CEEMC 2015 JUDGMENT

3 May 2015

DISCLAIMER

For the sole purpose of the CEEMC 2015, the Court delivers the following judgment which should not be taken as a definitive expression of my views on any of the issues with which it deals.

Question 1

1. The Court considers it necessary to reformulate Question 1 because, as worded, it does not make it clear why EU law would apply. However, when read against the factual background, it becomes clear that the referring court in essence asks the Court whether Articles 20, 21 and/or 45 TFEU preclude a Member State from requiring EU citizens who have benefited from a student grant to study at a higher education institution in that Member State to reimburse the entire amount of the grant, together with interest, if they fail to seek and/or obtain employment there during the first five years following the completion of their studies ('the employment condition').
2. It is not wholly clear from the facts whether the EU citizen in question, Mr Boris, actually moved from Emoh to Osorrab in order to seek or take up employment. That is a matter for the national court to determine. The Court will examine the applicability of both Article 45 TFEU and Articles 20 and 21 TFEU.
3. National law which places at a disadvantage certain of the nationals of a Member State simply because they have exercised their freedom to move (including in order to seek employment) and to reside in another Member State is a restriction on the freedoms conferred by Article 45 TFEU as well as Articles 20 and 21 TFEU.
4. The facts of the main proceedings show that the employment condition is being applied so as to put at a disadvantage an EU citizen who has taken up residence elsewhere. Although not formally a residence condition, the employment condition *as applied* is tantamount to a residence condition. The Court finds it significant that Mr Boris was asked to reimburse the grant when he left his home Member State and despite the fact that the five year period during which he could have satisfied the employment condition had not yet expired.

5. Such a restriction can be justified under EU law only if it is based on objective considerations of public interest and if it is proportionate to the legitimate objective(s) pursued. That means that the contested measure must be appropriate to secure the attainment of the objective pursued and must not go beyond what is necessary in order to attain it.

6. It is for the national court to determine the precise objective of the employment condition based on the text of the applicable law, as well as the design, structure, and operation of the law. That inquiry cannot be limited to the text of recitals 88 and 89 of the Education Grants Act ('EGA'). Moreover, the national court must distinguish between the genuine objective of a measure and wider policy considerations that might provide useful context to understand the objective without themselves specifically forming the basis for the measure. Without a precise definition of the objective it is not possible to examine the proportionality of the measure.

7. In what follows, the Court assumes that the objective of the measure is to ensure that all EU citizens who received funding for their studies from Emoh remain in Emoh for five years in order to contribute to the Emohy employment market.

8. In Case C-542/09 *Commission* v *Netherlands*, the Netherlands relied on a similar objective in order to justify a residence condition that applied to students who wished to obtain funding from the Netherlands in order to study elsewhere. The Court accepted that objective and the appropriateness of a residence requirement to attain it.

9. The Court takes the same position in the present case.

10. A measure such as the employment condition is proportionate if it does not impose a greater restriction than is needed in order to achieve its objective. In making that assessment, the competent national court must also consider the availability of alternative but less restrictive measures.

11. Here, the proportionality of the employment condition depends on (i) whether there is a risk that graduates who have received a grant and studied in Emoh will *not* contribute to the Emohy employment market and (ii) what level of protection is sought against such risk. The national court must consider whether it is proportionate to impose the condition for a period of five years and on graduates in all disciplines, taking into account the degree of the risk, the sectors or professions with respect to which the risk arises and the level of protection desired.

12. Whilst it is for the national court to decide on the proportionality of the measure, the Court none the less feels it appropriate to indicate that the employment condition *as applied* is likely to be more restrictive than necessary because it requires repayment of the grant by graduates who, despite taking up residence elsewhere and possibly taking up some form of employment there, might none the less be able to satisfy the condition (for example, by looking for (part-time) work in Emoh).

13. Having regard to all of the foregoing consideration, the answer to Question 1 is that Articles 20, 21 and 45 TFEU preclude a Member State from requiring EU citizens who have benefited from a student grant to study at a higher education institution in that Member State to reimburse the entire amount of the grant, together with interest, if they fail to seek and/or obtain employment there during the first five years following the completion of their studies.

Question 2

14. Mr Boris is an EU citizen who has moved to another Member State. Directive 2004/38 therefore applies.

15. Although he has resided for more than three months in Osorrab, he did not obtain permanent residence there. Thus, his residence right in Osorrab was subject to the conditions laid down in Article 7 of Directive 2004/38.

16. Whilst he appeared to have performed some economic activity during his residence in Osorrab (and was probably a worker for some of that time), at least from June 2009 he was no longer working and, whilst seeking employment, was not registered as a job seeker.

17. His residence right in Osorrab was subject to Article 7(1)(b) of Directive 2004/38. Because he does not satisfy the grounds in Article 7(3) of that directive, he cannot rely on any worker status he previously had.

18. Whether he resided lawfully in Osorrab depends on whether he had sufficient resources for himself and his family members not to become a burden on the social assistance system of Osorrab during the period of residence.

19. It follows from the Court's judgment in *Dano* that Mr Boris can claim equal treatment with nationals of Osorrab as regards entitlement to social benefits only if his residence complies with the conditions laid down in Article 7(1)(b) of

Directive 2004/38. In that judgment, the Court also held that lawful residence is a pre-condition for invoking Article 21 TFEU.

20. Thus, it is for the national court to examine the details of Mr Boris's financial situation and apply the conditions set out in Article 8(4) of Directive 2004/38. For the purpose of that analysis, the Court has held that the origin of the resources is not pertinent. In making that assessment, and where satisfying the condition of sufficient resources determines whether or not a person can rely on EU law in seeking access to social advantages, the national court may not take account into the resources that would be obtained if the person were granted access to those advantages.

21. If the national court finds that Mr Boris had sufficient resources and was therefore lawfully resident in Osorrab, he can claim equal treatment under Article 24(1). The host Member State cannot then rely on Article 24(2) in order to deny him equal treatment on the grounds that his residence is longer than three months. Nor can the Member State rely on Article 24(2), read in conjunction with Article 14(4)(b), because the latter relates only to first time job seekers in the host Member State.

Question 3

22. Miss Nezitic is a third country national. She married Mr Boris after he had already moved and taken up residence in a Member State other than that of his nationality. Although she was already residing on a different basis in Osorrab prior to her marriage, following her marriage she became a beneficiary within the meaning of Article 3 of Directive 2004/38.

23. Once Mr Boris left Osorrab and the couple divorced, Miss Nezitic could in principle no longer enjoy derived rights of residence in Osorrab linked to Mr Boris. However, Directive 2004/38 foresees that, subject to certain conditions, she may retain a right of residence in the host Member State on a personal basis. The grounds upon which that right can be based are set out in Article 13 of Directive 2004/38, which essentially also restates the requirement under Article 7 which the Court has already interpreted in connection with Question 2.

24. The referring court asks whether Miss Nezitic can rely on Article 13(2). It does not explain why it is uncertain as to the meaning of that provision. However, the facts suggest that Miss Nezitic might be able to rely on Article 13(2)(b) provided that she has custody over one of Mr Boris's children. The text of Article 13(2)(b) does

not require that those children should themselves be EU citizens or children of which the third country national is not a parent. Thus, in the present case, that condition appears to be satisfied: Miss Nezitic was granted custody over the child she had with Mr Boris. (She also has, in practical terms, care of Mr Boris' other child Xela.)

25. Finally, the Court notes that, whilst arguments have been raised as regards the application of Article 12 of Directive 2004/38, which concerns the circumstances in which family members retain a right of residence when the EU citizen has departed, the referring court has not asked the Court about that provision. The Court does not consider it necessary in the present case to explore the relationship between Articles 12 and 13 because it appears that residence rights can be established on the basis of Article 13 and the Court has insufficient factual material before it to make any finding about Article 12.

26. If the national court were to find that Miss Nezitic cannot claim residence rights under Directive 2004/38 in the present circumstances, the Court is further asked to consider whether she can claim residence under Articles 20 and 21 TFEU on the basis of her connection to Xela who is an EU national and who has exercised free movement rights.

27. The principles developed by the Court in cases such as *Ruiz-Zambrano* and *Dereci* do not apply here because those cases involved EU citizens who had *not* exercised free movement rights.

28. Therefore, Article 21 TFEU applies.

29. Denying a third country national (Miss Nezitic) who is the guardian of an EU citizen (Xela), a dependent minor, a right of residence results in a restriction on that EU citizen's free movement rights because it forces him to move to another Member State. Whether that restriction can be justified depends on the legitimate objective pursued by the Member State and the proportionality of that measure in relation to that objective, bearing in mind the fundamental rights which the child enjoys under the Charter. The referring court has not identified what that objective might be in the present case and therefore the Court is unable to offer guidance on whether the restriction could conceivably be justified.

Question 4

30. The first issue with which the Court must grapple is admissibility. Mr Boris applied to be included in the electoral register so that he could vote in the Presidential elections. He was refused registration on the basis of section 218 of the Voting Rights Act ('VRA'), which provides that 'a person who has been sentenced to imprisonment by final judgment delivered in an EU Member State is not eligible to vote.'

31. It has been argued (forcefully) by the Emohy Government that this is a purely internal situation. Mr Boris points out that, by virtue of Chapter XII of the VRA, section 218 VRA also applies to elections for the European Parliament and that its effect is therefore permanently to deprive him of the right to vote, including for European Parliament elections which take place predictably and regularly every 5 years. He also stresses that, since the ban on voting is triggered by a 'final judgment delivered in an EU Member State' (and such judgments from other Member States would automatically therefore be recognised in Emoh), there is an obvious potential effect on the voting rights of EU citizens who have exercised rights of free movement. But the sentence of imprisonment passed on Mr Boris was handed down by an Emohy court – that is, a court of his own Member State.

32. It is clear that on the narrow facts of this case the question is hypothetical. What is at issue in the case before the national court is Mr Boris's registration to vote in a national election. What happens in national elections is exclusively a matter for national law (framed, as appropriate, by national constitutional provisions and by Article 3 of Protocol 1 to the ECHR).

33. Normally, the Court would declare this part of the reference inadmissible. However, given the fundamental importance of the issues raised to the democratic legitimacy of the European Union, the Court will – exceptionally – provide guidance to the national court on the substance.

34. Even if the case is admissible, the Court must also determine whether it is competent to answer the question. It is well established (*Åkerberg Fransson*) that, since the Charter applies 'to the Member States only where they are implementing Union law' (Article 51 of the Charter), there must be some relevant provision(s) of EU law that can be invoked. The Charter does not, in the absence of any other provision of EU law, grant 'free-standing' rights.

35. Admissibility and competence are here inextricably linked. If the facts of the case are purely internal (so that the question is inadmissible), there is no EU law 'trigger'

for the Charter and the Court has no competence to interpret it. If, however, there is sufficient (potential or inevitable) EU effect to make the situation one that is not purely internal, there is clearly sufficient relevant EU law to trigger the application of the Charter. The Court refers here to Articles 10 and 14 TEU (setting out respectively the principle of representative democracy and the mandate of MEPs), Article 20(2) TFEU (right to vote in European Parliament and municipal elections under the same conditions as nationals), the Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom ('the 1976 Act') and the Council Decision of 25 June 2002 and 23 September 2002 amending the 1976 Act.

36. So far as the substance is concerned: in principle Member States are free to define the beneficiaries of the right to vote in European Parliament elections, since neither Article 14 TEU nor the 1976 Act set clear and express conditions (*Eman and Sevinger*). However, in so doing Member States must act in compliance with EU law (*Spain v UK*; *Eman and Sevinger*). The right to vote is of fundamental democratic significance. The right to vote in European Parliament elections conferred by Article 20(2)(b) TFEU thus necessarily forms part of the substance of the rights conferred by EU law on an EU citizen (applying, *mutatis mutandis*, the logic of *Ruiz Zambrano* on residence within the European Union to voting rights). Because Chapter XII of the VRA makes section 210 VRA applicable to European Parliament elections, it has the effect of depriving an EU citizen (such as Mr Boris) of that right. It can only be permitted if it pursues a legitimate objective and is a proportionate interference with that right. The permanent voting ban in section 210 VRA, which is triggered by *any* sentence of imprisonment, of *any* duration, on *any* basis under the (varying) national laws of 30 EU Member States (the usual 28 plus Emoh and Osorrab) does not appear to the Court to satisfy that test as expressed either as a fundamental principle of EU law or under Article 49 of the Charter.

37. However, Article 22(1) TFEU makes it clear that the right to vote conferred on a citizen of the Union by Article 20(2)(b) TFEU is granted to 'every citizen of the Union residing in a Member State of which he is not a national'. Mr Boris is residing in the Member State (Emoh) whose nationality he holds. His right to vote in European Parliament elections in his own Member State is therefore governed, not by Articles 20 and 21 TFEU and *Ruiz-Zambrano*-by-analogy, but by the 1976

Act read in the light of the Charter. Mercifully, the national court has asked no question about the interpretation of that EU measure; and this is the end of the moot court judgment.

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