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The Common Market for International Students: Does a Right to Free Movement and Equal Treatment for Students Exist in the European Union?

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The market for international students in Europe is a lucrative one. Although there is no express free movement of students in the Treaty on the Functioning of the European Union ("TFEU"), the European Court of Justice ("ECJ") has combined, through its jurisprudence, several provisions of European Union ("EU") law to create a de facto right of free movement and equal treatment for citizens as they cross member-state borders seeking a higher education. Articles 18, 20, and 21 of the TFEU guarantee freedom of movement for citizens of the EU across member-state borders and freedom from discrimination based on nationality. Article 45 of the TFEU provides for the free movement of workers to pursue employment in other member-states so long as these workers are citizens of the EU. Article 49 of the TFEU gives EU citizens the right to pursue self-employment activities in another member-state. Regulation 1612/68 provides for equal treatment guarantees for migrant workers. These various provisions of EU law have been interpreted by the ECJ to grant free movement and equal treatment rights to students, but not on equal terms. The strongest rights for EU citizen-students is derived from the rights associated with free movement of workers which extends to both the worker and his or her children pursuant to Article 45 and Regulation 1612/68. Although the ECJ has held that member-state governments cannot treat citizens of other member-states differently in regard to tuition and admissions, the ECJ has left open the ability of member-states to require proof of integration and financial stability on the part of a migrating student that threatens the existence of free movement and equal treatment rights for students.

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I. INTRODUCTION

Education is a lucrative export.[1] The world's colleges and universities must be the first access and development point to prepare students for an interdependent world.[2] Today, colleges and universities are building international experiences for their students to help them achieve their academic and career goals.[3] The United Nations Educational, Scientific, and Cultural Organization defines the international mobility of a student as an action whereby a student has crossed a national border to study or is enrolled in a distance learning program abroad.[4] Higher education is a very important element to the social, cultural, and economic development of any country.[5] The

1. B.R., *Foreign Students: Not Welcome Here*, ECONOMIST (Oct. 9, 2012, 1:47 PM), http://www.economist.com/whichmba/foreign-students-not-welcome-here [hereinafter *Foreign Students: Not Welcome Here*].

2. Donald Vest, Lori Boyer & Charles Moses, *Internationalizing U.S. Colleges and Universities While Decreasing the Trade Deficit: The Positive Double Whammy*, 9 INT'L J. EDUC. RES. 177, 177 (Spring 2014).

3. Janet Hulstrand, *Strategic Portfolios: Developing and Managing a Varied Range of Education Abroad Programs*, INT'L EDUCATOR, Mar.- Apr. 2015, at 44.

4. Margaret A. Goralski & Ahmad Tootoonchi, *Recruitment of International Students to the United States: Implications for Institutions of Higher Education*, 10 INT'L J. EDUC. RES. 53, 54 (Spring 2015).

5. *Id.* at 61.

recruitment of international students in higher education is big business, and competitors in this endeavor are only likely to intensify their activities in all continents.[6] By one estimate, in 2030, over four hundred million students will be pursuing higher education around the globe.[7] Regardless of this high figure, there is significant competition in Europe among universities.[8] In order to keep up with this competition, colleges and universities are maximizing their resources to attract international students, despite overall declines in their operating budgets.[9] The world's colleges and universities often use their global network of alumni to recruit international students.[10] Countries in Europe are spending less on their universities and thus the attraction of foreign students is more important than ever.[11] American universities are no different in that they have worked to increase international student enrollment to help offset the decline in government funding.[12] Although it is clear that international students can certainly assist colleges and universities to make their finances more plentiful, there is some comment that an ethical issue exists in that international students pay higher fees and that global education should be a source of profit.[13] The condition in the European Union ("EU") is no different. Major higher education systems in the EU are likely to continue to expand.[14] The EU's twenty-eight member-states are investing in, and thus emphasizing, the ability of its citizens to acquire academic credentials.[15] Newer member-states of the EU, upon entry to the common market, have transformed their higher education systems to meet this challenge.[16]

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6. *Id.* at 57.

7. *Id.* at 55.

8. *Higher Education: Class Apart*, ECONOMIST (Mar. 19, 2016), http://www.economist.com/news/europe/21695002-growing-number-european-students-are-opting-pay-their-education-class-apart.

9. Rahul Choudaha, *Preparing to Recruit From Emerging Markets*, INT'L EDUCATOR, Jan.- Feb. 2015, at 52.

10. Dana Wilkie, *A Remarkable Resource – International Alumni*, INT'L EDUCATOR, May-June 2015, at 71.

11. *Higher Education: Class Apart*, *supra* note 8.

12. Douglas Belkin & Miriam Jordan, *Heavy Recruitment of Chinese Students Sows Discord on U.S. Campuses*, WALL ST. J. (Mar. 18, 2016, 10:18 AM), http://blogs.wsj.com/chinarealtime/2016/03/18/heavy-recruitment-of-chinese-students-sows-discord-on-u-s-campuses/.

13. Penny Enslin & Nikki Hedge, *International Students, Export Earnings and the Demands of Global Justice*, 3 ETHICS & EDUC. 107, 108 (Oct. 2008).

14. Marek Kwiek, *From System Expansion to System Contraction: Access to Higher Education in Poland*, 57 COMP. EDUC. REV. 553, 555 (2012).

15. Marianne Skardeus, *Building Connections Through Study Abroad – Mobility in Europe*, DELTA KAPPA GAMMA BULL., Winter 2010, at 43.

16. Pero Lucien & Snjezana Prijic Samarzija, *The Bologna Process as a Reform Initiative in Higher Education in Croatia*, 43 EUR. EDUC. 26, 27 (2011).

Potential international students are now rational consumers that will explore all domestic and international opportunities carefully.[17] When deciding whether to study abroad, international students generally make their decision based on destination.[18] More than 50% of all international students engage in studies in just five countries: including Australia, the United States, the United Kingdom, Germany, and France—the latter three of which are member-states of the EU.[19] Another leading factor in the decision process for international students is the level of financial support for students.[20] In Europe, much like the United States, primary and secondary education is heavily subsidized by the government but, unlike the United States, higher education is also heavily subsidized.[21] Given this reality, Europe will likely continue to be an attractive venue for international students given the high level of financial support for higher education on that continent.[22]

At one time, the use of Latin as a continental language unified Europe as well-versed students could move about what is now the EU without a language barrier as Latin was the language of instruction at most universities.[23] Despite that phenomenon from five hundred years prior, higher education institutions saw student mobility *double* during the first part of the twenty-first century.[24] European universities are now offering courses in English not only to unify the continent's higher education system, but also to attract foreign students.[25] There are several factors that affect an international student's mobility including: the availability of higher education, an institution's prestige, the value of an international degree, an institution's language policy, cultural similarity to the home state, levels of educational assistance, alliances between the home country and host country, security, and the level of academic freedom enjoyed by students in the host country.[26] Access to higher education credentials and employability, linked closely together, have also been cited as factors affecting international student mobility.[27] More nar-

17. Raul Caruso & Hans de Wit, *Determinants of Mobility of Students in Europe: Empirical Evidence for the Period 1998-2009*, 19 J. STUD. INT'L EDUC. 265, 270 (2015).
18. Hulstrand, *supra* note 3, at 44.
19. Caruso & de Wit, *supra* note 17, at 266.
20. Caruso & de Wit, *supra* note 17, at 278.
21. Philippe DeVille, Francois Martou & Vincent Vandenberghe, *Cost-Benefit Analysis and Regulatory Issues of Student Mobility in the EU*, 31 EUR. J. EDUC. 205, 206-07 (1996).
22. Caruso & de Wit, *supra* note 17, at 278.
23. Brigitte Mohr, *Europe as an Educational Community*, 30 EUR. EDUC. 92 (1998).
24. Caruso & de Wit, *supra* note 17, at 266.
25. *Foreign Students: Not Welcome Here*, *supra* note 1.
26. Caruso & de Wit, *supra* note 17, at 268-69.
27. Kwiek, *supra* note 14, at 555.

rowly, there is a known challenge associated with international student mobility in the ability of an employer to recognize credentials from a college or university located in another country.[28]

The international recruitment of students can assist the economies of EU member-states.[29] In addition to buffering a government's balance sheet, countries committed to attracting international students can solve problems associated with a dearth of qualified employees in some employment sectors necessary for economic growth.[30] There is comment that the global increase in the mobility of students has mirrored the developments in the liberalization of trade around the world, generally.[31] In fact, education is one of twelve services covered by the General Agreement on Trade in Services ("GATS").[32] As an example, the five Scandinavian countries have signed an agreement whereby public financial support follows the student to wherever he or she decides to study.[33] Regardless of the correlation to international trade, an international student wishing to cross political borders for an education can gain invaluable experience.[34] International students can benefit from studying in another member-state as they increase their international awareness.[35] Indeed, mixing international and domestic students helps both groups understand the globalized world.[36] As more students in the EU cross member-state borders for higher education, the student bodies of the EU's universities are likely to become more heterogeneous.[37] This, in turn, allows students to make relationships with domestic students that can last a lifetime, and students that have worked or attended university in another country are more likely to do business in that other country.[38] In order to attract workforce talent, some countries allow foreign students to stay in the country after graduation, without restriction.[39]

The EU has worked hard as an international organization to promote the internationalization of its higher education student body. The LEONARDO

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28. Ian M. Johnson, *The Impact on Education for Librarianship and Information Studies of the Bologna Process and Related European Commission Programmes – and Some Outstanding Issues in Europe and Beyond*, 30 EDUC. INFO. 63, 64 (2013).
29. Vest et. al, *supra* note 2, at 178.
30. Caruso & de Wit, *supra* note 17, at 270.
31. Caruso & de Wit, *supra* note 17, at 266.
32. Caruso & de Wit, *supra* note 17, at 266.
33. DeVille et. al, *supra* note 21, at 218.
34. Goralski & Tootoonchi, *supra* note 4, at 54.
35. Goralski & Tootoonchi, *supra* note 4, at 56.
36. *Foreign Students: Not Welcome Here*, *supra* note 1.
37. DeVille et. al, *supra* note 21, at 213.
38. *Foreign Students: Not Welcome Here*, *supra* note 1.
39. *Foreign Students: Not Welcome Here*, *supra* note 1.

program supports vocational training whereby students who desire experiences in other member-states can do so to learn other languages.[40] The ERASMUS program supports EU citizens who wish to study in another member-state with funds for travel expenses and basic student subsistence.[41] More specifically, ERASMUS promotes the mobility of students and faculty through exchanges created by agreements between universities.[42] To date, 90% of all European universities are part of the ERASMUS program, which has benefitted over two million students.[43] The TEMPUS program is designed to foster the modernization of universities in the EU, and this program has also been extended to non-EU member-states that maintain close ties with the EU.[44] The TEMPUS program also links European universities to the Trans-European Mobility Program for University Studies.[45] Perhaps the most noteworthy higher education program in the EU, the Bologna Process, aims to increase both internal and external mobility of students.[46] The Bologna Process has been credited with increasing the attractiveness of colleges and universities in the EU.[47] The Bologna Process was adopted in 1999 to promote the harmonization of the EU's educational institutions by, among other activities, creating a system for the mutual recognition of degrees and credits through the European Credit Transfer System.[48]

II. PROVISIONS OF THE TFEU APPLICABLE TO THE FREE MOVEMENT OF STUDENTS

There are several provisions of the Treaty on the Functioning of the European Union ("TFEU") cited by the ECJ that collectively create the right of students of EU member-states to pursue an education in other member-states. Articles 18, 20, and 21 often work together to provide free movement rights. Article 18 (ex 12, 6) expressly prohibits member-states from engaging in discrimination on account of a member-state citizen's nationality while provid-

40. Thomas Volker, *Living in Europe, Working for Europe: An Overview of the European Union's Education Programs*, 30 EUR. EDUC. 6, 8 (1998).

41. Johnson, *supra* note 28, at 69.

42. Johnson, *supra* note 28, at 69.

43. Skardeus, *supra* note 15, at 46.

44. Skardeus, *supra* note 15, at 46.

45. Siegbert Wuttig, *Help for Higher Education Institutions in Central and Eastern Europe: The Tempus Program is Promoting Reform and Student Exchange*, 30 EUR. EDUC. 89, 89 (1998).

46. Lucien & Samarzija, *supra* note 16, at 35.

47. Jean-Emile Charlier & Sarah Croche, *The Bologna Process: The Outcome of Competition Between Europe and the United States and a Stimulus to This Competition*, 39 EUR. EDUC. 10, 10 (2007).

48. Johnson, *supra* note 28, at 65-66.

ing the EU Parliament and EU Council authority to write legislation to enforce prohibitions against discrimination.[49] The TFEU grants EU citizenship through Article 20 (ex 17, 8), which acknowledges that any citizen of any member-state of the EU is also a citizen of the EU itself, while also providing that each EU citizen has the right to freely move and reside within the EU.[50] However, Article 21 (ex 18, 8a) of the TFEU serves as a check and balance against the unfettered ability to move throughout the member-states by citing that other provisions of the TFEU may provide limitations and other legislative acts may also provide limitations on the free movement of persons.[51]

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49. Consolidated Version of the Treaty on the Functioning of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326) 56 [hereinafter TFEU].

> 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. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Id.

50. TFEU art. 20.

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Id.

51. TFEU art. 21.

> 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

While Articles 18, 20, and 21 concern the free movement, citizenship, and anti-discrimination rights of individuals, they should not be confused with other provisions of the TFEU that also allow people to move freely throughout the EU. Article 45 (ex 39, 45) provides for the free movement of workers across the EU.[52] Specifically, Article 45 prohibits member-states from enacting barriers that would be considered discrimination based on nationality.[53] Furthermore, Article 45 allows workers to move freely across member-state boundaries in order to work and to live in the member-state in which work is sought.[54] However, it should be noted that Article 45 does not

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> 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
>
> 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

Id.

52. TFEU art. 45.

> 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.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) 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; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> 4. The provisions of this Article shall not apply to employment in the public service.

Id.

53. *Id.*

54. *Id.*

define the term "worker." The right of establishment is provided for in Article 49 (ex 43, 52).[55] More generally, the right of establishment allows a citizen of any member-state to move freely across member-state boundaries in order to establish a business entity, including for the purposes of self-employment.[56] Related to the absence of definition associated with Article 45, Article 49 does not define the term "self-employment."

The free movement of services is espoused by the TFEU in Articles 56 (ex 49, 59) and 57 (ex 50, 60). Member-states are not permitted to erect barriers to the free movement of services offered by citizens of the EU, and the EU legislative bodies may also extend the free movement of services provisions pursuant to Article 56.[57] Article 57 builds upon the TFEU's other provisions requiring the free movement of capital, persons, and goods by defining the term "services" to include activities that are of an industrial or commercial character, activities of craftsmen, and activities provided by professionals.[58]

Article 166 (ex 150, 127) of the TFEU is a federalist policy that requires the EU government to create a vocational training program that supports and supplements the work of the member-states in their vocational education pur-

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55. TFEU art. 49.

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Id.

56. *Id.*

57. TFEU art. 56.

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Id.

58. *Id.*

suits, but also gives each member-state the discretion as to how to craft vocational training programs.[59] Pursuant to Article 166, the vocational training objectives identified by the EU government and the member-states should allow for access to, and mobility of, both instructors and students as well as foster integration of the labor markets across the EU.[60]

III. PURPOSE OF THIS ARTICLE

The author wishes to accomplish three goals with this Article. The first goal of this Article is to provide the reader with a working understanding of the various provisions of the TFEU that collectively provide for the free movement of EU citizens as students across the member-states. Second, the author wishes to provide the practitioner with a framework of EU law that governs the free movement of students within the EU. Third, and most importantly, this Article will explore the ECJ's jurisprudence on the free movement of students to determine whether that jurisprudence truly allows citizens

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59. TFEU art. 166.

> 1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
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> 2. Union action shall aim to: - facilitate adaptation to industrial changes, in particular through vocational training and retraining, improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market, facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people, - stimulate cooperation on training between educational or training establishments and firms, develop exchanges of information and experience on issues common to the training systems of the Member States.
>
> 3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.
>
> 4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt measures to contribute to the achievement of the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States, and the Council, on a proposal from the Commission, shall adopt recommendations.

Id.

60. *Id.*

of the EU, who desire to be students in another member-state, the freedom to do so without limitations.

IV. CASE LAW OF THE ECJ ON THE SUBJECT OF FREE MOVEMENT OF STUDENTS

A. APPLICABILITY OF EUROPEAN UNION LAW TO EDUCATION AND FREE MOVEMENT

In *Casagrande v. Landeshaupstadt Munich*, the ECJ articulated that although the TFEU, as it stood in 1974, did not specifically address education, the TFEU does apply to educational practices.[61] Specifically, the ECJ held Regulation 1612/68, protecting the free movement of workers, to apply to children of migrant workers who desire the same educational benefits as their host-country's national peers.[62]

In *Casagrande*, a child of two Italian migrant workers, both of whom held Italian nationality, was denied an education grant to attend a secondary school-based apprenticeship program by the German government.[63] His situation did not meet one of three qualifications under German law for the grant which included that the applicant be of German citizenship, a stateless alien, or an alien who is eligible for asylum.[64] In essence, the ECJ stated that children of migrant workers who hold citizenship in another member-state must be able to participate in apprenticeship and professional training on the same level as those holding citizenship in the host member-state.[65]

The ECJ solidified its holding by examining the legislative history behind Regulation 1612/68, which it believed was designed to remove '"all obstacles . . . which stand in the way of the mobility of labour, in particular in relation to the right of the worker to have his family join him, and to the conditions for the integration of his family in the host-country."'[66] Additionally, the ECJ was particular in mentioning that this right of children, under Regulation 1612/68, extended to both education and available opportunities for training.[67] Moreover, the right extends to any member-state government's attempt at promoting education.[68]

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61. Case 9/74, Casagrande v. Landeshaupstadt Munich, 1974 E.C.R. 774, 775, 2 C.M.L.R. 423, 424.
62. Case 9/74, *Casagrande*, 1974 E.C.R. at 775.
63. *Id.* at 774-75.
64. *Id.*
65. *Id.* at 778.
66. *Id.*
67. Case 9/74, *Casagrande*, 1974 E.C.R. at 775.
68. *Id.*

In one of the first cases brought to the ECJ that determined the rights of students in higher education to move from one member-state to another member-state to engage in academic study unfettered by national law, the ECJ gave one of its best articulations of the link between the principle of free movement under the TFEU and education:

> [I]t constitutes a fundamental right of workers and their families since mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement . . . and also that obstacles to the mobility of workers shall be eliminated . . . the common vocational training policy must have certain fundamental objectives which are *inter alia* to bring about conditions which will guarantee adequate vocational training for all and to offer to every person, according to his inclinations and capabilities, working knowledge and experience, the opportunity to gain promotion or to receive instruction for a new and higher level of activity.[69]

Forcheri v. Belgium was also one of the first cases whereby the ECJ found that domestic higher education law violated EU law.[70] The government of Belgium enacted a law that required students who were not of Belgian nationality to pay enrollment fees unless the student met some of the various exceptions.[71] Ms. Forcheri, of Italian nationality, was the spouse of an Italian diplomat working in Brussels and was assessed an enrollment fee because her husband did not meet any exception to the Belgian law which would have exempted her from payment if her husband had both worked in Belgium *and* paid taxes in Belgium (her husband paid taxes in Italy).[72]

The ECJ in *Forcheri* took a comparatively strong stance in holding that such disparate treatment based on nationality was repugnant to the TFEU's fundamental freedom of movement of workers under Article 45 (ex 39, 48).[73] However, the ECJ did rest much of its decision on an interpretation of Article

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69. Case 152/82, Forcheri v. Belg., 1983 E.C.R. 2323, 2324.

70. *See id.* at 2327.

71. *Id.* at 2325-26. Case 221/83, Comm'n of the European Comtys. v. Italian Republic, 1984 E.C.R. 3249, 3257 (holding "the actual titles of the subjects and disciplines forming the curriculum for veterinary surgeons are not therefore required to be transposed word for word into the legal systems of the Member-States . . . .").

72. Case 152/82, Forcheri v. Belg., 1983 E.C.R. 2323, 2325-26.

73. *Id.* at 2335.

13 of the Protocol on the Privileges and Immunities of the European Communities which dictated the rights and responsibilities of employees of the EU, diplomats working for member-states, and the member-states.[74]

According to the ECJ in *Morgan v. Bezirksregierung Koln*, a member-state may not impose national legislation that places students who are citizens of that member-state at a disadvantage merely because those students have exercised their freedom of movement rights under Article 18 (ex 12, 6) of the TFEU.[75] In one of the most articulate descriptions by the ECJ on the issue of free movement of persons in the EU, the ECJ commented that such a right cannot be fully realized if a citizen of a member-state can be deterred from availing to him or herself of that right through obstacles placed in the way of his or her ability to stay in another member-state due to that member-state's legislation that penalizes the exercise of that right.[76] Equally articulate, and more to the point on the subject of students and education, the ECJ stated that the free movement principles are "particularly important" to encourage the mobility of teachers and students and such principles are identified in other areas of the TFEU, including Article 165 (ex 149, 126).[77]

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74. *Id.* at 2336.

75. Case C-11/06, Morgan v. Bezirksregierung Koln and Case C-12/06, Bucher v. Landrat des Kreises Duren, 2007 E.C.R. I-9195, I-9206.

76. *Id.*

77. *Id.* at 9206-07. Consolidated Version of the Treaty on the Functioning of the European Union art. 165, Oct. 26, 2012, 2012 O.J. (C 326) 120-21 [hereinafter TFEU].

> 1. 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 . . . ;
>
> 2. Union action shall be aimed at: developing the European dimension in education, particularly through the teaching and dissemination of the languages through the Member States, encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study, - promoting cooperation between educational establishments, developing exchanges of information and experience on issues common to the education systems of the Member States, encouraging the development of youth exchanges and of exchanges of socio-educational instructors, encouraging the development of distance education . . . ;
>
> 3. The Union and the Member States shall foster cooperation with third countries and the competent inter-national organisations in the field of education . . . in particular the Council of Europe.

At issue in *Morgan* was whether Germany could require German citizens to first study in Germany for one year before studying in another member-state with the assistance of an education or training grant without infringing upon the free movement guarantees of Articles 20 (ex 17, 8) and 21 (ex 18, 8a) of the TFEU.[78] These Articles, taken together, create a right to EU citizenship in conjunction with citizenship of the member-state and a right to move and reside freely within the EU. Additionally, these rights are subject only to other restrictions in the TFEU, respectively, among other rights.[79]

While first characterizing the rights guaranteed pursuant to Article 21, including the right to freely move and reside in other member-states as fundamental freedoms, the ECJ entertained five arguments by the German government as to why its "first-stage studies condition" does not violate the TFEU.[80] First, the German government contended that such financial awards for study should only be provided to students that have a good chance at succeeding in their chosen program of study.[81] Although the ECJ provided a glimpse of sympathy for this contention, the ECJ stated that the one-year requirement of domestic study did not ensure students would be successful in their academic pursuits Case C-11/06, *Morgan*, 2007 E.C.R. at I-9203-04, and the rule may actually harm the success of students in that requiring one year of domestic study may actually prolong the student's academic program.[82] The second argument put forth by the German government was that the first-stage studies condition was necessary to make sure that students had made the right choice of study.[83] The ECJ discounted this second argument by holding that the first-stage studies rule worked contrary to this goal in that students are discouraged from abandoning a first course of study they find undesirable and instead wish to engage in another program in another member-state, which is especially likely where no desired academic program exists in Germany, as was the case in the facts at bar.[84] According to the ECJ,

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> 4. In order to contribute to the achievement of the objectives referred to in this Article: - the European Parliament and Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States . . . the Council, on a proposal from the Commission, shall adopt recommendations.

Id.

78. Case C-11/06, *Morgan*, 2007 E.C.R. at I-9203-04
79. *Id*.
80. *Id*. at I-9205.
81. *Id*. at I-9208.
82. *Id.* at I-9209.
83. *Id.*
84. Case C-11/06, *Morgan*, 2007 E.C.R. at I-9209.

such students would be forced with an unhelpful choice between studying an undesirable program in Germany with the benefit of a grant or moving to another member-state for the desired program without the support of educational assistance.[85]

The third argument in support of the first-stage studies rule by Germany was that a student who followed such a rule could return to Germany after having studied in another member-state for another year of financial support which would also include travel costs, registration fees, and medical insurance.[86] The ECJ made short shrift of Germany's third argument stating strongly that such a benefit would not justify the restriction on Article 21's limitations on the free movement of member-state citizens, especially for students that would otherwise not return to Germany after completing their studies in another member-state.[87] Fourth, the German government stated that such a restriction on educational support to be used in another member-state was justified on the grounds that to allow such support to be completely consumed in another member-state would create an unreasonable burden on Germany leading to an overall limitation on educational and training grants.[88] Here, the ECJ was the most sympathetic and acknowledged that such an interest by a member-state could be justified in that domestic residents may not be supporting the educational system in Germany long enough to justify support to be consumed in another member-state but, in the case at bar, found the contention not credible in that the students in question here were raised in Germany and completed the entirety of their primary and secondary education in Germany.[89] Lastly, with some support from the European Commission, Germany stated that since there was no coordinating provisions among the member-states in regard to education and training grants, and without the first-stage studies rule, there would be too great a risk for the duplication of such entitlements.[90] In regard to the fifth defense, however, the ECJ showed no sympathy and commented that the first-stage studies rule was in no way designed to prevent or take into account educational assistance provided by other member-states.[91]

85. *Id.*
86. *Id.*
87. *Id.* at I-9210.
88. *Id.* at I-9210-11.
89. Case C-11/06, *Morgan*, 2007 E.C.R. at I-9211.
90. *Id.* at I-9212.
91. *Id.*

B. FINANCIAL SUPPORT AND ITS LINK TO THE DEFINITION OF VOCATIONAL EDUCATION

A more complicated case was presented to the ECJ in *Brown v. Secretary of State for Scotland*.[92] Brown, a citizen of the European Union with dual national citizenship from France and the United Kingdom, finished his first degree in France and went to work in the United Kingdom—specifically in Scotland.[93] After working approximately eight months, he began study towards a degree in electrical engineering at Cambridge University, to which he had already been accepted before accepting the Scotland-based job.[94] He applied for a maintenance grant, similar to the one in *Lair*, that would have supported him during his studies but was denied the grant by the Scotland Education Department based on grounds supported by British law.[95]

The ECJ first grappled with whether university-based education that allows admission to a particular profession upon completion of the education is vocational education pursuant to the TFEU.[96] While citing both the *Gravier* and *Blaizot* cases, the ECJ held that such academic endeavors constitute vocational education and reminded future readers that education is designed to only promote general knowledge and is not used for preparation leading to a specific profession.[97] However, the opinion went further and, in a deliberate fashion, ruled that even under Regulation 1612/68 vocational education must be tied to apprenticeship-like enterprises.[98]

However, and inconsistent with *Lair*, the ECJ did not find that maintenance grants are to be treated the same as tuition and fees, and given the current state of EU law, that such grants were protected under the TFEU.[99] Furthermore, the ECJ dictated that such decisions on whether to issue maintenance grants are the province of the national governments.[100] Relatedly, the ECJ held that a migrant worker who only works for eight months in a new member-state, even though he had the intention of ending his employment to attend an educational institution, is a worker and must be afforded associated protections under the TFEU.[101] According to the ECJ, an EU citizen obtains

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92. Case 197/86, Brown v. Sec'y of State for Scot., 1988 E.C.R. 3207, 3238.
93. *Id.*
94. *Id.* at 3238-39.
95. *See* Case 39/86, Lair v. Univ. of Hanover, 1988 E.C.R. 3162, 3190; Case 197/86, *Brown*, 1988 E.C.R. at 3238- 39.
96. Case 197/86, *Brown*, 1988 E.C.R. at 3239.
97. *Id.* at 3241-42.
98. *Id.* at 3242.
99. *Id.*
100. *Id.*
101. Case 197/86, Brown v. Sec'y of State for Scot., 1988 E.C.R. 3207, 3244.

such protections when one person offers services in return for remuneration from another person for a certain period of time.[102]

In a somewhat confusing manner, the ECJ distinguished this case from that of *Lair* in finding that a maintenance grant is not a social advantage under Regulation 1612/68 when he or she comes to the host member-state with the intent to break his employment and engage in university study.[103] The ECJ justified its distinguishing of the *Brown* and *Lair* cases, albeit indirectly, by articulating that Brown came to the United Kingdom with the intent of needing such a maintenance grant whereby Lair was in need of such a grant because of her involuntary cycles of unemployment.[104] Incidentally, the ECJ also found that Brown could not take advantage of the benefits in Regulation 1612/68 that allow for children of parents of workers to gain social advantages when, such as in Brown's case, the parents had ceased living and working in the host member-state before their children were born.[105]

The ECJ has broadly construed vocational education to include "any form of instruction which prepares a person for qualification in a specific profession, trade or employment . . . ."[106] In *Gravier*, a student of French nationality sought to continue her study of the art of strip cartoons at the Academie Royale des Beaux Arts of Liege when the Belgian government required her, as well as other students of non-Belgian nationality, to pay a "minerval."[107] The minerval was a fee to assist in the support of the institution and was defended by the Belgian government as a means to counter the reality that Belgium had a greater percentage than any other member-state of non-national students studying in Belgium.[108] As well, the Belgian government argued that every other non-Belgian student had to pay the minerval, although there were exceptions in the Belgian law for non-nationals who had one parent who was Belgian, students whose mother or father lived in Belgium, and students who were of Luxembourg nationality.[109] Otherwise, public education at all levels in Belgium is free with the exception that public universities may assess students "enrolment fees at insignificant level[s]" to finance social services for students.[110]

Ms. Gravier's complaint rested on the argument that such an assessment of the minerval violated Article 18 (ex 12, 6), which prohibits domestic laws

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102. *Id.*
103. *Id.* at 3244-45.
104. *Id.*
105. *Id*. at 3246.
106. Case 293/83, Gravier v. City of Liege, 1985 E.C.R. 606, 614, 3 C.M.L.R. 1, 21 (1985).
107. Case 293/83, *Gravier*, 1985 E.C.R at 607.
108. *Id.* at 610.
109. *Id.* at 608.
110. *Id.* at 15.

that discriminate based on nationality; and Article 56 (ex 49, 59), which prohibits domestic law from inhibiting the enjoyment of services that a citizen of a member-state seeks.[111]

The ECJ unequivocally found the Belgian government's argument, specifically that the minervals were necessary to help off-set the costs associated with the large number of non-Belgian citizens studying in Belgium who were also not paying taxes to support the educational system, a violation of the TFEU.[112] Indeed, the ECJ found that the minerval assessment did nothing more than serve as a form of discrimination based on nationality and that the few exceptions that the Belgian rule made for the minerval did not save it from failing to meet TFEU muster.[113]

The ECJ continued to find fault with the Belgian minerval practice by citing Article 166 (ex 150, 127), which requires the EU member-states to work together to implement a common policy on vocational education.[114] In fact, the ECJ called the common policy an "indispensable element in the activities of the Community" as it helps to promote one of the cornerstones of the EU common market—the free movement of persons.[115] To help support this mandate on the part of all member-states, the ECJ broadly construed what can be called vocational education by including any course of study that leads to intellectual and/or personal development.[116]

A later case further muddied the waters of whether a particular type of education is considered "vocational education" and whether a member-state can assess minervals on citizens of other member-states. In *Belgium v. Humbel*, the ECJ held that a state-supported educational institution does not supply services pursuant to Article 56 (ex 49, 59) of the TFEU and, thus, such institutions may assess minervals on students that are not domestic nationals or are not subject to various exceptions.[117] The ECJ here was addressing the same Belgian practice cited above while entertaining a complaint filed against a former, and now deceased, student's estate for repayment of minervals.[118] In a case that well-depicts the realities of residential life in the EU, a student of French nationality, who with his parents lived in Luxembourg, was attending the Institut Technique de L'Etat, which required three levels of education over six years in order to finish the required program of study.[119] Humbel, the student, was at the time of his death enrolled in the second year

111. *Id.* at 608.
112. Case 293/83, *Gravier*, 1985 E.C.R at 610-11.
113. *Id.*
114. *Id.* at 612.
115. *Id.* at 613.
116. *Id.* at 613-14.
117. Case 263/86, Belg. v. Humbel, 1988 E.C.R. 5383, 5389.
118. *Id.* at 5384.
119. *Id.*

of the second level, which was considered by the educational institution to be part of the basic general education that was necessary for the last two years, which specifically covered vocational subjects.[120]

The ECJ first determined that, when a program of study is divided into several parts including vocational and non-vocational, and the non-vocational is a required portion of the program, the entire educational program is considered vocational education under the TFEU.[121] However, the ECJ did not find that this educational program was a "service" subject to the protection of the TFEU since it was not reflective of a relationship between a supplier and a recipient for remuneration as required by Article 56 (ex 49, 59) of the TFEU.[122] The ECJ was consistent in its reasoning that when an institution is part of a national education system, and is publicly funded, it is not rendering the type of services that are subject to the fundamental freedoms of the TFEU.[123]

In a bizarre twist, although the ECJ cited its precedent-setting *Gravier* case, finding that Article 18 (ex 12, 6) prohibits discrimination on the basis of nationality, it refused to protect Humbel's estate from having to repay the minervals for his time in study at the Institut based on an interpretation of Regulation 1612/68 that actually allows a member-state to assess fees to non-domestic nationals as a condition for admission to the educational programs.[124] This is despite the fact that the ECJ acknowledged that the very same Regulation requires member-states to admit to its educational programs citizens of other member-states as part of the free movement of workers.[125]

According to the definition of vocational education announced in *Gravier*, the ECJ in *Blaizot v. University of Liege* found that veterinary education that leads to a doctorate in that field is vocational education subject to the TFEU's protection.[126] A contrasting argument was put forth by the Belgian government which asserted that vocational training is limited to education that is technical or apprenticeship-based and is wholly separate from university studies.[127] The ECJ spent very little time articulating that veterinary school was a level of education designed to qualify a student for an occupation, trade, or form of employment and rejected the Belgian government's proposal that there is a difference between university studies and vocational education.[128] Thus, veterinary school is also within the province of the

120. *Id.*
121. *Id.* at 5387.
122. Case 263/86, *Humbel*, 1988 E.C.R. at 5387.
123. *Id.* at 5388.
124. *Id.* at 5389.
125. *Id.*
126. Case 24/86, Blaizot v. Univ. of Liege, 1988 E.C.R. 398, 403-04.
127. *Id.* at 402.
128. *Id.* at 403-04.

TFEU's mandate that member-states cooperate to allow their citizens to travel freely and attend the various national educational institutions as part of the more general free movement of persons.[129] However, the ECJ went further and stated that there is very little education that is not subject to the TFEU's vocational education cooperation requirement and that such education could include those forms that are not required by a member-state's legislation for a particular occupation.[130]

There was a second, more pertinent issue presented in *Blaizot*. Blaizot and sixteen other students, who were French nationals studying in Belgium, demanded that the ECJ order the Belgian government to refund the minervals they paid to various Belgian educational institutions before the ECJ's 1985 *Gravier* decision.[131] Although the ECJ was not open to the Belgian government's argument that the minervals were necessary for the financial survival of its institutions of higher education, the ECJ was sympathetic to the effects of applying one of their decisions retroactively.[132] The ECJ articulated its policy of not generally allowing its decisions to apply retroactively, but instead it should base such decisions on three criteria including whether the issue of retroactivity for that specific issue has come before them, changes in national legislation, and changes in general EU policy.[133] At the time the issue was in front of the ECJ (satisfying the first requirement), the EU Commission had not satisfactorily determined the impact of the retroactivity of an order to repay several years' worth of minervals to all students and thus refused to assert either position.[134] However, the claimants in this case were entitled to the minervals they had paid in the past.[135]

The ECJ is not the only court in the EU to find broad protections within Regulation 1612/68. Indeed, in *MacMahon v. Department of Education* the British High Court found that the Regulation required a member-state to grant a "Further Education Award" to an Irish national of migrant worker

129. *Id.* at 403.

130. *Id.* at 404. In fact, the ECJ stated that only forms of education that were not subject to the TFEU's protections were "certain courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation." Case 24/86, Blaizot v. Univ. of Liege, 1988 E.C.R. 398, 404.

131. *Id.* at 401-07.

132. *Id.* at 406.

133. *Id.* at 404-07.

134. *Id.* at 407.

135. Case 24/86, Blaizot v. Univ. of Liege, 1988 E.C.R. 398, 407. The concern by the ECJ probably rested on probability that other national courts would rely on this decision to order the repayment of minervals. *Id.* at 404.

status who was initially refused due to the British government's belief that he was not a worker nor attended a vocational school.[136]

MacMahon moved to England from Ireland to work for a factory at the age of thirty.[137] After working for a short period of time, roughly one year, he decided that he wanted to be a teacher and applied, and was accepted, to a one-year teacher training program at St. Mary's College in the United Kingdom.[138] Although he did not hold a diploma of any kind beforehand, he received a Certificate in Education and began a teaching career.[139] However, before he began the one-year teacher training program, he applied for, but was denied by the local government, a Further Education Award which, pursuant to British law, was an entitlement unless the applicant had not lived in the United Kingdom for at least three years before beginning study.[140] Relatedly, and financially painful for MacMahon, he was forced to pay a tuition rate higher than what would be required of British nationals.[141]

Judge Dillon of the English High Court admitted that the outcome of the case rested on whether English or the TFEU law applied and, if it were the latter, whether MacMahon was a worker pursuant to the protections of Regulation 1612/68 and whether the program he enrolled in was a vocational program under Regulation 1612/68.[142] Judge Dillon held not only that the TFEU applied, but also that MacMahon should gain its protection in that it accords to all migrant workers the social advantages that would be bestowed upon host-country nationals.[143] The High Court's opinion dictated that under Regulation 1612/68, the label "worker" is not limited to nonskilled labor or skilled craftsmen, but also includes any under contract of employment such as "managers, lawyers, doctors, teachers, actuaries or research scientists."[144] Relatedly, and certainly beneficial to MacMahon, Judge Dillon contended that it would be difficult to create criteria to determine which institutions of higher education are vocational in nature.[145] However, he did state that medical schools, law schools, and teacher training programs are all vocational schools pursuant to Regulation 1612/68.[146]

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136. MacMahon v. Dep't of Educ. [1983] Ch 227 (English High Court, Chancery Division).
137. *Id.* at 235.
138. *Id.*
139. *Id.*
140. *Id.* at 235-36.
141. MacMahon v. Dep't of Educ. [1983] 1 Ch 227, 235 (Eng.).
142. *Id.* at 236.
143. *Id.* at 237-38.
144. *Id.* at 239.
145. *Id.*
146. MacMahon v. Dep't of Educ. [1983] 1 Ch 227, 239 (Eng.).

Once the above determinations had been made, the High Court found it easy to rule that the three-year residency requirement was a violation of Regulation 1612/68 as a form of "covert discrimination."[147] Judge Dillon did not find persuasive the British government's argument that those who have lived in the United Kingdom for three years before beginning a teacher training program are more likely to stay once the program is completed and, in fact, found such an argument to be blatantly against the goal of free movement of persons within the EU.[148]

For all but one bizarre twist, the 1985 case of *Regina v. Inner London Educational Authority* is a mirror image of *MacMahon*.[149] The case, decided by the English High Court, was a consolidation of three applicants for a British educational grant for various programs offered by three different colleges.[150] The first plaintiff, Duverly, was a French national who applied for an educational grant but was denied on grounds that she did not meet the three-year residency requirement and that the Faculty (Department) of Education at King's College was not a vocational school.[151] Although the British government rescinded its claim that she did not meet the three-year residency requirement in light of the *MacMahon* decision (above), Ms. Duverly was denied the educational grant for the one-year Certificate in Education program based alone on the contention that King's College was not a vocational school despite the fact that 80% of the students in the Faculty of Education were taking vocational courses.[152]

The second plaintiff, Mr. Hinde, an Irish national seeking an educational grant for a program leading to the Bachelor of Laws (LL.B.) degree from the University of London, was also denied the financial assistance due to the same contention that the law school at the University of London was not a vocational school.[153] Of significance in the case involving Mr. Hinde, it was necessary to hold a university degree for admission to the English Bar, but not necessarily an LL.B.[154] However, if the applicant to the English Bar held an LL.B., he or she would be exempted from several examinations that would be otherwise required.[155]

The third plaintiff, Mr. Phillips of Ireland, sought the same educational grant for a one-year Certificate in Education program at Edge Hill College.[156]

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147. *Id.* at 239.
148. *Id.*
149. Regina v. Inner London Educ. Auth. [1985] 1 C.M.L.R. 716.
150. *Id.* at 718.
151. *Id.*
152. *Id.*
153. *Id.* at 719.
154. Regina v. Inner London Educ. Auth. [1985] 1 C.M.L.R. 716, 719.
155. *Id.*
156. *Id.* at 719-20.

Mr. Phillip's application was denied due to the fact that Edge Hill College was not on the approved list of establishments for migrant workers drawn up by the British government used by local governments who are responsible for issuing the educational grants.[157]

Justice Taylor began his opinion stating that an educational institution, in order to earn the label "vocational school," does not necessarily have to be one in which most of the students are studying vocational courses nor one in which most of the courses offered are vocational.[158] As well, Justice Taylor stated that vocational schools are not as such because they offer courses that are related to manual and/or technical labor.[159] Furthermore, Justice Taylor agreed with the ECJ's definition of worker to include virtually all forms of employment that are pursuant to contract, not just those that involve manual or technical labor.[160]

However, Justice Taylor found that only the teacher training programs, and not the law school, were vocational programs subject to protection pursuant to the TFEU.[161] The English High Court followed a seemingly universal definition of vocational school, one that "covers any training in a school or college which is intended to prepare or qualify a person for a particular vocation or job," but did not extend the definition's coverage to the law school due to the fact that a faculty of law is designed to teach those who wish to practice law and those who do not wish to practice law.[162] According to the ECJ, a vocational school must offer a program that qualifies or trains the person who completes the program for a particular vocation or job.[163] This is indeed an unusual twist in that the English High Court did acknowledge that lawyers were workers pursuant to EU law.[164]

As one might imagine, the *Gravier* decision sent a wave of students to the steps of the Belgian government demanding that they be refunded the minervals they were forced to pay in violation of EU law. In *Barra v. Belgium*, the ECJ held that Belgium could not write legislation that would limit the ability of some students to demand refunds for minervals they paid between the years of 1976 and 1984 when the minerval policy was in force.[165] The case is important in that although the ECJ admitted that it had limited the ability of plaintiffs to file suits retroactively to take advantage of a new

157. *Id.* at 720.
158. *Id.* at 721.
159. Regina v. Inner London Educ. Auth. [1985] 1 C.M.L.R. 716, 721.
160. *Id.* at 722.
161. *Id.* at 722-24.
162. *Id.* at 723.
163. *Id.*
164. Regina v. Inner London Educ. Auth. [1985] 1 C.M.L.R. 716, 722.
165. Case 309/85, Barra v. Belg. State & City of Liege, 1988 E.C.R. 371, 375-76.

ruling, such as in the *Defrenne* case, the ECJ stated that it alone had the responsibility to define the rights of plaintiffs in such situations and determine whether their decisions could apply retroactively.[166] Furthermore, the national courts must follow rules annunciated by the ECJ, not the member-state's legislature, when determining if retroactive cases have merit.[167]

C. HOME-COUNTRY TREATMENT

In an early 1990s case, *Wirth v. Landeshauptstadt Hannover*, the ECJ addressed the question of whether a member-state, here Germany, may deny an educational grant to one of its citizens who attends a course of instruction at an institution of higher education in another member-state even if the educational grant would have been provided to the German citizen if he were to attend a German university.[168] Wirth, a German national who sought to study jazz saxophone at the Kunsten Arts College in the Netherlands, argued that Germany's practice violated Article 57 (ex 50, 62) prohibiting member-states to place restrictions on services.[169] The German law at the time stated that educational grants would only be afforded to German nationals if they attended German educational institutions unless the education sought in another member-state is related to the national's previous education.[170] However, Wirth argued that he could not study jazz saxophone in Germany because no comparable program existed in Germany.[171]

The ECJ found that the educational program that was offered in the Netherlands was not a "service" within the scope of Article 57.[172] According to the ECJ, in order to qualify as a service for protection under Article 57, there must be an agreement between the provider and the consumer.[173] Here, however, since the state is merely fulfilling its goals by providing a state-funded education, which is more pertinent to social, cultural, and educational missions, the state is not engaged in a gainful activity.[174] In contrast, when an educational program is operated through private monies, it is a service subject to protection under the TFEU's Article 57.[175]

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166. *Id.*
167. *Id.* at 377.
168. Case C-109/92, Wirth v. Landeshauptstadt Hannover, 1993 E.C.R. I-6448.
169. *Id.* at I-6467-68.
170. *Id.* at I-6466.
171. *Id.*
172. *Id.* at I-6469-70.
173. Case C-109/92, Wirth v. Landeshauptstadt Hannover, 1993 E.C.R. I-6448, I-6469.
174. *Id.*
175. *Id.* at I-6467-68.

A second question was also addressed in *Wirth*. Interestingly enough, German law, before 1990, did allow German nationals to use German-provided educational grants to study in other member-states.[176] Wirth contended that such post-TFEU restrictions violated Article 56 (ex 49, 59) which prohibits restrictions on services provided by member-states and are sought by citizens of member-states.[177] Wirth again failed on this point as the ECJ reasoned that since the educational program with which Wirth sought to benefit was not a service subject to protection under the TFEU, member-states were not bound by Article 56.[178]

According to the ECJ, member-states cannot draft bilateral agreements that only provide educational benefits to the citizens of those contracting members.[179] In *Matteucci v. French Regional Council of Belgium*, the ECJ analyzed whether an agreement between Belgium and Germany drawn in 1956, before the Treaty of Rome (1957), allowing for scholarships for each member-state's nationals to study in the other member-state could withstand the protections granted to all citizens of the member-states under TFEU Articles 18 (ex 12, 6), 45 (ex 39, 48), 56 (ex 49, 59), and 166 (ex 150, 127), and Regulation 1612/68.[180]

Ms. Matteucci, the plaintiff, was an Italian national and the daughter of an Italian national migrant worker who had settled in Belgium.[181] She sought an education scholarship from the German government as a Belgian resident to study voice training pursuant to a program that allowed for scholarship exchanges between the two countries for "scientific, cultural, artistic, or technical education."[182] Ms. Matteucci was denied the scholarship because she was not a citizen of Belgium despite the fact that she was born in Belgium and had completed all of her education to that point in Belgium.[183]

Despite the fact that the plaintiff asserted protection under several Articles of the TFEU, the ECJ narrowed its decision and analysis to the protections of Regulation 1612/68.[184] In a strongly worded opinion, however, the ECJ made it clear that the Regulation put forth a general rule that all member-states must treat migrant workers and the children of migrant workers equally in regard to social advantages including access to education.[185]

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176. *Id.* at I-6466; *id.* at I-6470.

177. Case C-109/92, Wirth v. Landeshauptstadt Hannover, 1993 E.C.R. I-6448, I-6470.

178. *Id.* at I-6467.

179. Case 237/85, Matteucci v. French Reg'l Council of Belg., 1988 E.C.R. 5590.

180. *Id.* at 5609.

181. *Id.* at 5591.

182. *Id.* at 5590.

183. *Id.* at 5591.

184. Case 237/85, Matteucci v. French Reg'l Council of Belg., 1988 E.C.R. 5606, 5608-09.

185. *Id.* at 5609.

The ECJ made two additional important pronouncements. First, since in the case at bar it would actually have been the German government providing the scholarship to Ms. Matteucci, this was not an internal matter and therefore the TFEU applies.[186] Second, and very important for senior member-states, newly admitted member-states, and applicants, the ECJ held that bilateral agreements made before ratification of the TFEU must adhere to the principles of the common market.[187]

D. DEFINITION OF A WORKER

Although the TFEU may not protect students from one member-state while they are seeking educational benefits in another member-state, lesser laws including regulations may provide protection. In *Lair v. University of Hanover*, the ECJ struggled with one of the more common realities in the world of work—a displaced worker who seeks another career through education and seeks state benefits to achieve that goal.[188]

Lair was a French national who moved to Germany in 1979 to work as a bank clerk but went through periods of unemployment through 1983.[189] However, beginning in 1983, she attended the University of Hanover to study Romance and Germanic languages and literature which would have eventually led to a new occupational qualification.[190] She applied for a maintenance and training grant from the German government through the university but was denied because she did not meet the German government's qualifications.[191] The maintenance and training grants were available to all German nationals, but were only available to non-German nationals if they had continuously worked in Germany for a total of five years immediately preceding the undertaken course work.[192] The maintenance and training grants were designed to subsidize the life of the displaced worker and were separate from tuition and fees.[193]

Lair claimed that the German policies were in violation of Article 18 (ex 12, 6), which prohibits discrimination based on nationality, and of Regulation 1612/68, which prohibits discrimination in the "allocations of social benefits."[194] The ECJ quickly dismissed Ms. Lair's claim that the denial of a maintenance and training grant is in violation of the TFEU since such grants

186. *Id.*
187. *Id.* at 5612.
188. Case 39/86, Lair v. Univ. of Hanover, 1988 E.C.R. 3162.
189. *Id.* at 3162.
190. *Id.*
191. *Id.* at 3162-64.
192. *Id.* at 3163.
193. Case 39/86, Lair v. Univ. of Hanover, 1988 E.C.R. 3162, 3163.
194. *Id.* at 3168.

were "at the present stage of development of Community law," and thus outside the scope of the TFEU.[195]

However, the ECJ spent much more time defining and exploring the concept of social advantages under Regulation 1612/68. To begin, the ECJ explained that the purpose of the Regulation was to enforce Articles 45 (ex 39, 48) and 46 (ex 40, 49) which require that all member-states not interfere with the free movement of workers, considered one of the fundamental freedoms guaranteed by the TFEU.[196] According to the ECJ, Regulation 1612/68 should be interpreted to require equal treatment in all forms of employment and working, including that any social advantages that might be afforded to domestic nationals be afforded to migrant workers of member-states.[197]

First, the ECJ determined that such maintenance and training grants constitute a social advantage in that they directly contribute to the development of job qualifications and career advancement.[198] Furthermore, although the ECJ found that university study was not vocational training protected under the TFEU, social advantages are separate in fact and issue and thus a maintenance and training grant for university (non-vocational) studies is still a social advantage covered by Regulation 1612/68. Next, the ECJ addressed the second hurdle that Ms. Lair had to clear which was whether her activities in Germany constituted those of a worker for Articles 45 and 46.[199] The ECJ held that even a migrant, member-state, citizen-worker meets the TFEU's definition of a worker even if he or she voluntarily interrupts his or her career to pursue university studies that lead to another career.[200] Furthermore, the TFEU gives the formerly employed, migrant, member-state, citizen-worker and his or her family the right to permanently remain in another member-state.[201] Finally, the ECJ struck down, as a violation of Regulation 1612/68, the five-year work period requirement before benefits can be obtained.[202]

Raulin v. Minister Van Onderwijs en Wetenschappen is one of the rarer cases entertained by the ECJ that is short on facts but long on law.[203] Raulin, a plaintiff of French nationality, moved to the Netherlands due to the offering of an "on-call contract" by an employer in that member-state.[204] Pursuant to such a contract, she would work only sporadically and, indeed, she only worked a total of sixty hours between December of 1985 and August of 1986

195. *Id.* at 3195.
196. *Id.* at 3196.
197. *Id.*
198. Case 39/86, Lair v. Univ. of Hanover, 1988 E.C.R. 3162, 3196.
199. *Id.* at 3199.
200. *Id.* at 3197.
201. *Id.*
202. *Id.* at 3201.
203. Case C-357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054.
204. *Id.* at I-1056.

when she began a full-time academic program at the Gerrit Rietveld Academie in Amsterdam.[205] Later in 1986, Raulin applied for financial assistance from the Dutch government and was denied because she failed to gain a residence permit when she moved to the Netherlands initially.[206] Seven issues were presented to the ECJ for resolution.[207]

First, the ECJ first articulated that an "on-call contract" does not necessarily preclude a member-state citizen from gaining educational benefits from another member-state even if the amount of work during the stay in the host member-state is minimal.[208] The ECJ reasoned that many workers may migrate to other member-states and their work assignments may vary due to conditions that may not be subject to the worker's control.[209] The ECJ restated the rule in *Brown* that the most important factor in determining if an employment relationship between an employer and an employee exists is whether there was a period whereby an employee sold his or her labor to the employer in return for remuneration.[210] However, the work performed must be something more than "marginal and ancillary."[211]

Relatedly, and potentially contradictory, the ECJ dictated that a national government may take into consideration the duration of the employment to determine whether the migrant, member-state citizen has met the definition of a worker under Article 45 (ex 39, 48) of the TFEU, and that this should include the reality that the particular form of employment is designed to be seasonal and/or irregular.[212]

The ECJ then reminded the parties of the *Lair* decision that worker status pursuant to Regulation 1612/68 should not be based on a logical relationship between working activities in the host member-state and the home member-state, but that member-states could consider the relationship between the working activities in the host member-state and the educational program to be pursued in the host member-state.[213] The only exception to this basic rule is when the migrant worker is involuntarily unemployed; in which case, the host member-state cannot require a link between the work performed in the host member-state and the educational program.[214] Therefore, the migrant worker must, in order to expect to be treated the same as any host member-

205. *Id.*
206. *Id.*
207. *Id.* at I-1057-59.
208. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1059.
209. *Id.* at I-1059.
210. *Id.* at I-1060.
211. *Id.*
212. *Id.*
213. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1061.
214. *Id.*

state national, prove to the national government a link between the work performed in the member-state and his or her educational program if they leave their employment voluntarily to pursue the academic program.[215]

The next issue addressed by the ECJ was whether the financial assistance that Ms. Raulin applied for in the Netherlands was only for the necessaries of life and not for the tuition and/or enrollment fees.[216] The Netherlands government argued that the form of financial assistance in question was only for the necessaries of life and was not intended to be used to pay for the courses and that an attempt to sever the purposes of the basic life maintenance grant would interfere with the policy behind the financial grant.[217] The ECJ was not persuaded and found that the purpose of the financial grant, in its entirety, was to allow a student to have some form of financial independence and that since domestic Dutch students could use their grants for whatever expenses they encountered, including tuition and enrollment fees, non-national, member-state citizens should be able to do so as well. Thus, such a policy by the Netherlands government violated Article 18 (ex 12, 6) and its prohibition against discrimination by nationality.[218]

The controversy did not end there, however, as the ECJ also was asked to determine whether a citizen of another member-state gains a right of residence in the host member-state under the TFEU when they are admitted to an educational program in that same host member-state; the ECJ answered affirmatively.[219] The ECJ maintained that such a right is imperatively bestowed upon an applicant who becomes admitted into the educational program since, otherwise, the right to be free from discrimination based on nationality would be violated as would the confirmation of educational access to vocational training rights under Article 166 (ex 150, 127).[220] Continuing, the ECJ held that this right of residence conferred by the TFEU exists as long as- but only as long as- the period of the vocational training.[221] Furthermore, the host member-state cannot condition the right to residence upon the possession of a residence permit and that admission to the program is sufficient under the TFEU.[222] However, the host member-state may not be forced to extend other rights to the migrant student even in the case of other forms of maintenance including health insurance.[223] Relatedly, the ECJ noted that a

215. *Id.*
216. *Id.*
217. *Id.*
218. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1061.
219. *Id.* at I-1062.
220. *Id.* at I-1063.
221. *Id.*
222. *Id.*
223. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1063.

residence permit may not be required in order to gain the type of general financial assistance that Ms. Raulin was seeking here.[224]

E. MIGRANT WORKERS

In a case that cited *Bettray*, *Brown*, *Lair*, *Laurie-Blum*, and *Matteucci*, the ECJ held that a child of a member-state national migrant worker may not be refused financial support if the child seeks to study in the member-state to which she is a national, but is not the member-state of her residence or that of her parents.[225] Furthermore, the ECJ in *Bernini v. Minister* annunciated that the child of the migrant worker is still eligible for financial support pursuant to the same terms as any other student even if she is still financially dependent upon her parents who live in a member-state different from the one in which the child decides to study.[226]

Ms. Bernini, the plaintiff, was an Italian national who moved at the age of two to the Netherlands with her father and had completed an occupational training course in the Netherlands before she applied to the University of Naples to study architecture at the age of twenty-five.[227] The Netherlands government refused the finance award on grounds that Ms. Bernini would be a resident of Italy despite the fact that the government conceded that she would have been eligible for the award if she were to study architecture in the Netherlands.[228] Perhaps inconsequential to the outcome of *Bernini*, the ECJ entertained the case despite the fact that the Netherlands government had later awarded her the financial support.[229] Indeed, this would otherwise make the case "moot" and beyond justiciability in many American courts.

In its decision, the ECJ stayed true to the definition of work in that it must be performed by a migrant worker and must include work that is effective and genuine, above marginal and ancillary, and performed pursuant to the direction of another person in return for remuneration, in order to maintain protection under Regulation 1612/68 and Article 45 (ex 39, 48) of the TFEU.[230] As well, since it does not matter that the productivity of the worker is low, occupational training qualifies as work in Ms. Bernini's case and provided her with protection under the TFEU and the Regulation.[231] In the end,

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224. *Id.* at I-1064.

225. Case C-3/90, Bernini v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1098, I-1108.

226. *Id.*

227. *Id.* at I-1100-01.

228. *Id.* at I-1101.

229. *Id.* at I-1103.

230. Case C-3/90, Bernini v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1098, I-1104.

231. *Id.* at I-1105.

the ECJ held that Regulation 1612/68 does not allow for a member-state to impose a residency requirement when allocating social benefits to migrant workers or their children when both are nationals of another member-state.[232]

According to the ECJ in *Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Gaal*, a child pursuant to the protections of Regulation 1612/68 is not necessarily a person who is a dependent nor a person under the age of twenty-one.[233] Gaal, the plaintiff, was a Belgian national who desired to study in the United Kingdom and had lived in Germany twenty-five of his twenty-seven years.[234] Gaal was an orphan and was living on an orphan's allowance awarded to him by the German government following the death of his father but was also financially independent from his mother.[235] He applied for an educational grant from the German government but was denied since he was over the age of twenty-one and was financially independent.[236]

Although Section 12 of Regulation 1612/68 requires that member-states allow the children of member-state nationals who are migrant workers full access to educational, vocational, and apprenticeship programs, the German government contended that Sections 10 and 11, which together specifically create a right to establishment for the children under age twenty-one of those same migrant workers, required that those same children be under age twenty-one in order to receive the benefits of Section 12.[237]

The ECJ discounted the German government's position in that Article 12 of Regulation 1612/68 does not reference Articles 10 or 11 and vice-versa.[238] Therefore, Regulation 1612/68 does confer a right of access to educational benefits and programs to adult children of member-state nationals who are migrant workers even if the migrant worker is deceased.[239]

On the topic of student financial assistance, the case of *Meeusen v. Hoofddirectie* perhaps represents the most complex set of facts.[240] Ms. Meeusen was a Belgian national child of Belgian parents, the latter of which worked and paid taxes in the Netherlands and all three lived in Belgium.[241] Mr. Meeusen, the plaintiff's father owned his own business that operated in

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232. *Id.* at I-1108.

233. Case C-7/94, Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Gaal, 1995 E.C.R. I-1040.

234. *Id.* at I-1042.

235. *Id.*

236. *Id.* (If Gaal were under the age of twenty-one and were financially dependent, he would have been eligible for the education grant pursuant to German law).

237. *Id.* at I-1044.

238. Case C-7/94, Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Gaal, 1995 E.C.R. I-1040, I-1044.

239. *Id.*

240. Case C-337/97, Meeusen v. Hoofddirectie, 1999 E.C.R. I-3304.

241. *Id.* at I-3306.

the Netherlands, was the sole shareholder, and employed his wife two days a week along with nineteen other employees.[242] The plaintiff applied for a study finance grant from the Netherlands government in order to study chemistry at an industrial school in that same member-state.[243] The Dutch study finance program was an entitlement program making two groups of applicants eligible for financial assistance including Dutch nationals and residents of the Netherlands.[244] Interestingly enough, Ms. Meeusen was initially awarded the study finance grant but it was rescinded by the Dutch government, with an order to repay some of the funds, based on the fact that she did not qualify.[245] The plaintiff filed a complaint contending that the Dutch government's decision to rescind the award was a violation of TFEU Article 45 (ex 39, 48) and Regulation 1612/68 since she was the child of a migrant worker, specifically her mother.[246]

Therefore, the first question that the ECJ had to resolve was whether her mother, as a resident of Belgium and a part-time employee of her husband's business in the Netherlands, was a migrant worker whose child, the plaintiff, was entitled to equal treatment under Article 39 and Regulation 1612/68.[247] Before asserting that the plaintiff's mother was a worker and, therefore, her child was entitled to equal treatment pursuant to EU law, the ECJ reminded the reader that the label "worker" should not be subject to a narrow interpretation that might later allow for discrimination.[248] Once again, the ECJ cited its oft used definition of a worker as a person who pursues activities that are effective and genuine and not merely marginal and ancillary, and performs work at the direction of another person in return for remuneration.[249] Therefore, just because the worker is related by marriage to the sole shareholder, does not preclude the possibility that the worker may assert the protections of the TFEU.[250]

Once the ECJ determined that the plaintiff's mother was a worker under EU law, it was fairly easy for the tribunal to find that the Dutch law, limiting study finance awards to Dutch nationals and Dutch residents, violated Article 39 and Regulation 1612/68.[251] According to the ECJ, to hold otherwise, migrant workers would be limited in their choices as to where to pursue em-

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242. *Id.*
243. *Id.* at I-3308.
244. *Id.*
245. Case C-337/97, Meeusen v. Hoofddirectie, 1999 E.C.R. I-3304, I-3308.
246. *Id.*
247. *Id.* at I-3311-12.
248. *Id.*
249. *Id.*
250. Case C-337/97, Meeusen v. Hoofddirectie, 1999 E.C.R. I-3304, I-3311-12.
251. *Id.*

ployment activities due to considerations associated with their child's education.[252] Therefore, a child of a migrant worker may apply for study finance in the host member-state while maintaining a residence in the home member-state.[253]

F. DERIVATIVE RIGHTS OF PARENTS AND CHILDREN

Citizens of countries outside both the EU and the European Economic Area may participate in the various social benefit programs that exist pursuant to the domestic law of the various member-states. However, as the case of *Fahmi and Another v. Bestuur Van de Sociale Verzekeringsbank* reflects, it is much more difficult for outside nationals to assert rights to these benefit programs once they leave the EU.[254] The case at bar was actually the consolidation of two cases, one of which involved a citizen of a nationality not part of the EU. Fahmi, a Moroccan national who had gone to work in the Netherlands pursuant to a co-operation agreement between the EU and the Moroccan government, was eligible for a dependent child's allowance pursuant to Dutch law that should be used to help finance his child's higher education.[255] For several years, the Dutch program allowed for a dependent child's allowance to be paid to parents when they had children up to age twenty-seven attending an educational institution.[256] However, the program was changed so that the parent could only obtain the allowance if their child was younger than 18 years old but allowed the child to directly apply for a financial support grant with the goal that the adult student could be financially independent from their parents.[257] However, Mr. Fahmi at one point became physically unfit to work in the Netherlands and returned to Morocco.[258] After he received notice that he would not be entitled to the dependent child allowance, he filed a complaint against the Dutch government arguing that his rights under Regulation 1408/71, prohibiting discrimination in the awarding of benefits to member-state workers who work in other member-states, were infringed since the Regulation was applicable to him pursuant to the co-operation agreement.[259] As well, Mr. Fahmi argued that Regulation 1408/71 should

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252. *Id.*

253. *Id.* at I-3312-13.

254. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452.

255. *Id.* at I-2463.

256. *Id.* at I-2460.

257. *Id.*

258. *Id.* at I-2463.

259. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452, I-2458-59. The relevant provisions of Regulation 1408/71 state:

> Article 1
>
> For the purposes of the application of this Regulation:

be linked to Regulation 1612/68; that together they prohibit discrimination based on nationality in the workplace.[260]

The ECJ began by stating that member-states are free to create and change their social benefits systems as they wish provided that the member-states do not violate EU law.[261] Relatedly, and more importantly, that Regulations 1408/71 and 1612/68, and likewise Article 45 (ex 39, 48) securing the right of free movement of workers, do not limit the ability of a member-state to gradually alter a social benefit system, including the abolition of a dependent child allowance and the creation of a direct study finance system, so long as there is no discrimination based on nationality.[262]

The second part of the case at bar involved a Spanish national, Ms. Esmoris, who also worked in the Netherlands until she could no longer physically work and who later returned to her native Spain.[263] Like Mr. Fahmi,

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> (u) (i) 'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Art. 4(1)(h) . . . ;
>
> (ii) 'family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family.
>
> Article 3(1)
> Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.
>
> Article 77
> 'Dependent children of pensioners', provides
>
> 1. The term 'benefits', for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.
>
> 2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children residing: (a) to a pensioner who draws a pension under the legislation of one Member State responsible for the pension . . . .

Id. at I-2457-59.

260. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452, I-2463-64.

261. *Id.* at I-2466-67.

262. *Id.* at I-2468.

263. *Id.* at I-2463.

Ms. Esmoris also had an adult child who had begun university studies at the time she discovered her dependent child allowance was to be terminated.[264] Consistent with its opinion on Mr. Fahmi's condition, the ECJ held that once the member-state national is no longer exercising her right to establishment, by returning to her member-state of nationality, she cannot seek protection under Article 45 (ex 39, 48) nor Regulation 1612/68.[265] Equally damaging to Ms. Esmoris's argument was the fact that her daughter was also no longer residing in the Netherlands.[266]

Despite the actions of their parents, especially if the parents are migrant workers or spouses of migrant workers, children have significant protection under EU law to continue their education. In *Baumbast v. Secretary of State*, the ECJ held that children of migrant workers who have established themselves in a member-state because of the employment activities of their parents may continue to reside in the host member-state to attend general education courses.[267] According to the ECJ, this is true even if the parents of the children have divorced and only one of the parents is actually an EU citizen and that parent has ceased living and working in the host member-state.[268] This right exists even if the children themselves are not EU nationals.[269]

In *Baumbast*, the ECJ heard two consolidated cases concerning primary care parents of children, the latter of which were attending general education courses, who were denied residency permits to stay with their children.[270] The case involving the Baumbast family itself is quite compelling and truly reflects the reality of global education. The Baumbasts consisted of a father who was a German national, a mother who was a Colombian national, and two children one of whom was a Colombian national and the other a dual citizen of Germany and Colombia.[271] The Baumbasts lived in the United Kingdom for several years, pursuant to Mr. Baumbast's employment activities, before Mr. Baumbast moved to China and Lesotho over periods of time never to return to Britain.[272] The Baumbast children continued to live in the United Kingdom while the daughters continued their education when the British government refused to renew residency permits of Mrs. Baumbast and her children.[273]

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264. *Id.*
265. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452, I-2473-74.
266. *Id.* at I-2473-74.
267. Case C-413/99, Baumbast v. Sec'y of State, 2002 E.C.R. I-7136, I-7140-41.
268. *Id.*
269. *Id.*
270. *Id.* at I-7145.
271. *Id.*
272. Case C-413/99, Baumbast v. Sec'y of State, 2002 E.C.R. I-7136, I-7145-46.
273. *Id.*

The second case involved a woman and her children, the former of which was identified as "R" in the pleadings, who was denied a residency renewal to stay with her children a few years after she was divorced from her husband, a French national, who continued to work in the United Kingdom after the divorce.[274] The couple's children held dual nationality of the United States (the nationality of "R") and France.[275]

Citing Article 12 of Regulation 1612/68, providing that "[m]ember States shall encourage all efforts to enable such children [of migrant workers] to attend these courses under the best possible conditions," the ECJ ordered that the children involved in the two consolidated cases have a direct right to continue their education in the member-state in which they began their education.[276] The ECJ's position was further solidified by their citation of the remainder of Article 1612/68, specifically Article 10, which guarantees the right of children of migrant workers to associate themselves with the worker if they are a dependent under the age of twenty-one.[277]

The ECJ also held that the parents of children have a derivative right to stay in the host member-state if they are the primary caretakers of children who are continuing their general education courses, irrespective of whether the parent is a member-state national or if the parents are divorced from the member-state national who is exercising a right under Article 45 (ex 39, 48) to move freely across member-state borders for purposes of employment.[278]

G. RESIDENCY PERMITS AND REQUIREMENTS

Often, the ECJ will accept for resolution two or more cases that have similar facts. In *Echternach and Another v. Minister of Education*, the ECJ evaluated another situation concerning the financial support program in the Netherlands and found that it unlawfully discriminated against citizens of other member-states in violation of the TFEU and Regulation 1612/68.[279] The Netherlands study finance program provided financial assistance for enrollment fees, life maintenance, and other necessaries for Dutch nationals and others who were entitled to be treated as Dutch nationals pursuant to domestic law, which at least required the possession of a residence permit.[280] Those who were eligible for a Dutch residency permit included, first, those who possessed a residence permit for a limited period which were reserved for nationals of other member-states who were either salaried employees in the

274. *Id.* at I-7146-47.
275. *Id.*
276. *Id.* at I-7140-41 (quoting Article 12 of Regulation 1612/68).
277. Case C-413/99, Baumbast v. Sec'y of State, 2002 E.C.R. I-7136, I-7140.
278. *Id.* at I-7157-58.
279. Case 390/87, Echternach & Another v. Minister of Educ., 1989 E.C.R. 755.
280. *Id.* at 761-62.

Netherlands or who had a specific purpose for residence (including education).[281] A second group was eligible for national treatment if the applicant was over the age of majority or maintained the Netherlands as their principal place of residence for at least five years.[282] The study finance system was open to non-Dutch nationals if they had a residence permit, were at least twenty-three years old, and their parents lived in the Netherlands for an uninterrupted three-year period.[283] Another group was eligible for the study finance program if the student lived in the Netherlands for three uninterrupted years and who were orphaned, and/or over twenty-one years of age, and/or married.[284]

The first case involved a student, Echternach, of German nationality whose father, at the time of the litigation, worked for the European Space Agency (ESA) but had worked in the private sector in the Netherlands before employment with the ESA.[285] Echternach was denied a study finance grant because, according to the Dutch government, he did not fit within the exceptions of domestic law allowing for national treatment due to the fact that when his father began employment at the ESA (an international organization), Echternach lost the protection under Article 45 (ex 39, 48) of the TFEU, which in Section 4 exempts workers in the public sector.[286]

In the second case, the German national plaintiff, Moritz, had completed his primary, secondary, and a year of technical schooling in the Netherlands while his family lived there but lost the ability to claim national treatment, according to the Dutch government, when he and his father left the Netherlands in order for the latter to take employment in Germany.[287] Moritz was denied a study finance grant despite the fact that he was forced to return to the technical college in the Netherlands when the institution in Germany he was attending could not duplicate his academic program.[288]

The ECJ held that a worker employed by an international organization within the EU is not a worker employed in the public sector under Article 45 and thus is covered by the protections within the TFEU.[289] In turn, the ECJ further held that children of such workers are protected under Article 45 and Regulation 1612/68 and, thus, must be afforded national treatment.[290] The meaning of Article 39 was further clarified as the ECJ stated that Section 4

281. *Id.*
282. *Id.*
283. *Id.*
284. Case 390/87, Echternach & Another v. Minister of Educ., 1989 E.C.R. 755.
285. *Id.* at 757.
286. *Id.* at 757-58.
287. *Id.* at 757.
288. *Id.* (The ECJ did not address the issue of course in this case).
289. Case 390/87, Echternach & Another v. Minister of Educ., 1989 E.C.R. 755, 759.
290. *Id.*

only allows member-states to forbid citizens from other member-states to hold office within the former's public service.[291]

Specific to the case involving Mr. Moritz, the ECJ stated that Regulation 1612/68 does protect children of citizens of member-states in that equal national treatment is required regarding access to education even when the child's education is interrupted by family circumstances.[292] This is especially true when it is no fault of the student regardless of whether it is due to his family's move out of the host state or because of his need to return due to the incompatibility of programs.[293] The ECJ as well, in maintaining consistency, held that the study finance program was a social advantage that cannot be limited in application to exclude migrant workers, nor their children, from other member-states.[294]

Article 352 (ex 308, 235) allows the EU Council to draft Directives when no other specific provision of the TFEU provides authority for it to act in a particular area of regulation.[295] When acting pursuant to Article 352, the

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291. *Id.*

292. *Id.* at 760-62.

293. *Id.*

294. Case 390/87, Echternach & Another v. Minister of Educ., 1989 E.C.R. 755, 760-64.

295. Consolidated Version of the Treaty on the Functioning of the European Union art. 352 Oct. 26, 2012, 2012 O.J. (C 326) 196 [hereinafter TFEU].

> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Id.

EU Council need only consult the EU Parliament.[296] In *Re Students' Rights*, the ECJ held that the EU Council cannot draft a Directive to mandate a right of residence for students pursuant to Article 352 since Article 18 (ex 12, 6) provides the EU Council with the authority to create such a right.[297] In late 1989 and early 1990, the EU Council drafted a Directive (90/336) that would have provided a right of residence for non-nationals in host member-states if they were employees or self-employed workers who ended their occupational activity, were students, and/or were present in the host member-state with no further qualification.[298] Specifically, a student who was a national of another member-state would have a right of residence (including his or her spouse and dependent children) in the host member-state if enrolled in a recognized educational establishment for the purposes of vocational training, had sufficient resources that would prevent him or her from becoming a burden on the member-state's social assistance program, and had health insurance.[299] The right of residence, in which the directive required all member-states to implement, would be for renewable one-year periods and would not extend past the student's academic program.[300]

The EU Parliament contended that Article 18 prohibiting discrimination based on nationality should have been sufficient authority and thus the proposed Directive 90/366 should be found void.[301] Obviously, if Article 18 had been the source of justification for the contested Directive, then the EU Parliament would have greater power to manipulate its final draft.

The ECJ maintained that the proper analysis for such a conundrum begins with determining whether the EU Council could have acted pursuant to the more specified TFEU provision, here Article 18, before determining whether the EU Council acted properly under Article 352.[302] Authority was found in not only Article 18, but also Article 166 (ex 150, 127), which allows the EU Council to craft education policies that foster the coordination of vocational education programs.[303] Additionally, the ECJ determined that its decision in *Raulin*, prohibiting discrimination based on nationality when a citizen of a member-state has been admitted to a program of vocational study in another member-state, was sufficiently broad enough to grant EU Council the ability to establish a right to residence for students.[304]

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296. *Id.*
297. Case C-295/90, Re Students' Rights, 1992 E.C.R. I-4230, I-4234-45.
298. *Id.* at I-4232-34.
299. *Id.*
300. *Id.* at I-4232-33.
301. *Id.*
302. Case C-295/90, Re Students' Rights, 1992 E.C.R. I-4230, I-4233-34.
303. *Id.* at I-4234-35.
304. *Id.*

In *Bidar v. London Borough of Ealing*, the ECJ held that the issuance of a subsidized loan or grant for educational studies and maintenance costs is an appropriate subject for the anti-discrimination provisions of Article 18 (ex 12, 6) of the TFEU and Article 18 also prohibits a member-state from imposing settlement requirements on a citizen of another member-state when that citizen is a lawful resident of the member-state, has received a substantial part of his or her education in that member-state, and has established a genuine link to that member-state's society.[305] In *Bidar*, the United Kingdom had imposed several conditions on the availability of financial assistance in the form of subsidized loans and grants; including that the prospective student be a lawful resident on the first day of the academic term for which the student is attending, that he or she have been a resident for three years prior to that same first day of attendance, and that the three-year period of residence was wholly or mainly for the purpose of gaining an education.[306] However, another provision of United Kingdom law made it impossible for a citizen of another member-state to be a resident of the United Kingdom solely based on being a student.[307]

The plaintiff, Bidar, was a French citizen who came to the United Kingdom with his mother at a young age so that she could be medically treated and he completed secondary education while living with his grandmother as his grandmother's dependent.[308] Upon graduation, he sought to enter a collegiate-level program in the United Kingdom and although he obtained financial assistance for the tuition portion of his educational expenses, the British government refused to issue him a subsidized loan for maintenance costs on grounds that he did not meet the requirements set by British law.[309] The British government, when pressed for an explanation, stated that a citizen of another member-state does not have equality rights under Article 18 of the TFEU for maintenance costs based on the *Lair* and *Brown* (above) decisions and even if the ECJ were to find such an equality right, there must be a direct link between the citizen and the assistance the United Kingdom was supporting.[310] As well, the first British national court that found for the United Kingdom government ruled that Bidar and other similarly situated students would

305. Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing and Sec'y of State for Educ. and Skills, 2005 E.C.R. I-2151, I-2154.

306. *Id.* at I-2158-59.

307. *Id.* at I-2160-61.

308. *Id.*

309. *Id.* at 2161-63.

310. Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing and Sec'y of State for Educ. and Skills, 2005 E.C.R I-2151, I-2162.

not be eligible for financial support for maintenance costs pursuant to Regulation 1612/68 and Directive 93/96 and furthermore stressed the high cost of allowing all such students access to assistance for maintenance costs.[311]

While finding that the United Kingdom violated EU law, the ECJ first stated that any student who is a national of another member-state is exercising free movement rights guaranteed under Article 21 (ex 18, 8a) of the TFEU.[312] Relatedly, the ECJ commented that a student enjoys a right of residence pursuant to Article 21 and Directive 90/364 when he or she moves to another member-state, Case C-11/06, *Morgan*, 2007 E.C.R. at I-9203-04; completes his or her secondary education; and when that host member-state does not object to the student's lack of resources.[313] Furthermore, the ECJ went as far as recognizing that the status of the EU had changed since the *Lair* and *Brown* decisions held that financial assistance for education was a matter of education policy only and was not woven into the fabric of EU legal life but that such a reality had changed since the TFEU had been amended to include education and vocational training.[314] As well, according to the ECJ, Article 165 (ex 149, 126) suggests that the EU government work toward providing a quality education system throughout the member-states.[315]

In addition to finding that the scope of EU law on the topic of education had broadened, the ECJ stated that the basic principle of equal treatment between nationals and non-nationals who are also citizens of another member-state prohibits host member-states from engaging in both overt and covert forms of discrimination using "distinguishing criteria."[316] Given the facts in the case at bar, the ECJ found that the British requirement of residence for three prior years before becoming eligible for financial support in the form of a subsidized student loan placed citizens of the EU, yet not citizens of the United Kingdom, at too great a disadvantage in the face of Article 18.[317] The ECJ did comment that member-states can require some level of "financial solidarity" and demonstration of "a certain degree of integration" into the member-state's society on the part of an EU citizen who is not a citizen of the member-state responsible for establishing the criteria for financial assistance for education in order for such assistance not to become a burden.[318]

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311. *Id.* (The national court estimated such costs would be £66 million annually).

312. *Id.* at I-2165.

313. *Id.*

314. *Id.* at I-2165-66 (the ECJ specifically mentioned Title XII (ex XI, VIII) on Education, Vocational Training, Youth and Sport).

315. Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing and Secretary of State for Educ. and Skills, 2005 E.C.R I-2151, I-2166.

316. *Id.* at I-2169.

317. *Id.* at I-2169-71.

318. *Id.* at I-2170.

However, member-states cannot do so in a way that forces students to establish a link to the host member-state's workplace, and the ECJ made clear that a difference exists between financial assistance for a student and a tide over allowance for a young person seeking his or her first job in the host member-state.[319]

Rarely do facts so dominate the outcome of a case from the ECJ as was the situation in *Lyyski v. Ume Universitet*, where the ECJ stated that the acceptability under EU law of a member-state's requirement for its training program that teachers enrolled in the program maintain a teaching post in that same member-state, depends on the impact on the applicants.[320] In *Lyyski*, the ECJ was called on to determine whether the Swedish government's requirement that all teachers enrolling in a short-term training program designed to fill a need for teachers in that member-state maintain a teaching post in Sweden violated Article 18 (ex 12, 6) and Article 45 (ex 39, 48), which guarantee the free movement of persons without discrimination based on nationality and the free movement of workers, respectively.[321] However, the ECJ quickly dispatched any concern over Article 18 and sought only to focus on whether the Swedish restriction on its teacher training program violated Article 45.[322]

The plaintiff, Lyyski, a Swedish national holding a teaching post in neighboring Finland at a school that was Swedish-speaking and an applicant for the Swedish government's teacher training program, was denied admission to the program due to the fact that he did not hold a teaching position at a Swedish school whereby he could complete the practical training portion of the program.[323] However, his application was rejected based on the lone reality that his teaching position was not in Sweden despite his argument that he was both Swedish and had sufficient professional knowledge to engage in a teaching career.[324]

The ECJ initiated its decision with a pronouncement that the free movement of persons is designed to preclude any legislation by a member-state that places EU citizens at a disadvantage when choosing the freedom to move to another member-state for occupational and economic activities.[325] As well, although not expressly stated as such, the ECJ hinted that there existed a presumption that the Swedish government's training program was in violation of free movement principles since teachers who have exercised their free movement rights are excluded from application to the program pursuant to

319. *Id.*
320. Case C-40/05, Lyyski v. Umea Universitet, 2007 E.C.R. I-117, I-135.
321. *Id.* at I-126-27. *See id.* at I-131.
322. *Id.* at I-131.
323. *Id.* at I-126-27.
324. *Id.*
325. Case C-40/05, Lyyski v. Umea Universitet, 2007 E.C.R. I-117, I-131.

Article 45.[326] Once again, the ECJ acknowledged the discretion member-states hold when developing their educational systems pursuant to Articles 165 (ex 149, 126) and 166 (ex 150, 127), and that barriers to free movement can only be justified by "pressing reasons of public interest."[327]

Based on the facts of the case at bar, however, the ECJ held that several of these facts must be explored to determine whether the Swedish program could exist in the face of Article 45. First, the ECJ noted that the practical training part of the program would be more difficult to carry out, given the need for monitoring and assessment, if the practical portion were conducted outside the Swedish school system.[328] However, the ECJ also found that the Swedish program allowed some applicants to engage in the practical portion at a school that was not his or her employer, that there was no requirement that the applicant maintain a position at a Swedish school upon completion of the program, and thus the ECJ stated that it could not determine whether the practical portion was "an essential and obligatory element" of the program.[329] Furthermore, the ECJ stated that the Swedish school requirement may be disproportionate to the aim of the training program if all training opportunities in Sweden are filled without some other avenue for candidates to take advantage of the program but stopped short of declaring an Article 45 violation.[330]

H. BURDEN ON HOST MEMBER-STATES

Similarly related to *Casagrande* and *Re Higher Education Funding*, the ECJ has held that member-states cannot refuse applications for educational grants made by nationals of other member-states on account of the high number of such applications.[331] In *Alaimo v. Prefet of the Rhone*, the Italian-national plaintiff sought a "county grant," essentially an educational grant allocated on a local level, but was denied when the local government decided to limit the awards to citizens of French nationality because of both the scarcity of funds and the high number of applications made by non-French nationals.[332]

The ECJ again extended the protections of Regulation 1612/68 to protect the children of migrant workers, here the adult children of migrant workers who are attending an institution of higher education, in their quest for

326. *Id.* at I-131-32.
327. *Id.* at I-132.
328. *Id.* at I-133.
329. *Id.* at I-134.
330. Case C-40/05, Lyyski v. Umea Universitet, 2007 E.C.R. I-117, I-130-31.
331. Case 68/74, Alaimo v. Prefet of the Rhone, 1975 E.C.R. 109, 114.
332. *Id.* at 109-12.

equal treatment regarding education-based subsidies.[333] However, the ECJ went further and stated that the protections of Regulation 1612/68 extended to course registration and "to all the rights arising from such admission."[334] Citing the *Casagrande* case, the ECJ mandated that children of all member-states must be treated equally on issues of education.[335]

The ECJ has also held that member-states may not limit the number of students who hold citizenship in other member-states who are eligible for state financial assistance.[336] Indeed, the ECJ found in violation of Article 18 (ex 12, 6) of the TFEU prohibiting discrimination based on nationality, a Belgian law that limited the number of non-Belgian students eligible for financial subsidies to 2% of the number of citizens from Belgium and Luxembourg attending each vocational institution.[337] Additionally, the ECJ found that the Belgian law also violated Regulation 1612/68 which requires citizens of member-states to be admitted upon the same admissions standards as citizens of the host member-state.[338]

In *Bressol v. Belgium*, the ECJ stated that a member-state cannot restrict the number of students applying to medical programs from other member-states using a ratio analysis, unless that member-state can prove that such a restriction is needed to protect human health pursuant to Articles 18 (ex 12, 6, 7) and 21 (ex 18, 8a).[339] In the case at bar, the Gouvernement de la Communauté française ("French Community" of the Belgian government) imposed a restriction on the number of non-resident students to its various medical-related university-level programs to 30% of the total student population enrolled in these programs on several grounds, including that if the percentage were to surpass 30% there would exist a significant financial burden on the member-state government, the quality of the programs would decline, and there would exist a risk to the public health of the member-state in that there would not be enough trained professionals in these occupational fields.[340] Pursuant to the admissions policy articulated by the French Community, in order to be included in the traditional applicant pool (the pool for those who are not "non-residents"), the student-applicant must be able to show that his

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333. *Id.* at 112-14.

334. *Id.*

335. *Id.*

336. Case 42/87, Re Higher Educ. Funding, 1988 E.C.R. 5453, 5455-57.

337. *Id.* at 5455-56.

338. *Id.* at 5456.

339. Case C-73/08, Bressol and Chaverot v. Gouvernement de la Communaute francaise (Belg.), 2010 E.C.R. I-2782, I-2791. *See id.* at I-2809.

340. *Id.* at I-2791. *See id.* at I-2801-02; *id.* at I-2804; *see also id.* at I-2790-93. The various health-related programs included midwifery, occupational therapy, speech therapy, podiatry-chiropody, physiotherapy, audiology, psycho-educational counseling, and veterinary medicine.

or her principal residence was Belgium at the time of registration and had to meet one of eight conditions.[341]

The ECJ began its analysis by clarifying that member-states do have considerable discretion as to how to organize their educational systems pursuant to the TFEU, but in doing so must make sure that the principal EU freedoms of movement and residence throughout the member-states is respected.[342] Relatedly, this discretion allows member-states to choose a system of free access or restriction of applicants so long as the system developed respects the principle of non-discrimination on national grounds as espoused in EU law.[343]

On the issue of nationality discrimination, the ECJ stated that member-states can engage in such discrimination but only if: there is proof of a threat to public health; the national legislation in place is designed to secure against that threat; and the national court finds evidence that there is a genuine risk

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341. *Id.* at I-2788-89. These conditions included:

> 1. [the student had] the right to remain permanently in Belgium;
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> 2. [the student] had had his principal residence in Belgium for at least six months prior to his registration in an institution of higher education, at the same time carrying on a remunerated or unremunerated professional activity or benefitting from a replacement income granted by a Belgian public service;
>
> 3. [the student had] permission to remain for an unlimited period [in Belgium] on the basis of [the relevant Belgian legislation];
>
> 4. [the student had] permission to remain in Belgium because he enjoys refugee status [as defined by Belgian legislation] or has submitted a request to be recognized as a refugee;
>
> 5. [the student had] the right to reside in Belgian because he benefits from temporary protection on the basis of [the relevant Belgian legislation];
>
> 6. [the student had] a mother, father, legal guardian, or spouse who fulfills one of the above conditions;
>
> 7. [the student] has had his principal residence in Belgium for at least three years at the time of his registration in an institution of higher education;
>
> 8. [the student] has been granted a scholarship for his studies within the framework of development cooperation for the academic year and for the studies for which the request for registration was introduced.

Id.

342. *Id.* at I-2796-97.

343. Case C-73/08, Bressol and Chaverot v. Gouvernement de la Communaute francaise (Belg.) 2010 E.C.R. I-2782, I-2797-98.

to public health.[344] However, the ECJ also contended that just because a shortage of workers in these health occupations may exist, a public health concern does not automatically exist warranting a preference for member-state nationals to have a greater share of the seats in the academic programs.[345] For example, and according to the ECJ, it cannot be inferred that all students trained in these academic programs will continue to live in the member-state enacting the restrictions in hopes the students will remain in that member-state.[346] Furthermore, although member-states need not wait until a crisis occurs due to a shortage of qualified workers in such health care fields in order to place limitations on admissions, the member-state must still show that the actual threats to public health truly exist.[347] Indeed, the member-state enacting limitations on non-resident applications must provide an analysis of the proportionality and appropriateness of the limitation.[348]

Although the European system of student assistance would seem lucrative in comparison to American standards, it is not the case that the ECJ will not guard against abuse of the system. However, due to the broad protections that EU citizens maintain under the TFEU, it is very difficult to decipher a case of abuse. In *Ninni-Orasche v. Bundesminister Fur Wissenschaft*, the ECJ laid out the parameters for determining whether a citizen is abusing the study finance system, but left it to the national courts to evaluate each case pursuant to those parameters.[349]

Ms. Ninni-Orasche was an Italian national, who had married an Austrian, and had lived in Austria pursuant to a residence permit granted by the Austrian government.[350] During her stay in Austria, she worked for a fixed period of time, exactly two and one-half months, as a waitress and a cashier for the same Austrian catering company.[351] However, at the end of that period of employment, she took an entrance exam and was admitted to study at an Austrian university, but before she began her course of study, she looked for employment in the hotel and banking industry without success and applied for study finance from the Austrian government to help support her studies.[352] Her application was denied by the Austrian government on the grounds that she had not obtained worker status pursuant to Article 45 (ex 39, 48) and,

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344. *Id.* at I-2804-05.
345. *Id.* at I-2805-06.
346. *Id.* at I-2807.
347. *Id.* at I-2806-07.
348. Case C-73/08, Bressol and Chaverot v. Gouvernement de la Communaute francaise (Belg.), 2010 E.C.R. I-2782, I-2797.
349. Case C-413/01, Ninni-Orasche v. Bundesminister Fur Wissenschaft, 2003 E.C.R. I-13217, I-13234-36.
350. *Id.* at I-13220-22.
351. *Id.*
352. *Id.*

relatedly, could not gain the benefits associated with that status including study finance.[353]

The ECJ was again forced to mesh the rights and obligations of citizens and member-states under Regulation 1612/68 and Article 45. The ECJ also had to address provisions of Regulation 2434/92 and Directive 93/96 which, respectively, require member-states to treat citizens of the EU equally despite their source of national citizenship in matters of employment, social programs, tax advantages, and allow member-states to deny study finance in cases where a citizen may become an unreasonable burden on the member-state's public resources.[354] Furthermore, Directive 93/96 states that there is no general right of students to obtain study finance merely because they are exercising their right of residence and, therefore, students would have to show they are protected by some other TFEU right, such as the right of free movement of workers.[355]

The ECJ began by restating that worker status should not be interpreted narrowly under the TFEU and that the essential aspect of an employment relationship is that a person perform services in return for remuneration for an identifiable period of time.[356] Continuing, and quite methodically, the ECJ stated that a short length of employment is not grounds to exclude a citizen from protection under Article 45 and that the activity be "effective and genuine" and not merely "marginal and ancillary."[357] Specifically addressing the question of Ms. Ninni-Orasche's employment, the ECJ found that she had obtained the status of worker under the provisions of Article 45 despite the fact that she had worked only a few years after she obtained her residency permit for a short fixed duration, and sought enrollment at the university while immediately applying for financial support.[358] Therefore, her rather small set of working activities was not deemed "marginal and ancillary," and in fact most of these factors outside of her actual employment were actually not very important in determining whether she had achieved worker status.[359]

The second question, whether she was voluntarily unemployed at the time of her application for study finance, was more complicated. The ECJ had to determine whether she was voluntarily unemployed and thus still maintained the protection of worker status under Article 45 which would allow her to stay in Austria and to utilize the public services of the Austrian

353. *Id.* at I-13221-24.

354. Case C-413/01, Ninni-Orasche v. Bundesminister Fur Wissenschaft, 2003 E.C.R. I-13217, I-13219-20.

355. *Id.* at I-13221-22.

356. *Id.* at I-13227-29.

357. *Id.* at I-13227-29.

358. *Id.* at I-13231-32.

359. Case C-413/01, Ninni-Orasche v. Bundesminister Fur Wissenschaft, 2003 E.C.R. I-13217, I-13231-32.

government under Regulation 1612/68.[360] Regulation 1612/68 would allow a TFEU-protected worker to gain the benefits of support for university studies if there is a continuity between the occupational activity and the education sought, unless the worker can show that he or she was involuntarily unemployed and/or is required to undertake retraining due to changes in the labor market.[361] The ECJ did find sympathy for the governments of member-states to protect against the labor activities of citizens of other member-states designed to merely allow them to take advantage of the host's study finance program following very short periods of employment.[362]

Nonetheless, the ECJ made it clear that, although the national court has the ability to determine whether the employment activities of a citizen of another member-state are designed to merely take advantage of the former's study finance program, the national court cannot exclude citizens who have worked for short durations.[363] However, the national court can consider the individual fact patterns, including in Ms. Ninni-Orasche's case the fact that she only began work after living in Austria for some time, worked for a short duration, obtained admission to an Austrian university, and immediately sought study finance, to determine if abuse was the intent of the worker.[364] Furthermore, it is up to the national court to determine if such a citizen was voluntarily or involuntarily unemployed.[365]

I. DISCRIMINATION BASED ON NATIONALITY

The chief argument asserted by Grzelczyk was that such discrimination violated Article 18 of the TFEU which prohibits discrimination based on nationality, Article 20 which establishes EU citizenship for all citizens who are nationals of member-states, and Article 21 which allows citizens to exercise their EU citizenship to move freely within other member-states subject only to EU law.[366]

The ECJ found this particular case especially easy to resolve once it became obvious that Grzelczyk would have been eligible for the minimex (a stipend to help cover the costs of maintenance, accommodation, and studies) had he been a Belgian citizen.[367] Furthermore, and certainly reflective of the

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360. *Id.* at I-13232.
361. *Id.*
362. *Id.*
363. *Id.* at I-13233.
364. Case C-413/01, Ninni-Orasche v. Bundesminister Fur Wissenschaft, 2003 E.C.R. I-13217, I-13231-32.
365. *Id.*
366. Case C-184/99, Grzelczyk v. Centre Public D'Aide Sociale, 2001 E.C.R. I-6229, I-6243-16.
367. *Id.* at ¶ 29.

more aggressive position mentioned earlier, the ECJ stated that the citizenship provision of TFEU enacted in 1993 and the newer provisions concerning education and vocational training, makes such cases easier to decide since the 1988 *Brown* decision.[368] According to the ECJ, when students move from member-state to member-state, they do not lose the right to enforce non-discrimination provisions of the TFEU, even if the member-states may enact residency requirements for student-related benefits.[369] However, the ECJ did articulate that member-states do have the right to require students to provide sufficient documentation that serves as proof that when he or she moves from one member-state to the host member-state that the student will not be a burden on the host state's social welfare system.[370]

The ECJ drew heavily on comparisons to the *Bidar* case in *Forster v. Hoofddirectie* to hold that a member-state's five-year residency period requirement before a maintenance grant for educational purposes could be awarded was not unreasonable in the face of Article 18 (ex 12, 6, 7).[371] In *Forster*, the plaintiff, a German national, was awarded a maintenance grant by the Netherlands government in order to pursue an education program in secondary education in the Netherlands while she also held employment in the Netherlands.[372] However, the Netherlands government ordered her to refund some of the maintenance grant funds after the government learned that she didn't hold continuous employment for the previous five years and thus could not be deemed a worker pursuant to EU law and, as well, she could not be deemed a person that had integrated herself sufficiently enough in Dutch society to be eligible for the maintenance grant pursuant to the ECJ's decision in *Bidar*.[373] The plaintiff challenged the order to repay the funds arguing that despite the fact she had not held continuous employment in the Netherlands over the prior five years, she was sufficiently integrated into Dutch society making her a worker for purposes of EU law.[374]

According to the ECJ, Article 18 of the TFEU prohibits discrimination based on nationality in all matters that are subject to EU law and included within the bounds of this corpus of law is the fundamental freedom to move and reside within the member-states as conferred by Article 21 (ex 18, 8a).[375] Furthermore, while citing the *D'Hoop* decision by the ECJ six years prior to

368. Case C-184/99, Grzelczyk v. Centre Public D'Aide Sociale, 2001 E.C.R. I-6229, I-6243-44.

369. *Id.*

370. *Id.*

371. Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, ¶¶ 58, 72.

372. *Id.* at ¶¶ 15,17.

373. *Id.* at ¶¶ 20-21.

374. *Id.* at ¶ 23.

375. *Id.* at ¶¶ 36, 37.

the case at bar, the ECJ restated that a citizen of a member-state that enters another member-state to pursue secondary education is exercising a fundamental freedom espoused by Article 21.[376] Additionally, the ECJ cited the *Bidar* decision commenting that Article 18 governs the situation whereby a student who is also a lawful resident of another member-state seeks the awarding of a maintenance grant.[377] The ECJ also remarked that *Bidar* stood for the principle that a citizen of a member-state who is a lawful resident in another member-state is subject to equal treatment in comparison to nationals of the host member-state pursuant to Article 18 when seeking a maintenance grant from the host member-state.[378]

Regardless of the strong language in *Bidar*, the ECJ found a significant difference between that case and the case at bar in that the member-state in *Bidar* required the citizen of another member-state to be established in the host member-state when asking for financial assistance, and the member-state legislation in *Bidar* made it impossible for a citizen of another member-state to become established.[379] The ECJ then recollected its statement in the *Bidar* case that a host member-state can require that a citizen from another member-state show a financial link to the citizens of the other member-state so as to make sure the host member-state does not face an unreasonable financial burden that might affect financial assistance to all applicants.[380]

The ECJ proclaimed a test for the host member-state requiring that any legislation requiring a five-year residency period before the awarding of a maintenance grant for education purposes show that the need for the citizen to be integrated sufficiently into the host member-state's society be proportionate to its aims.[381] While holding that the five-year residency period for citizens of another member-state was not unreasonable, the ECJ required only that the member-state imposing the requirement make the rule clear to those affected and in advance.[382] However, the ECJ also stated that member-states need not impose any five-year residency requirement in order to award maintenance grants to citizens of other member-states.[383]

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376. Case C-158/07, Jacqueline Forster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, at ¶¶ 58, 72.

377. *Id.* at ¶ 41.

378. *Id.* at ¶ 45.

379. *Id.* at ¶ 47.

380. *Id.* at ¶ 54.

381. Case C-158/07, Jacqueline Forster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, at ¶¶ 51, 53.

382. *Id.* at ¶ 56.

383. *Id.* at ¶ 59. The ECJ also held that Regulation 1251/71 which allows a worker to remain in the host member-state permanently and also requiring equal treatment based on nationality after having worked for a period in the host member-state did not apply to the facts involving Forster, and thus did not provide her any relief. *Id.* at ¶¶ 25-32.

J. PERSONAL PROPERTY RESTRICTIONS

In *Ministere Public v. Profant*, the ECJ wrestled with the question of whether a value-added tax placed on a car that a student from one member-state used in another member-state as a source of primary transportation in the second member-state violated the TFEU.[384] Profant was a student of Luxembourg nationality who attended the University of Liege for several years and also married a woman of French nationality during his tenure as a student.[385] During his five years of study, he owned two cars, the first of which was bought and sold in Luxembourg and the second was bought in Luxembourg and remained with the couple.[386] According to Belgian law, non-Belgian nationals who brought into Belgium certain goods were subject to a value-added tax assessed against those goods.[387]

Several exemptions existed pursuant to the Belgian value-added tax requirement, one of which was an exemption for the temporary importation of goods (including those that students might import).[388] However, this exemption is lost when the importer of the goods becomes a permanent resident to which the Belgian government insisted was the case when, during the middle of his studies, Profant married a woman of French nationality (who subsequently took Luxembourg citizenship) and the couple maintained a residence in Belgium through Profant's studies.[389] When the Belgian government was notified of the transactions involving the purchase and sale of the cars, they brought criminal charges against Profant who refused to pay the value-added tax since he had already paid the taxes in Luxembourg.[390]

Profant's chief argument was that the application of the Belgian value-added-tax was a violation of Articles 28 (ex 23, 9) and 30 (ex 25, 12), which support the free movement of goods and prohibit customs duties on imports and exports and any fiscal charges that have such an effect.[391] Additionally, *Profant* suggested that although member-states are free to develop their own systems of taxation, the Belgian law violates Article 110 (ex 90, 95) of the TFEU which mandates that internal taxes not be excessive, either directly or indirectly, in relation to domestic products.[392] The ECJ took a fairly narrow

384. Case 249/84, Ministere Public v. Profant, 1985 E.C.R. 3250, 3251-52.
385. *Id.*
386. *Id.*
387. *Id.* at 3252.
388. *Id.*
389. Case 249/84, Ministere Public v. Profant, 1985 E.C.R. 3250, 3252-53.
390. *Id.* at 3253-54. However, it should be noted that the Belgian appellate court, the Cour d'Appel, Brussels, required that the charges be dropped against Profant concerning the first car due to time limitations. *Id.*
391. *Id.* at 3254-55.
392. *Id.* at 3255-56. It should be noted that the cars that Profant owned that are in question here were, first, an Alfa Romeo (Italy) and second, a Volkswagen (Germany). *Id.* at

view of the case despite the various possible infringements of the TFEU. The ECJ explained that had Profant merely stayed single and/or lived with his spouse instead of marrying her; Belgium, by its own law, would not be able to assess the value-added tax and that marriage itself should not dictate whether a student has decided to maintain a permanent residence in any member-state.[393] Furthermore, the ECJ articulated that many provisions of the TFEU require member-states to work towards harmonization of tax laws which will, in turn, put an end to the potential for double taxation (a real risk here since Profant did pay the value-added tax in Luxembourg).[394]

K. POST-STUDY BENEFITS

A member-state's government may not condition the benefits of a tide over allowance program based on the completion of a stated level of education in that same member-state.[395] In *Re Access to Special Employment Programmes*, the EU Commission brought a complaint against the Belgian government for not meeting the requirements of Article 45 (ex 39, 48) and Regulation 1612/68 securing the right of free movement of workers by maintaining an educational benefit program that was an entitlement for a first-time job seeker if, and only if, the job seeker had finished his or her secondary, technical, or vocational education or training in Belgium.[396] The EU Commission's position, and clearly accepted by the ECJ, was that the Belgian law

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3251. Consolidated Version of the Treaty on the Functioning of the European Union art. 110, Oct. 26, 2012, 2012 O.J. (C 326) 93 [hereinafter TFEU].

> No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Id.

393. Case 249/84, Ministere Public v. Profant, 1985 E.C.R. 3250, 3256-57.

394. *Id.* at 3257-58.

395. Case C-278/94, Re Access to Special Employment Programmes, 1996 E.C.R. I-4328, I-4329-30.

396. *Id.* at I-4330. The salient provisions of the Belgian law reads:

> To qualify for the tideover allowance, the young worker must have:
>
> (1) completed his compulsory education;
>
> (2) either
> (a) completed secondary education or technical or vocational training at a centre run, recognised or subsidized by a community; or

created a form of indirect discrimination in that the overwhelming majority of those who complete their stated level of education in Belgium are Belgian.[397] Furthermore, the ECJ held that the mere fact that Belgian nationals who complete their stated level of education in another member-state are not eligible for the program is not enough to remove the reality of indirect discrimination under the TFEU and Regulation 1612/68.[398] Also, the Belgian government's position was not helped by the fact that facially all member-state nationals are treated equally.[399]

Perhaps one of the most important aspects of *Re Access to Special Employment Programmes* was the test that the ECJ provided to determine whether indirect discrimination was present. Specifically, the ECJ stated that a provision of national law violates EU law if it is likely to affect migrant workers more than domestic workers and there is a risk that the national law will affect the migrant worker in a disadvantageous manner in respect to the migrant worker.[400] Furthermore, the national law is still in violation of EU law even if in practice the national law does not impact a substantially higher number of migrant workers.[401] According to the ECJ, all that is necessary for such a finding is that there exists a potential effect for disadvantage.[402]

V. THE DOMINANT THEMES OF THE ECJ'S JURISPRUDENCE ON THE FREE MOVEMENT OF STUDENTS

The overview of the ECJ's jurisprudence on the free movement of students supports five dominant themes. First, the ECJ's case law suggests that the various TFEU Articles as well as Regulation 1612/68 require absolute free movement of students and equality of treatment for the EU's citizens as they move from one member-state to another member-state in search of higher education. In *Casagrande*, the ECJ made it clear that citizens of any member-state must be treated by another member-state as if they were citizens of that member-state.[403] More specifically, the ECJ in *Casagrande* stated that all member-state citizens must be able to participate at the same level as their host-member-state counterparts, and the ECJ went as far as to

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(b) obtained from the competent authority of a community the diploma or educational certificate corresponding to the studies mentioned in (a) above.

Id. at I-4331.

397. *Id.* at I-4335.

398. *Id.* at I-4336.

399. *Id.* at I-4337.

400. Case C-278/94, Re Access to Special Employment Programmes, 1996 E.C.R. I-4328, I-4337-38.

401. *Id.*

402. *Id.*

403. Case 9/74, Casagrande v. Landeshaupstadt Munich, 1974 E.C.R. 774, 775.

place significance on the unification of families.[404] The *Gaal* decision by the ECJ further strengthened the mobility of students as the ECJ remarked that adult children must have equal access to educational benefits in the host member-state even if the children of a migrant worker are over the age of twenty-one and are also financially dependent.[405] The ECJ in both the *Gaal* and *Baumbast* decisions strengthened the rights of students by providing that equality in treatment extended to children who have deceased parents.[406] *Baumbast* went even further by extending the rights of students to equal treatment when a student is not a citizen of the EU yet is also child of a migrant worker who possesses EU citizenship.[407] The ECJ held, in a strongly-worded opinion in *Re Students' Rights* and *Forster*, that Article 18 of the TFEU provides a right of residence in another member-state for students of EU citizenship seeking to cross borders in pursuit of an education and also provides for fundamental right to move freely within the EU.[408] Although the ECJ stated that the TFEU allows member-states to alter their social benefit systems which would include support for students, any changes must still recognize that citizens of other member-states are treated in the same manner as national citizens.[409]

The second dominant theme revealed in the case law from the ECJ is its intolerance of excuses provided by member-states as the latter attempt to justify reasons as to why dissimilar treatment among students from home and host countries should exist. The *Morgan* decision is perhaps the best example of this intolerance in that the ECJ rejected several justifications by the German government for imposing a one-year domestic study rule as a precondition for gaining educational benefits.[410] The concerns including that students without a one-year domestic study rule will not do well in their studies, that the rule was necessary to make sure that students had chosen the correct field of study, that without the rule in place the funds available for students would be exhausted, and the concern that the German educational benefits scheme might lead to a duplication of benefits were all rejected by the ECJ, which

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404. *Id*.

405. Case C-7/94, Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Gaal, 1995 E.C.R. I-1040.

406. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452, I-2473-74.

407. *Id*.

408. Case C-295/90, Re Students' Rights, 1992 E.C.R. I-4230, I-4235-36; Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, ¶¶ 36-37.

409. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452.

410. Case C-11/06, Morgan v. Bezirksregierung Koln and Case C-12/06, Bucher v. Landrat des Kreises Duren, 2007 E.C.R. I-9195, I-9206.

held that the one-year domestic study rule was a violation of Article 18.[411] Similarly, in *Bidar*, the ECJ stated that the high costs of allowing all non-domestic students to use a particular form of financial assistance was not an acceptable reason for dissimilar treatment.[412] Likewise, the ECJ did not accept the rationale that a scarcity of funds existed in *Alaimo*.[413]

The ECJ may have had the most difficult time rejecting a member-state's rationale for treating its own citizens different than citizens from other member-states in the *Bressol* and *Echternach* decisions. In *Bressol*, the ECJ rejected Belgium's concern that the equal treatment requirement for the admission of students from other member-states would imperil the country's health care system as the shortage of trained workers would continue if such students were admitted on a non-discriminatory basis.[414] Instead, the ECJ required Belgium to show such a shortage of health care workers existed, not just merely fear that non-domestic students who studied in Belgium would return to their home member-states leaving a void in the health care system.[415] The Dutch government attempted to bar EU citizens from other member-states working for international organizations and their children from equal treatment in regards to a study finance program in *Echternach*, to which the ECJ interpreted Article 45's (ex 39, 48) limitations on public sector not to extend to those employed by such organizations.[416] These cases most likely best reflect both the best justifications for dissimilar treatment of students but also the ECJ's resolve to keep the strong precedent that students holding EU citizenship are entitled to equal treatment and free movement regardless of the member-state's rationale for doing so.

Third, the fact that regardless of the form of support offered by a member-state government, the ECJ found that the TFEU and Regulation 1612/68 required the free movement and equal treatment of students. The cases explored in this Article found several forms of support for students pursuing a higher education program including maintenance grants, further education awards, financial aid, minimexes, tide over allowances, and study finance. In addition to these forms of monetary support, member-states were asking EU citizens of other member-states to pay either minervals or enrollment fees. Financial support or penalties were not the lone forms of dissimilar treatment limiting the free movement of students put forth by member-states as limited

411. *Id*. at I-9208-12. *See also id.* at I-9212-13.

412. Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing and Sec'y of State for Educ. and Skills, 2005 E.C.R. I-2151, I-2161-165.

413. Case 68/74, Alaimo v. Prefet of the Rhone, 1975 E.C.R. 109, 114.

414. Case C-73/08, Bressol and Chaverot v. Gouvernement de la Communaute francaise (Belg.), 2010 E.C.R. I-2782.

415. *Id*. at I-2806-08.

416. Case 390/87, Echternach & Another v. Minister of Educ., 1989 E.C.R. 755, 760-64.

access to programs based on nationality were also barriers erected by member-states. Consistently, in the *Raulin* and *Forster* cases, the ECJ held that if a member-state provides maintenance grants for its own citizens, that member-state must do so for students with EU citizenship from other member-states when those citizens exercise their free movement rights without discrimination based on nationality.[417] The ECJ's language in *Raulin* was perhaps the strongest defense of the free movement and equal treatment of students, as in contrast to the Netherlands' argument that the maintenance grants could only be used for the necessaries of life, the ECJ stated that the intent of this form of financial assistance was for whatever expenses students in the Netherlands encountered and the same should apply to students with citizenship from other EU member-states.[418] In *Forster*, the ECJ found that a residency requirement in order to gain a maintenance grant from the Dutch government violated both Articles 18 (ex 12, 6) and 21 (ex 18, 8a) as such a requirement would serve as a form of discrimination based on nationality.[419]

Likewise, Belgium's argument that EU citizens of other member-states should have to pay a minerval to attend a university in Belgium due to the fact that Belgium had more students from other member-states than any other EU member-state fell short as the ECJ found such a policy a blatant form of discrimination based on nationality in *Gravier*.[420] The Belgian government's similar requirement that EU citizens from other member-states wishing to study in Belgium pay enrollment fees not assessed to Belgian nationals was also found to violate the TFEU, more specifically the right to free movement of workers under Article 45 (ex 39, 48), whereby the ECJ linked the mobility of workers to the free movement of students and the importance of education.[421] Belgium's attempt at prohibiting access to a minimex, another form of financial aid available to Belgian citizens, also was found to violate free movement and equal treatment principles subject to Articles 18 (ex 12, 6), 20 (ex 17, 8), and 21 (ex 18, 8a) in *Grzelczyk*.[422] In similar fashion, the U.K. courts linked the free movement of workers to the rights of free movement of students and the equal treatment thereof pursuant to Regulation 1612/68 holding that a residency requirement as a precondition to accessing a further

417. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1064-66; Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, ¶¶ 45, 58, 72.

418. Case C-357/89, Raulin v. Minister Van Onderwijs en Wetenschappen, 1992 E.C.R. I-1064-66.

419. Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507, ¶¶ 58, 72.

420. Case 293/83, Gravier v. City of Liege, 1985 E.C.R. 606, 614.

421. Case 152/82, Forcheri v. Belg., 1983 E.C.R. 2323, 2324.

422. Case C-184/99, Grzelczyk v. Centre Public D'Aide Sociale, 2001 E.C.R. I-6229, I-6245.

education award was abhorrent to EU law.[423] However, in heavy contrast to the immediately aforementioned cases, Germany's program whereby only German citizens attending a German university were eligible for an education grant was upheld by the ECJ in *Wirth*, as the ECJ found no violation of TFEU Articles 56 (ex 49, 59) and 57 (ex 50, 62) prohibiting limitations on services.[424]

Despite this almost blanket-level approach by the ECJ whereby it found virtually all forms of dissimilar treatment among EU citizens in all forms of financial assistance and/or the requirement that non-home member-state citizens pay an additional fee; the ECJ in *Bidar* did hold that member-states can require EU citizens from other member-states show some form of integration in order to get financial assistance.[425] Although the possibility of an "integration requirement" does exist, the ECJ has not been specific as to what the boundaries of such a requirement would be acceptable in the face of the TFEU or Regulation 1612/68.[426] Regardless, the ECJ did state that, in order to establish integration into the host-member-state, a citizen from another member-state can be asked to provide documentation.[427] The ECJ took a similar approach in *Forster* which stated that member-states can require that EU citizens of other member-states are sufficiently integrated so long as the rules on what constitutes sufficient integration in order to receive education benefits are clear.[428]

The lack of specificity in the definition for, yet the seemingly unyielding protection of, vocational education as a form of education providing students across the EU's member-states with the greatest level of free movement and equal treatment rights serves as the fourth dominant theme found in the ECJ's jurisprudence. Article 166 (ex 150, 127) provides for an EU-wide policy on vocational training and pushes member-states to cooperate to build a seamless vocational education program but does not define vocational education.[429] Article 166 also encourages the mobility of workers and students and identifies such mobility as part of the fundamental freedoms under the TFEU.[430] Despite the lack of a definition, the ECJ has been forced to define vocational education through its jurisprudence.

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423. MacMahon v. Dep't of Educ. [1983] Ch. 227, 237-39 (English High Court, Chancery Division).

424. Case C-109/92, Wirth v. Landeshauptstadt Hannover, 1993 E.C.R. I-6447, I-6452-53.

425. Case C-209/03, The Queen (On Application of Dany Bidar) v. London Borough of Ealing, 2005 E.C.R. I-2110, I-2170.

426. *See generally id.*

427. *Id.* at I-2170.

428. Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507.

429. TFEU art. 166, *supra* note 59.

430. TFEU art. 166, *supra* note 59.

In *Brown*, the United Kingdom government's attempt to exclude "university-level" education from the definition of vocational education failed the requirements of Regulation 1612/68.[431] Although the ECJ did not specify exactly what did or did not fall within the definition of vocational education for free movement and equal treatment purposes, the ECJ did state that vocational education included educational programs that were apprenticeship-based but also that education that merely promoted general knowledge fell outside the domain of vocational education.[432] The ECJ's decision in *Gravier* perhaps provided the best articulation of vocational education. Here, the ECJ commented that vocational education prepares a student for a specific trade, profession, or employment.[433] More narrowly, the ECJ held that any extra fees assessed by a member-state against EU citizens of another member-state would violate the tenets of Article 166, and that the ability to pursue vocational education across the member-states was all too critical to the free movement of persons.[434] Adding to the cumulative definition of vocational education, the ECJ stated that any educational program that has both vocational and non-vocational elements would be considered vocational education for the purposes of the TFEU.[435] Perhaps a good application of this doctrine is found in *Blaizot*, whereby the ECJ held that a veterinary medicine program constitutes vocational education pursuant to the TFEU, since that program prepared students for a career even if it was not an apprenticeship-based program.[436]

Perhaps the most dominant theme of the ECJ's jurisprudence on the free movement of students concerns the link between migrant worker status and student status. In several of the cases explored above, a student gained free movement and equal treatment rights through the migration of a worker—either the student him or herself or a parent. The *Bernini* case is perhaps the ECJ's best articulation of the definition of a migrant worker which includes that the EU citizen's work is effective and genuine, above a level of marginal and ancillary, and is performed in return for remuneration.[437] More pertinent to this work, the ECJ in *Bernini* stated that work productivity levels were not an appropriate gauge as to whether a worker gained migrant worker status and the occupational training qualifies as work for migrant worker status pursuant to EU law.[438] The ECJ's decision in *Raulin* extended the idea that in

431. Case 197/86, Brown v. Sec'y of State for Scot., 1988 E.C.R. 3205, 3239-40.
432. *Id.* at 3242-43.
433. Case 293/83, Gravier v. City of Liege, 1985 E.C.R. 606, 613-14.
434. *Id.* at 612-13.
435. Case 263/86, Belg. v. Humbel, 1988 E.C.R. 5383, 5387-88.
436. Case 24/86, Blaizot v. Univ. of Liege, 1988 E.C.R. 398, 403-04.
437. Case C-3/90, Bernini v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1098, I-1104.
438. *Id.* at I-1105.

order to achieve migrant worker status the work in question is minimal.[439] In *Raulin*, the ECJ commented that migrant worker status is achieved even if the duration of employment in the host member-state is of a short duration, but also that member-states may consider the duration of employment as a factor among others.[440] The ECJ's decision in *Ninni-Orasche* likewise stated that migrant worker status is achieved when the employment is for a short fixed period of time and even if just a small set of working activities are assigned to the migrant worker.[441] The ECJ widened the spectrum of what is a migrant worker to include those member-state citizens that commute to a host member-state for work and, according to the ECJ, Article 45 and Regulation 1612/68 provide the children of these migrant workers with equal access to educational benefits.[442] In *Meeusen*, the ECJ once again cited the concerns of migrant workers and preventing member-states from erecting barriers to educational opportunities for their children.[443]

This is not to say that the ECJ has not identified some potential limits on the definition of migrant worker that may limit the worker and/or his or her children from gaining free movement and equal treatment rights. The ECJ stated in *Ninni-Orasche* that three conditions existed whereby migrant workers, who are no longer employed, could keep their migrant worker status for the purposes of educational benefits including: when the worker was involuntarily unemployed; the worker must adapt to the changing labor market; and/or there exists a link between the line of work and the educational program pursued by the migrant worker.[444] Therefore, the limitations on a migrant worker's ability to enjoy equal treatment and free movement as a student (or his or her child) would exist where the migrant worker was voluntarily unemployed, was not ceasing work to adapt to changes in the labor market, and/or no link existed between the migrant worker's line of work and the educational program pursued. A second, and related, limitation on a migrant worker's free movement and equal treatment rights exists in that the ECJ left it up to the national courts of member-states to determine whether a migrant worker is involuntarily unemployed.[445] The third potential limitation is found in the ECJ's decision in *Fahmi*, whereby the ECJ stated that if a migrant worker is gaining such status through the right of establishment as

439. Case C-357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-10, I-1057-60.

440. *Id.* at I-1059-62.

441. Case C-413/01, Ninni-Orasche v. Bundesminister Fur Wissenschaft, 2003 E.C.R. I-13217, I-13226-27.

442. Case C-337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, 1999 E.C.R. I-3304, I-3312.

443. *Id.* at I-3312-14.

444. Case C-413/01, Ninni-Orasche v. Bundesminister fur Wissenschaft, 2003 E.C.R. I-13217, I-13232-36.

445. *Id*.

provided for in Article 49, but then the migrant worker ceases exercising the right of establishment, then the worker loses equal treatment and free movement rights as a student.[446] The last potential limitation on a migrant worker's ability to secure free movement and equal treatment rights lies in the *Raulin* decision as the ECJ stated that a member-state can consider for the purposes of migrant worker status the relationship between the work activities and the educational process sought by the migrant worker.[447]

VI. ANALYSIS: DOES THE FREE MOVEMENT OF STUDENTS EXIST?

The chief question to be answered in this Article is whether the rights of free movement and equal treatment exist for EU citizens wishing to pursue higher education in another member-state. The answer to this question is that, although the TFEU does not expressly provide for a free movement and equal treatment guarantee for EU citizen-students wishing to cross borders to attend a university, such rights do exist through the ECJ's jurisprudence as the ECJ interprets several articles of the TFEU. The rights to free movement and equal treatment of students is vested in Articles 18, 20, 21, 45, 166, and Regulation 1612/68 which focus on prohibitions against discrimination based on nationality (Articles 18, 20, and 21), prohibitions against the free movement of workers (Article 45 and Regulation 1612/68), and the incumbent duties placed upon member-states to develop an EU-wide vocational education program.

The case of *Morgan v. Bezirksregierung Koln* perhaps best conveys the free movement and equal treatment principles.[448] Here, the ECJ made it clear that any obstacles put into place by a member-state which could interfere with the rights to freely move from one member-state to another pursuant to Article 18 would be suspect, and no member-state rule can place a citizen from another member-state in a disadvantaged position in comparison to domestic nationals.[449] The ECJ in *Morgan* also emphasized the importance of Article 165 which fosters and endorses the mobility of teachers and students.[450] While finding Germany's first-stage studies rule in violation of the TFEU, the ECJ also cited the importance of a student's choice in his or her academic programs and the ability to change his or her mind.[451] However,

446. Case C-33/99, Fahmi & Another v. Bestuur Van de Sociale Verzekeringsbank, 2001 E.C.R. I-2452, I-2473-74.

447. Case C-357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1060-62.

448. Case C-11/06, Morgan v. Bezirksregierung Koln and Case C-12/06, Bucher v. Landrat des Kreises Duren, 2007 E.C.R. I-9195.

449. *Id.* at I-9206.

450. *Id.* at I-9206-07.

451. *Id.* at I-9209-10.

the *Morgan* decision meant much more to the free movement and equal treatment of students than black letter law. The ECJ's decision in *Morgan* both identified and solved a problem associated with free movement of students and workers. Specifically, Germany was attempting to require students to stay in Germany for at least one year in an academic program in order to gain other educational benefits. If such a rule were upheld by the ECJ, Germany, and every other member-state, would have to create an academic program for every academic discipline and/or vocation. Such an endeavor would be inefficient. By striking the first-stage studies rule, member-states can direct their universities to efficiently specialize in certain academic and vocational programs and in cases whereby a member-state cannot effectively or efficiently maintain a particular program, EU citizen-students can move to a member-state that possesses a university with the desired program. Therefore, member-states can invest wisely in academic and/or vocational programs that later become much stronger while not investing in weak programs. In turn, the tenets of Article 166 are realized in that the 28 member-states are working together to achieve an efficient EU-wide vocational education system. This reality would also remove the argument by member-states identified in the cases surveyed in this Article that attempted to require non-domestic students to pay extra fees to support their universities.

When an EU citizen-student is not a migrant worker, a survey of the ECJ's jurisprudence in this Article best supports the rights of free movement and equal treatment when the education sought by the EU citizen-student is vocational education. Several of the cases cited in this Article reflected a significant debate as to what vocational education encompassed. Once the education in question was deemed vocational by the ECJ, the free movement and equal treatment rights were applied by the ECJ. Furthermore, Articles 165 and 166 of the TFEU only pertain to vocational education in terms of supporting the mobility of teachers and students and requiring member-states to work together to develop an EU-wide vocational education program. If an EU citizen-student wishes to move from one member-state to another to engage in a university-level academic program that is not vocational in nature, he or she will likely have to rely on Articles 18, 20, and 21; which allow for a more general freedom of movement for EU citizens.

When, however, the EU citizen-student is a migrant worker and is seeking an educational program in another member-state there is a greater level of protection pursuant to Article 45 and Regulation 1612/68. Article 45 of the TFEU and Regulation 1612/68 only protect the free movement of migrant workers who are EU citizens but does require member-states to admit students on equal terms when they apply to education programs.[452] Interestingly

452. Case 9/74, Casagrande v. Landeshaupstadt Munchen, 1974 E.C.R. 774, 778-80; Case 24/86, Blaizot v. Univ. of Liege, 1988 E.C.R. 398, 403; Case 263/86, Belg. v. Humbel,

enough, the United Kingdom High Court provided one of the most expansive definitions of a migrant worker to which EU law served to protect. According to the British High Court, the definition of worker is not relegated to non-skilled workers and skilled craftsmen but a host of other professions.[453] More specific to the ECJ, the *Ninni-Orasche* and *Bernini* decisions provided broad definitions of migrant worker status. According to the ECJ in *Ninni-Orasche*, a worker who can show that his or her labor was conducted for a specific period of time, in return for remuneration, was effective and genuine, and not merely marginal and ancillary, is deemed a migrant worker for the purposes of Article 45 and Regulation 1612/68.[454] Adding to the definition provided by the ECJ in *Ninni-Orasche*, the ECJ stated in *Bernini* that a migrant worker is protected under Article 45 and Regulation 1612/68 and thus is provided free movement and equal treatment rights even if her work product is low.[455] Clearly, the broader the definition of migrant worker, the greater the scope of protection for migrant workers toward free movement and equal treatment as students. Furthermore, the ECJ has made it clear that once a migrant worker is protected under Article 45 or Regulation 1612/68, his or her children gain free movement and equal treatment rights when those children seek assistance for a higher education program in the host member-state.[456]

The potential for a residency requirement is troubling. In all cases identified in this Article, the ECJ and the United Kingdom High Court have steadfastly prohibited member-states from maintaining a residency requirement for EU citizen-students in order to gain equal treatment as a student.[457] The ECJ's decision in *Raulin* made it clear that once a migrant worker is admitted to a higher education program in another member-state, he or she also secures

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1988 E.C.R. 5383, 5388-89; Case 237/85, Matteucci v. French Reg'l Council of Belg., 1988 E.C.R. 5606, 5610-13.

453. MacMahon v.Dep't of Educ. [1983] Ch. 227, 239-40.

454. Case C-413/01, Ninni-Orasche v. Bundesminister fur Wissenschaft, 2003 E.C.R. I-13217, I-13227-32.

455. Case C-3/90, Bernini v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1098, I-1105.

456. Case C-3/90, *Bernini*, 1992 E.C.R. at I-1071; Case 9/74, Casagrande v. Landeshaupstadt Munchen, 1974 E.C.R. 774; Case C-7/94, Landesamt fur Ausbildungsforderung Nordrhein-Westfalen v. Gaal, 1995 E.C.R. I-1040; Case C-337/97, Meeusen v. Hoofddirectie van de Informatie Beheer Groep, 1999 E.C.R. I-3304; Case C-33/99, Fahmi & Another, 2001 E.C.R. I-2452; Case C-413/99, Baumbast v. Sec'y of State, 2002 E.C.R. I-7136; Case 390/87, Echternach & Another v. Minister van Onderwijs en Wetenschappen, 1989 E.C.R. 755; Case 68/74, Alaimo v. Prefet du Rhone, 1975 E.C.R. 109.

457. Case C-357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054; Case C-390/87, Echternach & Another v. Ministervan Onderwijs en Wetenschappen, 1989 E.C.R. 755; Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing, 2005 E.C.R. I-2110; Case C-73/08, Bressol v. Gouvernement de la Communaute francaise (Belgium) 2010 E.C.R. I-2782; MacMahon v. Dep't of Educ. [1982] 3 C.M.L.R. 91; Regina v. Inner London Educational Authority [1985] 1 C.M.L.R. 716.

a right of residence in that member-state.[458] Similarly in *Re Access to Special Employment Programmes*, the ECJ found intolerable, in the face of Article 45 and Regulation 1612/68, a residency requirement for a post-degree tide over allowance.[459] Although this line of cases seems to make it clear that a residency requirement is not permitted in the face of the TFEU, two cases leave the door open for such a possibility. In *Bidar*, the ECJ, while striking down a three-year residency requirement also stated that member-states could require proof of financial solidarity and integration with that member-state.[460] Although the ECJ was not clear as to how financial solidarity and integration with a member-state could be proven, there is the possibility that a shorter residency requirement may be a requirement for a member-state to insist upon as an EU citizen-student applies for an academic program and associated benefits. While citing the *Bidar* decision, the ECJ used slightly different language in *Forster* but similarly maintained that member-states can require a financial link between the member-state and the EU citizen-student from another member-state.[461] In a hypothetical case whereby an EU citizen-student tries to enter another member-state for the purposes of pursuing higher education, and is not protected as a migrant worker, that member-state's requirement of financial solidarity, integration, and/or a financial link may make truly constitute a residency requirement of some kind as trying to show financial solidarity, integration, and/or a financial link with a host member-state would be almost impossible without living in that member-state for at least some time period.

Equally troubling is the "the burden argument." Many member-states have used the possibility that EU citizen-students arriving in pursuit of higher education would become a burden to that member-state's social system. In *Re Higher Education Funding*, the ECJ found Belgium's limitation on access to educational subsidies for EU citizen-students from other member-states to violate the free movement and anti-discrimination provisions of Article 18.[462] The ECJ likewise found fault with Germany's first-stage studies condition which was based on a rationale that students coming to Germany would become a burden on the social system that provided educational benefits in the face of the TFEU.[463] The ECJ in the *Alaimo* decision stated that member-

458. Case C-357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-1054, I-1063-65.

459. Case C-278/94, Re Access to Special Emp't Programmes, 1996 E.C.R. I-4328, I-4329-30.

460. Case C-209/03, The Queen (On Application of Dany Bidar) v. London Borough of Ealing, 2005 E.C.R. I-2110, I-2170.

461. Case C-158/07, Förster v. Hoofddirectie van de Informatie Beheer Groep, 2008 E.C.R. I-8507.

462. Case 42/87, Re Higher Education Funding, 1989 E.C.R. I-5453, I-5455-57.

463. Case C-11/06, Morgan v. Bezirksregierung Koln and Case C-12/06, Bucher v. Landrat des Kreises Duren, 2007 E.C.R. I-9195.

states cannot limit educational assistance to EU citizens of other member-states based on a concern that the source of funds supporting the assistance program would evaporate if non-domestic students were eligible.[464] Despite the dismissal of the burden argument by the ECJ in the immediately aforementioned cases, the ECJ in *Grzelczyk* stated that member-states may require documentation on the part of students crossing borders in pursuit of a university education to provide documentation that they will not become a burden on the member-state's social system.[465] Similarly, as stated above in this section, the ECJ in the *Bidar* decision did provide some room for member-states to require documentation on the part of an incoming EU citizen-student to show that they would not be a burden to the system.[466] The *Bidar* and *Grzelczyk* cases, taken together, could potentially leave room for member-states to claim that EU citizen-students from other member-states are such a burden on the educational social system that they should not be eligible or create a condition where the required documentation for the non-domestic student is so overwhelming to prove the absence of a burden that the student does not make the attempt to study in another member-state.

VII. CONCLUSION

One of the ways to make the EU more relevant and useful to the ordinary person is to make education part of EU policy.[467] The EU federal government has attempted to encourage university students to cross national borders to study.[468] Even at the time of the founding of the Treaty of Rome, it was obvious to the Framers that an open labor market would be a critical element of a truly integrated single market.[469] Among other areas of social policy, the EU has attempted to push member-states toward greater convergence in the area of education.[470] In contrast to the free movement for American citizens within the United States, EU citizens have faced other barriers such as different languages, different educational systems, and differences in credential

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464. Case 68/74, Alaimo v. Prefet du Rhone, 1975 E.C.R. 109, 115.

465. Case C-184/99, Grzelczyk v. Centre Public D'Aide Sociale, 2001 E.C.R. I-6229, I-6245.

466. Case C-209/03, The Queen (On the Application of Dany Bidar) v. London Borough of Ealing and Sec'y of State for Educ. and Skills, 2005 E.C.R. I-2110; Case C-184/99, Grzelczyk v. Centre Public D'Aide Sociale, 2001 E.C.R. I-6229, I-6244-45.

467. DESMOND DINAN, EUROPE RECAST: A HISTORY OF EUROPEAN UNION 253 (2004).

468. ELIZABETH BOMBERG, JOHN PETERSON & RICHARD CORBETT, THE EUROPEAN UNION: HOW DOES IT WORK? 106 (3d ed. 2012).

469. JOHN MCCORMICK & JONATHAN OLSEN, THE EUROPEAN UNION: POLITICS AND POLICIES 270 (5th ed. 2014).

470. MICHELLE CINI & NIEVES PEREZ-SOLORZANO BORRAGAN, EUROPEAN UNION POLITICS 9 (3d ed. 2010).

qualification.[471] The EU workforce, as mentioned above, is heavily dependent upon credentials—many of which are earned through participation at higher education institutions. A true EU-wide workforce may depend on the free movement and equal treatment of students. Truly, not all universities and member-state governments will be able to develop academic programs that meet all needs of all employers within their political boundaries. As well, employers will need a more mobile workforce constituting members exposed to several geographic areas of the EU in order to garner the qualified employees they need. The ECJ has at least created a non-discrimination playfield for this to occur. This non-discrimination policy will allow for greater competition among member-states and universities not only to improve academic programs but, also, to attract talented students. As well, this non-discrimination policy should allow the ERASMUS, TEMPUS, LEONARDO, and Bologna Process programs to prosper.

However, in order to make the free movement and equal treatment rights absolute guarantees, the several potential loopholes identified in regard to: claims that the education sought is not vocational, the student is not a migrant worker or the child of a migrant worker, and the potential for a cumbersome process to develop in regard to whether an incoming student is a burden on the education of a member-state; must be closed by the ECJ in future jurisprudence. Such closure would perfect the above-mentioned goals of the EU on education policy.

471. *Id.*