

CJEU judgements in *Ibrahim* and *Teixeira*

Helena Wray
Middlesex University

Introduction

- Judgements delivered in February 2010.
- Concern derivative/retained rights.
- Arise when a right is derived from a primary EU citizen who is exercising free movement rights, or is retained when the EU citizen ceases exercising free movement rights.

- Rights may be derived or retained by family members including spouses, children and parents who are not themselves EU citizens.
- Both cases centre on the derivative/retained rights of parents whose children are in education.
- Critical issue was meaning of Article 12 Regulation 1612/68 and its relationship with Directive 2004/38 (Citizens' Directive).

Article 12 Regulation 1612/68

“The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.”

- Applies to children of workers or former workers.
- Requires equal treatment in provision of educational social assistance e.g. grant (*Casagrande; Di Leo*).
- Right does not expire if parent ceases to be a worker, leaves the Member State or dies and is irrespective of educational opportunities in the other Member State (*Commission v Belgium; Echternach and Moritz; Baumbast*).

- Applies to children who are not themselves Member State nationals (*Baumbast*).
- Is not subject to conditions of age and dependency and applies to primary school aged children (*Gaal* and *Baumbast*).
- Child's 'primary carer' has right to remain even after divorce or departure of EU citizen, to facilitate child's education (*Baumbast*).

- Article 12 of Regulation 1612/68 was not repealed by Directive 2004/38.
- Yet Directive 2004/38 also provides for derivative/retained rights in ways that are both more expansive and more restrictive than Regulation 1612/68.
- So what is effect of Directive 2004/38 on the Regulation?

Article 12(3) Directive 2004/38

- “The Union citizen’s departure from the host Member State or his/her death shall not entail loss of the right to residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.”

- Narrower than A.12 Regulation 1612/68: applies only to death or departure of Union citizen, not if ceases activity nor to divorce.
- Broader than A.12 Regulation 1612/68: applies to children/carers of all Union citizens not just workers.
- No condition as to economic activity/self-sufficiency/sickness insurance c.f. retained rights elsewhere in Directive.

- Question in *Ibrahim* and *Teixeira* was whether A.12 Regulation 1612/68, with its broader rights for the children of workers who had ceased work, was still effective as before or had been qualified by narrower provisions of Directive 2004/38.
- In particular, was there now a requirement of self-sufficiency?

Ibrahim

- Ms Ibrahim is Somali national married to Danish national, Mr Yusuf. 3 children born in Denmark, 1 born in UK, all Danish citizens.
- Mr Yusuf arrived in Autumn 2002 and worked until May 2003. Claimed invalidity benefit until March 2004 when declared fit for work. Left the UK shortly after until December 2006.

- Accepted that Mr Yusuf ceased to be a ‘qualified person’ some time after ceasing work and before leaving UK
- Ms Ibrahim and children arrived in UK in February 2003 with approval of immigration authorities. Separated from Mr Yusuf when he left the UK in 2004. Reliant on benefits
- Claimed housing assistance in January 2007 which was refused on basis that she had no right to reside. She appealed

- Court of Appeal made referral to ECJ, asking whether, when:
 - Non-EU national spouse and EU national children accompany EU national worker
 - Children begin primary education
 - EU national stops work and leaves UK
 - Spouse and children are not self-sufficient.
- Is there a right to reside under A.12 independent of the conditions of Directive 2004/38 including self-sufficiency/sickness insurance requirements?

Teixeira

- Mr and Mrs Teixeira are Portuguese nationals who arrived in UK in 1989. Mrs Teixeira worked until 1991 when Patricia was born. Worked only intermittently afterwards, relying on benefits between times. Was not working when Patricia started school.
- Mr and Mrs Teixeira divorced but both remained in UK.

- Court ordered Patricia to live with her father but to have open contact with mother.
- Aged 16, she started a childcare course and moved in with her mother.
- Mrs Teixeira applied for housing assistance and was refused.

- Mrs Teixeira accepted that she had no independent right to reside and relied on Article 12 Regulation 1612/68.
- Court of Appeal made similar referral as in *Ibrahim* but highlighted factual differences:
 - Mrs Teixeira was not working when her daughter started school and had worked only intermittently since.
 - Patricia was 15 when the claim was made and was now an adult.

The judgements: key points

- A.12 Regulation 1612/68 remains in force and is not limited by Directive 2004/38.
- Although the right derives from parent's activity as worker, it is an independent right of residence that does not depend upon parent's continuing activity.

- Arises when child installs him/herself as family member of an EU worker. That parent is no longer working when child starts school is immaterial.
- Right of child to education implies right of child's 'primary carer' to reside in order to facilitate child's education. No requirement of self-sufficiency or sickness insurance. Father's self-sufficiency in *Baumbast* was incidental.

- The child's right to education does not end at majority. However, adult child would not normally require continued presence of family member but that is a factual question to be assessed.

Commentary 1: An Expansive Approach

- Strengthens position of family members of EU citizen workers – children in education and their ‘primary carer’ may remain regardless of their self-sufficiency if resided at same time as EU worker (even if did not cohabit) and even if economic activity was brief.

- Court did not investigate Mr Yusuf’s level of economic activity. AG’s opinion said it had been “effective and genuine”.
- AG found no indication that “either he or his spouse attempted to improperly or fraudulently take advantage of the provisions of Community law” (para 21).

- To take a different approach would compromise the aim of integrating migrant workers' families and “might dissuade [EU citizens] from exercising the rights to freedom of movement ... And would therefore create an obstacle to the effective exercise of the freedom” (AG's opinion in *Ibrahim* para 23).

- Right is not contingent on EU citizen being in work during education or even at its inception. If “every interruption or cessation of the migrant worker’s employment ... also resulted in the automatic loss of his children’s right of residence and, accordingly, they were obliged to interrupt their education, there is a risk of disadvantage” (para 44 AG’s opinion *Teixeira*)

- Problematic aspects:
 - Absolute bar to a relative obstacle
 - Public perceptions of EU ‘over-reach’ and ‘reverse discrimination’
 - Lack of clarity about the full impact of the right

2. An Uncertain Obligation

- Purpose of Directive 2004/38 was “to codify and review the existing Community instruments dealing separately with workers, self employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens” (para 3 Preamble).

- Tension between strengthening and simplification given failure to properly incorporate A. 12 Regulation 1612/68 into the Directive.
- These decisions are well-reasoned and aim at maintaining rights granted under previous interpretations of A.12 of the Regulation but the result is that these are not integrated with other provisions and their limits are unclear.

3. Children

- *Teixeira*: right crystallises when child is installed as child of the EU citizen worker and terminates when education is completed.
- Younger siblings not yet in education will have right if installed during period of work.

- Siblings born after work has ended?
- Prolonged right of children and primary carer to remain for education without regard to self-sufficiency even if not EU nationals c.f. position of EU citizen child under *Chen* as determined by UK courts.

- Children of EU citizen worker who has ceased work or divorced seem to be in a stronger position than children of EU citizens who have ceased exercising other rights or who have divorced – right under A.12(3) of Directive confined to children of those who have died or departed the Member State.
- *Teixeira*: contribution of workers to public funds and social assistance programmes.

- Alternative view: scope of A.12(3) of Directive could be expanded to include these other situations (but divorce is specifically catered for separately in A.13 and removing obligation for self-sufficiency when primary EU citizen's claim is based on self-sufficiency and this ceases could be problematic).
- Court did not explore limits of A.12(3).

4. 'Primary carer'

- *As Ibrahim, Baumbast* etc demonstrates, 'primary carer' need not be EU citizen.
- 'Primary carer' in potentially stronger position than her EU citizen spouse/former spouse in respect of entitlement to welfare.

- As already discussed in relation to children, ‘primary carer’ of children of EU citizen worker who has ceased work or divorced is in a stronger position than those in a similar situation but whose primary EU citizen was exercising different rights.
- Who may be a ‘primary carer’ c.f. ‘parent who has actual custody of the children’ in A.12(3) Directive?

5. Permanent Residence

- Not explored but is problematic.
- Significance of permanent residence.
- EU citizens and non-EU citizens are in a different position.

- A.16 Directive 2004/38: EU citizens entitled to permanent residence after five years lawful and continuous residence in Member State. Not necessary to have been exercising free movement rights during this period.
- Position of EU citizen children, carers and other family members e.g. siblings, who reside under A.12 Regulation 1612/86

- What about Mrs Teixeira? Could it be argued that she was not the ‘primary carer’ and neither was she a worker throughout? Her presence was tolerated by the Member State who allowed her access to welfare system.
- *Lassal*: critical factor is integration into Member State.

- AG expressed surprise that Mrs Teixeira had conceded that she had no right to permanent residence.
- Non-EU citizens: A.16(2) provides that these are entitled to permanent residence if they reside legally and continuously with an EU citizen for 5 years.

- Mrs Ibrahim was not an EU citizen but was she residing legally with her Danish citizen children? If so, after 5 years, she also had an unidentifed right to permanent residence.
- What if neither child nor carer is an EU citizen and they did not accumulate 5 years residence before separation (see *Lassal*)?

- Combined with Article 8 ECHR considerations, would distinctions on that basis be sustainable given that the child's and carer's rights derived, irrespective of nationality, from the original exercise of Treaty rights by the EU citizen parent which should not be deterred or obstructed?

Conclusion

- Far from settling matters, *Teixeira* and *Ibrahim* have raised new questions about the outer limits of derivative/retained rights.
- Judgements reaffirm superior position of workers' family members: implications for concept of EU citizenship.