

## SEMINAR 6 FREE MOVEMENT OF WORKERS

### Read

Barnard, Chs 8 and 9

Treaty of Maastricht 1993 created the status of Union Citizenship

Arts 45-48 TFEU Treaty

### 1. Introduction to Free movement of Persons

- TFEU articles/secondary legislation
- Overview of Arts 45 (workers), 49 (right of establishment) and 56 (free movement of cross-border services) TFEU + 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 (CRD)**); Provisions re EU Citizenship to be found in Arts 20-25 TFEU
- Preliminary points: **Article 18** no discrimination on the grounds of nationality and **Article 21** '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):- now Title V TFEU - powers to introduce measures in the fields of visas, immigration and asylum

### 2. Personal Scope of the Freedom of Movement of Workers

Is Article 45 TFEU horizontally directly effective? Yes - *Walrave*, case 38/74 [1974] ECR 1405; *Dona v Mantero* [1976] ECR 1333; *Bosman* Case C-415/93 [1995] ECR I-4921; *Angonese*, Case C-281/98 [2000] ECR I-4139 (direct effect of Art 45 TFEU)

Who is a worker? What is employment? – no definition in TFEU 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)

*Betray*, 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

*Martinez-Sala*, Case C-85/96 [1998] ECR I-2691

*Trojani* Case C-456/02 [2004] ECR I-7573 (Salvation Army hostel 3hour p.w. – for national court)

Extensions to jobseekers: *Procureur du Roi v Royer*, Case 48/75 [1976] ECR 497 further developed in *R v IAT ex p. Antonissen*, Case C-292/89 [1991] ECR I-745 (right to seek work for reasonable period); Case C-138/02 *Collins* [2004] ECR I-2703; C-258/04 *Ioannidis*; C-22 and 23/08 *Vatsouras*

\*Dougan, "Free Movement: The Work-seeker as a Citizen" (2001) 4 CYELS 93

Art 46 TFEU Secondary Legislation re ancillary rights - (a bit of history!!)

Directives 64/221; 68/360; 72/194; 75/34; 75/35; 90/364 (“Playboys”); 90/365 (retired persons); 93/96 (replacing Dr 93/96 on students); [**all repealed and consolidated into 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 later] (repealed)

**3. Meaning of ‘family’**

Art 2(a)-(d) of **Directive 2004/38** - 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 2 CRD:** ‘(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; [History: *Netherlands v Reed* Case 59/85 [1986] ECR 1283]

**Article 3 CRD**

(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)’

What rights do they all have? (same rights/procedure as the worker but.....)

- Entry and residence (may need an entry visa; up to 3 months) Arts 6 and 7 CRD
- Rights dependent on continuing rights of the worker (see also Regulation 1251/70-right to remain))
- Rights to remain in same circumstances as worker (Regulation 1251/70)
- Rights to remain in certain other circumstances following worker’s death (See Regulation 1251/70)

*Diatta v Land Berlin* Case 267/83 [1985] ECR 567

*R v IAT & Singh ex p. Secretary of State for the Home Office*, Case C-370/90 [1992] ECR I-4265

*Morson & Jhanjan*, Cases 35 & 36/82 [1982] ECR 3723

*Mary Carpenter*, Case C-60/00 [2002] ECR I-6279

Watson “Free Movement of Workers: A One Way Ticket?” (1993) 22 ILJ 68  
Shah “UK Settlement for EC Spouses” (1997) 147 NLJ 1094.

#### 4. Material Scope of the Freedom

*What rights are granted?* Rights conferred by Article 45(3) TFEU. Rights elaborated by Regulation 1612/68; Regulation 1251/70 (right to remain) and the Citizens Rights Directive (CRD)

- (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 (+Art 16 CRD)
- (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.

Worker’s Rights (Arts 1- 12 of Regulation 1612/68 – eg Art 7(2) and (3) re “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 and elaborated in Regulation 1612/68, Art 7(1)

**Article 45(2) TFEU:** ‘.. 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.’

See *Groener*, Case 378/87 [1989] ECR 3967 (language requirement, indirect discrimination? No discrimination); Case 167/73 *Commission v France (Code Maritime)* [1974] ECR 359 (direct discrimination)

**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)

*Graf*, Case C-190/98 [2000] ECR I-493

**6. Citizenship (Arts 20-25) case-law based on Art 21(1) and Art 18 FEU**

NB: the right of Citizenship does **not** bring any new free movement rights into being but formally attaches **existing** rights with all the qualifications and exceptions, to the new citizenship. However the CJEU appears to have breathed life into the concept of EU citizenship in a series of cases. **NB Art 21 TFEU together with Art 18** irrespective of any economic nexus

Case C-85/96 *Martinez Sala v Freidstaat Bayern* [1998] ECR I-2691 (non-workers/non-economically active)

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 – direct effect confirmed)

\*Case C-148/02 *Garcia Avello*

\*Case C-200/02 *Chen* [2004] ECR I- (3<sup>rd</sup> 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-258/04 *Ioannidis*

Case C-406/04 *De Cuyper*

Case C-192/05 *Tas-Hagen*

Cases (Joined) C-11/06 & C-12/06 *Morgan*

Case C-258/07 *Forster*

Cases C-22 and C-23/08 *Vatsourias*

Case C-73/08 *Bressol*

Case C-310/08 *Ibrahim*

Case C-480/08 *Teixeira*

\*Case C-34/09 *Zambrano*

\* Case C-434/09 *McCarthy*

\* Case C-256/11 *Dereci*

NB \* Erosion of the wholly internal rule – takes increasingly little to trigger application of EU Law

**Further reading**

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

Jacqueson “Union Citizenship and the Court of Justice: something new under the sun? Towards global citizenship?” (2002) ELRev 260

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

Meulman & de Waele “Funding the life of Brian: job seekers, welfare shopping & the frontier of Europe Citizenship” (2004) Legal Issues of Economic Integration 275-288

O’Leary “Putting flesh on the bones of EU Citizenship” (1999) ELRev 68.