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Annual Conference on Free Movement of Workers

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The situation of jobseekers under EU law on Free Movement

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The Situation of Jobseekers under EU Law on Free Movement

**Residence Rights of Jobseekers and “Vatsouras”-Benefits –
National Practices and Legislation**

Annual Conference on Free Movement of Workers

Network on Free Movement of Workers, Malta, 16 November 2012

A) Background: The position of jobseekers

- Free movement of jobseekers important not only for individual self-development and prosperity, ...
- ... but also for making full use of the EU's labour potential, in particular in times of labour shortage in some MS
- Thus: Free movement of jobseekers has been acknowledged in principle, ...
- ... but: extent of free movement rights of jobseekers remains controversial issue

The Situation of Jobseekers under EU Law on Free Movement

- Due to janus-faced status of jobseekers (intend to contribute to productivity, but currently unemployed)
- Challenge in a free movement regime based on distinction between market and non-market actors
- Reflected in their position in the EU's free movement regime
 - Right of residence (B)
 - Limited access to social benefits (C)
- Comparative study for the network by me and Jennifer Ricketts based on reports of national experts

B) Right of residence

- Acknowledged in EU law for a long time (ECJ, Antonissen)
- Currently: Art. 45 (3) lit. a and b TFEU & Dir. 2004/38/EC
- Periods of up to three months
 - No particular conditions or formalities provided for by Art. 6 (1) Dir. 2004/38/EC
 - Respected by most MS, only exceptionally is registration required (sometimes only indirectly as condition for benefits)

- Periods exceeding three months (I)
 - Some MS apply economic criteria of residence (sufficient resources and a comprehensive health insurance)
 - In line with Art. 7 (1) Dir. 2004/38/EC
 - However: protection from expulsion required by Art. 14 (4) lit. b Dir. 2004/38/EC “as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.”
 - Not always guaranteed by law

- Periods exceeding three months (II)
 - Some MS require jobseekers to prove reasonable chances to get employed
 - Problematic at least if jobseeker is economically self-sufficient (only proof of status may be required), ...
 - ... but no practical consequences in view of right of residence as non-market actor
 - Significance of Antonissen-judgement in this respect open to debate (cf. recital 9 Dir. 2004/38/EC)

C) Social Benefits

- Orthodox position of EU law
 - Non-discrimination regarding access to employment – e.g. assistance by the employment offices – granted (Art. 2, 5 Reg. 492/2011)
 - Equal access to social benefits (Art. 7 para. 2 Reg. 492/2011) limited to workers (confirmed in ECJ, Lebon [1987])

- Shift of paradigm by Union Citizenship
 - Following introduction of Union Citizenship, position of non-mar-ket actors regarding equal access to social benefits has been improved (ECJ, Sala, Grzelczyk etc.)
 - This calls for reconsideration of orthodox position of jobseekers hitherto excluded from equal access to social benefits

- I) The answer of the Free Movement Directive ...
- II) ... has been questioned by the ECJ's jurisprudence in Collins and Ioannidis
- III) No clarification in the Vatsouras judgement
- IV) Possible solutions

I) The answer of the Free Movement Directive ...

- Host Member State not “obliged to confer entitlement to social assistance” (Art. 24 para. 2 Dir. 2004/38/EC)
- Corresponds with former situation (Lebon)

II) ... questioned by the ECJ's jurisprudence in Collins and Ioannidis

- 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

II) ... questioned by the ECJ's jurisprudence in Collins and Ioannidis

- Extension by the ECJ – Lebon overruled:

“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 [45 para. 2 TFEU] ... 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 ...“

- However: Proportionate residence requirement justifiable to guarantee link with the national labour market
- Confirmed in Ioannidis
- Confirmed recently in Prete (25/10/2012)
 - Belgian “tideover allowance for ... young people looking for their first job conditional upon the person concerned having completed at least six years’ studies in an educational establishment of the host Member State”
 - DP “married a national of the host Member State, resides with him in that State [2 years] and is registered as a job seeker with an employment service of the host State [16 months].”

III) No clarification in the Vatsouras judgement

- Extension of non-discrimination principle in Collins/Ioannidis 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

- Q: Is “Article 24(2) of Directive 2004/38 ... compatible with Article [18 TFEU], read in conjunction with Article [45 TFEU]”?
- ECJ: Reiteration of former case-law (Collins):

Jobseekers with “real links with the labour market of that State can rely on Article [45 (2) TFEU] 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”

IV) Possible solutions

- Distinction of ECJ problematic – also reflected in national law (1)
- Limits to the jobseekers' access to social benefits (2)

(1) Distinction problematic in terms of EU law

- Formalistic and entails legal uncertainty
 - benefits “of a financial nature intended to facilitate access to the labour market” have to be distinguished from ordinary social assistance benefits
 - narrow (labour-market orientation) / wide understanding (also subsistence benefits facilitate access) debatable
 - “objective ... must be analysed according to its results and not according to its formal structure. A condition ... under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.”

- Qualification issues (cf. discussions in various MS) in view of hybrid character (e.g. France, Germany)
 - France: social assistance, but aim «d’inciter à l’exercice d’une activité professionnelle»
 - Germany: Benefits intend to support persons able to work with taking up or maintaining a job and secure their living (§1 [2.2] SGB II)

- Core issue: Is jobseeker entitled to a social benefit intending to finance her/his living?
 - Distinction based on the fact whether a MS has included jobseekers into the general social assistance system or grants specific benefits questionable in this respect ...
 - ... and also grants discretion to MS
 - Some MS: Collins-benefits (e.g. Ireland, UK); other MS: social assistance with or without exclusion of first-time jobseekers

The Situation of Jobseekers under EU Law on Free Movement

- If not following the Court for these reasons and applying Art. 24 (2) Dir. 2004/38/EC to all maintenance benefits, permanent exclusion of jobseekers not in line with primary law
- If following the Court, the issue still remains whether Art. 24 (2) Dir. 2004/38/EC is in line with primary law – ECJ obiter: Art. 24 (2) “must be interpreted in accordance with Article [45 (2) TFEU]”
- In all cases: limits according to Collins-jurisprudence?

- Problems in view of Collins-benefits
 - Conditions for entitlement in line with the requirement of a *proportionate* link with the national labour market?
 - General exclusion (cf. unclear situation in *Ireland*)
 - Debatable in others (acceptable duration of residence/ registration requirements, e.g. *Spain*; requirement of previous education in the Member State, *Belgium*)

(2) Possible solutions

(a) 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

- Hence: May 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 (Collins)

- ECJ, Prete (25/10/2012) – possible further widening:

“inasmuch as it prevents other factors which are potentially representative of the real degree of connection of the claimant with the relevant geographic labour market being taken into account, a condition such as ... goes beyond what is necessary to achieve its aim” (51)

 - In casu: Residence, period of jobseeking, close ties with host Member State for personal reasons (marriage)
 - Prete thus questions rules making benefits conditional upon a single criterion
 - (P): legal certainty – cf. in this direction ECJ, Förster, paras. 34 seq.

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

- 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).

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
- 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 in the Member States

THANK YOU VERY MUCH
FOR YOUR ATTENTION!

QUESTIONS & COMMENTS:

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16 November 2012

**Residence rights of first time
jobseekers and the right
to retain a status of workers
for persons who lost their job
in the host MS involuntarily**

Jitka Hrudova





16 November 2012

The UK perspective in light of the Collins judgment

Sarah St Vincent





16 November 2012

**Session with reports from
the 2012 specialized seminars
of the Network**

**Denmark/Sweden:
Örjan Edström**





16 November 2012

**Session with reports from
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**Czech Republic/Slovakia:
Martin Škamla**





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**Session with reports from
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**Italy:
Alessandra Lang**



DOES CITIZENSHIP MATTER? THE TREATMENT OF EU WORKERS IN ITALY

Milan, October the 5th, 2012

*National Seminar of the Network on
Free Movement of Workers*

Aim of the seminar

- To discuss issues about the treatment of EU nationals (especially workers) in Italy
- To compare the treatment of EU and foreign workers in Italy
- To check whether EU workers are treated in accordance to EU law

Foreigners on Italian labour market

- Italy is a reluctant importer of migrants
- 2012: more than 5 million regular foreigners, of which 1.3 million of EU nationals
- 2002: 1.357.000 of which 125.000 EU nationals

Two sets of applicable rules

- Legislative Decree No 286/1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national
- Legislative Decree No 30/2007 transposing Directive 2004/38

Main problems

- Family reunification:
 - difficult implementation of the *Metock* case
 - checks on whether the marriage of Italian nationals to foreigners are real
 - unclear status of same sex marriage
 - Family links are not duly taken into account in case of expulsion

Main problems

- Expulsion:
 - expulsion for not satisfying the conditions for residence: little attention to the overall situation of the person concerned
 - expulsion on grounds of public security or public order:
 - almost whichever crime committed is evidence of a threat to society
 - considerations of general prevention
 - wide concept of public security

Rights not explicitly granted to EU nationals

- Judicial protection against discrimination on grounds of nationality
- Unaccompanied minors
- Access to health care free of charge

Foreign workers vs EU workers

- access to employment in the public sector
- effects of the loss of employment and of job insecurity on the workers' right of residence
- access to social benefits regulated by Regional laws



16 November 2012

Breaches of Union Law by non-state entities?

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Annual Conference on Free Movement of Workers

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Breaches of Union law by Non-state entities

Jonathan Tomkin, Barrister

Today's Menu

- A. Application of Union law to M.S and public bodies
- B. Extension of scope of Union law to private parties
- C. State liability for breaches of Union law by private parties
- D. Conclusion

A. Application of EU law to Public (1)

1. Union Treaties primarily addressed to M.S.
(With exception of Competition law)

2. CJEU extends scope of Application of Union law
 - Direct effect – combined with Supremacy
Case 26/62 *Van Gend & Loos* [1963] ECR 1.
 - Obligation to comply with Union law extended to emanations of the state and public bodies (health authorities, public hospitals, local govt, fire services...)
 - – even as employer
 - 152/84 *Marshall* [1986] ECR 723
 - C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 43
 - C-243/09, *Günter Fuß v. Stadt Halle* [2010] ECR I-9849

A. Traditional Application of EU law (2)

3. Doctrine of State Liability

- Joined Cases C-6 & 9/90 *Francovich and Others* [1991] ECR I-5357
- Sufficiently serious breach of a provision of Union law that is intended to confer rights on individuals

B. EU law and Private Parties (1)

1. Traditional Means:

- No horizontal direct effect of Directives – though harmonious interpretation
- State liability? – reserved for breaches by State?
- Arbitrary? Case 152/84 *Marshall* [1986] ECR 723
- Obligation to give full effect to EU rights in national law
- Principle of effectiveness and equivalence – mustn't render EU rights impossible or excessively difficult
 - Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213.
- Availability of Effective remedies
 - Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para 5

B. EU law and Private Parties (2)

2. CJEU applies EU law directly where:

- (1) Individual has interest in performance of duty laid down – e.g. general principle of equality
- (2) Necessary for effective functioning of internal market
- (3) Private entities performing public functions

B. EU law and Private Parties (3)

(1) Individual has interest in performance of duty laid down – e.g. general principle of equality and non discrimination

- Case 43/75 *Defrenne* (no.2) [1976] ECR 455
 - Union “not merely an economic Union” (para 9)
 - Implementation of principle entails both Union and national measures
 - Direct discrimination under 157 TFEU covers legislation and collective labour agreements -applies whether public or private
 - The fact that provisions are “formally addressed to Member States” does not prevent rights from being conferred at the same time **on any individual who has an interest in the performance of the Duties laid down**
 - Gives rise to individual rights which the Courts must protect

B. EU law and Private Parties (4)

Case 43/75 *Defrenne* (no.2) [1976] ECR 455...cont/d

- The effectiveness of Article 157 TFEU cannot be affected by a Member State's failure to discharge duty and Institutions having not reacted sufficiently energetically against such failure to act
 - *The prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals*
- Followed in
 - Case C-281/98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4139
 - C-94/07 *Raccanelli* [2008] ECR I-5939

B. EU law and Private Parties (5)

Direct application of General Principle of Equality and non discrimination on grounds of age through directive (implementation date of which has not yet expired)

- Case C-144/04 *Mangold* [2005] ECR I-9981
- C-555/07 *Kücükdeveci* [2010] ECR I-365

B. EU law and Private Parties (4)

(2) Necessary for effective functioning of internal market

Competition Law

EU Competition rules seek to ensure that obstacles removed by State action (in accordance with the requirements of the EU Treaties) are not subsequently resurrected by means of arrangements or conduct of a private character

- C-453/99 *Courage v. Crehan* [2001] ECR I-6297:
- 101 and 102 TFEU produce direct effects in relations between individuals and create rights for individuals

B. EU law and Private Parties (5)

Free Movement of Workers, Establishment, Services

Rules of International sporting federations

- Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405
- Case C-415/93 *Bosman* [1995] ECR I-4921
- Abolishing obstacles would be compromised if removal of barriers could be neutralised by acts of on public law bodies

Collective Agreements – Collective Action

- Case C-341/05 *Laval un Partneri* [2007] ECR I-11767 -
- Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779

B. EU law and Private Parties (6)

(3) Private entities performing public functions

- Public Procurement (contracting authorities)
- State aid
- V.A.T
- Free Movement of Goods (regulatory authorities)

Public procurement

- Directives 2004/18 and 2004/17 – definition of contracting authority
- Case 31/87 *Beentjes v Netherlands State* [1988] ECR 4635
- Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761
- Public task / De facto control as single shareholder

B. EU law and Private Parties (7)

(3) Private entities performing public functions

Free movement of Goods

- Case 249/81 *Commission v. Ireland (Buy Irish)* [1982] ECR 4005
- Case C-325/00 *Commission v. Germany* [2002] ECR I-9977
- Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313
- Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012

Criteria: Decisive control (direct/indirect): management structure, power to issue binding directions, appoint board members, funding, define function

C. State liability - breach of EU law (1)

Case T-341/10 *F91 Diddeléng (and others) v. Commission*,
Order of the General Court dated 16 April 2012

1. Private entities exercising delegated functions

- Commission v. Ireland (Buy Irish) / Commission v. Germany,
- Foster v. British Gas

“a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon

Case C-171/11 *Fra.bo SpA*, judgment of 12 July 2012 – where no decisive State control

C. State liability - breach of EU law by private entity (2)

2. Private individuals making representations on behalf of State

➤ Case C-470/03 A.G.M.-COS.MET Srl [2007] ECR I-2749

Indicators

- The official has authority generally within the sector in question;
- the official sends out his statements in writing under the official letterhead of the competent department;
- the official gives television interviews on his department's premises;
- the official does not indicate that his statements are personal or that they differ from the official position of the competent department; and
- the competent State departments do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official's statements are addressed that they are official positions taken by the State.

C. State liability - breach of EU law (2)

3. Article 106 Entity granted special or exclusive rights

- Member States prohibited from maintaining as regards such entities any measure contrary to the rules of the Treaties
- Case 13/77 *GB-Inno-BM* [1977] ECR 2115

4. Breaches evidence of Breach of State liability

- Case C-265/95 *Commission v. France* [1997] ECR I-6959
- Case C-112/00 *Schmidberger* [2003] ECR I-5659

D. Conclusion (1)

- Primary means of applying Union law to private parties is through full implementation
- EU law may apply directly to Private parties where:
 - (1) Interest of individual attaches, e.g. general principle of equality
 - (2) Effective functioning of internal market
 - (3) Private body exercising public functions

D. Conclusion (2)

Private acts may be attributed to the State where sufficient link e.g

- (1) Private entity exercising delegated function
- (2) Private entity making representations on State's behalf
- (3) Private entity granted special or exclusive rights
- (4) Private entity's breach illustrative of State's breach

D. Conclusion (3)

- Evolution of Court's case-law reflects underlying shift in conceptual borders delimiting public and private spheres
- Court has moved to uncouple “form” from “function”

THE END.....

Thank you for your attention



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Comments

Mr. Justice Nicholas Blake





16 November 2012

Direct and indirect barriers to free movement of labour within the EU – The experience of a National Ombudsman

Calliope Spanou





Conclusions

Kees Groenendijk





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