Case C-73/08 Bressol & Chaverot [2010] 3 CMLR 20, European Court of Justice

**Issues:** European citizenship; Articles 18 and 21 TFEU; indirect discrimination; justification; public health; proportionality

**Legislative background:** In 2006 a decree was adopted by the Parliament of the French Community of Belgium restricting the number of ‘non-resident’ students who could enrol on physiotherapy and veterinary medicine courses at higher education institutions in that part of Belgium. This was in response to a marked rise in student numbers, attributable to the limitations placed on student places on physiotherapy and veterinary medicine courses in France, prompting students who had missed out on places in that country seeking to study in Belgium instead. The Parliament was concerned that, given the budgetary, human and material resources available at the Belgian institutions, the quality of teaching – and consequently public health – was being jeopardised by this influx of French students.

**Facts:** Nicolas Bressol, Céline Chaverot and 51 others, mostly French students, brought an action seeking the annulment of the decree. They relied on several provisions of EU law, including Articles 18 and 21 TFEU.

**Held:** (1) The imposition of a residence requirement under the Belgian decree amounted to indirect discrimination, *prima facie* prohibited by Articles 18 and 21 TFEU, although capable of objective justification.

(2) The residence requirement was potentially justifiable on public health grounds. The Court held that “a reduction in the quality of training of future health professionals may ultimately impair the quality of care provided in the territory concerned, since the quality of the medical or paramedical service within a given area depends on the competence of the health professionals who carry out their activity there.”

(3) Ultimately it would be a matter for the national court to decide whether the residence requirement was actually necessary.

Case C-135/08 Rottmann [2010] 3 CMLR 2, [2010] QB 761, European Court of Justice

**Issues:** European citizenship; Article 20 TFEU; revocation of nationality

**Facts:** Janko Rottmann was born in Austria and acquired Austrian nationality. In 1995 he went to live in Germany and in 1998 applied for German nationality through naturalisation, which was conferred in 1999. As a result, he lost his Austrian
nationality. Subsequently, his German nationality was revoked on the basis of intentional deception (it transpired that a court in Austria had issued a warrant for his arrest before he had moved to Germany, but he had failed to disclose this to the German authorities). However, this did not mean he automatically re-acquired his Austrian nationality, leaving him ‘stateless’. He challenged the decision to strip him of his German nationality. The German government (supported by several others) argued that, as the case involved the decision by the German authorities to strip a German national of his nationality, it was a “purely internal” matter.

**Held:** (1) The matter was not “purely internal”, given that the decision to remove German nationality also stripped him of his status as an EU Citizen, and therefore fell within the ambit of EU law.

(2) The situation was distinguishable from *Kaur* (Case C-192/99) [2001] ECR I-1237. She had never been an EU Citizen, whereas Rottmann had been an EU Citizen (initially based on his Austrian, and later his German, nationality).

(3) In general, Member States were free to decide on matters of nationality, including loss of nationality. The Court stated that a “decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality” (paragraph 51).

(4) Decisions on nationality fell within the remit of the individual Member States – a point confirmed in several international conventions.

(5) However, when the removal of nationality also entailed the loss of EU Citizenship, it was incumbent on the national court to assess whether the decision to remove nationality was proportionate. It would be necessary “to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union” (paragraph 56). It would also be necessary “to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality” (paragraph 56). However, a Member State whose nationality has been acquired by deception “cannot be considered bound, pursuant to [Article 20 TFEU], to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin” (paragraph 57).

**Comment:** This case complements earlier cases such as *Micheletti* (Case C-369/90) [1992] ECR I-4239 and *Zhu & Chen* (Case C-200/02) ECR I-9925, in which the ECJ held that the **acquisition** of nationality (on which EU Citizenship depends) was, generally speaking, a matter for the Member States. *Rottmann* decides that the **loss** of nationality is equally a matter for the Member States. It is therefore permissible under EU law for Member States to withdraw nationality, even though loss of EU Citizenship will follow as a consequence. However, as with many cases involving free movement, this is ultimately subject to the proportionality principle.
Case C-147/08 Römer (2011) 10th May, European Court of Justice

Issues: Discrimination on grounds of sexual orientation; Directive 2000/78; meaning of ‘pay’

Facts: For 40 years, from 1950 until his retirement in 1990, Jürgen Römer worked for the City of Hamburg as an administrator. From 1969, he lived with his partner, Mr U. In 2001, the two men entered into a “registered life partnership” recognised under German law. At the same time, Römer contacted his former employers and requested that his pension be re-calculated on the basis that he was now ‘married’, but this was refused. Römer calculated that his monthly pension was over €300 less than it would have been had he been classed as ‘married’, on the basis that ‘married’ pensioners were subject to a much lower income tax liability than unmarried pensioners. He therefore brought a challenge, alleging a breach of Directive 2000/78, and contending that people in registered life partnerships, like himself, should be entitled to the same pension rights as married couples. The defendants pointed out that, under German federal law, ‘marriage’ enjoys “special protection”.

Held: (1) Pension entitlements amounted to ‘pay’ within Article 3(1) of Directive 2000/78, following Maruko (Case C-267/06) [2008] ECR I-1757.

(2) There was a potential breach of the equal treatment principle in Article 2 of the directive. Whether or not there was a breach depended on whether marriage and registered life partnerships were legally and factually “comparable”. This was a question for the national court to decide “focussing on the respective rights and obligations of spouses and persons in a registered life partnership” (paragraph 52).

Case C-34/09 Ruiz Zambrano [2011] All ER (EC) 491, European Court of Justice

Issues: European citizenship; Article 20 TFEU; the ‘purely internal’ rule

Facts: Gerardo Ruiz Zambrano and his wife Moreno López, both Colombian nationals, arrived in Belgium in April 1999 accompanied by their first child. Gerardo claimed asylum on the basis that he had fled Colombia to escape persecution (in the form of extortion, physical violence and abduction of his son) from militias. This was rejected by the Belgian authorities, and orders were issued for him to leave Belgium. He responded by applying for a residence permit, which was refused. He challenged the refusal before the Belgian courts.

In October 2001, Gerardo obtained full-time employment with a company called Plastoria. In September 2003, Moreno gave birth to their second child, Diego, and in August 2005 to their third child, Jessica. Both children were born in Belgium and acquired Belgian nationality.

In October 2006, Belgian authorities visited Plastoria and discovered that Gerardo was working there without an official work permit. His contract was immediately terminated. He submitted a claim for unemployment benefit, which was rejected. He challenged that refusal as well, and the case was referred to the ECJ. Several Member States and the European Commission intervened, arguing that the case was “purely
internal”, given that the only EU Citizens were the children, Diego and Jessica, both of whom were Belgian nationals who had never left Belgium.

**Held:** (1) Directive 2004/38 did not apply, as that specifically referred to ‘Citizens who move to reside in a State other than that of which they are a national’.

(2) Diego and Jessica were “undeniably” Citizens of the Union.

(3) They were entitled to invoke their rights as Citizens, even though living in their home State. The Court stated that Article 20 TFEU “precludes national measures which have the effect of depriving Citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Citizens of the Union” (paragraph 42; emphasis added).

(4) A refusal to grant residence and/or work permits to the non-EU relatives in the ascending line of Citizens who were “dependent minor children” would have such an effect, and was therefore prohibited. The failure to provide residence permits to the parents would force them to leave the territory of the Union and accordingly their children would also have to leave, depriving them of their rights as Citizens. Similarly, the failure to provide work permits would leave the parents at risk of not having sufficient resources, which might again force them to leave the territory of the Union, again forcing their children to leave with them, depriving them of their rights as Citizens.

**Comment:** This is a ground-breaking case for the ECJ. Until Ruiz Zambrano, the ECJ had insisted that it was a prerequisite for the application of EU law on the free movement of persons for the case to involve at least two Member States. The ‘purely internal’ rule is well-established – see, amongst many examples, R v Saunders (Case 175/78) [1979] ECR 1129 and Uecker & Jacquet (Cases C-64, 65/96) [1997] ECR I-3171. In Ruiz Zambrano, only one Member State – Belgium – is involved, and yet the ECJ nevertheless holds that Article 20 TFEU applies. To say that this is an interesting development is a huge understatement. However, it may be that its implications are quite modest. It is clear that the ‘purely internal’ rule has not been abandoned – Ruiz Zambrano has already been distinguished in McCarthy (Case C-434/09), discussed below.

**Case C-104/09 Roca Álvarez v Sesa Start España [2011] 1 CMLR 28, [2011] All ER (EC) 253, European Court of Justice**

**Issues:** Discrimination on grounds of sex; Directive 76/207; positive action; direct effect of directives

**Legislative background:** Spanish legislation (originally passed in 1900) gave all working mothers the right to time off work each working day for the purpose of feeding a child up to the age of nine months. This could either be a ½ hour reduction in the working day or an hour off work during the day. When first passed, the legislation referred specifically to breast-feeding, but had been amended so that now all working mothers were eligible for the time off to feed their child, whether they breast-fed their child or not. Working fathers were only eligible if the child’s mother
was working but declined to take her time off; fathers had no independent right to the time off.

**Facts:** In March 2005, Pedro Roca Álvarez applied to his employer, Sesa Start España, for time off work to feed his newborn child but was refused on the basis that the child’s mother was self-employed and hence Pedro did not qualify. He challenged this, alleging a breach of Directive 76/207 (the Equal Treatment Directive (ETD)).

**Held:** (1) The entitlement to leave from work for the purposes of breastfeeding constituted ‘working conditions’ within the ETD.

(2) The requirement that men had to have a child whose mother was also working, whereas a woman did not have to have a working husband, amounted to sex discrimination *prima facie* prohibited by the ETD.

(3) The original legislation, referring explicitly to breast-feeding, might have been justifiable as a measure designed to protect the biological condition of a woman following pregnancy and/or to protect the special relationship between a woman and her child immediately following childbirth. However, with the removal of the reference to breast-feeding, that was no longer available (paragraph 31).

(4) Nor could the legislation be justified as a form of positive action within the ETD and/or Article 157(4) TFEU. The refusal to allow fathers of children (whose mothers were not in employment) time off work to feed their child was “liable to perpetuate the traditional distinction of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties” (paragraph 36). Instead, the legislation could actually impose an obstacle to some mothers: it was likely to mean that self-employed mothers would have to limit their self-employed activities in order to feed their child, with the child’s father being unable to take time off work to ease the burden (paragraph 37).

(5) The Spanish legislation was therefore precluded by the ETD.

**Note:** The ETD was repealed in August 2009. The principle of equal treatment is now found in Directive 2006/54, the ‘recast’ Directive.

Also, at the Opinion stage of this case, Advocate-General Kokott described some of the Court’s case law in this area as involving “horizontal direct effect” and noted that, at some point in the future, it may become “necessary to discuss the dogmatic foundations of that contested horizontal direct effect and its limits”. However, in its judgment, the ECJ simply confirmed that directives can be used to prevent other individuals from enforcing contradictory national legislation, and did not go so far as to introduce full horizontal direct effect of directives.

**Case C-108/09 Ker-Optika [2011] 2 CMLR 15, European Court of Justice**

**Issues:** Free movement of goods; Article 34 TFEU; measures having an effect equivalent to quantitative restrictions on imports; selling arrangements; Article 36 TFEU, Human Health Protection; proportionality
**Facts:** Under Hungarian legislation, contact lenses could only be sold in specialist medical accessory shops or by home delivery. The effect of this was to prohibit the online sale, in Hungary, of contact lenses. A Hungarian company, Ker-Optika, which sold contact lenses via its website, challenged this before the Hungarian courts, alleging a breach of EU law. The Hungarian court referred the case to the ECJ, asking, *inter alia*, whether or nor the Hungarian legislation constituted a breach of Article 34 TFEU.

**Held:** (1) The ECJ considered the possibility that the Hungarian legislation might amount to a selling arrangement (in which case it would be exempt from Article 34 TFEU) but concluded that it was not. The reason for this was because the second *Keck* condition was not satisfied, following *Deutscher Apothekerverband* (Case C–322/01) [2003] ECR I–14887. The ban on internet sales had a greater impact, in fact, on traders based in other Member States than it did on traders based in Hungary itself. The Court stated that “It is clear that the prohibition on selling contact lenses by mail order deprives traders from other Member States of a particularly effective means of selling those products and thus significantly impedes access of those traders to the market of the Member State concerned” (paragraph 54; emphasis added). The legislation was therefore an MEQR, prohibited by Article 34 TFEU, unless justified.

(2) It was potentially justifiable on human health grounds under Article 36 TFEU.

(3) The Hungarian legislation went beyond what was necessary and therefore failed the proportionality test. Whilst it was justifiable to require customers to be examined by a qualified optician on the first occasion when they bought lenses, it was unnecessary to force customers to go through this process on every subsequent purchase.

**Case C-137/09 Josemans (2010) 16th December, European Court of Justice**

**Issues:** Freedom to provide services; Article 56 TFEU; indirect discrimination; justification based on grounds of preventing ‘drug tourism’ and public nuisance; proportionality

**Legislative background:** Dutch legislation prohibits the possession, dealing, cultivation, transportation, production, import and export of narcotic drugs, including cannabis and its derivatives, unless the substance or product in question is used for medical, scientific or educational purposes. However, a policy of tolerance is applied to cannabis. Thus, the sale of cannabis is tolerated in certain circumstances, allowing for resources to be targeted on more dangerous substances. Specifically, cannabis can be bought and consumed alongside food and non-alcoholic drinks in designated ‘coffee-shops’ in strictly limited quantities (maximum of 5g per person per transaction) and in controlled conditions (no advertising of drugs, no sale of drugs to minors, no minors may be admitted to the premises, no nuisance may be caused, etc).

In Maastricht, a further condition was attached: non-residents of the Netherlands were barred from entering ‘coffee-shops’. This was designed to tackle ‘drug tourism’. According to the local authorities, before the ban was introduced the 14 coffee-shops in Maastricht attracted around 10,000 visitors per day (i.e. nearly 4m visitors per
year), 70 per cent of whom were not resident in The Netherlands. These large numbers of people generated nuisance and crime, in particular dealing in hard drugs.

**Facts:** Marc Josemans ran the Easy Going ‘coffee-shop’ in Maastricht. The shop was shut on the orders of the mayor after two non-residents were seen in his shop. Josemans alleged a breach of various provisions of the TFEU. The local authorities relied on the public policy derogation. The Belgian and German governments, intervening, suggested that public health and/or public security might apply as well. The Dutch government, intervening, suggested the prevention of ‘drug tourism’ was an overriding public interest objective.

**Held:** (1) The ban on non-residents entering ‘coffee-shops’ fell within Article 56 TFEU (the freedom to provide services), rather than Article 35 TFEU (prohibition of quantitative restrictions and equivalent measures on exports). This was for two reasons: (i) the cannabis was to be consumed on the premises; (ii) it was unlikely that anyone would wish to export such small quantities of cannabis to other Member States.

(2) The ban on non-residents entering ‘coffee-shops’ was a prima facie infringement of Article 56 TFEU, as it indirectly discriminated against customers resident in other Member States.

(3) The ban was justifiable on grounds of preventing ‘drug tourism’ and the accompanying public nuisance, which in turn helped to maintain public order and protected public health (paragraph 65).

(4) Other methods of combating ‘drug tourism’, such as allowing non-residents to enter coffee-shops but denying them the right to buy cannabis, were not as effective or efficient (paragraph 81). The ban was therefore proportionate.

**Comment:** *Josemans* was decided on the basis of Article 56 TFEU. However, it is worth taking a moment to consider whether the decision may have differed had it been decided using the provisions of Directive 2006/123 (the Services Directive) instead. Article 16 of the Services Directive states *(inter alia)* that “Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles… (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment…”. Whereas, in *Josemans*, the stated grounds for allowing the ‘service activity’ to be restricted are “combating drug tourism and the accompanying public nuisance”. However, the Court observes that “combating drug tourism and the accompanying public nuisance is part of combating drugs. It concerns both the maintenance of public order and the protection of the health of citizens…”

*Josemans* is therefore perfectly consistent with the Services Directive.
Case C-145/09 Tsakouridis [2011] 2 CMLR 11, European Court of Justice

Issues: Free movement of persons; Directive 2004/38; limitations of movement on grounds of public security

Facts: Panagiotis Tsakouridis, a Greek national, was born in Germany in 1978, and had lived in Germany virtually ever since. He was often in trouble with the police. In August 2007, he was sentenced to 6 years’ imprisonment for drug dealing. In August 2008, the German authorities ordered his expulsion, even though he had lived in Germany for over 30 years. He challenged that before the German courts, from where the case was referred to the ECJ, with the Court asked to interpret Article 28(3) of Directive 2004/38, which provides for “enhanced protection” for those with more than 10 years residence in the host State. More specifically, Article 28(3)(a) provides that expulsion for those with more than 10 years residence is possible only on ‘imperative grounds of public security’. There were two main issues for the ECJ. (i) Whether Tsakouridis’s trips to Greece for several months in 2004 and again in 2005 meant that Article 28(3) was inapplicable. (ii) The meaning of ‘public security’.

Held: (1) Before the “enhanced protection” provided by Article 28(3) can apply, the “decisive criterion” is whether the Union citizen has, for the 10 years preceding the expulsion decision, lived in the Member State in question. In deciding whether the citizen has reached this threshold, the national authorities are “required to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State. It must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned” (paragraph 33).

(2) On the interpretation of the phrase ‘public security’, the Court noted that “a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security“ (paragraph 44). However, that did not necessarily exclude other threats from the scope of ‘public security’. The Court went on to hold that the “fight against crime in connection with dealing in narcotics as part of an organised group” was capable of falling within its scope (paragraph 45). The ECJ elaborated by stating that “Dealing in narcotics as part of an organised group is a diffuse form of crime with impressive economic and operational resources and frequently with transnational connections… illicit drug trafficking poses a threat to health, safety and the quality of life of citizens of the Union, and to the legal economy, stability and security of the Member States” (paragraph 46).

Comment: This is an important judgment on the scope of Article 28(3)(a) of the Citizenship Directive. Those Citizens who have achieved 10 years’ residency in the host State may only be deported on ‘public security’ grounds – public policy grounds are inapplicable. Historically, the ECJ has dealt with convicted criminals as posing a threat to ‘public policy’, rather than ‘public security’, with Oteiza Olazabal (Case C-100/01) [2002] ECR I-10981, involving a member of a terrorist organisation, being a rare example of the latter. However, the decision in Tsakouridis is to treat organised...
drug dealing as serious enough to bring it within the scope of ‘public security’, means that certain criminals can be deported even with more than 10 years’ residency.

**Case C-421/09 Human plasma (2010) 9th December, European Court of Justice**

**Issues:** Free movement of goods; Article 34 TFEU; measures having an effect equivalent to quantitative restrictions on imports; Article 36 TFEU; Human Health Protection; proportionality.

**Facts:** In 2005, an Austrian company called Humanplasma successfully tendered to supply blood products, imported from Germany, to the Vienna Hospital Association. However, the tender was revoked when a new Austrian law entered into force in 2006. This stipulated that the importation of blood products for medicinal purposes was permissible only where the blood was donated entirely free of charge (i.e. and not paid for, including non-reimbursement of expenses), subject to exceptions for emergencies and where the blood was of a rare type. The same conditions applied to the obtaining of blood products from blood donated in Austria. The tender was revoked because Humanplasma’s blood products had been paid for when donated in Germany. Humanplasma alleged that the new Austrian law was in breach of Article 34 TFEU. The Austrian government invoked the health derogation under Article 36 TFEU.

**Held:** (1) The ban on the importation of blood products (except those which had been donated free of charge), coupled with the ban on the obtaining of domestic blood products, amounted to an MEQR, prohibited by Article 34 TFEU, unless justified.

(2) The Court accepted that allowing the importation only of freely-donated blood was capable of ensuring the protection of human health.

(3) The legislation went beyond what was necessary and therefore failed the proportionality test. Given that every donation of blood had to be tested in any event (as required by Directive 2002/98), it was unnecessary to prohibit the importation of blood which had been paid for.

**Case C-434/09 McCarthy (2011) 5th May, European Court of Justice**

**Issues:** European citizenship; Article 21 TFEU and Directive 2004/38; the ‘purely internal’ rule

**Facts:** Shirley McCarthy, a British national, was born in the UK and had resided there all of her life. However, she also had Irish nationality because her mother was Irish. Shirley’s husband, George, a Jamaican national, whom she had married in 2002, wished to be issued with a residence permit as the spouse of an EU Citizen. Shirley therefore applied for a residence permit on the basis that she was an EU Citizen resident in a state other than that of her nationality (Irish). The Home Office refused. She challenged that refusal and eventually her case reached the Supreme Court of the UK, from where it was referred to the ECJ.
Held: (1) Neither Article 21 TFEU, nor Directive 2004/38, applied to the situation of an EU Citizen who had never exercised his or her free movement right and who had always resided in the Member State of which he or she was a national, even if the Citizen was also a national of another Member State.

(2) It followed that the family members of such a Citizen could not invoke any rights under that legislation either.

(3) The situation in Ruiz Zambrano (Case C-34/09) was distinguishable, because the national measures in that case had the effect of depriving an EU Citizen of “the genuine enjoyment of the substance of the rights conferred by virtue of that status”, which was not the situation in the present case.

Comment: As indicated above, the decision to distinguish Ruiz Zambrano in McCarthy confirms that the “purely internal” rule has not been abandoned by the ECJ.

Cases C-372 & 373/09 Peñarroja (2011) 17th March, European Court of Justice

Issues: Freedom to provide services; Articles 56 and 57 TFEU; the mutual recognition of qualifications; Directive 2005/36; official authority derogation; Article 51 TFEU

Facts: Josep Peñarroja Fa, a Spanish national, was a qualified expert translator, who had worked for 20 years in Barcelona translating French to Spanish and vice-versa during court proceedings. In 2008, he asked to be enrolled on the Registers of court experts at the Court of Appeal in Paris and at the French Court of Cassation, also in Paris, but both applications were rejected. He challenged these rejections, and several questions involving Articles 51 and 56 TFEU and Directive 2005/36 (the Qualifications Directive) were referred to the ECJ.

Held: (1) Directive 2005/36 did not apply. The duties of court expert translators were not covered by the definition of ‘regulated profession’ within Article 3(1) of that directive.

(2) Article 56 TFEU did apply. The activities of court expert translators, “in providing to a high standard an impartial translation from one language to another”, constituted the provision of ‘services’ within the meaning given to that word in Article 57 TFEU.

(3) The existence of the Registers of court experts in France was capable of restricting the freedom to provide services. Although judges at the Court of Appeal in Paris and at the French Court of Cassation who were seeking experts to assist them in court were not obliged to appoint from the Register, it was likely that they would do so (paragraph 52).

(4) The restriction was capable of justification, on the grounds of the protection of litigants and the sound administration of justice (paragraph 55).

(5) However, all decisions about enrolment on such Registers had to be open to “effective judicial scrutiny”. It transpired that there was no legal requirement to state
the reasons for refusal of enrolment on the Registers. This failure to ensure that such effective judicial scrutiny was available therefore constituted a breach of Article 56 TFEU (paragraph 64).

(6) Translation services did not fall within the scope of the ‘official authority’ exception in Article 51 TFEU, following Reyners (Case 2-74) [1974] ECR 631. Translations were “merely ancillary steps” that left the “discretion of judicial authority and the free exercise of judicial power” intact (paragraph 44).