

An Emerging Era of Integration with Embryo of EU Citizenship: EU Workers' Rights in a Single Market

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ABSTRACT.

The European Union (EU) as a single market embraces, *inter alia*, free movement of persons including those 'exercising a Treaty right' as a worker. While the Treaty on the Functioning of the European Union (TFEU) gives workers the rights to move across EU member states, the concept of EU citizenship emerges increasingly controversial, apparently not being impacted by developments of Brexit. Drawing on the prevailing EU law as elaborated by the legislation and the case law of the Court of Justice of the European Union (CJEU), this article examines and prompts to inspiration of an evolving legal order on EU citizenship for a new era of integration.

KEYWORDS: EU citizenship, EU workers' rights, single market, new legal order, TFEU (Lisbon Treaty)

Implications of the EU single market

The European Union (EU) is based on a single market which entails free movement of persons, goods, services and capital. As EU competence on free movement of persons 'exercising a Treaty right' as a worker involves a complex legal basis, it is inevitably controversial³. Barnard (2016) considers that "[i]n the case law on workers it is possible to detect the embryo of what later became EU citizenship"⁴. Reflecting on the concept of EU citizenship supported by case law and Directive 2004/38/EC⁵ (the Directive), also known as the Citizen's Rights Directive (CRD) or the Free Movement Directive, the following critically analyses the different viewpoints and presents the argument.

The Treaty on the Functioning of the European Union

Article 45 of Treaty on the Functioning of the European Union (TFEU) gives workers the rights to move across member states for employment: Procureur-du-Roi (1976)⁶, to travel for that purpose, to reside and stay conditionally after cessation of work in the host state. Regulation 492/2011/EU⁷ benefits migrant workers on recruitment equality and social advantages⁸. Technically distinct from 'free movement for workers', the concept of EU citizenship is established under Article 20 TFEU by conferring on citizens "the right to move and reside freely within the territory of the member states", a right exercisable with conditions stipulated in the Treaties and other measures following Article 21 TFEU.

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³ UK Department for Work & Pensions, *Review of the Balance of Competences – Internal Market: Free Movement of Persons* (Call for Evidence 2013) 17

⁴ Barnard C, *The Substantive Law of the EU: The Four Freedoms* (6th edn, OUP 2016) 287

⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L158, 30 April 2004

⁶ Case 48/75 *Procureur du Roi v Royer* [1976] ECR 497

⁷ Regulation 492/2011/EU of 5 April 2011 on freedom of movement for workers within the Union, OJ L141/1, 27 May 2011 (Replacing 1612/68/EEC)

⁸ Articles 1-9, Regulation 492/2011/EU

In this regard, Kremzow (1997) established a right of access to education for children of migrant workers⁹; Baumbast (2002) clarified that EU citizenship is not a blanket right covering every aspect of life of a member state but is there for specific purpose¹⁰;

And McCarthy (2011) clarified that the Directive only confers rights on the nationals of a member state who have moved to another member state, whether they are citizen of more than one member state¹¹.

The Directive 2004/38/EC

The Directive generally deals with these rights to workers including their families. EU citizens may move and reside for up to 3 months in any member states without formality upon proof of identity and status: Article 6 CRD, and for over 3 months to defined categories, e.g. self-employed and family members (non-EU family members included) accompanying/joining the worker: Article 7 CRD. Specifically within the Schengen area, there is abolition of internal border controls that all EU citizens need only show identity card or passport to enter the area. There are currently 26 full Schengen members: 22 EU member states plus Iceland, Liechtenstein, Norway and Switzerland. Iceland and UK are not parties to the Convention though can opt in to some parts of it. Workers and their families can acquire the right of permanent residence after five years continuous residence: Article 16 CRD. Where the worker becomes involuntarily unemployed during the first 12 months and is registered as a jobseeker, worker status is retained for at least six months: Article 7(3)(c) CRD. Furthermore, family members include registered partners if the host state treats such partnerships as equivalent to marriage: Article 2(2)(b) CRD. Article 3(2)(b) further provides that a partner, not falling within the above definition, but with whom the EU citizen has a durable relationship, falls within the category of beneficiaries whose entry and residence is also facilitated, i.e. denial of entry/residence to be justified. Barnard described these as “ever-expanding rights” providing the “testing ground” for the Court of Justice of the European Union (CJEU) more ambitious jurisprudence on EU citizen rights¹². A closer look at case law below gives us more assessments.

A further review of case law

Legally, “a worker” must be economically active over time and under supervision: Lawrie-Blum (1986)¹³, though not necessarily on a full-time basis: Levin (1982)¹⁴, and possibly with remuneration in kind: Steymann (1988)¹⁵ or partly relying on social security: Kempf (1986)¹⁶. It is thus relatively easy to qualify as a worker. The fact that a worker may also be entitled to access social advantages leads to suggestions that individuals are travelling across member states because of more generous benefits or easier availability than in their home state. Besides, jobseekers, including their family members, may not be expelled until a reasonable time has elapsed: Article 14(4) CRD, even though they have no a realistic prospect of re-employment: Antonissen (1991)¹⁷. On the principle of non-discrimination under Article 18 TFEU, the CJEU held in Collins (2004)¹⁸ that equal treatment in access to employment in Article 45(2) TFEU includes the right for a jobseeker’s allowance¹⁹, though with a further test of ‘real link’ between jobseeker and the labour market: Vatsouras (2009)²⁰. When jobseekers in the 1960-70s had to travel to avail themselves of employment, this is no longer applicable when vacancies are accessible on the Internet and interviews can be conducted remotely. Nowadays those who appear as jobseekers may sometimes exploit arising welfare benefits. Barnard’s stance is valid that a broad definition of worker (leading to EU citizenship) appears inappropriate in modern circumstances.

Longer-term residence in another member state is presumably reserved to those with independent/proven means, i.e. workers, self-employed and tertiary students, and their family members, generating no burden to the host state.

⁹ Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] ECR I-7091

¹⁰ Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629

¹¹ Case C-434/09 *McCarthy* [2011] ECR I-3375

¹² *ibid* 2

¹³ Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121

¹⁴ Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 103566/85

¹⁵ Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159

¹⁶ Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741

¹⁷ Case C-292/89, *R v. Immigration Appeal Tribunal ex parte Antonissen* [1991] ECR I-745

¹⁸ Case C-138/02 *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703

¹⁹ However, based on the facts, Collins was not entitled to the jobseeker’s allowance.

²⁰ Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900* [2009] ECR I-04585

Under Article 24(2) CRD, member states are not obliged to provide maintenance grants/loans to persons other than workers, self-employed, and their families. There is no ready entitlement to recourse to public funds in the host state: *Garcia-Nieto* (2016)²¹, though students might still claim towards their course end on ground of non-discrimination of nationality: *Grzelczyk* (2001)²², and a pensioner for supplementation: *Brey* (2013)²³. Importantly, their recourse to public funds would not automatically affect their right of residence. The CJEU's interpretation apparently supported Barnard's "embryo" assumption.

However, more recent case law suggests a "narrower" approach that such right to reside, and consequential rights, only exist in the specific categories prescribed in the Directive, e.g. no recourse to public funds: *Dano* (2014)²⁴; on social advantages upon losing worker status: *Alimanovic* (2015)²⁵. Importantly, member states have stronger legitimate reasons for expelling an individual. Codifying and incorporating earlier case law, Article 27 CRD regulates these circumstances on grounds of public policy, public security or public health. Article 29 CRD further provides that for exclusion on public health grounds, this can only be exercised within 3 months of first arrival, and on the basis of evidence that the individual is suffering from a communicable disease as defined by the World Health Organisation. Therefore, it can be due to a personal conduct, e.g. membership of an organisation/entity with unacceptable individuals: *Van Duyn* (1974)²⁶. While past criminal convictions or associations might not be conclusive: *Bouchereau* (1977)²⁷, an updated assessment of the threat posed from previous serious offences might be sufficient: *Orfanopoulos* (2004)²⁸. The individual must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society": *Staatssecretaris* (2018)²⁹. After 5 years continuous legal residence expulsions are restricted to serious grounds of public policy/security; after 10 years to "imperative grounds" of public security: Article 28 CRD. member states cannot rely on domestic law enforcing mandatory expulsion: *Calfa* (1999)³⁰ or on 'the deterrent effect': *Bonsignore* (1975)³¹. Any decision to expel must be notified in writing and carries a right of appeal: Articles 30-31 CRD.

Conclusion: An emerging era seen from the courts' approach

In conclusion, the CJEU appears to interpret the member states' power of expulsion restrictively. This reflects that with emphasis of human rights, a concerned individual after integration into the host state would justifiably require more consideration of family and personal circumstances by courts. Barnard views that 'human rights orientation' actually underpins much of the case law on workers, and this generous interpretation of the citizenship provisions has nurtured "the conditions of mistrust over EU rules on free movement of persons in some member states, in particular the UK", behind Brexit³². *Morano-Foadi and Vickers* (2015) share that indeed "EU has entered a new era of integration inaugurated by Lisbon Treaty and based on human rights"³³. The above being analysed, *Kostakopoulou* (2018)'s comments appear more relevant and true that with availability of 'in-between' Treaty amendments providing impetus for evolving the EU legal order, "scholars and policy-makers alike were not justified to be either pessimistic or ambivalent about the promise of the institution of EU citizenship"³⁴.

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²³ Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* [2013] EU:C:2013:565

²⁴ Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] EU:C:2014:2358

²⁵ Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] EU:C:2015:597

²⁶ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337

²⁷ Case 30/77 *Regina v Pierre Bouchereau* [1977] ECR 1999

²⁸ Cases C-482/01 and C-492/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] ECR I-5257

²⁹ Cases C-331/16 and C-366/16 *K. v Staatssecretaris van Veiligheid en Justitie and H.F. v Belgische Staat* [2018] ECLI:EU:C:2018:296

³⁰ Case C-348/96 *Donatella Calfa* [1999] ECR I-11

³¹ Case 67/74 *Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln* [1975] ECR 297

³² *ibid* 2

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