HOW TO BENEFIT FROM STUDYING IN THE EU

Tereza Kunertová*

Abstract: *In accordance with the Directive 2004/38/EC, the Member States are not entitled to grant the Union citizen the maintenance aid for studies prior the acquisition of the right of permanent residence permit. Such entitlement does not concern workers, self-employed persons, persons who retain such status and members of their families. The paper deals with the growing tendency of Union citizens to move to the host Member States to study while retaining the status of a worker and thus claim the maintenance aid for studies as of the commencement of their studies. In what way can this practice be considered as an abuse of right under the Directive 2004/38/EC? What does the Court rule?*

Keywords: *Union citizenship, maintenance aid for studies, free movement rights, the Court of Justice of the EU, Directive 2004/38/EC*

1. FREE MOVEMENT BEFORE AND AFTER THE NATIVITY OF THE UNION CITIZENSHIP

While discussing the Union citizenship, one may ask what is the practical difference of being simply a citizen or any other individual exercising free movement rights (such as worker or self-employed). In the Maastricht treaty the Union citizenship has been founded bringing the citizens of the EU the ban on discrimination based on their nationality. When examining the notorious case in the field of free movement of workers of Mrs. Levin,[1] it is quite clear that nowadays Mrs. Levin shall not represent herself as a worker to be able to settle down in the Netherlands with her husband. In eighties, the time the case took place, however, any economic activity was desired to fall under the free movement rights.

Thus, Mrs. Levin, even though in dispose of sufficient financial means, had still to find any, even clearly undesired, job to be considered a worker and so allowed residing in the Netherlands. On this basis, the Court of Justice of the EU[2] hold that *"the provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine."*[3] Furthermore, *"the motives which may have prompted the worker to seek employment in the Member State concerned are of no account and must not be taken into consideration"*.[4] Therefore, once Mrs. Levin availed herself with a genuine employment, irrespective of its weekly hours and income limit, she felt under the scope of Treaty rights regardless the primary concern of such action had been a residence allowance in the host rights Member State.

* JUDr. Tereza Kunertová, LL.M., Department of European Law, Faculty of Law, Charles University, Prague

[1] 53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECR 01035.

[2] Hereinafter the "Court".

[3] 53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECR 01035, para. 18.

[4] 53/81 D.M. Levin v Staatssecretaris van Justitie [1982] ECR 01035, para. 22.

2. WHO, WHEN AND HOW ACQUIRES THE RIGHT TO MAINTENANCE AID FOR STUDIES

Following the set of the Union citizens, the nationals of Member States are entitled to establish themselves in the host Member States provided they have sufficient financial means not to become a burden on the social assistance system therein during their period of residence and have comprehensive sickness insurance cover in the host Member State.[5]

According to the Article 24 of the Directive 2004/38/EC, citizens of the EU shall be treated equally with nationals of the host Member State.[6] Nevertheless, prior their acquisition of the right of permanent residence the host Member State is not obliged to grant maintenance aid for studies, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.[7] In general, EU students thus may receive any maintenance aid for studies in the host Member State only after five years continuous residence in that state.

Such requirement evolved from the Court's case law regarding students. Starting with Grzelczyk[8], the Court ruled that *"Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for".*[9] Subsequently, the Court acknowledge that *"it is … 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 (…), 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".*[10] The Directive 2004/38/EC set the time limit at acquisition of the right of permanent residence in the host Member State.

The agreed time length might be deemed as a bit harsh one comparing that not many students enter studies in a host Member State for such a long period of time. One may assume that close link between the Union citizen and the host Member State may be even developed upon a shorter period of time. One may question the necessity of durational test to prove his integration into the society of the host Member State. Even if the durational residence requirement proves to be necessary, what is the reason for adopting a three or even five years term?[11] Therefore, one shall not be surprised that quite speedily following the lapse of the Directive 2004/38/EC's implementation time in Member States, the time limit was questioned in front of the Court.

---

[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 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 (hereinafter the "Directive 2004/38/EC"), *OJ L 158, 30.4.2004, p. 77–123*, Art. 7 (1)(b).

[6] Directive 2004/38/EC, Art. 24 (1).

[7] Directive 2004/38/EC, Art. 24 (2).

[8] C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-06193.

[9] C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-06193, para. 31.

[10] C-209/03 The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills [2005] ECR I-02119, para. 57 and 59.

[11] See also Mei van der, A.P. Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid. *Maastricht Journal*. 2009, Vol. 16, Nr. 4, p. 491.

Ms. Jacquelline Förster, a German national, 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. From October 2002 until June 2003, Ms. Förster completed a paid work placement in a Dutch special school providing secondary education to pupils with behavioral and/or psychiatric problems. After that placement, Ms. Förster did not undertake any further employment. From September 2000, the IB-Groep granted Ms. Förster a maintenance grant. Following a check, the IB-Groep ascertained that between July 2003 and December 2003 Ms. Förster had not been gainfully employed. It therefore held that she could no longer be regarded as a worker. As a result, the decision concerning the maintenance grant paid in respect of the period from July to December 2003 was annulled and Ms. Förster was requested to repay the excess sums. It was reasoned that Ms. Förster could not claim entitlement to a maintenance grant pursuant to *Bidar* because, before her degree in educational theory, she had not been in any way integrated into Dutch society.

Even though the Advocate General Mazák proposed an individual approach,[12] the Court confirmed the five years term condition. *"In the present case, such 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. (…) A condition of five years' continuous residence cannot be held to be excessive having regard, inter alia, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State. (…) It must therefore be stated that a residence requirement of five years, such as that laid down in the national legislation at issue in the main proceedings, does not go beyond what is necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State."* [13]

By its decision the Court seems to sidestep from the previous case law *"in which the Court had ordered national courts to examine on a case-by-case basis whether a given condition is genuinely needed for the objective pursued"*.[14] Is it possible that the Court decided to take a step back in its pro-active citizens' case law and accept what the Union legislator expressly authorized by the secondary legislation? Undoubtedly, the ruling has been accepted with a relief by national authorities who would otherwise undergo an administrative burden by analyzing the individual levels of integration into the society.[15]

[12] Opinion of Mr Advocate General Mazák delivered on 10 July 2008 in C-158/07 Jacqueline Förster v Hoofdirectie van de Informatie Beheer Grep [2008] ECR I-08507.

[13] C-158/07 Jacqueline Förster v Hoofdirectie van de Informatie Beheer Grep [2008] ECR I-08507, para. 52, 54 and 58.

[14] Mei van der, A.P. Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid. *Maastricht Journal*. 2009, Vol. 16, Nr. 4, p. 478–479.

[15] See Mei van der, A.P. Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid. *Maastricht Journal*. 2009, Vol. 16, Nr. 4, p. 479 and 486.

3. WHY TO DIFFER AMONG ECONOMICALLY ACTIVE AND NON-ECONOMICALLY ACTIVE UNION CITIZENS

At this point we are getting to the division between non-economically active citizens and workers (or self-employed) who are entitled to all the benefits right away upon their arrival to the host Member State and no time limit shall be prescribed for its entitlement. The above mentioned (5 years) time requirement, however, does not apply to citizens (students) who retain the status of workers in accordance with the Article 7 (3) d) of the Directive 2004/38/EC provided the studies to be related to the previous employment. Those who retain the status of workers not only enjoy full equality treatment under Art. 24 (1) of the Directive 2004/38/EC, but also do not fall under the derogation in Article 24 (2) therein.[16]

In the course of years Member States have acknowledged a practice of certain individuals who come to the host Member State with their primary intention to be subscribed at the studies therein. While working for a limited period of time prior the commencement of their studies, they subsequently ask for the maintenance aid for studies claiming they have retained a status of a worker.

May this practice then represent an abuse of rights as envisaged under the Article 35 of the Directive 2004/38/EC?[17] The Court has recently dealt with such a claim in a case L. N.[18]

Mr. N. entered Denmark in June 2009. Upon his arrival he was offered full-time employment in an international wholesale firm. Prior entering Denmark, Mr. N. had applied to the Copenhagen Business School. In August 2009, Mr. N. filed an application for education assistance from September 2009 onwards. While he began his studies, he resigned from his job and carried on only other part-time jobs. His application for the education assistance was rejected on grounds that Mr. N. shall not be deemed as a worker anymore.

The Court had an opportunity to draw a line between the right to retain the worker status and the circumvention (or even abuse) of such right. Unfortunately, it seems that the Court did not tackle the job.

Firstly, it simply clarified that any derogation from the equal treatment principle shall be interpreted narrowly. Therefore, *"the low level of or origin of the resources for that remuneration, the rather low productivity of the person concerned, or the fact that he works only a small number of hours per week do not preclude that person from being recognized as a 'worker' within the meaning of Article 45 TFEU"*.[19]

Secondly, the Court leaves the conclusion to a national court which shall decide whether the respective individual is a worker or not. *"It is for the national court to conduct an analysis of all the aspects which characterize an employment relationship for the purpose of determining whether the employment activities pursued by Mr. N. before*

[16] See BARNARD, C. *The Substantive Law of the EU. The Four Freedoms.* 4th edition, Oxford: Oxford University Press, 2013, p. 277.

[17] *"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience."*

[18] See C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte (2013) ECR (not published yet).

[19] C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte (2013) ECR (not published yet), para. 41.

and after he began his studies were effective and genuine in nature and, therefore, such as to confer the status of worker on him. That court alone has direct knowledge of the facts of the main proceedings and the aspects characterizing the employment relationship of the applicant in the main proceedings and is accordingly the best placed to make the necessary findings."[20]

One doesn't argue that in a final phase it shall be the national court only to decide the subject matter of the case. Nevertheless, the Court has not satisfied the claims by Danish and Norwegian governments that *"a citizen of the Union who studies full-time in a host Member State and who entered the territory of that Member State for that purpose may be refused maintenance aid for studies for the first five years he is resident in the country, even if he is in part-time employment alongside his studies"*.[21] The Court simply reminded the previous case law according to which any intentions leading the worker to look up a work in a host Member State are irrelevant provided that he pursues or wishes to pursue effective and genuine employment activities.[22] Therefore, the national court has not been left with a great margin of appreciation.

4. WHAT CONSTITUTES THE MAINTENANCE AID FOR STUDIES

While analyzing the maintenance aid for studies one may query what exactly constitute such aid. The Directive 2004/38/EC does not provide a specific definition. It only mentions the maintenance aid for studies consisting of student grants or student loans. Recently, the Court elaborated on the term when deciding on the reduced fares on public transport for students.[23] The Austria granted the reduced fares on public transport in principle only to students whose parents are in receipt of Austrian family allowances. According to the Austria such *"reduced fares on public transport for students are supplementary family benefits coming within the system of family allowances granted in Austria and must therefore be categorised as social security benefits for the purposes of the European Union legislation applicable in the area of coordination of social security schemes. It is not the students themselves who benefit from the reduced fares, but rather the parents who provide for their children for as long as they retain their status as students.*"[24]

First, the Court considered the scope of EU law. *"The Court has held previously that national aid granted to students to cover their maintenance costs, social benefits provided for by a national, non-contributory scheme and so-called tideover allowances provided for by national legislation intended for unemployed youth seeking their first employment all come within the scope thereof.*"[25] The reduced fares for public transport constitutes an unequal treatment of Union citizens. Even though the non-Austrian students are not

[20] C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte (2013) ECR (not published yet), para. 44.
[21] C-46/12 L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte (2013) ECR (not published yet), para. 31.
[22] See case Levin supra note 3, para 21 and 22.
[23] C-75/11 Commission v. Austria (2012) ECR not yet reported.
[24] C-75/11 Commission v. Austria (2012) ECR not yet reported, para. 20.
[25] C-75/11 Commission v. Austria (2012) ECR not yet reported, para. 42.

discriminated on the first hand basis of their nationality, it is obvious that *"such a condition is more easily fulfilled by Austrian students because their parents as a rule receive those allowances"*.[26]

Secondly, the Court had to find out whether the reduced fares on the public transport may be subject to the derogation under the Article 24 (2) of the Directive 2004/38/EC. *"Although … the reduced transport fares granted to the students concerned constitute maintenance aid for them, only maintenance aid for studies 'consisting in student grants or student loans' come within the derogation from the principle of equal treatment provided for in Article 24(2) of Directive 2004/38. Any other interpretation of that provision would run counter to not only its wording but also to the Court's obligation to interpret that derogation in accordance with the provisions of the Treaty, including those relating to Union citizenship."*[27] The Court maintained the settled approach that any derogations from the free movement rights shall be interpreted restrictively.

As a result any other benefits not constituting the narrow maintenance aid for studies may be claimed by Union citizens on equal basis. If not provided equally, they breach the Article 18 TFEU in conjunction with Articles 20 and 21 TFEU.

4. THE (UN)DESIRED OUTCOME

In analyzing the CJEU case law one has to express its doubts in regards with the whole construction of the Article 24 of the Directive 2004/38/EC. At one hand, the Member States have adopted a condition for the entitlement of maintenance aid for studies. Such condition is derived from a past case law according to which any close link with the host Member State may be required. The Directive itself has determined a permanent residence (5 years term). It is fully embraceable that had the Court ruled the maintenance grants to be provided to all migrant students by the host Member State as of the arrival date, this would have an undesirable impact on budgets of these Member States; especially those were students mainly move to.[28] On the other hand, I would humbly agree with those proposals that the Member State shall be entitled to apply the rebuttable durational residence requirement for the grant of maintenance aid for studies but as well allow migrant students to demonstrate their de facto integration in the host Member State.[29]

Uniformly, it may somehow seem reasonable when someone works in the host Member State, pay taxes, and then while raising his qualification he may retain the status of worker. The host Member States will take care of him under the principle of reciprocity. The idea of economic reciprocity allows economically active Union citizens to access welfare benefits in the host Member State in an exchange of their employment in the market of that host Member State.[30]

[26] C-75/11 Commission v. Austria (2012) ECR not yet reported, para. 50.
[27] C-75/11 Commission v. Austria (2012) ECR not yet reported, para 55 and 56.
[28] See BARNARD, C. *The Substantive Law of the EU. The Four Freedoms*. 4th edition, Oxford: Oxford University Press, 2013, p. 300.
[29] Compare Mei van der, A.P. Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid. *Maastricht Journal*. 2009, Vol. 16, No. 4, p. 495.
[30] See WITTE, F. Who funds the mobile students? Shedding some light on the normative assumptions underlying EU free movement law: Commission v. Netherlands. *Common Market Law Review*. 2013, Vol. 50, No. 1, p. 207.

Beside the doubts I have expressed on the time requirement, I would not grumble much if there won't be cases such as L. N. In a situation when someone may easily circumvent the time requirement by working in the host Member State for approx. one or two months and still retain the status of a worker, the condition itself seems to lose its practical sense.[31]

As a result, we have arrived at a two-rail track. By one track, we enable the practice of finding an employment for a short period of time by which the citizens may immediately achieve the maintenance aid for studies. By the second track, we insist that citizens who devote themselves fully to studies in the host Member State remain deprived of a legal entitlement to be helped by the host Member State in case of their sudden financial difficulties.

[31] See C-413/01 Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst (2003) ECR I-13217.