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JOBSEEKERS AND ACCESS TO SOCIAL BENEFITS

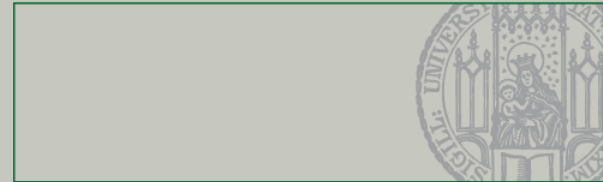
Annual Conference on Free Movement of Workers
European Network on Free Movement within the EU
Limassol, Cyprus, 9–10 October 2009





Overview

- I) Background: The Free Movement Regime in the European Economic Community and the Position of Jobseekers
- II) A Shift of Paradigm: Union Citizenship and its Dynamics for the Free Movement Regime
- III) Repositioning Jobseekers within the revised Free Movement Regime



I) Free Movement in the EEC

The Economic Focus of the Free Movement Regime

- Free movement as an instrument of market integration
- Free movement rights for workers, ...
- ... but not for economically inactive persons.



I) Free Movement in the EEC

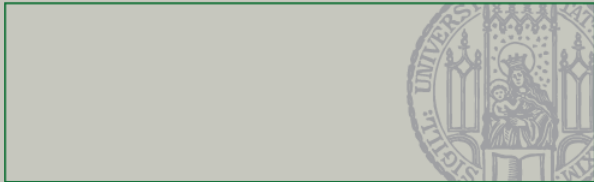
The Position of Workers

- Right of residence
- Comprehensive claim to national treatment, in particular in view of social benefits (Art. 7 para. 2 Reg. 1612/68)
- Absolute claim to social solidarity (residence requirement not justified)

I) Free Movement in the EEC

The Position of economically inactive Persons

- Largely excluded from the free movement regime
 - No right of residence (e.g. Bettray)
 - No claim to social solidarity (e.g. Lair)



I) Free Movement in the EEC

The Position of Jobseekers

- Janus-faced status
- Reflected in their position in the EEC's free movement regime
 - Right of residence
 - No access to social benefits

I) Free Movement in the EEC

The Position of Jobseekers – Right of Residence

Right to move freely within the EC „to accept offers of employment actually made“ (Art. 39 para. 1 lit. a and b EC)

- Wide understanding (effectiveness): Inclusion of jobseekers (Antonissen)
- Limited in duration

6 Months, “unless person provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged”

I) Free Movement in the EEC

The Position of Jobseekers – National Treatment (Lebon)

- Matters regarding access to employment – e.g. assistance by the employment offices – encompassed (Art. 2, 5 Reg. 1612/68)
- Equal access to social benefits (Art. 7 para. 2 Reg. 1612/68) limited to workers



II) Effects of Union Citizenship

- Shift of paradigm in the hitherto economically-oriented free movement regime
- Economically inactive persons enjoy
 - Right to free movement (Art. 18 EC)
 - Far-reaching claim to non-discrimination (Art. 12/18 EC)

II) Effects of Union Citizenship: Residence

- Art. 18 EC subject to economic conditions of residence enshrined in secondary law (sufficient resources; comprehensive sickness insurance)
- These, however, limitation of a guarantee of primary EC law
- Thus: Proportionality-test
 - ECJ (Grzelczyk; Baumbast and R)
 - Implemented in new Free Movement Directive 2004/38/EC

II) Effects of Union Citizenship: Residence

- Three-stage-model of Directive 2004/38/EC
 - – 3 months: No economic conditions, however:
Expulsion possible in case of unreasonable burden on the social assistance system
 - + 3 months: Economic conditions, however:
Expulsion measure shall not be the automatic consequence of recourse to the social assistance system
 - Right of permanent residence (acquired after 5 years):
Irrespective of economic conditions

II) Effects of Union Citizenship: Non-discrimination

- Hitherto: Equal treatment limited to workers
- ECJ: Inclusion of economically inactive persons ...
- ... by a wide interpretation of the general right of non-discrimination (Art. 12 EC), namely as annex to the general right of free movement (Art. 18 EC)
- Extension to all kinds of social benefits like social assistance, student maintenance grants or child-raising allowances

II) Effects of Union Citizenship: Non-discrimination

- However: Claim to equal treatment not boundless, rather graduations justified
 - Integration into the society of host Member State (duration of residence)
 - Nature of benefit
 - Effects of extension on the social system
- Implemented in new Free Movement Directive 2004/38/EC
 - Social assistance (> 3 months); maintenance aid for studies (> 5 years)



III) Repositioning Jobseekers

Revaluation of position of economically inactive persons calls for reconsideration of position of jobseekers

- 1) The answer of the Free Movement Directive ...
- 2) ... has been questioned by the ECJ's jurisprudence in Collins and Ioannidis
- 3) No clarification in the recent Vatsouras judgement
- 4) Possible solutions

III) Repositioning Jobseekers: Directive 2004/38/EC

- < 3 months: Unconditional right of residence (Art. 6)
 - > 3 months: No expulsion possible “as long as [jobseeker] can provide evidence that [he is] continuing to seek employment and that [he has] a genuine chance of being engaged.” (Art. 14 para. 4 lit. d)
 - However: Host Member State not “obliged to confer entitlement to social assistance” (Art. 24 para. 2)
- ↔ Corresponds with former situation (Lebon)

III) Repositioning Jobseekers: The Collins case

- No jobseeker's allowance for Mr. Collins (Irish national) because he was not habitually resident in the UK
- Perfectly in line with Lebon-ruling
- However: Conflict with extension of non-discrimination-principle in favour of economically inactive persons



III) Repositioning Jobseekers: The Collins case

- Extension by the ECJ:

“In view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39 para. 2 EC] ... a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State. The interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in Lebon ...”



III) Repositioning Jobseekers: The Collins case

- However: Residence requirement justifiable
- A “connection between persons who claim entitlement to such an allowance and its employment market” may be required in view of nature of benefit
- Link may be deferred from the claimant’s seeking employment in the respective Member State for “a reasonable period”
- Period “must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.”

III) Repositioning Jobseekers: The Collins case

- Confirmed in Ioannidis
 - Belgian tideover allowance not granted to a Greek national on the ground that he completed his secondary education in another Member State.
 - Deferring link with the labour market from the place of completion of secondary education inappropriate

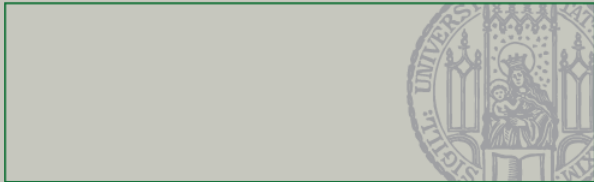
III) Repositioning Jobseekers: The Vatsouras case

- Extension of non-discrimination principle in Collins/loan-nidis conflicts with exclusion of social assistance from the same claim in Art. 24 para. 2 (both concern social benefits intending to finance a living)
- Clarification expected from the Vatsouras case (4 June 2009)
- German Code of Social Law, transposing Art. 24 para. 2, excluded foreign jobseekers from a social benefit granted to jobseekers

III) Repositioning Jobseekers: The Vatsouras case

- Q: Is “Article 24(2) of Directive 2004/38 ... compatible with Article 12 EC, read in conjunction with Article 39 EC”?
- ECJ: Reiteration of former case-law (Collins):

Jobseekers with “real links with the labour market of that State can rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market”
- No conflict: Such benefits “cannot be regarded as constituting ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38”



III) Repositioning Jobseekers: Possible Solutions

- a) ECJ's formalistic approach problematic
- b) Limits to the jobseekers' access to social benefits

III) Repositioning Jobseekers: Possible Solutions

- a) ECJ's formalistic approach problematic
 - ECJ subsumes benefits facilitating access to the labour market under Art. 39 para. 2 EC
 - Thus no conflict with Art. 24 Dir. 2004/38/EC vis-à-vis Art. 39 para. 2 EC constitutes a *lex specialis*
 - True, but problematic:
 - Legal uncertainty – benefits specifically granted to jobseekers have to be distinguished from ordinary social assistance benefits



III) Repositioning Jobseekers: Possible Solutions

- Distinction based on the fact whether the MS in question has included jobseekers into the general social security system or grants specific benefits questionable (formal and contingent, but uniform answer to inclusion in social system of essence)
 - Protection of financial interests of MS requires inclusion of all benefits securing a minimum for subsistence
- ↔ If not following the Court, permanent exclusion of jobseekers in Art. 24 para. 2 not in line with primary law (ECJ obiter: “must be interpreted in accordance with Article 39[2] EC”)



III) Repositioning Jobseekers: Possible Solutions

b) Limits to the claim to national treatment

- Nature of benefit (facilitating access to labour market) justifies requiring a “real link with the labour market”
- May be deferred from the fact that “the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question”
- Problematic as single criterion: For, jobseeker may be looking for jobs in more than one Member State

III) Repositioning Jobseekers: Possible Solutions

b) Limits to the claim to national treatment

- Hence: To be supplemented by residence-criterion (which, itself, does not necessarily say anything about a person's connection with the national labour market) required to attribute social responsibility to a certain Member State

III) Repositioning Jobseekers: Possible Solutions

(P) Justifiable length?

- Collins suggests a rather limited residence requirement
 - “genuine link ... between person seeking work and the employment market”
 - BUT: “period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State”

III) Repositioning Jobseekers: Possible Solutions

- Pro substantial period of residence
 - Risk of abuse
 - Jobseeker economically inactive person; might not find and take up work
- ⇒ Certain degree of integration into society of the host Member State required for access to social benefits
 - Students: 5 years
 - Unemployed: Expulsion before acquisition of right of permanent residence

III) Repositioning Jobseekers: Possible Solutions

- Intention of Community legislator (exclusion)

But: Could not consider ECJ's reinterpretation anymore (Common Position of the Council: 5/12/2003; Collins: 23/3/2004); overall intention to codify ECJ's case-law (e.g. recital 9).

III) Repositioning Jobseekers: Possible Solutions

- Pro short residence requirement
 - Equal treatment with other unemployed ⇔ access after 3 months?

However: No expulsion of jobseekers possible

- Janus-faced status of jobseekers: Intention to contribute to productivity in the host Member State justifies approximation to migrant workers
- Inconsistency: Distinction between part-time workers and jobseekers questionable

III) Repositioning Jobseekers: Possible Solutions

- Temporary character of the jobseeker’s right of residence (three months, if there are no chances)
- A possible solution
 - Short minimum period
 - But also: Maximum period (following from Art. 14 para. 4 lit.d Dir. 2004/38): “genuine chance of being engaged”
 - Thereafter: Treatment like other unemployed persons