

Portugal-Spain Free Movement Seminar

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CONFERENCE REPORT

By

Nuno Piçarra and Francisco Borges

Faculty of Law of the Universidade Nova of Lisbon

I. Introduction

The Faculty of Law of the Universidade Nova of Lisbon organized a regional seminar sponsored by the European Network on Free Movement of Workers, which took place in Lisbon, 7 and 8 October 2010. It was held under the title “1985-2010: 25 Years of Free Movement of Workers between Portugal and Spain in the Framework of the European Union”.

The objectives of the seminar were, on one hand, to assess the impact of the entry into force of the Treaty of Lisbon on the legal *acquis* on the free movement of workers; on the other hand, the seminar aimed at scrutinizing the legal and practical problems which still limit the free movement of workers between Portugal and Spain, particularly in respect (i) to the access to the public sector and (ii) to the situation of the frontier workers.

II. Free Movement of Workers and the Treaty of Lisbon

The first session included two presentations, one by Cristina Gortázar, of the Universidad Pontificia Comillas of Madrid, and the other by Alessandra Silveira, of the Faculty of Law of Universidade do Minho, Braga.

1. Cristina Gortázar shortly summarized the evolution of the free movement of workers from the Treaty of Rome till the Treaty of Lisbon in the light of the European single market, the European citizenship and the area of freedom, security and justice.

According to the author, the main improvements of the Treaty of Lisbon in this field were the attribution to the Charter of Fundamental Rights of the European Union (Charter) of the same legal value as the EU Treaties, the clarification of the repartition of competences between the European Union and the Member States and the strengthening – although limited – of the democratic legitimacy of the European Union, with a more significant participation of the European Parliament and the Parliaments of the Member States in the legislative procedure. In this context a mention was made to the relevant provisions of the Treaty on the Functioning of the European Union (TFEU), to the Declarations 22 and 23 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, and to Article 45 of the Charter.

Cristina Gortázar also focused on the Directive 2004/38/EC and on the contribution given to the definition of its content by the European Court of Justice (ECJ). She mentioned in particular the provisions of the Directive concerning the derogations to the free movement based on public policy and public security reasons.

A mention was also made to a recent judgement of the Spanish Supreme Court which considered that the Spanish law discriminated national citizens who did not exercise their EU free movement rights in accordance to Directive 2004/38/EC *vis-à-vis* those EU citizens who exercised such rights.

Finally, the fact that the provisions on free movement of workers are included in different directives and regulations was criticised and the proposal of a new regulation to substitute Regulation n° 1612/68 was welcomed.

2. The presentation of Alessandra Silveira aimed at characterizing the progressive establishment by the ECJ of the fundamental right to move and reside freely within the European Union. Such approach has now a reinforced basis in the Treaty of Lisbon and in the Charter of Fundamental Rights of the European Union.

To illustrate her thesis, Alessandra Silveira quoted, among others, the *Baumbast* and *Metock* judgements, according to which the right to move and reside freely within the European Union is not exclusive of European citizens; in some situations and under some conditions, such right can be extended to third-country nationals. Furthermore, according to Article 45(2) of the Charter, «Freedom of movement and residence may be

granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.»

The author also stressed the constant and extensive application by the ECJ of the principle of proportionality as a standard to scrutinize the limitations to that right imposed by Member States.

Finally, Alessandra Silveira reflected upon the consequences of the inclusion of the right to freedom of movement in the Charter of Fundamental Rights of the European Union. She reminded that, according to the ECJ case-law, fundamental rights are in principle weightier than economic liberties if a conflict between them arises.

III. Free Movement of Workers and Access to the Public Sector

The theme of the second session was the free movement of workers in the public sector. It included three presentations, made respectively by Emiliano García, of the Universidad Pontificia Comillas of Madrid, by Francisco Pereira Coutinho, of the Faculty of Law of Universidade Nova of Lisbon, and by Nuno Lampreia, legal adviser of the Portuguese Professional Order of Nurses.

1. Emiliano García organized his presentation in two parts. In the first he analysed the relevant provisions of the TFEU, mainly its Article 45(4) («the provisions of this Article [freedom of movement of workers] shall not apply to employment in the public service»), and of the Regulation (EEC) n° 1612/68 of the Council, of 15 October, on free movement of workers within the European Union, and also the case-law of the ECJ and the communications of the European Commission.

From the ECJ case-law, he quoted namely the judgements *Sotgiu*, 12 February 1974; *Commission vs. Belgium*, 17 December 1980 and *Commission vs. Luxembourg, Belgium and Greece*, 2 July 1996, which limit the discretionary power of the Member States when applying Article 45(4) of the TFEU.

He also analysed (i) the Communication of the European Commission of 18 March 1998, establishing a definition of the activities which may be reserved by the Member States to its nationals (*e. g.* army, judges) and the activities which may not (*e. g.* education services, transportation, scientific investigation), and (ii) the Communication of 11 December 2002, establishing the criteria that should guide the

national administrations on this subject (*e. g.* the principle of mutual recognition). The main purpose of the Commission is to abolish any discrimination (direct or indirect) based on nationality in the access to the public sector.

The second part of the presentation concerned the legal framework of Spain, and included an analysis of decisions not only of the ECJ but also of Spanish courts.

There is a national act on the conditions of access to the public sector (Act 7/2007, of 12 April), complemented by acts at both regional and municipal level. The possibility of access to the public sector by non-Spanish citizens of the European Union is granted explicitly in connection with a list foreseeing some exclusions (*e. g.* Fiscal Administration, Bank of Spain). Some limitations to free movement of workers in this area were pointed out (*e. g.* in some cases professional experience in other Member States is not taken into account; the homologation of professional qualifications obtained in other Member States often demands a long and costly procedure, etc.).

Emiliano García concluded his presentation defending that some of the legal limitations to the access to diplomatic careers of the Member States should be revised in the light of the creation of a European External Action Service.

2. Francisco Pereira Coutinho divided his presentation in three parts. The first focused on the significant dimension of the public sector in Portugal. Some impressive figures were quoted: according to data published in 2006 by Eurostat, Portugal is one of the EU Member States with more public servants *per* inhabitant (1 *per* 17.6 inhabitants; *e.g.* in Spain the *ratio* is 1 *per* 34.9 and in Germany 1 *per* 28.8).

In the second part of his presentation, the author also analysed some ECJ case-law on Article 45(4) of the TFEU. According to such case-law, the Member States may only preclude the access to the public sector by nationals of other Member States when the activity at stake implies the exercise of public authority or the protection of general public interests. The access to some sectors, like the police or the army, can thus be restricted, but not if the specific post has not such implications.

The third part of the presentation focused on the Portuguese legal order and how it deals with this subject. Article 8 of Law nº 12-A/2008, of 27 February, provides that only Portuguese nationals have the right to access to the public sector, unless otherwise is provided by the Constitution, any international convention or special legislation. As a matter of fact, this provision, if correctly interpreted, does not exclude the access of nationals of other Member States to the public sector (the EU law is obviously included

in the final part of the provision), unless, as seen before, the activity at stake implies the exercise of public authority or the protection of general public interests. Nevertheless, the text of such provision is systematically quoted in the recruitment notices prepared by the public administration. This can be considered as a practical obstacle to free movement of workers in the public sector.

The problems raised by the recognition of academic qualifications and professional experience obtained in other Member States were also analysed. Portuguese legislation does not explicitly exclude that the qualifications and experience obtained in another Member States are taken into account in the evaluation of *curricula*, but several practical limitations still exist. The most significant is perhaps the lack of a regulation of the procedure to be followed by the juries competent to evaluate the *curricula* of the different candidates. There are not, as in France, special commissions to decide on the equivalence of academic qualifications.

Finally, concerning the recruitment of workers who are already employed in the public sector – the so called “internal recruitment” –, it was stated that, for such purpose, only workers already employed in the Portuguese public sector are considered – and not those employed in the public sector of other Member States. Since the legislation in force significantly limits the recruitment of workers to the public sector, the exclusion of workers already employed in the public sector of other Member States from “internal recruitments” becomes a significant practical limitation to free movement of workers.

3. The presentation of Nuno Lampreia concerned the specific sector of nurses in Portugal and Spain. According to Directive 2005/36/EC, of 7 September, nursing is a regulated profession. In Portugal, the competent authority to apply such regime and namely to evaluate and to recognise the necessary academic qualifications to exercise the profession is the *Ordem dos Enfermeiros*, which is integrated in the autonomous public administration. In Spain, the regulation of such profession is split between different authorities. There are professional orders, but it is the Ministry of Education and Science who has the competence to evaluate and recognize the necessary academic qualifications to exercise the profession at stake. This may lead to some problems due to lack of coordination.

After such preliminary explanations, Nuno Lampreia briefly summarised the conditions established by Law n° 9/2009, of 4 March, which transposes the Directive

2005/36/CE into the Portuguese legal order. Such conditions are more demanding in respect to the right of establishment than to the free provision of services. The principle of mutual recognition of professional qualifications is an obligation to the Member States, although not unconditional.

In this context, the author presented some relevant data: in September 2010, from the 60549 nurses working in Portugal, 2016 were not Portuguese. Among these, 1162 were Spanish (more than 50% of the non-Portuguese). The geographical proximity, the unemployment in Spain in this professional area and the similitude of the idioms were pointed out as causes for this phenomenon.

Nuno Lampreia concluded his presentation stating that there are still significant indirect restrictions to free movement of workers in the field of nursing such as the slowness of the processes of recognition of qualifications obtained in the other Member States.

IV. Free Movement of Frontier Workers

This theme was the subject of the third session and included three presentations, the first by Dolores Carrillo, of the Universidad Pontificia Comillas of Madrid, the second by Ana Rita Gil, of the Faculty of Law of the Universidade Nova of Lisbon, and the third by Raúl Trujillo-Herrera, of the European Commission.

1. Dolores Carrillo started her presentation with a definition of frontier worker: a worker that resides in one Member State and works in another Member State, thus crossing regularly the border between the two States. For social security purposes, according to Regulation (EEC) n° 1408/71 as amended by Regulation (EC) n° 883/2004, a worker must come back to his/her State of residence at least once a week in order to be considered a frontier worker.

She stated that there are not reliable data on the number of frontier workers in Portugal and Spain. However, it is sure that the number of Portuguese nationals working in Spain has declined in the last years due namely to the level of unemployment in the latter.

The Spanish mandatory rules on labour conditions (*e. g.* wage, risk prevention, etc. – but not vacations) are applicable to Portuguese citizens working in Spain, even if they work for a Portuguese company.

In principle the contributions to social security are collected by the State where the person works and the income taxes are paid in his/her State of residence. But there are relevant exceptions to this principle not only established by the EU law but also by conventions between Portugal and Spain.

The relation between Portugal and Spain regarding frontier workers has been deepening over the years. At present there are conventions (i) on social security coordination (General Convention between Portugal and Spain on Social Security, signed in Madrid on 11 June 1969), (ii) on transportation (Agreement between the Portuguese Republic and the Kingdom of Spain on the Creation of a Joint Committee on Land Transports and Transportation Infrastructure, signed in Salamanca on 26 January 2000), (iii) on sanitary issues (Frame Agreement between the Portuguese Republic and the Kingdom of Spain on Frontier Cooperation on Health Issues, signed in Zamora on 22 January 2009) and (iv) a convention on frontier cooperation between several authorities of both States (Convention between the Portuguese Republic and the Kingdom of Spain on the Cooperation of Territorial Entities, signed in Valencia on 3 October 2002).

Dolores Carrillo also enumerated some initiatives aiming at facilitating EU frontier workers to live and work on both sides of the border.

EURES, the European network on job mobility, has a special programme aiming at facilitating the mobility of workers between the North of Portugal and Galicia. It provides information to jobseekers and employers in both regions, namely about job opportunities and legislation (on labour, on social security, etc.). On the other hand, the program of trans-frontier cooperation between Portugal and Spain, approved by the European Commission for the period 2007 to 2013, aims at stimulating the creation of job opportunities on both sides of the border and to facilitate the cooperation between the two States in several connected issues: *e. g.* protection of the environment and management of infra-structures. This broader programme includes some special programmes (*e. g.* Ibermovilitas and the project of cooperation in the regions crossed by the river Douro, which includes studies on the mobility in these regions).

Finally, Dolores Carrillo made some proposals to reinforce the mobility of workers between Portugal and Spain.

Since the difference of idioms is still a problem, the teaching of the Portuguese language should be promoted (and *vice-versa*). The information available on job opportunities should be transmitted to workers and employers through new channels and closer to the populations. The coordination of the social security systems of the two States should be satisfactorily achieved. Moreover, there should be a stronger support to the improvement of professional qualifications of workers on both sides of the border.

2. Ana Rita Gil started her presentation stating that in the Portuguese legislation the definition of frontier worker can only be found in the Act on the taxation of motor vehicles. According to it, a frontier worker is someone who resides in Spain and works in Portugal, thus regularly moving between the two States.

Afterwards, Ana Rita Gil enumerated some specific problems regarding frontier workers in Portugal.

Regarding the Portuguese social security system the principle is that the non-residents have the right to receive social benefits from it if they contribute to such system. Only residents may benefit from the subsystem of solidarity, *i. e.*, the one that does not depend on the contributions paid by the workers (*e. g.* protection of the family). Practical problems in this field are, on one hand, the different documents demanded by the administrations of Portugal and Spain and, on the other, the lack of articulation between the two administrations (*e.g.* it can happen that a person works in one State and receives social benefits as unemployed in the other).

Regarding taxation, Ana Rita Gil reminded that, according to the Convention between the Portuguese Republic and the Kingdom of Spain for the avoidance of double taxation and the prevention of fiscal evasion with respect to income taxes, signed in Madrid on 26 October 1993, income taxes are paid in the State of usual residence. For example, for fiscal benefits purposes all members of a family are considered to reside in Portugal if the person responsible for the family resides in Portugal. A married couple has the right to gather their income for taxation purposes even if only one of them resides in Portugal (see judgement of the ECJ *Zurstrassen*, C-87/99). There is one practical obstacle to mobility related to this issue: employers established in Spain do not have the obligation to withhold for taxation purposes part of the wages of their workers who reside in Portugal. The latter have thus the burden to pay the totality of their income tax at a single time every year.

Other practical obstacles to free movement of workers are *e. g.* the difficult recognition of professional qualifications and the difficult access to bank credit in the State where the person works.

Some cases of exploitation of Portuguese workers in Galicia were also mentioned. Due to lack of information about social rights and job opportunities, some Portuguese nationals accept work offers from Spain through mediators who do not provide them with a proper contract. If there is a work accident, these workers are often taken back to Portugal by such mediators, although they would have the right to social assistance in Spain. In order to avoid this phenomenon, Ana Rita Gil proposed a better coordination between the different inspection services and the establishment of more effective sanctions. Another significant measure would be to give more information to the populations about job opportunities and social rights.

The presentation ended with a reference to the initiatives aiming at stimulating the cooperation between Portugal and Spain. Concerning *Ibermovilitas*, it was stressed that it aims at identifying the sectors of the economy which demand workforce and, based on this information, to promote vocational training courses within the identified areas.

3. Raúl Trujillo-Herrera started his presentation stating that the data about the relevance of frontier workers in the European Union were scarce and needed constant revision, due, among other factors, to the economic crisis. Furthermore, the concept of frontier worker is changing with the development of means of transportation and of communication.

He also reminded that the major obstacles to mobility within the European Union pointed out by workers are: language barrier, lack of information about job opportunities and fiscal and social security legislation, difficulty of the procedure of recognition of professional qualifications and finally the obstacles raised by the different fiscal and social security systems. In this context, several important decisions of the ECJ were quoted concerning the main principle regarding free movement of workers – the principle of non-discrimination.

The presentation focused on the role of the European Commission in this context, underlining its concern to take the appropriate measures for reinforcing the frontier worker's legal security. One of the main questions is in fact to disseminate the appropriate information to all interested parties about the EU *acquis* in order to better

face the existing legal, administrative and practical obstacles. As a matter of fact, since the legislation of the country of employment is generally designed for workers who are resident, it is particularly important for a frontier worker to know to which benefits and/or social advantages under EU law he/she is entitled. As a rule, a frontier worker should enjoy the same advantages and benefits as a resident worker.

A mention also was made to the committees assisting the Commission (the Technical Committee, with representatives of the Member States, and the Advisory Committee, with also representatives of the social partners – *e. g.* unions) in the assessment of studies, reports, compilations of best practises, etc. The example of EURES in Sweden/Denmark was underlined (the initiative must be of the employers and job seekers and not only of the competent authorities). Other initiatives were mentioned: the European Network on Free Movement of Workers, several reports and studies commissioned by the European Commission and finally the recent special Eurobarometer with regard to mobility.

According to the latter, the majority of European citizens agrees that mobility within the European Union is something very positive. Nevertheless, when asked about their concrete case, the figures are not so significant and only a minority seriously considers the possibility to immigrate within the European Union. There are professions (*e. g.* artists, scientific researchers) more mobile than others.

Finally, it was stated that the free movement of workers and non-discrimination are fundamental objectives of the second European Commission leaded by José Manuel Barroso. That also comprehends an evaluation of the effectiveness in every-day life of Regulation (EEC) n° 1612/68.

V. Conclusions

The right to move and reside freely within the European Union is strengthened by the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union.

Free movement of workers within the public sector is still limited in Portugal and in Spain. As reasons for that, it should be mentioned that professional experience in other Member States is not always taken into account; the homologation of professional

qualifications obtained in other Member States can imply a long and costly procedure; the principle of mutual recognition is often limited indirectly or *de facto*.

There are still some problems concerning the free movement of frontier workers between Portugal and Spain: lack of articulation between the administrations of the two Member States and between the different social security and tax systems; lack of harmonization of the documentation demanded; difficult recognition of professional qualifications; difficult access to bank credit in the State where the person works.

There are some important initiatives regarding the stimulation of cooperation between Portugal and Spain: (i) Conventions and agreements between the two Member States; (ii) EURES; (iii) the program of trans-frontier cooperation between Portugal and Spain, approved by the European Commission for the period 2007/2013, which includes Ibermovilitas and the project of cooperation in the regions crossed by the river Douro/Duero.

Some proposals to reinforce the mobility of workers between Portugal and Spain were made: (i) the teaching of the Portuguese and Spanish languages should be promoted; (ii) information on job opportunities and labour and social legislation should be available through new channels and closer to the populations; (iii) the coordination of the social security and tax systems of the two States should improve; (iv) there should be a stronger support to the improvement of professional qualifications of workers on both sides of the border, specially in the sectors of the economy which demand workforce; (v) persecution of mediators exploiting workers should be more effective.