SEMINAR 6  FREE MOVEMENT OF WORKERS

Read
Barnard Ch 11
Arts 45-48 FEU Treaty (ex-Articles 39-42 EC)

1. Introduction to Free movement of Persons
   - EC Treaty articles/secondary legislation
   - Overview of Arts 45, 49 and 56 FEU (ex –Arts 39, 43 and 49 EC ) + Directive 2004/38 OJ 2004 L158/77 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizen’s Rights Directive); Provisions re EU Citizenship to be found in Arts 20-25 FEU (ex-Arts 17-22 EC)
   - Preliminary points: Article 18 (ex-Art 12 EC) no discrimination on the grounds of nationality and Article 21 (ex-Art 18 EC) “Every Citizen of the Union shall have the right to move and reside freely within the territory of the MS…” –
   - Treaty of Amsterdam, Title IV (Arts 61-69): powers to introduce measures in the fields of visas, immigration and asylum

2. Personal Scope of the Freedom of Movement of Workers

Who is a worker? What is employment? – no definition in EC Treaty or legislation
Lowrie-Blum, Case 66/85 [1986] ECR 2121 [trainee teacher] - (general definition): “The essential feature of an employment relationship … is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”

Unger (Hoekstra) Case 75/63 [1964] ECR 177 – a Community law concept
Levin, Case 53/81 [1982] ECR 1035 (chamber maid)
Kempf, Case 139/85 [1986] ECR 1741 (music teacher)
Bettray, Case 344/87 [1989] ECR 1621 – not work when provided for rehabilitation
Steymann, Case 196/87 [1988] ECR 6159 – (plumber) - can include members of an economically active religious community
Raullin, Case C-357/89 [1992] ECR I-1027
Meeussen, Case C-337/97 [1999] ECR I-3289
Trojani Case C-456/02 [2004] ECR I-7573 (Salvation Army hostel 3hour p.w. – for national court

Secondary Legislation
Directives 64/221; 68/360; 72/194; 75/34; 75/35; 90/364 ("Playboys"); 90/365 (retired persons); 93/96 (replacing Dr 90/366 on students); [all repealed by Dr 2004/38]; Regulation 1612/68 governs access to employment and conditions of employment and deals with families rights (as amended by Dr 2004/38 ie Arts 10 and 11))

1. Directive 68/360 (OJ 1968 L257/13) concerning the removal of restrictions on movement and residence within the Community for workers of Member States and their families. (repealed)

2. Regulation 1612/68 (JO 1968 L257/2) concerning the elaboration of the free movement principle.(Arts 10 & 11 repealed) : eligibility for employment; equality of treatment; and worker’s family

3. Regulation 1251/70 (OJ 1970 L142/24) on the right to remain in the territory of a Member State after having been employed in that State.

4. Directive 64/211 (OJ 1964 850) on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security or public health. [to be dealt with in Seminar 9] (repealed)

3. Meaning of ‘family’
Art 10(1) and (2); Art 11 (repealed by Dr 2004/38 – now Art 2(a)-(d)). The rights of family members are derived rights, in that they depend upon the worker’s status as a worker (who has exercised their right to free movement) and do not exist as independent rights – nationality irrelevant.

Who are the worker’s family?
[Article 10(1): “(a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse.” Article 10(2): the wider family – any other dependants]

New Art 2: “(a) the spouse
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a member State, if the legislation of the host member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host member state;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point 8b):
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)”

Article 11:
- Who is a “spouse”? *Netherlands v Reed* Case 59/85 [1986] ECR 1283. (but saved on the facts – now see Art 2 of Dr 2004/38)
- What rights do they have? (same rights/procedure as the worker but..
  - Entry and residential Directive 68/360 (may need an entry visa)
  - Rights dependent on continuing rights of the worker (see also Regulation 1251/70)
- Rights to remain in same circumstances as worker (reg 1251/70)
- Rights to remain in certain other circumstances following worker’s death (See Reg 1251/70)

_Diatta v Land Berlin_ Case 267/83 [1985] ECR 567
_Mary Carpenter_, Case C-60/00 [2002] ECR I-6279

Watson “Free Movement of Workers: A One Way Ticket?” (1993) 22 ILJ 68

4. **Material Scope of the Freedom**

What rights are granted? Rights conferred by Article 45(3) (ex-Art 39(3) EC)

(a) accept offers of employment actually made
(b) to move freely within the territory of Member States for this purpose
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

Rights elaborated by regulation 1612/68; Regulation 1251/70 (right to remain) and the Citizens Rights Directive

Worker’s Rights (Art 7(2) of Reg 1612/68 – “social and tax advantages”)

_Casagrande_, Case 9/74 [1974] ECR 773
_Michel S_, Case 76/72 [1973] ECR 457
_Fiorini_, Case 32/75 [1975] ECR 1085
_Ministere Public v Even_[ ] [1979] ECR 2019
_Reina_, Case 65/81 [1982] ECR 33
_Mutsch_, Case 137/84 [1985] ECR 2681
_Castelli_, Case 261/83 [1984] ECR 3199
_Lebon_, Case 316/85 [1987] ECR 2811

5. **Principle of non-discrimination on the grounds of nationality**

Clarified in Art 45 (ex-Art 39 EC) and elaborated in Regulation 1612/68, Art 7(1)

**Article 45(2)** (ex-Art 39(2) EC): “.. such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the MS as regards employment, remuneration and other conditions of work and employment.”

**Regulation 1612/68**: Article 7 – no discrimination as regards conditions of work eg Ugliola, Case 15/69 [1969] ECR 363 BUT Article 3 – linguistic knowledge See Groener (above)

ECJ: principle may be relied upon not only against member States and public authorities but also against private individuals confirmed in Case C-281/98 Angonese [2000] CMLR 1120

**Market access**

*Bosman*, Case C-415/93 [2995] ECR I-4921 (non-discriminatory measures)


6. **Citizenship case –**law based on Art 21(1) and Art 18 FEU (ex-Art 18(1) and Art 12 EC)

   Case C-85/96 *Martinez Sala v Freidstaat Bayern* [1998] ECR I-2691
   Case C-356/98 *Kaba* [2003] ECR I-2219 (citizenship is a right of paramount importance in Community Law)
   Case C-184/99 *Grzelczyk* [2001] ECR I-6193
   Case C-413/99 *Baumbast* [2002] ECR I-7091 (citizenship + proportionality)
   Case C-200/02 *Chen* [2004] ECR I- (3rd country national)
   Case C-209/03 *Bidar* (Art 18(1) + Dr. 90/364)
   Case C-224/02 *Pusa*
   Case C-403/03 *Schempp*
   Case C-406/04 *De Cuyper*
   Case C-192/05 *Tas-Hagen*
   Cases (Joined) C-11/06 & C-12/06 *Morgan*

**Further reading**

*Barnard* “Of students and babies” (2005) CLJ 560


*Somek* “Solidarity …… Being and Time in European Citizenship” (2007) ELRev 787
