

The Challenges Regarding the Right of Free Movement of Persons

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Abstract: European citizenship as an additional citizenship next to the national citizenship contains several important rights that are laid down in Article 20 TFEU. The centre point of the paper is the right to free movement in terms of its development. The structure of the EU legislation and the interpretation of this fundamental right by the Court of Justice of the European Union gives an overview about the development of this citizenship right and offers a clear view about the EU policy's challenges in reality regarding free movement of persons. The challenges facing the EU right of free movement of persons will be analysed from three different perspectives: the infringement proceedings of the EU Commission, the jurisdiction of the CJEU and the right to petition of the EU citizens.

Key words: free movement of persons, free movement of workers, European Commission, Court of Justice of the European Union, petitions

1 INTRODUCTION

Already the Rome Treaty contained several provisions to ensure the free movement of workers.¹ According to the TFEU, Union citizens are entitled to move and reside freely in the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and measures adopted to give them effect.² The European Commission has on a number of occasions reported that the expectations of the mid-eighties about mobility in Europe have not been realised, and the Commission at the same time has acknowledged that the opening up of the markets in Europe brought some unexpected side effects.³

Free movement had important impacts on several extent in people's life. A good example is family life, beyond this family reunification. It has been one of the main reasons of immigration to the EU and in 2017 472,994 persons were admitted to the EU-25 on grounds of family reunification. These amounts to 28% of all first permits issued to third-country nationals in the EU-25.⁴ Moreover, individuals who join their family and also obtain the permission to work are recorded in the family category. The channel of occupation is broad and consists of permits issued to highly skilled workers, holders of EU-Blue Card, researchers⁵, seasonal and other migrant workers who have obtained an authorization to work in a given European country.⁶ Also free movement of persons led to the modification of the rules for coordination of national social security systems and the application of mandatory national rules on working conditions has led to a series of debates with the legislator about the home versus the host country.⁷ In this study, the challenges facing the EU right of free movement of persons will be analysed from three different perspectives: the infringement proceedings of the EU Commission, the jurisdiction of the CJEU and the right to petition of the EU citizens.

2 LEGISLATION OF FREE MOVEMENT OF PERSONS

Freedom of movement and residence for persons is a vital element of Union citizenship, and enshrined in Article 3(2) of the Treaty on European Union (TEU); Article 21 of the Treaty on the Functioning of the European Union (TFEU); and Article 45 of the Charter of Fundamental Rights of the European Union. There were several legislation and a large body of case-law linked to the free movement of persons, when a comprehensive directive was adopted in 2004. Directive 2004/38/EC was meant to create a coherent legal system and unite the disparate pieces of legislation that dealt with workers and economically inactive EU migrants.⁸ Free movement of workers is

¹ Articles 48–51, Treaty of Rome

² Articles 20(2)(a) and 21 TFEU

³ Employment in Europe, chapter 3: Geographical labour mobility in the context of EU enlargement, Brussels 2008

⁴ In 2018, some 3.2 million residence permits were issued across the EU to people from non-member countries. See: Residence permits - statistics on first permits issued during the year

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Residence_permits_-_statistics_on_first_permits_issued_during_the_year&oldid=456573

⁵ The categories of high-skilled workers and EU-Blue Card holders are defined in Directive 2009/50/EC, while researchers in Directive 2005/71/EC.

⁶ Migali, S., Natale, F.: The determinants of migration to the EU: evidence from residence permits data, European Commission, JRC Technical Reports, 2017, 6.

⁷ Cremers, J.: Free movement of workers and rights that can be derived. FMW: Online Journal on Free Movement of Workers within the European Union, 2012/4, 26-32.

⁸ Mantu, S.: Concepts of time and European citizenship. European Journal of Migration and Law, 2013/4, 454. Heinonline

enshrined in Article 45 of the TFEU and is developed by EU secondary legislation and the case-law. According to the Directive 2004/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, EU citizens are entitled to look for a job in another EU country, work without needing a work permit, reside for that purpose to stay there even after the employment has finished. They enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages. Directive 2004/38/EC had the view to encourage Union citizens to exercise their right to move and reside freely within the Member States, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, and to limit the scope for refusing entry or terminating the right of residence.

3 INFRINGEMENT PROCEEDINGS

Infringements proceedings can give us information about the state of implementation in different Member States. The directive's implementation resulted in several problematic issues where the main ones concerned the rights of entry and residence for non-EU family members of Union citizens, including same-sex spouses or partners, conditions for issuing visas and residence cards to non-EU family members, the material and procedural safeguards against the expulsion of EU citizens. Following bilateral discussions with the Member States, the Commission successfully resolved 90% of outstanding issues in national implementation, but certain obstacles remained. The Commission therefore launched infringement proceedings against Austria, Belgium, Cyprus, the Czech Republic, Germany, Italy, Malta, Lithuania, Spain, Sweden, Poland and the United Kingdom over the period from March to October 2011 (IP/11/981).⁹ ¹⁰ Austria does not grant so-called "extended" family members of EU nationals who have moved to another Member State the rights granted by the Directive. In Germany, there are three issues of incorrect transposition of the Directive. The state has not – as is required by the Directive – set up a procedure designed to facilitate entry and residence for "extended" family members of EU citizens, has not adopted any measure in its legislation to ensure that "extended" family members are granted the full set of rights granted by the Directive, decisions to expel EU citizens and their family members are, by law and as a rule, combined with an exclusion order which is unlimited in time.¹¹

Table 1 Active and not active infringement decisions of the European Commission

Infringement number	Decision date	Decision type	Press release	Member state	Policy area Department in charge	Title	Active infringement cases	Non communication
20112034	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646-EN	Austria	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in Austria	Yes	No
20112054	2012/04/26	Reasoned opinion Art. 258 TFEU	IP-12-417-EN	United Kingdom	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in the UK	Yes	No
20112060	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646-EN	Sweden	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC	No	No
20112077	2012/01/26	Reasoned opinion Art. 258 TFEU	IP-12-75-EN	Czech Republic	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in the Czech Republic	Yes	No
20112083	2012/01/26	Reasoned opinion Art. 258 TFEU	IP-12-75-EN	Lithuania	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC in Lithuania	Yes	No
20112086	2012/06/21	Reasoned opinion Art. 258 TFEU	IP-12-646-EN	Germany	Justice, Fundamental Rights and Citizenship	Transposition of Directive 2004/38/EC and violation of Article 21(1) TFEU in Germany	Yes	No

Source: European Commission

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&PressRelease=true&DG=JUST&title=Directive+2004%2F38%2FEC&submit=Search

⁹ EUROPEAN COMMISSION, Free movement: Commission upholds EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_75

¹⁰ EUROPEAN COMMISSION, Free movement: Commission ask the UK to uphold EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_417

¹¹ EUROPEAN COMMISSION, Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights, PRESS RELEASE, Brussels, 21 June 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_646

4 CASE-LAW DEVELOPMENTS

The Court's case-law shows the extensive nature of the right to free movement. From family reunification of EU citizens and their non-EU citizen family members to economically active or inactive EU citizen there are a wide range of cases.

In Case C-140/12 Brey, the preliminary ruling request has been made in proceedings between Mr Brey and the Pensions Insurance Institution concerning the latter's refusal to grant him the compensatory supplement provided for in Austrian legislation to augment his German retirement pension. The Court made a clear distinction between the economic and social context of free movement of persons, the former arising from the movement of workers, the latter arising from the conferral of citizenship rights and all the ancillary benefits stemming from that status.¹² The Court stressed the importance of citizenship rights as a way to facilitate and strengthen the exercise of the primary and individual rights – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States. Thirdly, the principle of equal treatment – highlighted because citizenship rights are fundamental – was expounded upon, with detailed analysis of the situations in which derogations would be justified. Fourthly, due to the important competing values requiring adjudication, the Court in Brey insisted on a thorough and independent review of the proportionality of the national provisions. What was needed in this respect was an overall assessment of the specific burden which granting the benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned. As such, EU law would work to preclude national legislation which would bar the grant of a benefit to a national of another Member State who was not economically active, on the basis that he did not meet the criteria for obtaining the legal right to reside longer than 3 months in the host Member State just because that national law required applicants for the benefit to have sufficient resources.¹³

Regarding jobseekers from another Member State who worked in another Member State for less than a year and then looked unsuccessfully for work for the following six months, would retain their worker status for no less than six months –during which, they benefit from equal treatment and entitlement to social assistance benefits. After that period, the host Member State may withdraw such benefits, without individual examination.¹⁴ But job-seeker family members from other Member States can be excluded from social assistance during the first three months of their job search, without individual examination unless they have previously worked in the host Member State (first-time jobseekers).¹⁵ The Court instead to give a more substantial meaning to the unity of the family, allowed the discrimination towards the migrant workers.

In Case C-127/08 Metock and others the Court stated that Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.¹⁶ On family matters, namely cases of divorce between an EU citizen and a non-EU national, an EU citizen left the host Member State before commencing divorce proceedings, while the non-EU national spouse stayed behind, and the latter retains a right of residence only where this existed at the time the divorce proceedings were launched.¹⁷

The Court stated that non-EU citizens who are the primary carers of an EU citizen child can reside with their child in the host Member State by virtue of Article 20 TFEU if such a refusal would deprive that EU citizen of effective enjoyment of the substance of the rights conferred by virtue of the status of EU citizenship.¹⁸

Regarding non-EU family members' right of residence, EU citizens who reside in the Member State of their nationality but commute regularly for work reasons to another Member State fall within the scope of Article 45 TFEU, thus exercise their right to free movement as workers. A non-EU family member derives a right of residence in the home Member State of an EU citizen who is resident in that Member State but regularly travels to another Member State to work, if refusal to grant such a right would discourage the commuting EU citizen from effectively exercising his right to free movement as a worker.¹⁹

The rights enjoyed by citizens can be restricted for reasons of public interest. Nevertheless, if the rights of workers have to be curtailed then the court must consider whether such obstruction would likely impact the freedom of movement of workers.²⁰ It was established that workers are favoured citizens because their rights

¹²<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141762&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=319808>

¹³ <http://www.europeanmigrationlaw.eu/en/caselaw/peter-brey.html>
<https://www.schutze.eu/download-file/1721/>

¹⁴ Case C-67/14 Alimanovic.

¹⁵ Case C-299/14 García-Nieto and Others.

¹⁶ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/08>

¹⁷ Case C-218/14 Singh.

¹⁸ Case C-86/12 Alopka and others.

¹⁹ Case C-457/12 S and G.

²⁰ C-482/01 Orfanopoulos.

cannot be restricted even under public interest unless such measure is proportionate to the aim pursued, and compatible with the fundamental rights enjoyed by the workers.²¹

In Joined Cases C-331/16 K. and C-366/16 H.F. the Court stated that the Directive 2004/38 must be interpreted as meaning that the fact that a Union citizen or a third-country national family member of such a citizen, who applies for a right of residence in the territory of a Member State, has been refused refugee status that does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security. The finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State. During this, the principle of proportionality, and account must be taken of, *inter alia*, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with the host Member State²²

As we can see in the above cases, the particular political contentiousness, and fundamental rights-sensitivity of family reunification legislation is likely to provide the CJEU with both 'incentives', as well as 'tools' to curate precedent in its jurisprudence on family reunification immigration.²³

4 PETITIONS

The European Parliament can be petitioned on matters belonging to the fields of the European Union,²⁴ and it is possible to address a petition to the European Parliament in connection with Member States' authorities. The right to petition is of a general nature. The Committee on Petitions has the task to give adequate answer to complaints or opinion of natural or legal person in connection with the Parliament's resolution or decision of institutions and bodies. The large amount of petitions submitted to the EP is clear signs of citizens' activity in EU issues. Several petitions raise concerns about the different obstacles encountered by EU citizens in exercising their freedom of movement with issues that freedom of movement for workers has been violated by several Member States or issues of mobile EU citizens who sometimes avoid accessing health services for fear of expulsion, which effectively limits their fundamental right of access to healthcare.

Petitioners are concerned about the lack of broadband connectivity, especially in remote, rural and mountainous areas, and the mismatches between advertised and actual broadband speeds, which impinges on the level of consumer protection in the internal market and creates obstacles to the access of information and services. Interestingly there was a particular petitioner who expressed his concerns about the loss of EU citizenship of British citizens, and their right of free movement within the EU as he claimed that the EU has a duty of care towards all EU citizens. The petitioner called for a transitional arrangement allowing British citizens to opt for residence in an EU Member State during a transitional period of 5 years, with support by Member States to these citizens, in order to allow them in particular to apply for citizenship in that Member State. The petitioner also invited the European Parliament to support the European Citizens' Initiative on Permanent European Union Citizenship.²⁵

4 CONCLUSION

Migration, mobility can have different faces. Free movement is not free yet; evidences are the large amount and growing case-law, the active infringement cases, the ever active citizens' petitions and the reports of the EU institutions on the aspects of free movement. The European Commission faces challenges which were present in the past but not resolved and now faces newly formed challenges. Migration of EU citizens, their EU citizen family members or third-country family members inside the European Union generate new circumstances with new questions to answer. This challenge is further enlarged with the migration of third-country nationals with more newly generated issues.

Bibliography:

De Somer, M. and Maarten, P. V.: 'Precedent' and fundamental rights in the CJEU's case law on family reunification immigration. In: Christine Neuhold and Sophie Vanhoonacker (eds): 'Dynamics of institutional cooperation in the European Union: Dimensions and effects' European Integration online Papers (EIoP), 2015, Special issue 1, Vol. 19, Article 6, <http://eiop.or.at/eiop/texte/2015-006a.htm>, pp. 1-33.

²¹ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Directive 2003/86/EC on the right to family reunification.

²² <http://www.europeanmigrationlaw.eu/en/caselaw/k-hf-case-c-331-16-c-366-16.html>

²³ De Somer, Marie and Maarten P. Vink (2015): "'Precedent' and fundamental rights in the CJEU's case law on family reunification immigration", in: Christine Neuhold and Sophie Vanhoonacker (eds): 'Dynamics of institutional cooperation in the European Union: Dimensions and effects' European Integration online Papers (EIoP), Special issue 1, Vol. 19, Article 6, <http://eiop.or.at/eiop/texte/2015-006a.htm>, pp. 6.

²⁴ According to Art. 227 TFEU (ex Art. 194 TEC) "...have the right to address..a petition to the European Parliament on a matter which comes within the Union's fields of activity".

²⁵ https://www.europarl.europa.eu/doceo/document/TA-8-2017-0083_EN.html?redirect

CREMERS, J.: Free movement of workers and rights that can be derived. FMW: Online Journal on Free Movement of Workers within the European Union, 2012/4, 26-32.

Migali, S., Natale, F.: The determinants of migration to the EU: evidence from residence permits data, European Commission, JRC Technical Reports, 2017, 6.

Mantu, S.: Concepts of time and European citizenship. European Journal of Migration and Law, 2013/4, 447-464. Heinonline

Treaty establishing the European Economic Community

Consolidated version of the Treaty on the Functioning of the European Union

http://data.europa.eu/eli/treaty/tfeu_2012/oj

Employment in Europe, chapter 3: Geographical labour mobility in the context of EU enlargement, Brussels 2008 REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Directive 2003/86/EC on the right to family reunification

EUROPEAN COMMISSION, Free movement: Commission upholds EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_75

EUROPEAN COMMISSION, Free movement: Commission ask the UK to uphold EU citizens' rights, PRESS RELEASE Brussels, 26 January 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_417

EUROPEAN COMMISSION, Free movement: Commission asks Austria, Germany and Sweden to uphold EU citizens' rights, PRESS RELEASE, Brussels, 21 June 2012

https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_646

European Commission

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&PressRelease=true&DG=JUST&title=Directive+2004%2F38%2FEC&submit=Searc

EUROSTAT <https://ec.europa.eu/eurostat/home?>

Case C-140/12 Brey

Case C-333/13 Dano

Case C-67/14 Alimanovic

Case C-299/14 García-Nieto and Others

Case C-86/12 Alopka and others

Case C-457/12 S and G.

Case C-218/14 Singh

Case C-127/08 Metock and others

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