

Herwig Verschueren

London

25 November 2010

prof. dr. Herwig Verschueren

University of Antwerp

London – 25 November 2010

The loose ends of *Vatsouras & Koupatantze*

Overview

- The concept of workers
 - ▣ jobseekers and others not actually working
- The concept of “social assistance”
 - ▣ in Dir. 2004/38
 - ▣ and in Reg. 883/2004
- Third-country nationals and discrimination on grounds of nationality

The facts of the cases

- Both Greek nationals in Germany
- Vatsouras (V)
 - ▣ Worked for 10 months
 - ▣ Received benefit in favour of jobseekers
 - ▣ Benefit was withdrawn
- Koupatantze (K)
 - ▣ Worked for 7 weeks
 - ▣ Received benefit in favour of jobseekers
 - ▣ Benefit was withdrawn

Questions

- Are these Union citizens “workers”?
 - ▣ Question not asked by the national court but addressed by the CJ
 - ▣ Still relevant: “workers” have more rights to social benefits in the state of employment compared to “economically inactive persons”

Questions

- If V&K are not “workers” but just “first-time jobseekers”:
 - ▣ Are they entitled to financial assistance?
 - ▣ Despite limitations in Article 24(2) Directive 2004/38
 - ▣ And what is “social assistance” within the meaning of this provision?
- What about comparing this with the rights of illegally resident 3rd-country nationals?

“Workers” in free movement law

- Shifting definition in free movement of workers law
- “*an autonomous meaning specific to European Union law and must not be interpreted narrowly*”
- Worker under Article 7 Reg. 1612/68
 - ▣ Very broad concept: “*real and genuine activities*”
 - confirmed by V&K
 - used for other legal instruments: see *Danosa* (11.11.2010)
 - see also Commission’s Communication of 13.7.2010
 - ▣ First-time jobseekers not included

“Workers” in free movement law

- Worker under Article 45 TFEU
 - ▣ First-time jobseekers also included (*Collins; V&K*)
- Worker under Dir. 2004/38
 - ▣ Not defined
 - ▣ Maintain the status of “worker” under Article 7(3):
 - Some categories of sick, invalid or unemployed persons
- Worker under other EU legal instruments
 - ▣ Such as posting directive and labour law directives
 - ▣ Reference to labour law of the MS

Concept of workers in 1408/71-883/2004

- *Van Delft* (5.10.2010) para 81:
 - ▣ *“the concept of ‘worker’ used in the context of Article 45 TFEU does not necessarily coincide with the definition applied in relation to Article 48 TFEU and Regulation No 1408/71”*
- “Activity as an employed person”
 - ▣ depends on social security legislation of the state of employment
 - ▣ No autonomous EU law meaning

Concept of workers in 1408/71 - 883/2004

- Persons not actually working may also qualify as “pursuing an economic activity”
 - ▣ Article 11(2) Reg. 883/2004: receiving cash benefits because or as a consequence of their activity as an employed or self-employed person
- Why not discussed in V&K?
 - ▣ These two persons would most likely be covered by 1408/71 as “employed persons” or as “insured persons
 - ▣ and be entitled to benefits in the scope of this regulation, including financial assistance to jobseekers

“Workers” in free movement law

- Still adequate?
 - Artificial and blurred borderlines
 - Temporarily out of work to take care of family members: still “worker”?
 - Voluntary unemployed undertaking training in another sector
 - What about the difference between voluntary and involuntary unemployed?
 - See Förster

“Workers” in free movement law

□ Still adequate?

□ Source of discrimination?

- See prohibition of discrimination on grounds of sex or handicap (see *Coleman*)

□ Conflicts with social policy option

- “Adaptability” agenda

□ See Article of C. O’Brien in *CMLRev* 2009, 1107-1141

Concept of social assistance in Dir. 2004/38

- In articles 7, 14 and 24
- Same concept? Why should it not be?
- Narrow definition in *V & K*
 - ▣ *“benefits intended to facilitate access to the labour market cannot be regarded as constituting ‘social assistance’”*
 - ▣ Reading against the will of the legislature expressed in Article 24(2)?
 - ▣ MS tend to interpret this part of the judgement narrowly or even to neglect it: see Report
- What about other “financial assistance”?
 - ▣ see definition of “social assistance” under 1408/71 and 883/2004

Concept of social assistance in 1408/71 and 883/2004

- Long standing discussion and case law
 - ▣ The exclusion of “social assistance” should be interpreted strictly
 - ▣ See *Acciardi* (1993):
 - income support to older unemployed persons who are no longer entitled to a “classic” unemployment benefit
 - Such benefit should be qualified as an unemployment benefit under Reg. 1408/71
 - ▣ Why no discussion on 1408/71 in V&K?
 - Could already have offered a solution
 - German benefit qualifies as a “unemployment benefit” under 1408/71 and 883/2004

Social assistance under 1408/71-883/2004

- Coordination regime for special non-contributory benefits
 - ▣ Somewhere between social assistance and social security
 - Complement/substitute classic social security benefit: comes under the scope of 883/2004
 - Are not “social assistance” under 883/2004
 - ▣ See list in Annex X Reg. 883/2004
 - UK’s income-based Jobseeker’s Allowance included

883/2004: coordination of special non-contributory benefits

- Residence-based coordination
 - ▣ Subject to a “EU” habitual residence test
 - ▣ See Article 11 Reg. 987/2009: centre of interest
 - ▣ No reference to “genuine link” with the employment market of the host state
 - ▣ No reference to the legal status of the residence
- 883/2004 guarantees entitlement from the first day a person transfers his/her habitual residence to a MS
 - ▣ See *Swaddling* definition of habitual residence

Relationship 883/04 and 2004/38

- See *Teixeira* (para 60)
- “..it should be noted that, according to recital 3 in the preamble to Directive 2004/38, the aim of that directive is *inter alia* to simplify and strengthen the right of free movement and residence of all Union citizens”
- ECJ does not accept that migrant persons would under 2004/38 “be subject to stricter conditions than those which applied to them before the entry into force of that directive”
- See also *Metock* (C-127/08) and *Ibrahim* (C-310/08)

“Sufficient resources” requirement in 2004/38

- What about special non-contributory benefits?
 - ▣ Would it be unreasonable to rely on 883/2004 in order to claim a special non-contributory benefit, even when it is qualified in the host State as “social assistance”?
 - ▣ Or would claiming the right to special non-contributory benefits under 883/2004 jeopardize the right to reside under 2004/38
 - ▣ and consequently the right to special non-contributory benefits under 2004/38, because the person has not “the right to reside” in the host MS?
- *Effet utile* and *lex specialis*: 883/2004 should take precedence over 2004/38

Third-country nationals and discrimination on grounds of nationality

- Controversial issue
- Article 18 TFEU (former 12 EC and 6 EEC)
- Only applicable to EU nationals?
 - ▣ Disputable since Amsterdam
 - ▣ Pros and cons
 - Article of Chloé Hublet in *E.L.Journal* 2009, 757-774.

Third-country nationals and discrimination on grounds of nationality

- 3rd-country nationals may come under the scope of the Treaty
 - ▣ Extending the scope of the Treaty means extending the scope of Article 18 TFEU (12 EC; 6 EEC)
 - ▣ If they are within the scope of secondary legislation
 - See *Martinez Sala* on the material scope of Art. 12 EC
 - ▣ Subject to justification/proportionality test
 - for Union citizens: see *Grzelczyk*; *Förster*
 - for instance, residence status of 3rd-country nationals

Third-country nationals and Art. 12 EC in *V&K*

- What was the question?
 - ▣ Does Art. 12 EC preclude excluding EU citizens from benefits granted to illegal immigrants?

Third-country nationals and Art. 12 EC in V&K

- What did the CJ say in V&K (para 12)?
 - ▣ *“Art. 12 EC concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries.”*

Third-country nationals and Art. 12 EC in V&K

- What did the CJ mean?
 - ▣ Art. 12 is only applicable to EU citizens
or
 - ▣ Art. 12 is not meant to compare EU citizens with 3rd-country nationals, but to compare EU citizens with the nationals of the host State
 - this reading would not exclude 3rd-country nationals as such from its scope
 - and would be in line with its logic interpretation

Third-country nationals and discrimination on grounds of nationality

- EU Charter (applicable only after V&K)
 - ▣ Is addressed to the EU institutions and to the MS when implementing Union law (Article 51(1)).
 - ▣ Article 21 on “Non-discrimination”
 - ▣ Para 2: “*Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.*”
 - ▣ Identical to Article 18 TFEU (see Explanations referred to in Article 6(1) TEU)

Third-country nationals and discrimination on ground of nationality

- EU Charter: Article 21 (1)
 - ▣ *“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”*
 - ▣ Preceeds para 2 on discrimination on grounds of nationality, but does not exclude discrimination on grounds of nationality

Third-country nationals and discrimination on ground of nationality

- Explanations:
 - ▣ *“Paragraph 1 draws on ... Article 14 of the ECHR... In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.”*
 - ▣ See case law of ECtHR on the prohibition of discrimination on grounds of nationality:
 - *Gayguzus, Koua Poirez, Andrejeva*
 - This case law is now part of the *aquis communautaire*
- So Article 21(1) EUCFR also prohibits discrimination on grounds of nationality

To conclude

26

- Lessons from the loose ends of V&K:
- Concepts used in legal instruments must be interpreted and implemented in the broader legal picture:
 - TEU - TFEU
 - EUCFR
 - different related directives and regulations