Please read the text and answer the following question. Try to do it IN YOUR OWN WORDS.

1. Who is a worker under EU law?
2. Who defines the concept of 'the worker' (national courts or ETC) and why?
3. What is the legal status of the worker's family members?
4. Who are dependants?
5. What are the 'social advantages'? What principle does apply the granting these benefits to migrant workers?
6. Discuss the limitations of the free movement of workers.

Free Movement of Workers

To keep the differences between nations, e.g. cultural, while being united, is perhaps the highest achievement of the European project and maybe the key to its success. The abolition of the physical barriers, while keeping the virtual barriers of culture, language and the like, might prove to be a requirement for the achievement of an internal market of circa 500 million people, able to move freely within the whole continent for economical and leisurely purposes. Whether such an aim is achieved or otherwise is the purpose of this article.

The architects of Europe have taken a categorical approach towards the extent to which freedom is enjoyed in another member state. As long as there is an economical activity, they are separated into the free movement of workers, freedom of establishment, freedom of providing services and free movement of goods, otherwise known as the 'four freedoms'. The principles which govern these freedoms do not defer greatly, however the focus of this article will be on the facilitation of the free movement of workers by the ECJ, starting with defining what a worker is, their rights of entry and residence, the rights of their families, the social advantages which they may enjoy, briefly go over the limitations and conclude with citizenship.

Free movement of workers was established in Article 39 of the EC treaty and laid out in much more details in Regulation 1612/68 which deals with eligibility of employment, equality of treatment and the rights of a worker's family. A worker is not explicitly defined in either the article or regulation, however they both intended the definition of a worker to be one at a community level so as to avoid the possibility of member states defining a worker in such a way as to restrict their rights.[1] In *Lawrie-Brum*[2] a worker was defined as a person who 'for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration.'

The definition of a worker has been given a wide interpretation under community law as shown by the case of *Staymann*[3] in which although his remuneration was that of being looked after by the religious community in return for charity work, he was considered a worker. This case is contrasted with someone who is 'under a rehabilitation scheme'. They are consider to be carrying out compulsory work which is more of a social activity than an economical activity, therefore they are not considered as a worker.[4] Another restriction upon the definition of a worker is that the work should not be ancillary or marginal.[5] This can be illustrated by the case of *Mr. Brown*[6] in which it was decided that while a student who works in a country and

then leaves voluntarily to go on to take further studies could be considered a worker, Mr. Brown was not as his work was incidental in as far as it was taken because his studies required it.

The right of entry and residence have been expanded by case law. The right of residence for six months can be extended if the person shows that he is actively seeking and has a real chance of getting employment. The deportation of a work-seeker or his imprisonment simply because he does not have the right papers is now greatly limited under very narrow circumstances by ECJ case law. Finally the ECJ has established that a worker has the right to stay after employment in the host country.

It seems therefore that the rights of a worker fall short only in as far as they do not have access to benefits prior to having worked in that member states. A worker has to finance himself for the first six months, or maybe more, while he is looking for work for the first time in a certain member state. The reasons for such restriction might be understandable. To use a recent example, if a citizen of the EU was allowed access to benefits while looking for a job before he or she has carried out any work whatever in that member state, perhaps the number of migrants from the new EU member states to the old member states might have doubled and maybe even tripled. However, such transitions seems to be a temporary occurrence as it may be argued that once the standards of living in the new member states increase and more importantly they have a social security system which can be considered to be on equal footing to that of other member states, there would not be such movement for the sole purpose of accessing benefits. It could be assumed that prior to the enlargement, with the 15 member states being on equal footing and one assumes all of them having a benefits system, the restriction of access to benefits before having carried out any work in the member state might be an unnecessary deterrent to the free movement of workers.

It may be clear by now however, that if a worker has been working in a member state he is entitled to benefits. The worker's family are entitled to join him or her and reside with the worker for as long as the worker is there and in some cases such as death, or in circumstances involving children, they might be allowed to stay further. His family for the purpose of EU law consists of the spouse and any dependants, such as his children under the age of 21 which depend on the worker economically. The case of *Commission v Germany* shows that they do not have to live under the same roof, while not being divorced, to have a right of stay in the country.

The ECJ has been narrow in defining a spouse however, which may effect the way cohabitants are treated by the law. In the case of *Netherlands State v. Reed*,[7] Ms Reed went to Netherlands to cohabit with a worker. As the term spouse 'refers to a marital relationship only', the Member State tried to prohibit her move. However, as Netherlands' law confers upon individuals in such a relationship the same rights as married couples, they could not refuse entry as that would be direct discrimination on bases of nationality. It seems that in this aspect the EU has refrained from harmonizing the law within the community, opting instead for what could be termed as a 'bottom up' approach. In other words, the EU law allows the member state a margin of appreciation as to how it treats his own nationals and then the ECJ applies the golden rule of no discrimination based on nationality. Inevitably therefore, the question arises as to whether such approach amounts to an obstacle on the free movement of workers as, to illustrate, supposing that in Netherlands cohabitants are treated as married couples as far as the law is concerned, but not say in Spain or Italy. A citizen from

Netherlands therefore may be deterred from moving to Spain or Italy as his partner may not be able to join the worker.

In other areas, an EU worker does enjoy many rights, amongst which the so called 'social advantages'. The principles which govern the eligibility of 'social advantages' seems to be based on a common theme of free movement that a member state may not discriminate on the basis of nationality. In *Reina*[8] she was entitled to a child birth loan under the German law although she was an Italian national, while *Mr. Mutsch*[9] was entitled to speak in German and have the court proceeding in that language while being in Belgium as that province allowed Belgian nationals to do the same. Social advantages can be so varied as to include an entitlement of a reduced fee for rail travel as shown by the case of *Cristini.*[10]

It can be seen therefore that the rights a worker enjoys across member states are vast and may be considered to fall short in limited categories and narrow circumstance from being equal to that of a national of the host member state. Some of these categories may include the ability to limit free movement of a worker based on public policy, security or public health, it may also include some high ranking posts within public services. These limitations may be illustrated by the case of *Van Duyn.*[11] Directive 64/221/EEC has direct effect in limiting free movement of workers on ground of public policy, security and health. However, it states that such limitations: 'should be based exclusively on the personal conduct.' The Van Duyn case is interesting as while British nationals were able to work for scientology, the UK was allowed to refuse her entry as it considered scientology 'socially harmful'. It must be noted however that this was one of the early cases, therefore the ECJ perhaps had to be prudent. It is not clear whether such decision would be upheld if it appeared before the ECJ again.

If free movement of workers is to be achieved within the European internal market, then the principle of equal treatment and prohibition of direct and indirect discrimination might be considered as a just principle to aspire to. From the above case analysis, it seems clear that the ECJ has tried to interpret widely such concepts as a worker, so as to give maximum effect to equal treatment. The aspiration towards these principles has been made easier with the introduction of a European Citizenship. However, while a European Citizenship might be a welcomed move towards eradicating further any barriers to the freedom of movement, it does leave much to desire. Nationality has been left to Member States to be defined which might cause purposive, or otherwise, restrictions to the concept of EU citizenship. Furthermore, the effectiveness of the citizenship may also be criticised for being derives from the individual's citizenship of an EU member state. Of course otherwise it would mean a European Passport which might steer the EU or rather accelerate the EU's direction and more importantly, perhaps the citizens of EU members states are not ready yet for an EU Passport.

Notwithstanding the above criticisms however, the European Citizenship may be considered as a worthy initiative towards further internalisation of the market and the facilitation of the free movement of workers. The concept of citizenship is still in its infancy however, therefore it is yet to be seen how far reaching it will be.

Aside from the above mentioned limitations and obstacles to the free movement of workers, the ECJ case law may be considered to have facilitated effectively the achievement of EU's objective of an internal market where people, capital, and goods, are able to move freely. Rome tried it and failed, so did Napoleon and Hitler. This time it seems it is here to stay. The golden rule of member states treating other EU workers as equals with their own nationals seems to have worked well in the achievement of such a task which Churchill saw as a dream.

It might not be long therefore until those few obstacles to the free movement of workers which have been highlighted in this article are completely eradicated.