CENTRAL AND EASTERN EUROPEAN MOOT COURT COMPETITION

TBILISI, GEORGIA 1-4TH MAY 2015

CEEMC CASE 2015

Boris's studies in Emoh

1. Boris is a national of Emoh, an EU Member State. In 2003 he enrolled on a four-year course in philosophy at the Emohy State University. During his studies he benefited from a student grant provided by the Emohy Government which covered his tuition fees and accommodation together with a small expense allowance.

2. The grant was made available to Boris on the basis of *Section 218 of the Education Grants Act (EGA)* which provides as follows:

   Section 218 of the Education Grants Act

   "1. EU nationals are eligible for state grants (up to the amounts set out in Annex A to this Act) for studies at higher education institutions in Emoh provided that:

   a) *they have enrolled in a higher education institution in Emoh;*
   b) *they regularly attend classes;*
   c) *they do not fail their end-of-semester exams;*
   d) *the annual income of their family does not exceed the limits set out in Annex II; and*
   e) *they seek and/or obtain employment in Emoh during the first five years following the completion of their studies.*

   (…)

   4. *The requirement in Section 218(1) (e) is deemed not to be fulfilled when an EU national seeking employment then refuses an appropriate employment offer in Emoh.*
   5. *Failure to meet the condition laid down in paragraph 1(e), results in the obligation to reimburse the entire grant, together with interest."*

3. Section 218 was adopted several years after Emoh' s accession to the European Union, following a highly publicised pledge made by the Emohy government to stop the so-called "brain drain" phenomenon as this was widely regarded as one of the main causes impeding the sustainable development of the country. Indeed, according to the available statistical data, a large proportion of Emoh university graduates decide to take advantage of their freedom of movement on the completion of their studies and so leave Emoh to take up employment in other Member States of the European Union. They do so as the remuneration offered abroad is usually higher than that paid in Emoh.

   Recitals 88 and 89 of the EGA explain the reasons for the addition of Section 218, paragraph 1(e) and paragraph 5, as follows:

"(88) In the course of the last decade and, in particular since Emoh took up membership of the European Union, it has experienced the negative effects of an unprecedented phenomenon, whereby a significant proportion of young professionals leave the country upon completion of their university education in search of employment abroad. This has resulted in shortages of young professionals in a variety of sectors of the economy, a fact that seriously hampers Emoh's sustainable development.

(89) While investing in education remains a top priority in Emoh, such investment has had little impact on the competitiveness and the sustainable development of the economy due to the phenomenon described in the recital 88. Therefore, it is deemed necessary to ensure that any young professional who has benefited from the financial support of the State in order to complete their university education should accordingly be required, for a period of five years, to seek and/or obtain employment in Emoh."

4. During his studies, Boris had a short-lived relationship with a fellow student who died tragically giving birth to their son Xela in 2004. Xela has his father's nationality. Boris was awarded full custody of Xela in 2007.

5. In 2007 Boris also graduated from university. He immediately sought employment in Emoh and signed up with his local job centre. He was twice offered a job as a philosophy teacher in a high school in a remote part of the country, both offers he turned down due to terms and conditions including the low pay offered and the remoteness of the school. As a result Boris subsequently lost his right to unemployment benefits and found himself without regular income. Thus, in January 2008, he decided to leave Emoh with Xela and settle down in Osorrab, another Member State of the European Union.

6. After discovering Boris's departure, the Minister for Education adopted a decision on the basis of Section 218 (5) EGA, ordering Boris to reimburse the full student grant, together with interest, due to his failure to satisfy the condition laid down in Section 218, paragraphs 1(e) and (4).

7. Boris was unsuccessful in his challenge of the Minister's decision before the Emohy Administrative Court and so appealed to the Emohy Supreme Administrative Court arguing that, as an EU citizen who had moved to another Member State and so was entitled to rely on EU law, the aforementioned provisions of the EGA were contrary to EU law. He relied in particular on a breach of Articles 20, 21 and/or 45 TFEU submitting that:

   - the condition laid down in Section 218, (1)(e) EGA which limited his freedom to move to another Member State in order to live and seek employment was in breach of EU law;

   - that, even if the national measure is non-discriminatory, (1) it still constituted a manifest restriction to free movement which could not be justified by any of the policy objectives stated by the Emohy government and (2) was, in any event, disproportionate;

   - that there was no legitimate objective of public interest capable of justifying this type of restriction to free movement; and that, in any event, the measure was disproportionate in terms of its time span, its severity and the ability to take less restrictive measures.

8. The Minister for Education strongly opposed the claim, submitting that, as Boris was a national of Emoh who had not exercised his free movement rights when he received the funding in question, he could not now invoke EU citizenship and therefore EU law did not apply.

   In the alternative even if EU law was applicable:-

   - the measure at issue did not restrict Boris's free movement rights;

   - the measure was essential to the economic development of Emoh in that it provided a guarantee that any funding awarded to students will later both contribute to the Emohy economy and the solidarity from which they benefitted as a student;

   - moreover, the measure should be deemed both necessary and proportionate.

   - that none of the case-law invoked by Boris, (such as *Prinz and Seeberger* and *Commission v Netherlands*), was applicable to the case in hand, since the national measure at issue laid down no residence requirement.

9. In those circumstances, the Emohy Supreme Administrative Court decided to stay the proceedings and refer the following question to the Court of Justice:

   "Do Articles 20, 21 and/or 45 TFEU preclude a national measure, which requires students who have benefited from a state grant for studies in a higher education institution in a Member State to seek and/or obtain employment in that Member State during the first five years immediately following the completion of their studies, failing which they are required to reimburse the whole amount of the grant, together with interest?"

Boris's arrival in Osorrab

10. Several months after Boris moved to Osorrab with Xela in January 2008 he secured a 3-month non-paid internship at a research centre, which provided him and his son with accommodation, free of charge, for the duration of the internship. Unfortunately Boris's hopes for securing a job at the centre after the end of the internship did not materialise and his ensuing job search also proved futile. He did not register at his local job centre during this time.

11. In the meantime Boris relied on the financial support of his parents, who had been sending him a small monthly allowance. In order to supplement this income, Boris briefly worked for two weeks as a waiter at a bistro. He signed no employment contract having orally agreed with the bistro owner that he would work on a tips only basis. Boris never declared any of this income to the Osorrab authorities.

12. In June 2009, as he continued to be unable to find stable employment, Boris is filed two applications with the Osorrabian authorities, the first requesting unemployment benefits and the second seeking social housing.

13. After examining his request, the authorities rejected both applications on the basis of *Section 66 of the Social Assistance Act ('SAA')***,** according to which:

    Section 66

"1. All nationals of Ossorab and other EU Member States are eligible to receive unemployment benefits, provided they:

a) have worked in Osorrab uninterruptedly for a period of at least six months in the course of the last twelve months preceding the application; and

b) are not entitled to unemployment benefits in another Member State.

2. All nationals of Ossorab and other EU Member States are eligible to apply for social housing provided they:

a) are workers or self-employed persons; and

b) have resided lawfully in Ossorab in the course of the last two years preceding their application.

14. Section 66 SAA was adopted by Osorrab's new government as one of its first legislative initiatives upon entering into power. A central pillar of the government's election campaign had been its pledge to curb the so-called 'benefit tourism' from poorer EU Member States.

15. In the decision rejecting Boris's application, the Osorrabian authorities stated that:

- his alleged activities did not satisfy the minimum criteria set out for the receipt of unemployment benefits in Section 66 SSA (paragraph 1, first indent);

- at the time of the application, Boris had not resided in Osorrab for a period of two years;

- Boris was not a worker, since there was no record of Boris taking up employment or ever declaring an income;

- Boris's alleged sporadic and undeclared activities are insufficient to qualify him as a "worker".

16. After unsuccessfully challenging the decision before the Osorrabian Administrative court, Boris filed an appeal before the Osorrabian Supreme Administrative Court. He argued that Section 66 SAA was contrary to Articles 21 and 45 TFEU, as well as Article 24 of Directive 2004/38 (hereinafter the Citizenship Directive).

He submitted, in particular, that:

- in the light of the broad interpretation of the notion of "worker" by the Court of Justice, he should be regarded as a "worker" within the meaning of Articles 45 TFEU and Article 24 paragraph 2 of the Citizenship Directive, given his employment history both as an intern and as a waiter;

- The limitations provided for in Article 24, paragraph 2 of the Citizenship Directive can only be applied to "persons other than workers, self-employed persons and persons who retain such status" and so would not be applicable to his situation;

- in any event, the benefits in question constitute "social assistance" within the meaning of Article 24, paragraph 2, of the Citizenship Directive and could therefore only be refused during the first three months of residence and so the conditions set out in Section 66 (1)(a) and (2) (b) SAA are in breach of EU law.

- the reference to the "longer periods" provided for in Article 14(4) (b) of the Citizenship Directive only concerns job seekers who have not yet been employed in the host Member State.

the measure indirectly discriminates against nationals of EU Member States other than Emoh and that (1) such discrimination cannot be justified; alternatively, that (2) the objective of "curbing benefit tourism" cannot be admitted as a valid justification for such indirect discrimination; and (3) that, in any event, the measure would be disproportionate'

17. In reply to Boris's arguments, the Osorrabian authorities argue that:

- The Citizenship Directive does not apply because Boris has been residing in Osorrab in violation of Article 7, (1) (a) and (b) of the Citizenship Directive. Not only is Boris not a "worker", but he also does not possess 'sufficient resources' to maintain himself and his son;

- the concept of "worker" in the Court of Justice's case-law should be reconsidered in the light of the changing political and economic reality of the European Union and the growing gap between the levels of development of the Member States. Thus, a wide definition of the notion of "worker", which might have been justified in the past, would nowadays result in encouraging benefit tourism under the cover of a would-be "worker" status, without however there being a sufficiently strong link with the labour market of the host Member State. In support of this arguments, the authorities relied on the Court of Justice's judgment in *Dano*;

- in any event, such a restriction can be justified by the objective of curbing 'benefit tourism' and is proportionate.

18. The Osorrabian Supreme Administrative court decided to refer the following questions to the Court of Justice of the EU:

"1. Is a national of a EU Member State, who is not registered as a job-seeker in another Member State, where he resides, and who, in the course of almost two years, has mostly been unemployed, with the exception of a 3-month non-paid internship and some irregular and undeclared remunerated activities, to be considered a "worker" within the meaning of Article 7 of Directive 2004/38 and/or Article 45 TFEU?

2. If the answer to the first question is negative, does Article 24, paragraph 2, of Directive 2004/38, apply to a national of a Member State residing on the territory of another Member State, who cannot show he has sufficient resources for himself and the members of his family within the meaning of Article 7, paragraph 1, point b) of the Directive?

3. If Article 24, paragraph 2, of Directive 2004/38 does not apply, should Article 21 TFEU be interpreted as precluding a national measure, which pursues the objective of curbing 'benefit' tourism and which, for that purpose, makes the grant of unemployment benefits to nationals of other Member States conditional upon their having worked in the host Member State uninterruptedly for a period of at least six months and which requires such nationals, in order to be eligible for social housing, to have resided lawfully in the host Member State in the course of the last two years prior to their application?"

Miss Nezitic

19. Miss Nezitic is a national of Isilibt (which is not an EU Member State), who arrived in Osorrab on a student visa in 2008 to start a two-year Masters program in veterinary studies.

20. During her studies, she met Boris and promptly moved in with Boris and Xela. Soon afterwards the couple got married. In February 2009, Miss Nezitic and Boris had a daughter, Ellebasi, who was born whilst they were on an extended holiday in Isilibt. Ellebasi is an Isilibti national; because she was born in Isilibt and has an Isilibti mother. Upon their return to Osorrab, Miss Nezitic and Boris forgot to also apply for Emohy nationality for Ellebasi. Emohy law makes provision for the grant of Emohy nationality to children who have one parent of Emohy nationality; on the condition that such a claim is made by that Emohy parent within ten years of the child's birth.

21. The happiness of the new family was short-lived as the couple quickly experienced difficulties in their marriage and so decided to separate. In the meantime, Xela and Miss Nezitic had developed a strong emotional attachment, whereas the child's relationship with his father had grown sour with Boris showing little interest in either of his children. The couple divorced in February 2010 and Miss Nezitic was granted sole custody of Ellebasi. Boris had already returned to Emoh shortly before the final divorce decree leaving Xela and Ellebasi behind Osorrab with his former wife in Osorrab.

22. Miss Nezitic started proceedings for Xela's adoption as well as seeking a sole custody order of Xela. Those proceedings are still pending. Whilst awaiting the outcome, the competent authority agreed that Xela should continue to live with Miss Nezetic in the interim, finding this in the best interests of the child.

23. Unfortunately the acrimonious nature of the divorce means that Boris has now refused to apply for Emohy nationality for Ellebasi.

24. After completing her studies, Miss Nezitic unsuccessfully sought employment in Osorrab. She made ends meet with the assistance of the small amount of money she received monthly from Boris's parents.

25. In March 2010 she applied for a residence card and, simultaneously, for social assistance in the form of child support, minimum monthly social aid and subsidised housing. All her applications were rejected by the competent authorities on the ground that, following her divorce from Boris (1) Miss Nezitic was no longer the spouse of an EU citizen and thus (2) she and her daughter no longer had a lawful basis for residing in Osorrab. At the same time the authorities adopted an

expulsion order which gave Miss Nezitic 30 days to voluntarily leave the territory of Osorrab, failing which she would face compulsory expulsion.

26. Miss Nezitic appealed against all these decision to the Osorrabian Administrative court (resulting in the temporary suspension of the expulsion order).

27. The grounds of her appeal were:

- as the third country national former wife of an EU citizen, she is entitled to residence pursuant to Article 13(2)(b) of the Citizenship Directive because she has custody of Ellebasi;

- she satisfies the condition in Article 13(2) of the Citizenship Directive requiring 'sufficient resources' as she is currently searching for employment and receives regular monthly payments from Boris's parents-in-law;

- alternatively, Articles 20 and/or 21 TFEU, as interpreted by the Court in cases such as *Zambrano* and *Dereci*), confer upon her the right of residence, as she is the primary carer of both Xela, an EU citizen, and Ellebasi, who is 'potentially' an EU citizen, and so her removal would lead to both children being deprived of the enjoyment of the essence of their EU citizenship rights.

28. In response the Osorrabian authorities submit that Miss Nezitic could not rely on any of the situations provided for by Article 13, paragraph 2, of the Citizenship Directive because, (1) she failed to show that she has "sufficient resources" in the meaning of that Article, and (2) her (former) husband has ceased to exercise his EU rights of free movement and residence.

In addition they submitted that Miss Nezitic cannot rely on Articles 20 and/or 21 TFEU, since (1) Xela is not a member of her family and she has no custody of him and (2) Ellebasi is not a citizen of an EU Member State. The case-law of the Court of Justice relied upon by Miss Nezitic would therefore be inapplicable.

29. The Osorrabian Administrative Court is unsure of whether Article 13(2) of the Citizenship Directive and, alternatively, Articles 20 and/or 21 TFEU were applicable to the situation of Miss Nezitic and therefore decided to stay the proceedings and refer the following question to the Court of Justice of the EU:

"Where a marriage between an EU citizen and a third country national ends in divorce obtained after the EU citizen has departed from the host Member State and has ceased to exercise his rights of free movement and residence there, and where the third country national parent has custody over the divorced couple's (third country national) child and takes care of the EU citizen's child, who is a EU citizen:

a. can a third country national, in circumstances such as those at issue, rely on Article 13(2) of Directive 2004/38 in order to remain in the host Member State and to claim a right under EU law to work in the host Member State in order to fulfil the requirement for sufficient resources, laid down in that article?

b. Do Articles 20 and/or 21 TFEU, as interpreted by the Court of Justice of the EU, confer a right of residence to a third country national in the circumstances of the present case?"

Boris's return to Emoh

30. Following his return to Emoh in February 2010, Boris struggled to find a fresh start to his life. One night, after a few too many drinks with friends in his favourite pub, Boris is caught up in a street fight and accused of seriously assaulting one of the victims. In the ensuing trial Boris was found guilty and was sentenced to 8 months of imprisonment and a fine of EUR 10 000. He was released from prison in May 2011.

31. In August 2011 presidential elections were held in Emoh. Boris strongly supported one of the candidates and so sought to be added to the electoral role to register to vote. He was astonished when the Electoral Commission refused to include his name in the electoral lists as under Emohy constitutional law all Emohy nationals (irrespective of residence) are entitled to vote in national elections. The Electoral Commission referred him to Section 210 of the Voting Rights Act (VRA), which provides as follows:

Section 210

"A person who has been sentenced to imprisonment by final judgment delivered in an EU Member State is not eligible to vote."

32. Chapter XII of the VRA, called "European Parliament Elections" enumerates which provisions of the Act are also applicable to European Parliamentary elections. Section 210 is cited among those provisions.

33. Boris challenged the Electoral Commission's decision in an expedited procedure before the Emohy Administrative Court, relying upon Articles 39 and 49 of the Charter of Fundamental Rights and Freedoms (the Charter) and argues that such a permanent and unconditional ban on the exercise of his right to vote is disproportionate. He also states that he was able to rely upon the Charter in these circumstances as the registration restriction applied equally to both national and to EU parliamentary elections. Thus, the ban, if upheld, would permanently delete his name from the electoral lists and thus prevent him from voting in all sorts of elections, including elections to the European Parliament.

34. The Electoral Commission refuted this argument stating that, by virtue of Article 51 of the Charter, the Charter does not apply since the situation was purely internal and that EU law does not apply to national presidential elections. They added that in any event, the restriction was proportionate.

35. Unsure about the correct interpretation of the Charter, the Emohy Administrative Court decided to suspend the proceedings and to make a preliminary reference to the Court of Justice of the EU in the following terms:

"Are Articles 39, 49 and 51 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding EU Member States from imposing an indefinite and automatic ban on the exercise of voting rights of all individuals, who have been sentenced to imprisonment by final judgment delivered in a EU Member State?"

The procedure before the Court of Justice of the EU

36. Given the connection between the factual background of the above mentioned preliminary references, , the Court of Justice of the EU decided to examine the preliminary questions together in the following order:

"1. *Do Articles 20, 21 and/or 45 TFEU preclude a national measure, which requires students who have benefited from a state grant for studies in a higher education institution in a Member State, to seek and/or obtain employment in that Member State during the first five years immediately following the completion of their studies, failing which they are required to reimburse the whole amount of the grant, together with interest?"*

2. Should a national of an EU Member State, who is not registered as a job-seeker in another Member State, where he resides, and who, in the course of almost two years, has done a 3-month non-paid internship and has supposedly exercised some sporadic and undeclared remunerated activity:

a. be considered a "worker" within the meaning of Article 7 of Directive 2004/38 and/or Article 45 TFEU?

b. if the answer to question 2(a) is negative, does Article 24, paragraph 2, of Directive 2004/38, apply to a national of a Member State residing on the territory of another Member State, who cannot show that he has 'sufficient resources' for himself and the members of his family within the meaning of Article 7, paragraph 1, point b) of the Directive?

c. if Article 24, paragraph 2, of Directive 2004/38 does not apply, should Article 21 TFEU be interpreted as precluding a national measure, which pursues the objective of curbing 'benefit' tourism and which, for that purpose, makes the grant of unemployment benefits to nationals of other Member States conditional upon their having worked in the host Member State uninterruptedly for a period of at least six months and which requires such nationals, in order to be eligible for social housing, to have resided lawfully in the host Member State in the course of the last two years prior to their application?

3. Where a marriage between an EU citizen and a third country national ends in divorce obtained after the EU citizen has departed from the host Member State and has ceased to exercise his rights of free movement and residence there, and where the third country national parent has custody over the divorced couple's (third country national) child and takes care of the EU citizen's child, who is a EU citizen:

a. can a third country national, in circumstances such as those at issue, rely on Article 13(2) of Directive 2004/38 in order to remain in the host Member State and to claim a right under EU law to work in the host Member State in order to fulfil the requirement for sufficient resources, laid down in that article?

b. Do Articles 20 and/or 21 TFEU, as interpreted by the Court of Justice of the EU, confer a right of residence to a third country national in the circumstances of the present case?

4. Are Articles 39, 49 and 51 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding EU Member States from imposing an indefinite

and automatic ban on the exercise of voting rights of all individuals, who have been sentenced to imprisonment by final judgment delivered in an EU Member State?"

37. In order to limit the cost of the proceedings, Miss Nezitic and Boris agreed to be represented by the same lawyer. Likewise, discerning a number of legal issues of common interest, Osorrab and Emoh decided, in an unprecedented move, to hire the same barrister to represent both Member States in the aforementioned proceedings.

***