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Rights and Restrictions of EU Citizens within the Freedom of Movement of Persons

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Abstract: This Paper aims at presenting the risks and advantages of being a citizen of the European Union Member State/s, with respect to the Freedom of Movement of Persons, with focus on the Principle of Equality and Anti- Discrimination, as enshrined by the Treaties and other incident legislative acts, at first, and then as applied by the European Court of Justice via its established case law. Moreover, the two indicated Principles are quintessential when it comes to the rights pertaining to EU citizens, and therefore other Freedoms are interpreted in the light of Equality and Anti- Discrimination, e.g. Services, Capital etc. Regardless if one is a worker, a student or just someone who wishes to exercise his/her rights as an EU citizen in other capacities, it is highly desirable to understand the rationale behind those rights/freedoms.

Keywords: EU Law; students; workers; EU citizenship; equality; discrimination *on grounds of nationality;* ECJ Case- Law

1. Preliminary Remarks

When an EU citizen wishes to study/work abroad, awareness must be provided in relation to the conditions imposed by the National Authorities of the host Member State. As a consequence of the shared competences between Member States and European Union, except for the areas where the European Union has exclusiveness, National Authorities may impose different conditions which are to be met when a citizen of the EU wants to access another EU Member State territory. In this regard, this article will present two of the Landmark ECJ Cases, in order to have a peer outlook on the rights and obligations conferred by the EU citizenship. The Author trusts that having examples that explain the admission process and the residence criteria, along with the correspondent restrictions, the Reader, will better understand why it is beneficial, or not, to be a part of the European Union.

2. Ruling of the European Court of Justice (Grand Chamber), of March 15, 2005 in Case C-209/03, The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills, ECR *I-02119*[3]

A. Facts

In August 1998 Mr Bidar, a French national, entered the territory of the United Kingdom, accompanying his mother who was to undergo medical treatment there. Of course, they lived together,

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as her dependant, and pursued and completed his secondary education without ever having recourse to social assistance.

In 2001 he started a course in economics at the University College London. While Mr Bidar received assistance with respect to tuition fees, his application for financial assistance to cover his maintenance costs, in the form of a student loan, was refused on the ground that he was not settled in the United Kingdom. Against this refusal he brought an action before the British Court claiming that he should be granted the requested maintenance costs as he is an EU National and by making the grant of a student loan to a National of a Member State conditional on his being settled in the United Kingdom, the Student Support Regulations (National British Rules) introduced discrimination prohibited under Article 12 TEC, now Article 18 TFEU.

The Preliminary ruling was asked by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), which decided to stay the proceedings and refer questions to European Court of Justice on the interpretation of TEC, Articles12 and 18, now Articles 18 and 21 TFEU, and Directive 90/364/EEC in relation to the UK legislation which provided a three years residence criteria for accessing assistance to cover foreign students' maintenance costs. The National Court asked in essence whether that criteria is discriminatory or not.

B. Assessment of the Court

The Court dealt with the nationality discrimination prohibition (Article 18 TFEU) related to the citizenship provisions, as enshrined by Article 21 TFEU. In respect to nationality, the Court stated that when a situation falls within the scope *rationae materiae* of EU law, including the exercise of the freedom conferred by Article 21, to move and reside within the European Union, one can rely on those provisions.

The Court asserted that there is a difference of treatment of the non-resident students, based on the *residence criteria* contained in the UK legislation and this constitutes indirect discrimination. As a consequence, the defendant (UK Government) in the main proceeding tried to justify the contested rules by the need to ensure that the contribution made by parents or students through taxation is or will be sufficient to justify the provision of subsidised loans and by the need of the existence of a *a genuine link between the student claiming assistance to cover maintenance costs and the employment market of the host Member State*.

The Court found that it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State, but that Member State cannot require that the students concerned to establish a link with its employment market[1]. However, the Court asserted that a certain degree of integration can be reflected by the fact that the respective student has resided in the host Member State for a certain length of time. Still, the rules in question create a treatment that prevents a student who is a national of a Member State and who is lawfully resident and has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State, from being able to pursue his studies under the same conditions as a student who is a national of that State and is in the same situation. As a consequence, *this justification was not upheld by the Court*, which considered that the prior residence condition of three years (that the student resided in the UK territory on the first day of the first academic year and that of having resided in the United Kingdom for the

[1] Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 58.

three years preceding that day) is precluded by the application of the first paragraph of Article 18 TFEU (e.g. Article 12 TEC).

As this Ruling was meant to provide guidance, the next case, which was based on the latter, will be more expanded in its analysis, as it reflects an opposite view of the interpretation of the EU treaties, regarding EU citizenship, Anti- Discrimination and Equality in the context of Freedom of Movement of Persons within EU.

3. Ruling of 18 November 2008, of the Court (Grand Chamber) in Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, [2008], ECR *I-08507*, Referred by Centrale Raad van Beroep (Netherlands)[1]

A. Facts

On 5 March 2000, Jacqueline Förster, a German national aged 20, settled in the Netherlands, where she enrolled for training as a primary school teacher and, from 1 September 2001, for a course in educational theory leading to a bachelor's degree at the Hogeschool van Amsterdam. During her studies, Ms Förster had various kinds of paid employment. The IB-Groep, the competent authority as regards the financing of higher education, granted her a maintenance grant from September 2000. That authority took the view that Ms Förster was to be regarded as a 'worker' and, consequently, should be treated in the same way as a student of Netherlands nationality as regards maintenance grants.

Following a check, the IB-Groep however ascertained that between July 2003 and December 2003 Ms Förster had not been gainfully employed. Holding that she could therefore no longer be regarded as a worker, the IB-Groep annulled the decision concerning the maintenance grant paid in respect of the period between July and December 2003. Ms Förster was requested to repay the excess sums.

In her appeal against that decision, Ms Förster claimed, inter alia, that she was already sufficiently integrated into the Dutch society during the period at issue to be able to claim a maintenance grant as a student under Community law. In this respect, she relies on the judgment of the Court of Justice in *Bidar*[2], in which it was held that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

Following that judgment, the IB-Groep adopted a policy rule which provided that a student from the European Union must have been lawfully resident in the Netherlands for an uninterrupted period of at least five years before claiming a maintenance grant. The Centrale Raad van Beroep, which had to rule, in appeal, on the action brought by Ms Förster, made a reference to the Court of Justice.

B. Issues/Questions

Freedom of movement for persons – Student who is a national of one Member State and goes to another Member State to follow a training course – Student maintenance grant – Citizenship of the Union – Article 12 EC – Legal certainty/Under what conditions a student from another Member State may be entitled to a maintenance grant under article 12 TEC, which prohibits any discrimination on grounds of nationality? Is there a compatibility of the application to nationals of other Member States

[1] www.duca-llm.ro.
[2] Case C-209/03 *Bidar* [2005] ECR I-2119.

of a prior residence requirement of five years, with the first paragraph of Article 12? In the affirmative, then it is necessary, on a case by case analysis, to take into account other criteria pointing to a substantial degree of integration into the society of the host Member State? Does EU law, especially the principle of legal certainty, precludes the retroactive application of a residence requirement, which at the time of the facts in the main proceedings, could not have been foreseen by the applicant?

C. Answer of the Court

Community/Union law, in particular the principle of legal certainty, does not preclude the application to students of a requirement of five years' prior residence.

D. Reasoning of the Court

The Court points out that a student who is lawfully resident in another Member State can rely, for the purposes of obtaining a maintenance grant, on the prohibition of any discrimination on grounds of nationality[1].

Since the requirement concerning the duration of residence is not applicable to students of Netherlands nationality, the issue is raised of what restrictions may be imposed on the right of students who are nationals of other Member States to a maintenance grant without the different treatment which may result being considered discriminatory. In this connection, the Court observes that it is legitimate for a Member State to grant assistance covering students' maintenance costs only to those students who have demonstrated a certain degree of integration into the society of that State and that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

The Court holds that, in the present case, a condition of five years' uninterrupted residence is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State. Furthermore, that condition cannot be held to be excessive.

By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the residence requirement laid down by the IB-Groep's policy rule is, by its very existence, such as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students. As regards the retroactivity application of the Dutch rules in relation to the principle of legal certainty, the Court found that the national rules can be applied although the applicant could not foresee them.

E. Comments

It is obvious that the Court did not apply the Bidar "formula". In Bidar the Court found that the residence criteria imposed by the British rules constitutes a discriminatory measure on grounds of nationality, so that a foreign student could not obtain the status of "established person" and as a consequence could not benefit from the study maintenance assistance. In this respect the Court found that three years of residence can prove that the individual is integrated into the host society of the Member State. The applicant in the main proceedings, Ms. Forster, based her action on the Judgment

[1] Case [C-158/07], Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, [2008], ECR I- 08507, paragraph 35

of Bidar, as regards the integration issue, namely the link between the individual and the host society, the so called financial solidarity.

The discrimination issue was not dealt with as much as it should have been. The Court found that this case differs from Bidar, by the status of "established person", the requirement of the UK rules for granting studies finances, which was in fact the discrimination criteria, and was applicable regardless of the degree of integration into the host society of the respective Member State[1]. Unlike in "Bidar", in this one the Court accepted a national rule stipulating that the only way of proving integration would be a prior five years legal residence condition, a requirement which most non-national students will not be able meet at all. The individual situation of Mrs. Forster, the genuine nature of any link with the host society, did not make any difference. Before the time prescribed by the residence requirement elapsed, no integration can be legally obtained, so that no legal effects are attached to the actual integration of non-nationals into the host society of the Member State.

In "Bidar", it was exactly the same factual situation of the individual, which triggered the Courts' finding that there was a genuine link with the British society and that he was integrated at a certain degree.

Moreover, by its reasoning, the proportionality test seems rather shallow and incomplete. There was no inquiry as to whether the means put in place do not go beyond what is necessary or whether a blanket residence requirement is the least harmful measure to reach the objective of integration. The Court merely stated that the residence requirement is indeed proportionate[2]. The arguments referred first, to the provisions of the five years requirement for permanent residence provided by the Dutch rules, which is also contained in Directive 2004/38/EC (which was applicable in Bidar and not here)[3] and second, legal certainty. It is difficult for one to understand the reason why the Court made reference to that Directive, although it was not applicable to the Case. Maybe because it wanted to justify its reasoning by suggesting that EU law as regards freedom of movement of persons contains a similar provision with the Dutch one, so that it makes it compatible not only with the specific EU provisions, but also with the principle of non-discrimination?

Even if Advocate General Mazák, presented "alternatives", less harmful that would have worked with less rigidity, they were not explored. In this respect, AG Mazak suggested that the five year requirement can be considered disproportionate as long as one can provide enough evidence to prove that that he or she is already substantially integrated into the society of the host Member State. Moreover, he opined that the answer regarding the compatibility with the principle of non-discrimination, should be that the Dutch rules are to be precluded.

The principle of legal certainty is a fundamental principle of Community law which requires, in areas covered by Union law that Member States' rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are. It aims to ensure that situations and legal relationships governed by Union law remain foreseeable. The referring court asked whether he principle of legal certainty, precludes the retroactive application of a residence requirement which, at the time of the facts in the main proceedings, could not have been known to the applicant. The answer of the Court, which was in the negative, was based on two arguments, namely, first, that the residence requirement introduced by the Dutch rules, was introduced in order to cover the transitional period between the judgment in *Bidar* and the transposition of Directive 2004/38.

[1] Idem, paragraph 47.
[2] Case [C-158/07], Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, paragraph 52.
[3] Idem, paragraph 55.

Secondly, the Court noted that the contested Dutch rules give greater rights to the students concerned than those to which they were entitled under the former national rules. Regardless, of the amount of rights provided by the new Dutch rules, one has to ask: Is there not a general principle of law which states that the law is applicable since its entry into force, unless the new law explains somehow the meaning of the former one? This is the principle of non-retroactivity. Moreover, Advocate General stated in his Opinion that the principle of legal certainty and the protection of the individual do not preclude a rule from being applied retroactively in so far as such application puts the individual concerned in a more favorable legal position. There is derogation from the principle of non-retroactivity, i.e. the criminal law which is more favorable. Is that what the AG made reference to? Even if so, the Court ruled that it is possible, regardless.

As a direct result of this ruling, facts pointing towards "actual" integration into the host Members' State society become legally irrelevant. Although this will be the case only if the national law contains a formal definition of "integration", like the Dutch one.

3. Concluding Remarks

As one may think that the first case, i.e. Bidar, gives reason to the provisions contained in EU Law with respect to the benefits of being a EU citizen, one must be aware that the ECJ case law is not, *de facto*, so well established as presumed, given the second case, hereby presented...In the end, it remains to be seen how the Right to move, work and reside within EU will further on be applied, e.g. related to the restrictions imposed by Spain regarding employment of Romanians. For sustaining the ongoing development of the Single Market, which represents the core purpose of the European Union, all players must act in good faith by providing compliance with the Principles enshrined by the Treaties and other concluded Agreements, inter alia the Principles of Equality and Anti-Discrimination, the grounds of European citizenship. In the absence of the foregoing, one can gather that the European mechanism will disseminate inequity, along with opportunities.

4. References

Treaty of the European Union.

Treaty of the Functioning of the European Union.

Charter of the Fundamental Rights of the European Union.

Case [C-158/07], Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep, 2008.

Case C-209/03 Bidar [2005] ECR I-2119.

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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

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