

## EU Citizenship and European Arrest Warrant: The Same Rights for All?

Case C-123/08, Dominic Wolzenburg, Judgment of the Court of Justice of the European Union (Grand Chamber) of 6 October 2009 [2009] ECR I-9621

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### Keywords

European citizenship, area of freedom, security and justice, European arrest warrant, principle of non-discrimination, assessment of proportionality.

### Abstract

In the case Wolzenburg, the principle of non-discrimination of European Union citizens is applied to the European arrest warrant. The implementation of the European arrest warrant by the Member States cannot escape a control of proportionality made by the Court. Member States may impose a period of residence of five years to foreign Europeans citizens in order for them to rely on an optional ground for non-execution of a European arrest warrant (Article 4(6) of the Framework Decision on the European arrest warrant). Home nationals are not obliged to comply with a residence requirement. It is possible for Member States to justify an exception to the principle of non-discrimination of European citizens with a legitimate interest. The chances of social reintegration of a person convicted constitute such an interest. The national measure resulting in a difference of treatment must be proportional to that interest.

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## I. Introduction

With the establishment of an area of freedom, security and justice (AFSJ) and European citizenship, the Member States of the European Union (EU) have engaged in a new step towards European integration beyond the internal market.<sup>1</sup> The Framework Decision on the European arrest warrant (the FD) was the first measure taken in this area based on the principle of mutual recognition and is now implemented in all Member States of the Union.<sup>2</sup> It created an opportunity for the Court of Justice of the European Union (the Court) to rule on several occasions either on its validity or its interpretation.<sup>3</sup> The FD provides grounds for mandatory non-execution of an European arrest warrant (EAW) (Article 3) and grounds for optional non-execution (Article 4). In the *Wolzenburg* case, the Internationale Rechtshulpkamer of the Rechtbank Amsterdam asked for an interpretation of Article 4(6) according to which, the executing judicial authority may refuse to execute an EAW issued for the purposes of execution of a custodial sentence or detention order ‘where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law’. The Court ruled on the conformity of the Dutch provisions implementing Article 4(6) of the FD with Article 12 of the Treaty on the European Community (EC) (now Article 18 of the Treaty on the Functioning of the European Union (TFEU)). In doing so, the Court decided that Article 12 EC (now 18 TFEU) applies in the field of European criminal law, and more particularly in that of the implementation by Member States of acts adopted in this field.

The entry into force of the Treaty of Lisbon on 1 December 2009 seems to have taken away from the *Wolzenburg* ruling some of its innovative nature.<sup>4</sup> Before the suppression of the third pillar by the new Treaty, to admit the application of the principle of non-discrimination of European citizens to policy areas organised under the EU Treaty, and in particular, to police and judicial cooperation in criminal matters (Title VI of the EU Treaty before Lisbon) would not have been straightforward. Suffice to recall the comments<sup>5</sup> raised after the *Pupino* judgment.<sup>6</sup> By recognizing the indirect effect of framework decisions, the Court began to impose on Member States respect for principles of Community law when they are implementing or applying third pillar law.<sup>7</sup> Now, these principles should be fully applied in the field of European criminal law.

Despite the suppression of the third pillar, the ruling made by the Grand Chamber of the Court remains topical. First, under Article 9 of the Protocol on transitional provisions, if a framework decision (or any measure adopted on the basis of Titles V and VI of the EU Treaty before Lisbon) is not repealed, annulled or amended, its legal effects remain unchanged.<sup>8</sup> There is no time limit to the application of this article, which preserves the lack of direct effect of the FD. Secondly, and more importantly for the purpose of this case report, the ruling provides an illustration of the role played by European citizenship and the rights attached to it in the field of European criminal law. More generally, the decision sheds some light on the functioning of the principle of mutual recognition in this area and the judicial review carried out on national measures implementing the EAW. As recital 8 of the FD’s preamble states, ‘decisions on the execution of the European arrest warrant must be subject to sufficient controls’. However, it is not clear to what extent such a control can go. The question arises as to what extent the rights of European citizens and the model of the internal market are compatible with an area of freedom, security and justice that affects everyone.

## II. Facts and background

Since June 2005, Mr Wolzenburg and his wife, both German citizens, lived in a rented apartment in Venlo (The Netherlands). Mr Wolzenburg was employed, registered on the municipal registers of Venlo as a taxpayer and he had medical insurance. It

1 The AFSJ covers on the one hand, policies on border checks, asylum, immigration, and judicial cooperation in civil matters, and, on the other hand, police and judicial cooperation in criminal matters. The present contribution concerns the latter group of policies. Herein the notions of European criminal law and EU criminal law are used interchangeably. It does not cover criminal law of the Council of Europe.

2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

3 The Court has ruled on a reference on the validity of the FD in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633 and on five references on its interpretation in Case C-66/08 *Kozłowski* [2008] ECR I-6041; Case C-296/08 *PPU Santesteban Goicoechea* [2008] ECR I-6307; Case C-388/08 *PPU Leymann and Pustovarov* [2008] ECR I-8993; Case C-306/09 *I.B.* [2010] nyr; Case C-261/09 *Mantello* [2010] nyr.

4 Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community [2007] OJ C306/01.

5 See for example S Peers, ‘Salvation outside the church: judicial protection in the third pillar after the *Pupino* and *Segi* judgments’ (2007) 44 *Common Market Law Review* 883; E Spaventa, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*’ (2007) 3 *European Constitutional Law Review* 5; JR Spencer, ‘Child Witnesses and the European Union’ (2005) *The Cambridge Law Journal* 569; F Kauff-Gazin, ‘Effets d’une décision-cadre’ (2005) *Europe* 10; M Fletcher, ‘Extending “indirect effect” to the third pillar: the significance of *Pupino*?’ (2005) 30 *European Law Review* 862.

6 Case C-105/03 *Pupino* [2005] ECR I-5285.

7 *Pupino* (n 6) para 42.

8 Protocol (No 36) on transition provisions [2008] OJ C115/322.

should also be noted that Mr Wolzenburg's wife was pregnant at the time of the public hearing.

In 2006, caught up by his past, Mr Wolzenburg was arrested by the Dutch authorities who carried out an EAW issued on 13 July 2006 by the public prosecutor's office in Aachen (Germany). The German authorities required the surrender of Mr Wolzenburg so that he should serve a prison sentence of one year and nine months imposed on him for, in particular, the importation of marijuana to Germany. At the hearing, Mr Wolzenburg refused to surrender to the German authorities and asked to serve his sentence in a Dutch prison. He relied on Dutch law (*Overleveringswet*) which implements Article 4(6) of the FD and grants the competent authority with the power to refuse the execution of an EAW issued for the execution of a sentence or detention order in certain circumstances.

At the moment of giving a ruling on the fate of Mr Wolzenburg, the Dutch judge questioned the compatibility of these provisions with European law and, in particular, with Article 4(6) of the FD on the EAW. Under national law, the surrender of Dutch nationals is automatically refused 'if the surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision'. In contrast, if the person is not of Dutch nationality, the judge must verify that he or she is in possession of a residence permit of indefinite duration.<sup>9</sup> To be in possession of such authorization, an EU citizen non Dutch national must enjoy the right to permanent residence within the meaning of Article 16 of Directive 2004/38 and pay a sum of 201 Euros.<sup>10</sup> In other words, he or she must have legally resided for at least five years without interruption in the Netherlands. Mr Wolzenburg neither had a residence permit of indefinite duration nor enjoyed a right of permanent residence.

The national court submitted five questions to the Court. In the first two questions, it asked how long an EU citizen must have resided legally in the executing Member State to be considered as 'staying in' or 'being a resident' within the meaning of Article 4(6) of the FD. Does Article 4(6) concern all European citizens located on the territory of the executing Member State, whatever the duration of their stay? Or, can that State impose a minimum period of residence? And if so, under what conditions?

In the third question, the judge asked the Court whether the Member State of execution may impose on the person an administrative requirement such as the possession of a residence permit of indefinite duration in addition to a residence requirement.

The fourth question concerned the issue of whether the national law implementing the FD falls within the material scope of the EC Treaty.

The final question concerns the compatibility of the national law with the principle of non-discrimination on grounds of nationality provided in Article 12 EC (now 18 TFEU). Does this provision preclude a national law, which authorizes the judge to refuse to surrender an EU citizen subject to an EAW on the condition that he enjoys a right of residence and is in possession of a Dutch residence permit of indefinite duration, whereas such conditions are not imposed on Dutch nationals?

The questions asked by the Dutch court could be grouped into two sets of issues. The first set concerns the interpretation of Article 4(6) of the FD and aims, more specifically, to clarify what is meant by a person 'staying' or 'residing' in the executing Member State. Are the Dutch rules in line with the FD? In other words, does Mr Wolzenburg fall within the scope of application of Article 4(6) FD and can he be regarded as residing or staying in the Netherlands?

9 The Dutch law stipulates two further requirements. First, the offences that form the basis of the warrant should be subject to criminal prosecution in the Netherlands and, secondly the penalty or measure which may be imposed on him after surrender should not forfeit his right of residence in the Netherlands. At the time of the hearing, Mr Wolzenburg met these two conditions and, therefore, the national court did not feel it necessary to refer a question on their conformity with the FD. However, as noted by Advocate General Bot in his conclusions, there are reasons to doubt the conformity of the first of these two requirements. The Attorney General relies on arguments relating to the aim and context of the FD that does not provide for additional requirements and must be strictly construed (see paras 80 to 82). In addition, there are doubts as to the wording of the Dutch law is compatible with Article 2 of the FD that abolishes the dual criminality requirement. The ability to prosecute a person in a country implies that this country criminalises the facts at issue. In other words, it implies that the judge makes an indirect dual criminality test. However, the facts for which Mr Wolzenburg's surrender is requested may well be included in the list of crimes (drug trafficking) where a dual criminality test is abolished. An alternative interpretation of the Dutch law could consist in seeing such a requirement as an implementation of Article 4(7) of the FD.

10 Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

Secondly, if the Dutch rules are compatible with the FD, is the executing Member State allowed to automatically refuse the surrender of nationals while they require any person not of Dutch nationality to hold a residence permit of indefinite duration? In other words, can Mr Wolzenburg rely on the principle of non-discrimination on grounds of nationality provided in Article 12 EC (now 18 TFEU) against the national legislation implementing the FD on the EAW?

The first set of questions seemed already to have been addressed by the Court in the *Kozłowski* case. According to this ruling, the national court should perform a double test. It should first investigate whether the person subject to an EAW, if not a national of the executing Member State, 'resides' or 'stays' in that state within the meaning of Article 4(6) of the FD. These two concepts are autonomous concepts of EU law.<sup>11</sup> The Court assimilates a person who resides with a person who has his 'actual place of residence' in the executing Member State. The Court did not give more details on what is meant by that. Instead, it ruled that a person who 'stays' 'has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence'.<sup>12</sup> Therefore, the domestic judge should 'make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State'.<sup>13</sup>

If the person can be regarded as resident or staying in the Member State of execution, the judge is then authorized to verify that there is a 'legitimate interest which would justify the sentence imposed in the issuing Member State being executed on the territory of the executing Member State'.<sup>14</sup> Such an interest exists, for example, when the refusal to surrender the person increases 'the requested person's chances of reintegrating into society when the sentence imposed on him expires'.<sup>15</sup> The refusal to surrender the person must be proportionate to the aim pursued by the FD.

### III. The opinion of the Advocate General

In line with this ruling, Advocate-General Bot finds that Mr Wolzenburg could be regarded as residing in the Netherlands.<sup>16</sup> The national judge must only check that if Mr Wolzenburg has not his actual residence in the Netherlands, he 'has connections with that State which give grounds for concluding that execution of his prison sentence in the executing Member State is likely to facilitate his reintegration'.<sup>17</sup> As it has been recalled above, it is clear that Mr Wolzenburg had both social and economic ties with the Netherlands.

In addition, Mr Wolzenburg derives his right of residence directly from his status as a European citizen and Articles 20(1) and 21(1) TFEU (ex 17(1) and 18(1) EC). The right cannot be made subject to administrative conditions such as the possession of a residence permit of indefinite duration since such conditions are not imposed by either the Treaties or secondary legislation.

The Advocate-General then addresses the conformity of the implementation of Article 4(6) FD in the Dutch law with the principle of non-discrimination. Once a European citizen has exercised his right to freedom of movement granted by the Treaty, he may rely on Article 12 EC (now 18 TFEU) against national legislation. The fact that this legislation implements a FD adopted outside the EC Treaty does not relieve the Member State of its obligation to respect fundamental rights and freedoms.<sup>18</sup>

First, the Advocate-General considers that the absolute impossibility of surrendering a Dutch national constitutes discrimination, since the surrender of other nationals is possible under certain conditions. It should be possible to exclude home nationals from the scope of the exception to surrender. This should be the case if, for example, the person subject to the EAW has no connection with the Netherlands. The principles of mutual recognition and mutual trust are the basis of the FD and justify that Member States surrender their nationals. In application of these principles, Member States cannot invoke the principle of non-extradition of nationals. Secondly, if a distinction is made between the nationals of the executing Member State and other European citizens, this must be justified and proportionate to the objectives of the FD. That is not the case

11 *Kozłowski* (n 3) para 43.

12 *Kozłowski* (n 3) para 46.

13 *Kozłowski* (n 3) para 48.

14 *Kozłowski* (n 3) para 44.

15 *Kozłowski* (n 3) para 45.

16 Case C-123/08 *Wolzenburg* [2009] ECR I-9621, Opinion of AG Bot, para 69.

17 *Wolzenburg*, Opinion of AG Bot (n 16) para 70.

18 *Wolzenburg*, Opinion of AG Bot (n 16) paras 113 and 115.

with the Dutch law because the surrender of a national of another Member State who resides in the executing Member State would result in making his chances of social reintegration more difficult than for a national. This is contrary to the purpose of the FD.<sup>19</sup>

#### IV. Judgment of the ECJ

First, the Court ruled on the right of Mr Wolzenburg to invoke Article 12 EC (now 18 TFEU) against the Dutch law implementing the FD. The main argument in opposition to an affirmative answer lay in the fact that the FD on the EAW was adopted under the EU Treaty before Lisbon, and was not covered by Article 12 EC (now 18 TFEU).<sup>20</sup> However, it cannot be inferred from this finding that ‘provisions adopted by a Member State in order to implement a measure under the EU Treaty are not subject to any review of their legality in the light of Community law’.<sup>21</sup> Mr Wolzenburg’s case falls within the scope of the EC Treaty since he exercised his freedom of movement and residence. Therefore, he is entitled to rely on Article 12 EC (now 18 TFEU) before the national court.<sup>22</sup>

By relating the status of Mr Wolzenburg to European citizenship, the Court interpreted the FD in the light of the *acquis* on European citizenship. In application of the *acquis*, in particular articles 16(1) and 19 of Directive 2004/38, the Court recalled that a European citizen acquires a right of permanent residence in the host country where he has stayed in this country for five years without interruption. However, the possession of a residence permit of indefinite duration can only have ‘declaratory and probative’ value. The Court concluded that a Member State cannot require an EU citizen non Dutch national to hold such an authorization to enjoy his right of residence and consequently to serve his sentence in the executing Member State.<sup>23</sup>

The Court then analyzed the compatibility of Dutch law with Article 12 EC (now 18 TFEU). It observed that the principle of mutual recognition is the ‘essential rule introduced’ by the FD.<sup>24</sup> In application of this principle, a Member State can limit the circumstances under which the surrender of a person under an EAW should be denied. Consequently, Member States have a margin of discretion to achieve the goal of reintegration that underlies Article 4(6) of the FD. This discretion allows for differential treatment between Dutch nationals and nationals of other Member States. However, this difference in treatment must be objectively justified and not go beyond what is necessary to achieve the goal of reintegration.<sup>25</sup>

Dutch law may impose on an EU citizen who is not a Dutch national a requirement of five years of lawful residence without interruption. The aim of the national legislation is compatible with the FD as it is to ensure through this residence requirement that ‘that execution of European arrest warrants is refused only where the warrant is issued against requested persons who have genuine prospects of a future in the Netherlands’.<sup>26</sup> The residency requirement is proportionate to that objective and does not appear excessive. A period of five years ensures that non-Dutch nationals are integrated into Dutch society and, accordingly, that period is likely to ensure ‘their social reintegration after the sentence imposed on them has been enforced’.<sup>27</sup>

To support its reasoning, the Court recalled that Directive 2004/38 imposes a continuous period of five years of lawful residence to migrant European citizens in order to enjoy a right of permanent residence on the territory of the host Member State. The Court also referred to the Framework Decision 2008/909, which although not applicable in the *Wolzenburg* case, allows in Article 4(7) Member States ‘to make forwarding of a judgment easier when the sentenced person lives in and has been legally residing continuously for at least five years in the executing State and will retain a permanent right of residence in that State’.<sup>28</sup>

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19 *Wolzenburg*, Opinion of AG Bot (n 16) paras 155-157.

20 Before the Lisbon amendment, Article 12 EC read ‘Within the scope of application of *this Treaty*, ... any discrimination on grounds of nationality shall be prohibited’ (italic added).

21 Case C-123/08 *Wolzenburg* [2009] ECR I-9621, para 44.

22 *Wolzenburg* (n 21) para 46.

23 *Wolzenburg* (n 21) para 53.

24 *Wolzenburg* (n 21) para 59.

25 *Wolzenburg* (n 21) para 64.

26 *Wolzenburg* (n 21) para 66.

27 *Wolzenburg* (n 21) para 70.

28 Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty [2008] OJ L327/27.

Finally, in answering the first two questions asked by the Dutch judge, the Court recalled its ruling in *Kozłowski*. If a Member State has not provided the conditions for applying Article 4(6) of the FD, the national court must ensure that the person whose surrender is requested ‘resides’ or ‘stays’ in the executing Member State within the meaning of this Article. To do this an overall assessment of the situation of that person is required.<sup>29</sup>

#### IV. Comment

The principle of mutual recognition, the ‘cornerstone of judicial cooperation’,<sup>30</sup> is now enshrined in Articles 67(4) and 82(1) TFEU. This ‘leading principle’ entails the recognition of national standards by other EU Member States in order to ensure the free movement of judicial decisions. Contrary to the internal market where mutual recognition facilitates the exercise of an individual’s right to enjoy a fundamental freedom, in European criminal law, mutual recognition entails the free movement of a decision that may limit the rights of an individual. Judicial decisions in criminal cases may be aimed at prosecuting or at convicting a person.<sup>31</sup> Hence, exceptions to the principle of mutual recognition in criminal matters restrict the free movement of judicial decisions. The application of an exception prevents the surrender of a person for prosecution or for the execution of a criminal sanction. The Netherlands has limited the situations where a judge could refuse to surrender a person in application of one of the optional grounds. In other words, the Dutch legislature has provided an ‘exception to the exception’.

This derogation facilitates the movement of judicial decisions, and therefore, of the principle of mutual recognition. This is ‘to the advantage of an area of freedom, security and justice’.<sup>32</sup> According to Articles 3(2) TEU and 67(3) TFEU measures to prevent and combat crimes are adopted in an AFSJ offered to the citizens of the Union. In light of this objective, the principle of mutual recognition in criminal matters must be interpreted as leaving a certain margin of discretion to the Member State when implementing the exceptions to the principle laid down by the FD.<sup>33</sup> Accordingly, the legislature of a Member State is not obliged to implement all the optional grounds for non-execution under the FD. And when implementing these grounds, it may add restrictive conditions to their application as this fosters the free circulation of decisions in criminal matters. If the free movement of judicial decisions is certainly to the advantage of the security aspect of an AFSJ, one may however wonder how this free movement of decisions and the aspects of freedom and of justice in this area interact.<sup>34</sup> In European criminal law, freedom extends beyond EU fundamental freedoms and concerns an individual’s freedom, whether EU citizen or not, to come and go within one Member State. The concept of justice not only implies mechanisms of judicial review on all measures adopted to ensure the security of citizens in the enjoyment of their freedom, but also a control of these measures in the light of fundamental rights.

Indeed, Member States must respect fundamental rights and general principles of Union law whenever they act within the scope of EU law. This is true when Member States implement EU law, but also when they derogate from it.<sup>35</sup> Consequently, when implementing an exception to the obligation to surrender a person subject to an EAW, Member States act within the scope of EU law. Therefore, they must respect the rights and freedoms of citizens and general principles of Union law. In this respect, the situation of EU citizens is particular because they enjoy rights that derive directly from their status, such as the right to move and to reside in the European Union. EU citizens must suffer no discrimination on grounds of nationality when they exercise these rights. The principle of non-discrimination derives from the principle of equal treatment. The latter was first recognized in the case law of the Court and is now stated in primary legislation.<sup>36</sup> The principle of non-discrimination requires in a very general way that ‘comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified’.<sup>37</sup> A national measure must not have the effect to favour or disadvantage one group of persons over another. However, if this is the case, the difference in treatment must be sufficiently justified and proportionate.<sup>38</sup> The Court articulated these two principles around the notion of European

29 *Wolzenburg* (n 21) paras 75-79.

30 European Council, ‘Presidency Conclusions’ (Tampere, 15-16 October 1999) para 33.

31 Judicial decisions which have as their object to exculpate the defendant may require further research.

32 *Wolzenburg* (n 21) paras 58-59.

33 *Wolzenburg* (n 21) para 61.

34 See for example T Marguery, ‘La Citoyenneté Européenne Joue-t-elle un Rôle dans l’Espace Pénal de Liberté, de Sécurité et de Justice ?’ (2010) 3/4 Cahiers de Droit Européen 387.

35 See for example Case C-5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925.

36 Article 9 TEU; for the case law see in particular Case C-15/95 *EARL* [1997] ECR I-1961, para 35.

37 *Advocaten voor de Wereld* (n 3) para 56.

38 Case 152/73 *Sorgiu v Deutsche Bundespost* [1974] ECR 153; Case C-237/94 *O’Flynn v Adjudication Officer* [1996] ECR I-2617.

citizenship to ensure equal treatment of all citizens within the scope of the Treaty.<sup>39</sup> More specifically, Article 12 EC (now 18 TFEU) prohibits discrimination against EU citizens on grounds of nationality. However, in order to rely on this provision, the situation of an EU citizen legally residing in a Member State must fall within the material scope of the Treaty. Such is the case when an EU citizen has exercised ‘the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article [21 TFEU]’.<sup>40</sup>

It seems that only migrant citizens can rely on Article 12 EC (now 18 TFEU), though it could be argued that non-discrimination should also benefit non-migrant citizens in the AFSJ. Such a solution would be in line with the evolution of EU citizenship as a source of enforceable rights even in a case where there is no trans-border movement.<sup>41</sup> Acts as the FD on the EAW adopted by the European Union in the AFSJ may have legal effects on any EU citizens (and beyond, of course, any individual). Moreover, the principle is also a general principle of law and a fundamental right enshrined in the Charter of Fundamental Rights of the European Union.<sup>42</sup> Under Article 6 TEU, the Treaty establishes indeed no hierarchy between the sources of fundamental rights. Member States must respect the Charter when they act within the scope of EU law.<sup>43</sup> As the preamble of the latter recalls, the Union ‘places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice’. As the Stockholm program provided, ‘European citizenship must become a tangible reality. The area of freedom, security and justice must, above all, be a single area in which fundamental rights and freedoms are protected’.<sup>44</sup>

Yet it is possible for Member States to justify a restriction to the principle of non-discrimination on grounds of nationality in certain circumstances. One may recall the case law of the Court with regard to social assistance benefit. A Member State may impose on an EU citizen who does not have Dutch nationality to demonstrate a sufficient degree of integration into Dutch society in order to claim a social benefit there.<sup>45</sup> A difference in treatment may take the form of a residence requirement for a certain period or even for a minimum of five years. This period should be sufficient to suggest that the person has developed a relationship with the host country similar to the special bond between a citizen and his home state.

If Member States must ‘show a certain degree of financial solidarity with nationals of other Member States’, it is legitimate that the grant of a social benefit to all EU citizens does not become ‘an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State’.<sup>46</sup>

In *Wolzenburg*, the Court extends the exceptions to the principle of non-discrimination on grounds of nationality of migrant EU citizens to another domain than the benefit for social assistance. The legitimate interest justifying the difference in treatment could be the aim of reintegration pursued by Dutch law limiting the circumstances in which a person may refuse to surrender. It is also true that opening the Dutch prison doors to all EU citizens regardless of their link with the Netherlands could have the effect of imposing an ‘unreasonable burden’ on that country.<sup>47</sup> Anyway, this interest is entirely compatible with the objective of the FD, which provides in Article 5(3) that the surrender of a person, national or resident, for purposes of prosecution may be subject to the condition that that person is serving his sentence in the executing Member State. This interest is also compatible with the function of special prevention that can be attached to a criminal sanction.<sup>48</sup>

The assessment made by the Court of the proportionality of the national measure imposing a minimum period of residence of five years to the legitimate aim pursued by this measure confirms the importance the principle of proportionality may have in European criminal law. The proportionality principle is included in Articles 49(3) and 52(1) of the Charter. In order to justify the proportionality of the national measure to the aim pursued, the Court refers in particular to Article 16 of Directive 2004/38 pursuant to which a period of uninterrupted lawful residence of five years is likely to justify a right to permanent residence in the host Member State. Such a period is presumed adequate to demonstrate a sufficient degree of integration of

39 See for the evolution of the Court case law, in particular Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paras 14-17; Case C-85/96 *Martinez Sala* [1998] ECR I-26/91, paras 63-64; Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

40 See for example Case C-186/87 *Cowan* [1989] ECR 195, para 15; *Grzelczyk* (n 39) para 33.

41 Editorial Comments, ‘Two-speed European Citizenship? Can the Lisbon Treaty Help Close the Gap?’ (2008) 1 *Common Market Law Review* 1-11. See also the very recent developments concerning article 20 and 21 TFEU in Case C-34/09 *Ruiz Zambrano* nyr and Case C-434/09 *Shirley McCarthy* nyr.

42 Charter of Fundamental Rights of the Union [2010] OJ C83/389 (hereinafter Charter), Article 21 (2).

43 Article 51(1) Charter read in combination with Article 6(1) TEU and The Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02.

44 European Council, ‘The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens’ [2010] OJ C115/1 5.

45 See for study finance Case C-158/07 *Förster* [2008] ECR I-8507, paras 55-60.

46 Case C-209/03 *Bidar* [2005] ECR I-2119, para 56.

47 In 2007, the prison expenses rose 12% in one year <<http://www.cbs.nl/nl-NL/menu/themas/overheid-politiek/publicaties/artikelen/archief/2008/2008-2576-wm.htm>> accessed 14 April 2011.

48 M De Kerchove, ‘Les Fonctions de la Sanction Pénale’ (2005) 127 *Information Sociale* 22.

non-nationals in the executing Member State. The Court makes a selective application of the Directive's provisions. It did not rule on Article 24 of the Directive 2004/38, which details the scope of the principle of equal treatment of migrant citizens who are not home nationals. Mr. Wolzenburg seemed to fall within the scope of that provision since he presumably fulfilled the conditions of sufficient resources and medical insurance. Paragraph 2 of Article 24 lays down the circumstances in which exceptions may be made to equal treatment. This article does not include the right to serve one's sentence in the country of residence, but limits the exceptions to the domain of social assistance benefit.<sup>49</sup> Accordingly, in the implementation of European criminal law, a Member State can justify a restriction on the principle of non-discrimination and equal treatment of migrant EU citizens by legitimate interests that are not mentioned in Directive 2004/38.

One could argue however, that a minimum period of residence requirement only imposed on non-nationals is not always suitable for achieving a goal of social reintegration. Would it not be more suitable to leave entirely to national courts the task of assessing in a factual situation whether someone has more chance of social reintegration in the executing Member States or in the issuing one? As pointed out by Advocate-General Bot, a truly integrated concept of European citizenship should make possible the surrender of home nationals in application of Article 4(6) of the FD. There is something odd in an ever closer union among the peoples of Europe if a judge cannot consider that a national who exceptionally stays in his country of origin but who has developed a stronger relationship with another Member State (or who has a double nationality) does not demonstrate a sufficient degree of integration within the society of his country of origin. Assuming that person would be subject to an EAW for the purpose of executing a sentence, the judge should be able to balance the interests at stake and possibly authorize his surrender. This is, however, not the case. Conversely, should a national judge not have the power to consider that the surrender of a non-national in the position of Mr Wolzenburg to be disproportionate with the objective of social reintegration set forth by national law? Indeed, even if Mr Wolzenburg was not living in the Netherlands for five years, yet he had his family, work and paid his taxes there. His surrender to another Member State of Mr Wolzenburg will oblige his family to travel to another Member State and to request there a right to visit him. Could such consequences not affect Mr Wolzenburg's chances of reinsertion? One may wonder if the presumption that an EU citizen is sufficiently integrated within the society of a Member State other than his country of origin should not be rebuttable. However, the Court has removed from a national court the possibility of controlling the proportionality of a decision to execute an EAW to the aim of social reintegration where national law requires a minimum period of residence.

Finally and further than the interpretation of Article 4(6) of the FD in the light of the non-discrimination principle, the implementation of the FD and of the exceptions to the obligation to surrender should also be compatible with fundamental rights of citizens in general. The FD reaffirms the respect for fundamental rights in its preamble and in Article 1(3).<sup>50</sup> However, not all Member States have implemented a ground for non-execution of an EAW if the surrender of a person would violate his fundamental rights.<sup>51</sup> A person subject to an EAW, in any case, should be able to prove that his surrender could result in a violation of his fundamental rights, such as his right not to be subject to degrading treatment in the prisons of the issuing Member State.<sup>52</sup> Reports of the Council of Europe on European prisons show that prisons are not equally crowded.<sup>53</sup> Hence, depending on the country, a sentenced person would not serve his sentence in equal conditions. Since all Member States are party to the Convention on the Protection of Human Rights and must respect the Charter that reaffirms the rights provided in the Convention, there is no doubt that any competent authority controls the compatibility of an EAW with fundamental rights before executing the warrant. National judges must be able to review the proportionality of a national measure adopted in application of an EU measure with the fundamental rights, in particular those enshrined in the Charter. The full application of the Charter to measures adopted by Member States in the field of European criminal law would also be to the advantage of an AFSJ and, especially, to its citizens. ■

49 The Court did not mention any other reasons of public order, public security or public health set out in Chapter VI of the Directive.

50 The Framework Decision on the European Arrest Warrant reaffirms the importance of the respect for fundamental rights in recitals 12 and 13 of its preamble.

51 Refer on this issue to S Bot 'Le Mandat d'Arrêt Européen' (Larcier 2009) 410-466.

52 Such treatments are in breach with Article 4 of the Charter of Fundamental Rights and Article 3 ECHR. The Strasbourg Court has decided that under Article 3 ECHR 'the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity' *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 94.

53 See for example, the prison density per 100 places on 1 September 2008 in the Council of Europe Annual Penal Statistics – SPACE I – 2008, PC-CP (2010) 07 27.