⁰

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¹ Directive 2004/38/EC 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 [Hereinafter the Directive].

² C-127/08 *Metock & others v. Minister for Justice, Equality & Law Reform*, judgment of 25 July 2008, nyr.

³ Arising temporally prior to the transposition of the Directive: Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

⁴ Case C-85/96 *Martinez Sala* [1998] ECR I-2691.

⁵ I.e., that “[u]nion citizenship is destined to be the fundamental status of nationals of the Member States,” Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31. This sentence appears in Recital 3 of the Directive, as a marker of its significance.

⁶ For example, Case C-224/98 *D’Hoop v Office national de l’emploi* [2002] ECR I-6191; Case C-209/03 *The Queen*, on the application of *Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119; Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of 18 November 2008, nyr.

⁷ “European citizenship is slowly but steadily evolving into a fifth Treaty freedom...[t]he terms of the Maastricht Treaty dealing with European citizenship- initially perceived as merely symbolic- were progressively fleshed out in a cautious but persistent line of case law of the ECJ,” Editorial, (2008) 45 *Common Market Law Review* 1.

⁸ Coined by Curtin in “The Constitutional Structure of the Union: a Europe of Bits and Pieces” (1993) 30 *Common Market Law Review* 17.

⁹ See in particular, Article 14 and 24 of the Directive, section 5.1 above.

¹⁰ But not necessarily movement.

Vatsouras and Koupatantze,¹¹ the subject of review here, concerned Article 24 of the Directive and the thorny question of the putative difference between social assistance and work seekers benefit. The Court of Justice there considered the derogation from equal treatment contained in Article 24(2) as to social assistance, designed to be protective of State coffers and prevent Member States being under a obligation to pay social assistance to work seekers.¹² Earlier, the Court in *Collins* had subjected the predecessor to the Directive¹³ to a “citizenship” interpretation and upheld the payment of work seekers allowance to migrants, despite the express wording of the then yet-to be transposed Directive to the contrary, in Article 24(2). A curious feature of *Vatsouras and Koupatantze* is then the relationship between Articles 12, 18, 39 EC and the Directive, as well as, *inter alia*, the decisions of the Court in *Collins* and *Metock*, considered here in detail. *Vatsouras and Koupatantze* is approximately one year after its momentous decision in *Metock*, where the Court overruled its earlier decision in *Akrich*,¹⁴ that had been transposed into national law in a number of States so as to implement the Directive.¹⁵ *Metock* marked a constitutional milestone by re-enforcing the centrality of the individual to the free movement of persons and the Directive.¹⁶

A recent report has indicated that major issues remain about the adequacy of the transposition of the Directive by the Member States.¹⁷ In particular, Article 24 has been the subject of patchy acceptance, so far as the “solidarity” provisions are concerned.¹⁸ This state

¹¹ Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v. ARGE Nurnberg 900*, Judgment of 4 June 2009, nyr.

¹² See generally, Van der Mei *Free Movement of Persons within the European Community: Cross Border access to Public Benefits* (Oxford, Hart, 2003). Dougan & Spaventa “Wish You Weren’t Here... New Models of Social Solidarity in the European Union” in Dougan & Spaventa eds., *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005); Dougan “The Spatial Restructuring of National Welfare States within the European Union: the Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon” in Neergaard, Nielsen & Roseberry eds. *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009); Dougan Expanding the Frontiers of Union Citizenship by dismantling the Territorial Boundaries of the National Welfare States? in Barnard & Odudu eds., *The Outer Limits of EU Law*. (Oxford, Hart Publishing, 2009). See also Minderhooud “Access to Social Assistance Benefits and Directive 2004/38” in Guild, Groenendijk and Carrera eds., *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009).

¹³ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

¹⁴ Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

¹⁵ For example, Ireland, United Kingdom and Denmark.

¹⁶ See section 5.3 *infra*. See Costello “*Metock*: Free Movement and “Normal Family Life” in the Union” (2009) 46 *Common Market Law Review* 58; Fahey “Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*” (2008) 36 *Legal Issues of Economic Integration* 83; Currie “Accelerated justice or a step too far? Residence rights of non-EU family members and the court’s ruling in *Metock*” (2009) 34 *European Law Review* 310.

¹⁷ Carrera & Atger “Implementation of Directive 2004/38 in the context of EU Enlargement: A proliferation of different forms of citizenship?” (Centre for European Policy Studies Special Report, April 2009), available at <http://www.ceps.eu>; Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2008) 840). European Commission *Guidelines on free movement and residence rights of EU citizens and their families* (European Commission, 2 July, 2009). See Report from the Commission *Fifth Report on citizenship of the Union* (1 May 2004 - 30 June 2007) SEC(2008) 197, COM(2008) 85; Council Decision 2007/252/EC of 19 April 2007 establishing the specific programme “Fundamental rights and citizenship” for the period 2007-2013.

¹⁸ Carrera & Atger above, fn. 17.

of affairs might be regarded as unexceptional in the ordinary course of EU law and internal market, a theme of competing interests, were it not for *Metock*. Add to this the current scholarship that suggests that the very essence of the caselaw of the Court of Justice as to citizenship and Article 18 EC is in turmoil in respect of whether free movement must be exercised at all so as to benefit from Article 18 EC.¹⁹ While extensive scholarship has reflected upon social solidarity as the theoretical underpinnings to Article 18 EC,²⁰ at a time of economic crisis across the European Union and rocketing unemployment figures,²¹ the characteristics that would identify a work seeker *qua* citizen and their entitlements assumes a heightened significance to the real economy, rendering *Vatsouras & Koupatantze* worthy of consideration. This casenote considers the decision of the Court in *Vatsouras & Koupatantze*, in respect of the relationship between the Directive and the Treaty, in light of the above developments.

Factual and legal background of *Vatsouras & Koupatantze v. Arbeitsgemeinschaft (ARGE)*

The facts of the case concerned two Greek nationals, one of whom was described as a low paid worker, both eventually work seekers, who had their social assistance withdrawn in Germany when their employment ended.²² The decision of the Court of Justice ultimately turns on whether “social assistance” could be construed to be a “work access” benefit pursuant to Article 39 EC and not a welfare benefit *simpliciter*. Importantly, the facts of the indicate that one applicant obtained social assistance as a low paid worker who then became unemployed, *subsequent* to receiving this benefit and continued to receive this assistance until it was withdrawn and then challenged. Another feature of both cases is the time frame there. Both applicants arrived in Germany in 2006 and began to claim benefit in late 2006 and early 2007 respectively and both took up new employment in 2007 subsequent to the loss of the benefit. Social assistance had been withdrawn on the grounds that the maximum period of three months residence afforded under German law had been exceeded, thus they had lost their jobs involuntarily before completing one year of

¹⁹ Spaventa “Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects” (2008) 45 Common Market Law Review 13; Case C-353/06 *Proceedings brought by Grunkin and Paul* Judgment of 14 October 2008, nyr; Case C-148/02 *Garcia Avello v. État Belge* [2003] ECR I-11613.

²⁰ See Dougan, above fn. 17; Kostakopoulou “European Union Citizenship: Writing the Future” (2007) 13 European Law Journal 623; Somek “Solidarity Decomposed: Being and Time in European Citizenship” (2007) 32 European Law Review 787; Besson “Future Challenges of European Citizenship. Facing a Wide-open Pandora’s Box” (2007) 13 European Law Journal 573; Jacobs “Citizenship of the European Union- A Legal Analysis” (2007) 13 European Law Journal 591; Dougan “The Constitutional Dimension to the Case Law on Union Citizenship” (2006) 31 European Law Review 613.

²¹ Latest figures indicate that there are 15.013 million unemployed individuals in the Euro area. “May 2009: Euro area unemployment up to 9.5% EU27 up to 8.9%” (97/2009 - 2 July 2009). The Euro area (EA16) seasonally-adjusted unemployment rate was 9.5% in May 2009, compared with 9.3% in April: <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home> (visited 14 July 2009).

²² The job of the first applicant was simply “lost” in the words of the Advocate General and in the case of the second, his employer ran into financial difficulties. The benefit was retrospectively withdrawn in the case of the second applicant.

employment.²³ The benefits withdrawn in the proceedings would not have been withdrawn if the applicants were illegal immigrants and not EU nationals in the host State.

The referring Court in Germany, the Sozialgericht in Nürnberg, had questioned the compatibility of Article 24(4) of the Directive, in conjunction with Article 12 EC and Article 39 EC, as well as the legality of the operation of the national provisions, mooted by Dougan previously to be something that only a “brave court” would consider doing.²⁴ The referring Court also questioned the validity of the reverse discrimination rules.

Opinion of the Advocate General

Advocate General Ruiz-Jarabo Colomer in his Opinion²⁵ began by noting that the uncertainty giving rise to the preliminary reference was derived from the judgment of the Court of Justice in *Collins*, stipulating that job-seekers exercising free movement had to demonstrate a “link” with the host State in order to have access to social assistance, whilst Article 24(2) of the Directive prohibited the granting of assistance to such individuals. As a preliminary matter, Advocate General held that the applicants were workers protected by Article 39 EC, given that the short duration of the employment relationship was not determinative as regards the scope of Article 39 EC, relying on the decision of the Court of Justice in *Ninni Orasche*,²⁶ where the Court had found employment lasting two and a half months to suffice for the purposes of Article 39 EC. In the event that they were not workers within the meaning of Article 39 EC, Article 24(2) of the Directive arose for consideration.

The Advocate General noted that Article 24(2) of the Directive was ambiguous in the case of work seekers as to the minimum period of residence in considering the legality of the withdrawal of social assistance after three months, in contrast to students and that the objective of the assistance had to be analysed in accordance with its results. The referring Court had suggested two time frames as applying to the derogation in Article 24(2): an unlimited time frame, i.e. that social assistance was never possible from the express wording of the Article 24(2) or alternatively, an implied period of time- i.e. after 5 years, in light of the textual limitations applying to students, which would apply by implication to work seekers. He held that:

“Neither of those two interpretations is convincing. The first fails to convince, because it obviously contradicts *Collins*...The second, because it would not make

²³ Under the German rules, foreign nationals who entered the country to obtain social assistance or whose right of residence arose solely out of the search for employment, had no right to social assistance benefits: *Sozialgesetzbuch XII*.

²⁴ Dougan “The Constitutional Dimension to the Case Law on Union Citizenship” (2006) 31 *European Law Review* 613, 630. Although, Article 24(2) was upheld, *obiter*, by the Court of Justice in Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of 18 November 2008, nyr, at para. 55. See the discussion below section 5.4.

²⁵ Opinion of Mr Advocate General Ruiz-Jarabo Colomer, delivered on 12 March 2009.

²⁶ Case C-413/01 *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187. The Advocate General in *Vatsouras & Koupatantze* described the applicants as having “short-lived” and “low paid” work.

sense for the directive to make a distinction between ... students and the status of persons seeking employment...”²⁷

He also made the important assertion that there could be social assistance measures “as contemplated in Article 24(2),” that promoted integration into the labour market.²⁸ The Advocate General agreed with the submission of the Council that the provision at issue did not provide a rigid criterion for determining the existence of the “link” to the host State required by *Collins* and that it was for the Court of Justice to decide whether the national approaches complied with the Treaties and the Directive.²⁹ He held that it was for the referring Court to assess whether the assistance claimed served that purpose, but he noted the full name of the agency the subject of the dispute was an agency charged with the reintegration of individuals into the labour market, which suggested that the benefit at issue was work-related.³⁰

There was a significant difference, the Advocate General held, between the applicant in *Collins*, who had to demonstrate a link with the host State to obtain an allowance having been absent for 17 years, and the applicants who had gone to Germany and rapidly found work. Moreover, the Advocate General held that they were in a better position to secure work as they had previously been in “gainful employment.”³¹ Thus the facts indicated that the applicants had a “link” within the meaning of *Collins* to the host State and the employment market, between being previously employed and having a chance at finding new work, and thus it was “difficult to regard them as ordinary job-seekers.”³² The Advocate General held that legislation was contrary to Article 39 EC which denied EU workers access to social assistance benefits when after working for less than a year, they were unemployed and registered with an employment office, although it was not clear whether they had in fact registered, which if they had, rights would have accrued to them pursuant to Article 7 of the Directive.³³

Judgment of the Court of Justice

By way of preliminary observations, the Court held that although the referring court had based its reference on the premise that the applicants were not workers within the meaning of Article 39 EC, on account of the short duration of the employment, the Court held, reciting its formulaic case law,³⁴ that the fact that the income from employment was lower

²⁷ Para. 54.

²⁸ Author’s emphasis, at para. 57.

²⁹ Para. 55.

³⁰ “Arbeitsgemeinschaft,” meaning “Job Centre”: para. 58.

³¹ Para. 63.

³² Para. 63.

³³ Article 7(3)(c):

“[The work seeker]... 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 jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months.”

³⁴ Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121; Case C-228/07 *Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* Judgment of 11 September 2008, nyr; Case

than the minimum required for subsistence, did not prevent a person from being regarded as a worker within the meaning of Article 39 EC.³⁵ The Court held that while the assessment of whether the applicants had retained the status of workers was for the national court, the applicants would have had the right to benefits for a period of at least six months had they been workers, subject to the conditions as set out in Article 7(3)(c) of the Directive.

The Court held that, citing the literal text of Article 24(2), that States were “not obliged to confer entitlement to social assistance on, among others, job-seekers for the longer period during which they have the right to reside there.”³⁶ The Court held that it was legitimate for a Member State to grant an allowance only after it was possible to establish a real link between the work seekers and the labour market, placing an emphasis on the importance of the benefit in facilitating access to the labour market and relying upon its previous decision in *Collins*.³⁷ Following the lead of the Advocate General, the Court held that the objective of the benefit had to be analysed according to its results and not its formal structure. The Court held that:

“A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.”³⁸

The Court held that the derogation in Article 24(2) of the Directive had to be interpreted in accordance with Article 39(2) EC and that benefits of a financial nature, independent of their status under national law that would facilitate access to the labour market, could not constitute social assistance within the meaning to the Directive, thereby upholding the validity of Article 24(2).³⁹ As to whether Article 12 EC precluded national rules which excluded nationals of Member States from social assistance benefits granted to illegal immigrants, the Court held without more, employing a rigidly literal reading of the text, that it did not preclude reverse discrimination in favour of non-EU nationals.⁴⁰

Comment: *Work seekers allowance and social assistance*

That the proceedings were disposed of by a short opinion of the Advocate General and a brief decision of the Third Chamber of the Court (and not a Grand Chamber), with few interventions from Member States, indicates perhaps the perceived significance of the case, although it is suggested here that its application of the Treaty to the Directive may be of greater consequence than first appearances. The disinclination of States to intervene in such preliminary reference proceedings may reflect the *ennui* of States towards the emerging socio-economic rights caselaw from the last decade of the Court that is heavily fact-

344/87 *Betray v Staatssecretaris van Justitie* [1989] ECR 1621; Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035.

³⁵ Para. 28 of the Decision of the Court.

³⁶ Para. 35

³⁷ Para. 40.

³⁸ Para. 43.

³⁹ Para. 45.

⁴⁰ Dautricourt & Thomas “Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?” (2009) 34 *European Law Review* 433.

specific.⁴¹ A longstanding limb of this socio-economic rights jurisprudence is the protection of work seekers. For important social policy reasons not always articulated explicitly by the Court, since the now infamous decision of the Court of Justice in *The Queen v Immigration Appeal Tribunal, ex parte Antonissen*,⁴² the Court has held that a work seeker may constitute a “worker” for the purposes of Article 39 EC. As is well-known, in *Antonissen*, the Court of Justice had upheld as reasonable a six month period of residence provided for by UK legislation to seek work, with the right to search for work even after that period, provided that there was evidence of the individual continuing to seek employment and having a genuine chance of being engaged in employment.⁴³

Moreover, a work seeker is now a protected species under the Directive pursuant to Article 14 thereof and the Directive does not specify a particular time period for this in Article 14, which also prevents the expulsion of a job seeker for their activities *qua* job seeker, outside, as they are, of the working economy. Pursuant to Article 7 thereof, where an individual who has exercised their free movement to come to the host State for less than a year becomes involuntarily unemployed, they have pursuant to the Directive a right of residence for no less than six months and they retain the status of worker.⁴⁴ Traditionally, a work seeker could not enjoy access to social advantages in the same way as workers,⁴⁵ a line of case law that was changed by *Collins*, discussed below, where Article 18 EC operated to the benefit of the applicant so as to permit them ostensibly to have recourse to social assistance.⁴⁶ Many Member States fail to give effect to a right to benefits when unemployed, instead treating citizens of the Union who are in this situation as if they were new arrivals.⁴⁷

⁴¹ Arnall *The European Union and its Court of Justice* (2nd ed., Oxford, 2006) at 529:

“Moreover, the immediate consequences of several of its decisions have perhaps been limited...in *Grzelczyk*, the claimant was in the last year of his course; the personal circumstances of the claimants in *D’Hoop* and *Bidar* were probably atypical; the claimants in *Baumbast and R* and *Zhu* were self-sufficient. Be that as it may, the cumulative effect of the caselaw has been to impose significant new burdens both procedural and substantive on the Member States.”

⁴² Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I I-745.

⁴³ Or to describe the rules in *Antonissen* negatively, pursuant to the Immigration Act 1971, Statement of Changes in Immigration Rules (HC169), adopted pursuant to Act of 1971, a national of a Member State could be deported if, after six months from admission to the United Kingdom, he had not yet found employment or was not carrying on any other occupation.

⁴⁴ All EU citizens have a right of residence in a host State for up to 3 months irrespective of whether they are economically active, pursuant to Article 6 Directive 2004/38/EC, with certain conditions, Pursuant to Article 7 thereof, a right of residence accrues to citizens for more than 6 months and less than 5 years *inter alia* to workers and the self-employed so long as sufficient resources and medical insurance are held. A further right of residence applies pursuant to Article 16, according permanent residence where the citizen has acquired 5 years continuous residence.

⁴⁵ Case 316/85 *Centre public d'aide sociale de Courcelles v. Lebon* [1987] ECR 2811.

⁴⁶ Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703. See Golyner “Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity” (2005) 30 *European Law Review* 111; Oosterom-Staples “Annotation” (2005) 42 *Common Market Law Review* 205.

⁴⁷ Also, in a recent report on the implementation of Directive 2004/38/EC, Carrera & Atger, *supra* fn. 17, (at para. 2.2.4.2) outline how the “the criterion not to represent an “unreasonable burden” have been implemented in very different ways at national level,” another indicator of fractious acceptance of social solidarity.

Article 24 of the Directive, whilst providing for equal treatment, explicitly provides that Member States do not have to extend the value of equal treatment to social assistance for work seekers. This important derogation is contained in Article 24(2), as follows:

“1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty [...]

2. By way of derogation from paragraph 1, the host Member State *shall not be obliged* to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)

...⁴⁸

The language used in the derogation contains mandatory legislative language: “shall”, as opposed to discretionary terminology, such as “may,” underscoring the obligations or lack thereof on the States. Article 24(2) is, however, to be read subject to other provisions of the Directive that would prevent expulsion for reliance on the social welfare system in Article 14 thereof referred to above,⁴⁹ as well as Recital 21 of the Directive which provides that, employing discretionary language indicative of State choice:

“... it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens ...”

The inherent contradictions in these provisions are on the one hand extraordinary but on the other hand, simply reflect the divergent views in Member States as to the appropriate level of social solidarity to be applied in any context, a fuller consideration of which is outside of the scope of this review.⁵⁰ A recent comparative study has outlined the conflicting transposition of the equal treatment principle enshrined in Article 24 and the derogation clause across the Member States, reflecting this divergence of views.⁵¹

Permissible Work Seekers Assistance v. Prohibited Social Assistance: Interpretative legitimacy

The Advocate General in his Opinion made an important assertion, to the effect that there were certain social assistance measures, as contemplated in Article 24(2) that would promote integration into the labour market. It is submitted here then that it is this fine line between social assistance *simpliciter* and work seeker assistance the Court ultimately fails to distinguish with force despite its importance to the interpretation of the Directive.⁵² There is

⁴⁸ Emphasis supplied.

⁴⁹ Article 14(4)(b). If they have recourse to social assistance, expulsion cannot be the automatic consequence thereof Article 14(3). See generally, Van der Mei *Free Movement of Persons within the European Community: Cross Border access to Public Benefits* (Oxford, Hart, 2003); Minderhooud “Access to Social Assistance Benefits and Directive 2004/38” in Guild, Groenendijk and Carrera eds., *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009).

⁵⁰ See above fn. 12.

⁵¹ Carrera & Atger *supra* fn. 17.

⁵² Para. 57.

a major issue as to interpretative legitimacy where Article 39 EC forms the textual basis for the differentiation but not Article 18 EC, inexplicably, despite the earlier decision in *Collins*. No reference is made to the impact of Article 18 EC on the Directive with respect to this distinction. The Advocate General described as “ambiguous” the absence of a time period in the Directive, particularly in Article 24, attaching to work seekers in respect of the period of time sufficient to “constitute a ‘link’” with the host State in order to obtain benefits. The “link” of course refers to the development in *Collins*, discussed below, where the Court employed the weaponry of Articles 12, 18 and 39 EC to uphold legislation requiring “links” with the host state so as to obtain work Seekers Allowance. In neither the decision of the Court nor the Opinion of the Advocate General in *Vatsouras & Kouptantze* is the invalidity of this “link” approach confronted with, in light of the express wording of Article 24(2) which precludes the payment of such assistance.

The assertion by the Court in *Vatsouras & Kouptantze*⁵³ that host States are not obliged to provide social assistance to work seekers for the *longer period* during which they have the right to reside in a host State, pursuant to the literal wording of Article 14 while also confirming *Collins*, appears misleading. This is because the judgment of the Court would suggest that work seekers are entitled to social assistance for a *shorter period*, which is *not* in fact what the Court ultimately decides, but rather that social assistance does *not* include job seeker benefit by way of a literal interpretation of the Directive. The earlier decision of the Court in *Collins*, that exceeded the explicit parameters set by the Community legislature in Article 24(2), was central to *Vatsouras and Koupatantze* and was the subject of confirmation by the Court of Justice there despite the result reached, thus warranting closer consideration.

Examples of Article 18 EC “proofing” the Citizens Rights Directive: Collins & Metock

By way of background, the facts of *Collins*⁵⁴ concerned an Irish-US national seeking employment in the UK and the question of his entitlement to job seekers allowance. *Collins* arose temporally prior to the Directive and the enactment of Article 24.⁵⁵ Collins was a worker previously in other countries for seventeen years and had only previously worked casually in the UK. After seventeen years absence, he then returned to the UK and sought a for job seekers allowance. As he was not a UK national or resident of the UK, the allowance was conditional on his satisfaction of a “habitual residence” requirement for an “appreciable period of time”, a requirement which he could not satisfy on account of his time spent abroad. The Court of Justice held that those seeking employment fell within scope Treaty and that Citizenship entailed that it was no longer possible pursuant to Article 39(2) EC to exclude from the scope of the Treaty benefits of a financial nature that would facilitate access to employment in a host State, focussing on the procedural conditions for the award. However, while equal treatment was significant as a concept, such rights did not continue indefinitely. The Court held that, in introducing the now crucial “link” requirement:

⁵³ Para. 45 of the Decision of the Court.

⁵⁴ Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703.

⁵⁵ The referring Court requested a preliminary ruling as to the application of Regulation (EEC) 1612/68 and Directive 68/360/EEC to the Jobseekers Act 1995 and regulations thereunder.

“[i]t may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State...

The existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question.”⁵⁶

The Court held that any residence requirement had to have clear criteria, with redress for those seeking to question its interpretation.⁵⁷ The Court held that such requirements were not precluded so long as they could be objectively justified, with the Court relying on Article 39 EC in conjunction with Articles 12, 17 and 18 EC in this regard. Thus while *Collins* was lawfully resident in the host Member State and claiming a benefit that fell within the material scope of EC law, equal treatment with nationals of the host State did not follow automatically.

The controversy that arose after *Collins* concerned the fact that the decision of the Court went further than the newly enacted and now transposed Article 24(2) of the Directive,⁵⁸ which explicitly provided that a Member State was *not* under an obligation to grant social assistance to work seekers. Arguably, the Court in *Collins* then had Article 18 EC “proofed” the Directive, insofar as its reliance on Article 18 EC went beyond the literal text of the Directive, thereby ensuring a more favourable reading of its terms.⁵⁹ It must be said that *Collins* was particularly fact-specific in that the applicant was only related to the employment market tangentially, outside of the work place as he was for so long, unlike the applicants in *Vatsouras & Koupatantze*, who would more readily have fallen under the rubric of Article 39 EC, despite their limited activities.⁶⁰ Citizenship is not a feature of *Vatsouras & Koupatantze*⁶¹ and the Court there gives *Collins* what can only be described as a particularly narrow reading in terms of outcome, in light of its decision on the definition of social assistance, despite passages in the decision of the Court that might have suggested to the contrary.⁶² Even though the Advocate General was prepared to admit that social assistance could include benefits linked with integrating an individual back to the labour

⁵⁶ Para. 69-70.

⁵⁷ Para. 72.

⁵⁸ Since 30 April, 2006.

⁵⁹ As Barnard (*The Substantive Law of the EU: The Four Freedoms* (2nd ed., Oxford, 2007) states (p. 300):

“orthodox tenets of the Court’s earlier case law... must now be read subject to a “citizenship” interpretation. However, the Court’s approach to the Treaty provisions in *Collins* sits uncomfortably with Article 24(2) CRD, which provides that Member States are not obliged to provide social assistance during the citizens first three months of residence or longer...”

Oosterom-Staples “Annotation” (2005) 42 Common Market Law Review 205, who questioned as to whether the decision in *Collins* had a “sell by date,” in light of the fact that it was inconsistent with the text of the Directive; see also Currie “The Transformation of Union Citizenship” in Dougan & Currie eds., *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing, Oxford, 2009) 365, at 378: “*Collins* provides one of the most palpable examples of principles developed under the citizenship provisions impacting on economic free movement rights...”

⁶⁰ Rather, the applicant in *Collins* was classified by the Court as a national of a Member State looking for his first job in another Member State on account of his absence of connection with the UK: para. 29.

⁶¹ Except in a brief mention, without a reference to the text of Article 18 EC: see para. 37.

⁶² See the reference to citizenship in para. 37 and the emphasis on the “link” requirement in para. 39 of the decision of the Court.

force, the Court in *Vatsouras and Koupatantze* seizes upon the condition of the German rules, that the individual beneficiary of the benefit had to be “capable of earning a living,”⁶³ so as to render the decision one relating to Article 39 EC. However, in this case the importance of “capacity” is surely far more tangential in terms of rendering the benefit “work-related” when contrasted with that at issue in *Collins*, where a far more particular condition was attached to the UK job seekers allowance.⁶⁴ If anything, the German rules at issue were far broader and of more general application than those at issue in *Collins* and the confirmation of *Collins* by the Court in *Vatsouras and Koupatantze* surely represents a “reading down” of the earlier case. Dougan had commented after *Collins* that:

“One [felt] entitled to assume that other welfare benefits- not specifically linked to the work seekers desire to participate in the host states labour market- should also be caught by the combined effect of Arts 39 and 12 EC. Nevertheless, it would take a brave court indeed simply to strike down as invalid the proposed reversal of its case law now contained in Art 24.(2) Directive 2004/38.”⁶⁵

The context of the Directive has radically changed since the date of Dougan’s remarks, given that *Metock* subsequently pitched the Court of Justice against national legislatures reacting to its caselaw,⁶⁶ thereby Article 18 EC proofing the Directive and resulted in a dramatic change in position in the form of *Metock*. The facts and legal background of *Metock* will be briefly recounted here in light of its importance to the context of the matters under discussion. Despite the introduction of the Citizens Rights Directive,⁶⁷ European Union law had been silent on key issues as to the entry and residence rights for Third Country National spouses of Union citizens. A major issue raised by the recent decision of the Court of Justice (Grand Chamber) in *Metock*,⁶⁸ a referral from the Irish High Court, was as to whether national law or secondary Community law governs such entry and residence requirements, in light of the *Akrich*⁶⁹ decision of the Court, where the requirement for third country national spouses of Union citizens of having a “prior lawful residence” in another State prior to entry to the host State was first introduced.

The Irish High Court in *Metock* was faced with several third country national spouses of Union citizens who were refused residence in Ireland on account of their absence of “prior lawful residence” in another EU State.⁷⁰ The judgment of the Court of Justice, delivered

⁶³ Para. 7(1) SGB II, para. 43 of the Decision of the Court.

⁶⁴ The Job Seekers Allowance Regulations defined a ‘person from abroad’ as: “ ... a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland...” and such a person was precluded from obtaining the benefit.

⁶⁵ Dougan fn. 20 above, at. 630.

⁶⁶ I.e. in *Akrich*, above.

⁶⁷ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁶⁸ C-127/08 *Metock & others v. Minister for Justice, Equality & Law Reform*, judgment of 25 July 2008, nyr; Opinion of Advocate General Maduro, 11 June, 2008. See Costello “*Metock*: Free Movement and “Normal Family Life” in the Union” (2009) 46 Common Market Law Review 58; Fahey “Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*” (2008) 36 Legal Issues of Economic Integration 83.

⁶⁹ Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

⁷⁰ The (Irish) European Communities (Freedom of Movement of Person) Regulations, 2006 purported to transpose the Directive into Irish law and the “prior lawful residence” requirement from *Akrich*.

pursuant to the accelerated reference procedure,⁷¹ acknowledged that no provision of the Directive made its application to family members of a Union citizen conditional on previous residence in another Member State and in an unusual and explicit breach of precedent,⁷² held that the “prior lawful residency” requirement introduced in *Akrich* had to be “reconsidered” and that the benefit of such free movement rights to the family members and dependants could not now depend on such a condition. Rather, the Court held that the Community legislature was competent to regulate this issue and that the timing of a marriage or place of establishment of a citizen and their family was irrelevant. The importance of the *Metock* decision cannot be underestimated in terms of its constitutional re-enforcement of the centrality of free movement and its efforts to Article 18 EC “proof” the Directive.⁷³ The Irish State lobbied unsuccessfully after *Metock* for an amendment to the Directive.⁷⁴ A fuller recitation of the extensive caselaw on the boundaries of Article 18 EC is outside of this work, but is important to recount, as is commonly known, that the *Martinez Sala* decision concerned the rights of a non-economically active citizen and marked the beginnings of a historic new era of caselaw for the Court of Justice.⁷⁵ Equally, *Metock* reaffirms the importance of citizenship as a constitutional construct and the far-reaching values of truly free movement within the boundaries of the Union, that the Directive seeks to uphold and promote.

Arguably the combined effect of *Collins* and *Metock* is to suggest that Dougan’s assertion above, that to test Article 18 EC as against Article 24(2), would need courage or bravado, should now be more of a reality than ever before. Yet *Vatsouras and Koupatantze* still places enormous emphasis on the importance of being a worker, even in proceedings where a collection of legal bases are impugned, chief among them the Directive but not Article 18 EC despite the fact that the Greek nationals were exercising their free movement and relying on derived Citizenship rights pursuant to the Directive, particular questions of the material and personal scope of Article 18 EC aside.⁷⁶ The decision of the Court of Justice in *Vatsouras and Koupatantze* appears to wholly endorse the outcome in *Collins*,⁷⁷ that is noted by most commentators as going beyond the Directive albeit which was not then in force at the time of *Collins*. *Collins* defied the wording of the Directive because of the use of Article 18 EC and yet the outcome of *Vatsouras and Koupatantze* is entirely dependent on conclusions drawn as to Article 39(2) EC, unfettered by the application of Article 18 EC. Not merely does the decision of the Court lack analytical consistency in this regard, it appears to omit key legal provisions.

⁷¹ The speed of which has been the subject of some critique, for example, Editorial, “Speeding up the Preliminary Reference Procedure- fast but not too fast” (2008) 33 *European Law Review* 617.

⁷² Only *Keck* is perhaps comparable in terms of this dramatic about-turn: Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

⁷³ Although the decision has been criticised for its excessively speedy delivery: Currie “Accelerated justice or a step too far? Residence rights of non-EU family members and the court’s ruling in *Metock*” (2009) 34 *European Law Review* 310.

⁷⁴ See *The Irish Times*, September 22, 2008. See the European Commission guidelines published as a result, however, of these lobbying efforts: above fn. 17.

⁷⁵ Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691; see in particular, O’Leary *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law, The Hague, 1996); Jacobs “Citizenship of the European Union- A Legal Analysis” (2007) 13 *European Law Journal* 591.

⁷⁶ Considered below section 5.5.

⁷⁷ In para. 37 thereof.

The Relationship between Directive and Treaty in the caselaw

At the root of the issue then here is specifically the relationship between the Directive and the Treaty. Jacobs⁷⁸ has summarised the three different techniques used by the Court of Justice to employ European Union citizenship as being either (a) to broaden the scope of the non-discrimination principle, (b) to broaden the scope of the non-discrimination principles in the context of the market freedoms and (c) as an independent source of rights. It is the second of these techniques that is the subject of analysis here. Barnard has stated that, as between the Directive and the Treaty:

“the [Directive] fills in some of the interstices between the Treaty provisions but its coverage is far from complete. For this reason, litigants will inevitably invoke Article 18 (1) in the hope that it may offer great protection than the Directive [...] the Court has in the past been prepared to make creative use of the concept of Union citizenship to ensure that it is “not merely a hollow or symbolic concept.”⁷⁹

In the wake of *Collins*, it had also been contended that “[Article 24(2)] is also likely to be accepted as a valid limited or condition pursuant to Art. 18 EC sufficient to oust the application of Art. 12 EC and if necessary in turn to roll back the new found scope of Art. 39 EC,”⁸⁰ a prophecy which now does not reflect the caselaw. Apart from the decisions of the Court in *Collins* and *Metock*, there are only a small number of cases relevant to the precise question under discussion of how Article 18 EC applies to the Directive and none of which of entirely on point, in that the Court has yet to conclusively or directly address the point. Firstly, the decision of the Court in *D’Hoop*,⁸¹ concerned a tideover allowance for young people who had just completed their education that was tested as against Articles 12 and 18 EC, but not Article 39 EC as, the Court expressly stated, the applicant was a first-time worker.⁸² *D’Hoop* was a Belgian national who had completed her secondary education in France and was refused a tideover allowance on the basis that she had not received her secondary education in Belgium. The Court held that:

“[i]t is important to note that the main proceedings do not concern the recognition of Community law rights allegedly acquired before the entry into force of the provisions on citizenship of the Union, but relate to an allegation of current discriminatory treatment of a citizen of the Union ...”⁸³

The Court gave a strong reading to Articles 12 and 18 EC and not Article 39 EC and the absence of Article 39 EC to the decision entails that that *D’Hoop* is *sui generis*, straddling categories of individuals protected by the Directive, i.e. students and work seekers and for this reason has a different precedential value than *Collins*. The Court in *D’Hoop* thus makes

⁷⁸ Jacobs “Citizenship of the European Union- A Legal Analysis” (2007) 13 European Law Journal 591, 593. *Collins* and *Ioannidis* are suggested by Jacobs to be examples of the second approach, (b), where the Court has been seeking to establish an appropriate balance between competing interests.

⁷⁹ Barnard *The Substantive Law of The EU: The Four Freedoms* (2nd ed., Oxford, 2007), 445.

⁸⁰ Dougan fn.20 above, at 630.

⁸¹ Case C-224/98 *D’Hoop v Office national de l’emploi* [2002] ECR I-06191.

⁸² Para. 18 of the Decision of the Court.

⁸³ At para. 37.

no meaningful assessment of the relationship between Article 39 EC and Article 18 EC. In the subsequent decision of the Court in *Ioannidis*,⁸⁴ however, concerning again a tideoever allowance for young people seeking their first employment, a Greek national there seeking their first employment who was refused work seekers allowance in Belgium as he had completed his secondary education outside of Belgium, received a strong reading of Article 39 EC in contrast to *D’Hoop*.⁸⁵ The Court decided the case entirely on the grounds of Article 39 EC despite *inter alia* Article 18 EC being relied upon, holding somewhat tersely that “[h]aving regard to the aforementioned considerations, it is not necessary to rule on the interpretation of Articles 12 EC, 17 EC and 18 EC.”

In the more recent decision of *Förster*,⁸⁶ a German national training to be a primary school teacher in the Netherlands was granted a maintenance grant as a “worker,” but treated like a Dutch student as to grants. Under Dutch law, five years uninterrupted residence was required so as to obtain the grant by way of proof of one’s “integration into society”. The decision to award her a grant was later annulled and withdrawn, on the basis that she was no longer a worker and was not integrated into Dutch society. The Court of Justice held that the conditions of the grant were neither disproportionate nor legally uncertain, construing in the main Regulation (EEC) 1251/70 (and not the Directive)⁸⁷ and considering Articles 12 and 18 EC in its decision. The Court upheld, albeit indirectly and *obiter*, the validity of Article 24(2) of the Directive by remarking on its contents, but noting that it was not applicable to the facts in the case. The Court in its decision also placed reliance on *Collins* but only as regards the *procedural* conditions for the award of a grant.⁸⁸ *Förster* is remarkable perhaps for the *obiter* consideration of Article 24(2), in a judgment that considers the application of Article 18 EC extensively throughout.⁸⁹ While some commentators have suggested that irrespective of its terse wording, there is nothing in particular, in the judgment of the Court in *D’Hoop* to indicate that the Court regarded the status of citizenship to be secondary to that of a worker or job seeker,⁹⁰ there is a developing curiosity to the approach of the Court warranting clarification after *Collins* and *Vatsouras and Koupatantze* as to how Article 18 EC and 39 EC should interact. Between the opinion of the Advocate General and the decision of the Court in *Vatsouras and Koupatantze*, Article 18 EC appears to have been veritably “lost in translation” and its absence may be questioned, given that the use of Article 39 EC here is strained to find that the benefit is a work-related benefit and not social assistance *simpliciter*.⁹¹

⁸⁴ Case C-258/04 *Office national de l’emploi v Ioannidis* [2005] ECR I-8275.

⁸⁵ The applicant here was a registered job-seeker but the difference between *D’Hoop* and *Ioannidis* is difficult to discern otherwise. The applicant was clearly seeking his first employment: para. 19 of the Decision of the Court.

⁸⁶ Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of 18 November 2008, nyr.

⁸⁷ Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.

⁸⁸ Referring to para. 56 and 65 of *Collins*.

⁸⁹ *Förster* is not cited by the Court in *Vatsouras and Koupatantze*.

⁹⁰ Craig & De Burca *EU law: Texts, Cases and Materials* (4th ed., Oxford, 2007) p. 848.

⁹¹ The caption of the judgment headnotes in *Collins* and *Vatsouras and Koupatantze* place European citizenship at the beginning and end of the caption respectively—a baffling metaphor perhaps of where EU law stands as to the free movement of workers, persons and citizens and the Directive.

Certain elements of the caselaw of the Court of Justice as to the free movement of persons and workers are static and the Court has remained wedded to the “wholly internal rule” notwithstanding the introduction of citizenship.⁹² However, the boundaries of the new fifth freedom are in flux given that, as Spaventa suggests, the traditional application of Article 18 EC, involving analysis of its personal and material scope both to the individual and to the particular situation involved in the dispute, is increasingly overlooked in the jurisprudence of the Court.⁹³ If the caselaw of the Court of Justice has reached a point where the absence of free movement in the fact matrix of the proceedings now does not disentitle the litigant from the benefits of Article 18 EC,⁹⁴ perhaps Article 39 EC, 18 EC and the Directive are conjointly in turmoil. How can litigation about the Directive not raise Article 18 EC? Why should social assistance be narrowly construed by reason of pleadings omitting Article 18 EC, though essential to the claim? If Article 18 EC has been held to be directly effective since the decision of the Court in *Baumbast*⁹⁵ and is capable of being relied upon by litigants, the precise boundaries of the operation of the Article 18 EC here are now mired in excessive complexity also where the Directive is concerned.

Conclusion

The new “fifth freedom” has had a significant impact on litigation affecting persons, workers and citizens but its cumulative impact on existing freedoms and the Directive remains unexplored by the Court in an explicit fashion. The validity of the approach of the Court in *Collins* to Article 24(2) of the Directive has not been adequately addressed and the explanation that the Court was “proofing” the Directive by way of a favourable reading of Article 18 EC there, is difficult to accept after *Vatsouras and Koupatantze*. Despite the conclusions reached by the Court in *Vatsouras and Koupatantze*, the line between work seekers allowances and minimum income support is now subject to legal whitewash and the narrow reading of “social assistance” there is problematic, particularly in light of the decisions of the Court in *Collins* and *Metock*. In many countries, the distinction that the Court attempts to draw is certainly valid but would reflect social insurance contributions made by the applicants as regards the level of benefit that would qualify for.⁹⁶ In a cross-border situation of the migrant worker, surely such a distinction has less validity subject to *Collins*. The decision in *Vatsouras and Koupatantze* is bound to generate much litigation, particularly in a Europe of rocketing unemployment coping with global financial challenges.

⁹² Nic Shuibhne, “Free Movement of Persons and the Wholly Internal Rule: Time to Move on?” (2002) 39 Common Market Law Review 731; Spaventa, “Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects” (2008) 45 Common Market Law Review 13; Costello “*Metock*: Free Movement and “Normal Family Life” in the Union” (2009) 46 Common Market Law Review 587, 592.

⁹³ Spaventa *supra*, p. 17. In *Garcia Avello*, the Court held that material scope of the Treaty was not broadened by Article 18 EC. However, as Spaventa notes, reliance on Article 17 EC alone by the Court, where migration is not mentioned, may have justified a widening of the scope of citizenship (p. 22). The effect of the citizenship provisions are to broaden considerably the personal scope of the Treaty in that for the first time static citizens acquire general Community law credentials.

⁹⁴ See Spaventa and Costello, above fn. 90, considering Case C-353/06 *Grunkin and Paul*, Judgment of 14 October 2008, nyr; Case C-148/02, *Garcia Avello v. État Belge* [2003] ECR I-11613.

⁹⁵ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

⁹⁶ In Ireland, job seekers allowance differs from job seekers benefit, in that the latter is a reduced sum that is means tested and reflects or is relative to previous social insurance contributions made.