

PUBLIC SECURITY, PUBLIC POLICY AND PUBLIC HEALTH AS POTENTIAL GROUNDS FOR IMPOSING RESTRICTIONS ON THE RIGHT OF FREE MOVEMENT OF PERSONS

ANDREA JÁNOSI

Faculty of Law, Department of European and International Private Law,
University of Miskolc

Abstract

The issue of employment and the situation of workers and their family members have always been in the focus of the European Union's attention. It is of common knowledge that the free movement of workers is one of the fundamental principles of the European Community, one of the four pillars. Today this kind of freedom is an elemental right of all EU citizens, but there are some restrictions in exercising the right of entry and the right of residence. In my paper I would like to deal with these restrictions, which are based on public policy, public security and analyse the most important cases related to this topic.

Key words

Free movement of persons – restrictions of free movement of persons- public policy – public security- public health

INTRODUCTION

Free movement of persons has a central, distinguished place among common politics, one of the four, fundamental freedoms. Working in the territory of another Member State is a right of every citizen of the Union and also of their family members. They can move and reside freely within the territory of the Member States'.¹ However the realization of this principle was motivated originally by economic aims, the principle of free movement is more than merely just regulating economic questions.² In addition to this, demographical and labour market imbalances and unequal economic development of the Member States resulted in growing

¹ Directive 2004/38/EC, Preamble point 1.

² GYULAVÁRI, Tamás – KÖNCZEI György: *Európai szociális jog*, Budapest: Osiris Kiadó, 2000., p. 86., ISBN 963 379 641 5

migration in the last few years.³ In our days therefore the knowledge and analysis of the legal base of these tendencies is a must.

The rules regulating the free movement have been changed a lot since this principle was first declared in the Treaty of Rome. The most important turning point was the Maastricht Treaty, which established that not only workers, but also every citizen of the Union has the right of free movement. In the meantime the EU-level regulation of this topic has become really complex, two regulations and nine directives contained rules in relation to this issue, therefore the simplification of these norms was of high priority. Therefore the 2004/38/EC Directive was accepted for simplifying these rules, and it has replaced the former fragmented and sectorial regulation. Member States had to achieve the aim of this Directive within two years from the date of its publication.

Although the goal of the Union is to ensure the right of free movement of the citizens, i.e. the right of entry and residence, to the possible maximum extent, there are some cases, when it could be restricted. The grounds of these restrictions could be the public politics, public security and public health, amongst others.

I. COMMUNITY RULES OF RESTRICTIONS ON FREE MOVEMENT

I.1. RULES ESTABLISHED BY THE EC TREATY AND COUNCIL DIRECTIVE 64/221/EEC⁴

The legal basis of the restrictions on the free movement of persons was set out in the EC Treaty, pursuant to which the right of free movement could be restricted. These restrictions contain on one hand the „*limitations justified on grounds of public policy, public security or public health*”;⁵ on the other hand, the Treaty restricted the scope of applicability too: „*the provisions of this Article shall not apply to employment in the public service.*”⁶

³ DR. JUHÁSZ, Judit: *A nemzetközi vándorlás fogalmai és mérése*, Európa Tükör Műhelytanulmányok 61., p. 11.

⁴ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health

OJ 56, 4.4.1964, p. 850–857, English special edition: Series I Chapter 1963-1964 P. 0117

⁵ EC Treaty, Article 39. (3)

⁶ EC Treaty, Article, 39. (4)

Consequently the above-mentioned provisions of the Treaty allow Member States to not to admit citizens from other Member States to their territory or to expel them. Nevertheless, neither the EC Treaty, nor Directive 64/221/EEC had determined, which kind of situations and behaviour could be qualified as to be dangerous to public policy, public security or public health.⁷ According to the case law of the European Court of Justice, this notion has to be interpreted strictly. Member States must take into account different general and individual conditions, if they want to restrict the right of residence of citizens from other Member States, alluding to his or her behaviour to be against public policy, public security or public health.⁸ As a general rule, the examination taking place before the expulsion or the forbiddance of entry shall aim the individual concerned,⁹ and "*measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.*"¹⁰ According to the dominant standpoint, a general restriction is absolutely invalid. These viewpoints can be the basis of the investigations against native persons.¹¹

A behaviour jeopardises the public policy or it can be qualified as a danger, if it effectively and essentially detrimental for the society and it infringes the elemental interests of the society, at the time of exercising such behaviour, because the qualification of the behaviours endangering the public policy is able to change in the course of time. Member States may define these notions themselves. Consequently, it could be qualified as being dangerous to the public policy if somebody is threatening the democratic order or security of a country, takes part in violent actions to overthrow the order of the state, call on the public to do so, or shall be guilty of an offence or drug abuse.¹²

It could be mentioned as a failure of the Directive that although it provides for a remedy in case of expulsion and ban, it does not define precisely which are the possible ways of that.¹³

⁷ GYULAVÁRI, Tamás: *Az Európai Unió szociális dimenziója*, Budapest: Szociális és Családügyi Minisztérium, 2000., p. 58., ISBN 963 00 3854 4

⁸ A személyek szabad mozgása az Európai Unióban - munkavállalás és tanulás a magyar állampolgárok számára, Forrás: Külügyminisztérium, see: <http://mathom.dura.hu/mszeib/eubovites/szabadmozg.htm> (20.04.2008.)

⁹ DR. GELLERNÉ DR. LUKÁCS, Éva: *A munkavállalás feltételei az Európai Unióban*. In: *Európai Tükör, A Kormányzati Stratégiai Központ Folyóirata, Különszám, 2004.*, p. 39.

¹⁰ Council Directive 64/221/EEC, Article 3. (1)

¹¹ BANKÓ, Zoltán: *Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása*, Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, 2004., p. 21., ISBN 963 224 774 4

¹² GYULAVÁRI, Tamás: *Az Európai Unió szociális dimenziója*, p. 58.

¹³ KIRÁLY, Miklós-LUKÁCS, Éva: *Migráció és Európai Unió*, Budapest: Szociális és Családügyi Minisztérium, 2001., p. 118., ISBN 963 00 6654 8

Council Directive 64/221/EEC was amended by Council Directive 72/194/EEC.¹⁴ It has extended the effect of the Directive to nationals of the other Member States and members of their families who pursuant to Regulation (EEC) No 1251/70, exercise the right to remain in the territory of a Member State.¹⁵

I.2. PROVISIONS OF DIRECTIVE 2004/38/EC¹⁶

Member States had to implement this Directive until 30 April 2006, which has replaced Council Directive 64/221/EEC. It contains elements of certain former secondary legal sources and the related case law of the Court of Justice of the European Communities.¹⁷ The aim of this Directive was to impose stricter conditions in respect of determining the circumstances under which citizens of the Union and their family members could be declined to enter in the territory of other Member States or could be expelled from that countries. In addition, it has defined stricter procedural safeguards as well.¹⁸ Similarly to the provisions of the former Council Directive, the measure shall comply with the principle of proportionality, it must be based solely on „*the personal conduct of the individual concerned*”, and such measure should not be accepted on the basis of previous convictions.¹⁹

Host Member States, in order to make sure whether the individual concerned is dangerous for the public policy or public security, upon issuing the registration certificate, or no later than three months from the date of arrival of that person or from the date of reporting his/her presence, are allowed to inform about any former police record of the individual concerned from the State of origin or from the others. The Member States have two months to answer

¹⁴ Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
OJ L 121, 26.5.1972, p., English special edition: Series I Chapter 1972(II) P. 0474

¹⁵ Council Directive 72/194/EEC, Article 1.

¹⁶ 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
OJ L 158, 30.4.2004, p. 77–123

¹⁷ ASZTALOS, Zsófia: *Új irányelvek az uniós polgárok és családtagjaik szabad mozgásáról*. In: Európai Tükör, 2004/7 október sz., p. 104.

¹⁸ Directive 2004/38/EC, preamble, section 22.

¹⁹ Directive 2004/38/EC, Article 27. (2)

these questions. This kind of opportunity is also available for the Member State upon issuing the residence card.²⁰

The host Member State has to take into account different factors in case of an expulsion order on grounds of public policy or public security. The following factors has to be taken into account: „*how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*”²¹ An expulsion order could be taken against the EU citizens and their family members, who have permanent residence card only on the grounds of serious violation of public policy or public security²² An expulsion order could be taken only in specific circumstances against the EU citizens and their family members, who have been living in the host Member State for at least ten years, or who are minors. It is an expectation that the expulsion has to be „*necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.*”²³

According to the provisions of the Directive, the individual concerned has to be informed about the issuance of an expulsion order, the grounds based on which the expulsion order was made, and the court or the administrative authority, to which the individual concerned may submit an appeal.²⁴ The Directive also contains the requirement that the procedural safeguards must be determined precisely and the citizens of the Union shall always have the right to initiate redress procedure against the orders denying the entry or residence. Except of especially forcing cases, the time provided for leave the Member State's territory should not be less than three months. The expulsion procedure should not be a routine procedure and the authorities of the States have to conduct effective investigations.²⁵ If the application for appeal or judicial review of the expulsion order accompanied by a motion for interim measures to suspend the enforcement of that order, the expulsion order should be executed only, if it was based on a previous court decision; the individual concerned previously had access to judicial review; or the expulsion order was based on coercive grounds of public security. The individual concerned has the right to represent his or her defence personally,

²⁰ Directive 2004/38/EC, Article 27. (3)

²¹ Directive 2004/38/EC, Article 28. (1)

²² Directive 2004/38/EC, Article 28. (2)

²³ Directive 2004/38/EC, Article 28. (3)

²⁴ Directive 2004/38/EC, Article 30.

²⁵ ASZTALOS, Zsófia: *Új irányelv az uniós polgárok és családtagjaik szabad mozgásáról*, p. 104.

however the Member State may deny the permanent residence of the individual concerned during the redress procedure in that country.²⁶ The Directive forbids to issue orders excluding the persons for life, moreover it shall be provided that *„Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, and in any event after a three year period from enforcement of the final exclusion order.”*²⁷ The host Member State has three months to decide in this respect, however during this period the individual concerned is not allowed to entry to the territory of the State.²⁸ Expulsion orders as a penalty or custodial penalty may be enforced only, if the above-mentioned conditions and requirements are met. If an expulsion order will be enforced more than two years after it was issued, the Member State has to investigate whether the individual is still a real threat to the public policy or public security.²⁹

II. CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

However the protection of public policy has been codified in the EC Treaty,³⁰ the Member States are not allowed to use the notion of public policy and public security arbitrarily. The European Court of Justice has expressed this opinion in the Bouchereau-case,³¹ in which a British authority had initiated the expulsion of a French national, who had been employed in the United Kingdom, after he was found guilty twice of unlawful possession of drugs. The Court declared that *„in so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.”*³² Equality is a quiet problematic issue, since a Member State may expel citizens of other Member States, but not its own citizens. *„Any action affecting the right of persons coming within the field of application of article 48 of the treaty to enter and reside freely in the Member States under the same conditions as the nationals of the host state constitutes a 'measure' for the purposes of article 3 (1) and (2) of directive no 64/221/EEC. That concept includes the action of a court which is required by the*

²⁶ Directive 2004/38/EC, Article 31. (2) and (4)

²⁷ Directive 2004/38/EC, Preamble point 27.

²⁸ Directive 2004/38/EC, Article 32.

²⁹ Directive 2004/38/EC, Article 33.

³⁰ BANKÓ, Zoltán: *Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása*, p. 21.

³¹ Case 30-77. Régina v Pierre Bouchereau, Judgment of the Court of 27 October 1977., European Court reports 1977 Page 01999

³² Case 30-77. Régina v Pierre Bouchereau, Summary, point 3.

*law to recommend in certain cases the deportation of a national of another Member State, where such recommendation constitutes a necessary prerequisite for a decision to make a deportation order.*³³

One of the most often cited cases is the Van Duyn-case,³⁴ in which a woman of Dutch nationality was not allowed to enter into the United Kingdom to work as a secretary at the "church of scientology".³⁵ British politics did not assist the "church of scientology", and however it was not forbidden; according to the standpoint of the British politics it was socially harmful. The main question was whether in this case it is possible to refer to the danger of the public policy or public security. It was declared by the Court that "*the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with the same body or organization.*"³⁶ The most problematic issue of the practice that measures could be based only the conduct of the individuals. This problem was addressed in the Bonsignore case.³⁷

The problem in the case of Commission of the European Communities v Kingdom of the Netherlands³⁸ was that the general legislation of the Netherlands made it possible to establish a systematic and automatic connection between a criminal conviction and the issuance of expulsion orders.³⁹ The Court declared that the Netherlands has failed to fulfil its obligations under Directive 64/221/EEC⁴⁰

The Court has declared in the Commission of the European Communities v Kingdom of Spain⁴¹ case that Spain has failed to fulfil its obligations under Council Directive

³³ Case 30-77. Régina v Pierre Bouchereau,, Judgement, point 1.

³⁴ Case 41/74. Yvonne van Duyn v. Home Office, Judgment of the Court of 4 December 1974., European Court reports 1974 Page 01337

³⁵ Case 41/74. Yvonne van Duyn v. Home Office, Grounds, point 2.

³⁶ Case 41/74. Yvonne van Duyn v. Home Office, Operative part, point 3.

³⁷ Case 67-74. Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln, Judgment of the Court of 26 February 1975., European Court reports 1975 Page 00297

³⁸ Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgment of the Court (Third Chamber) of 7 June 2007., European Court reports 2007 Page I-04383

³⁹ Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Pre-litigation procedure, point 17.

⁴⁰ Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgement

⁴¹ Case C-503/03. Commission of the European Communities v Kingdom of Spain, Judgment of the Court (Grand Chamber) of 31 January 2006., European Court reports 2006 Page I-01097

64/221/EEC, because the state has refused entry into its territory and refused to issue a visa to nationals of a third country who were the spouses of Member State nationals. The reason why the state has done so, was that in connection to these persons alerts were entered in the Schengen Information System, but it was *„without first verifying whether the presence of those persons constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”*⁴²

According to the judgement of the Court made in the Georgios Orfanopoulos and Others and Raffaele Oliveri v Land Baden-Württemberg cases,⁴³ the Council Directive 64/221/EEC *„precludes national legislation which requires national authorities to expel nationals of other Member States who have been finally sentenced to a term of youth custody of at least two years or to a custodial sentence for an intentional offence against the Law on narcotics, where the sentence has not been suspended.”*⁴⁴

III. PUBLIC HEALTH

Article 4 of Council Directive 64/221/EEC deals with the question of public health, which refers to the Annex to the Directive, since *„the only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive.”*⁴⁵

Directive 2004/38/EC is relevant in the restriction of free movement on the grounds of public health, since it has amended the Annex to the Council Directive 64/221/EEC, in which the diseases endangering public health were listed. The amended Annex did not include new, important epidemics and diseases; moreover, diseases listed therein were dangerous in the 60-70's and for today they are successfully handled.⁴⁶ *„The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to*

⁴² Case C-503/03. Commission of the European Communities v Kingdom of Spain, Judgement

⁴³ Joined cases C-482/01 and C-493/01. Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, Judgment of the Court (Fifth Chamber) of 29 April 2004., European Court reports 2004 Page I-05257

⁴⁴ Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, Judgment, point 2.

⁴⁵ Council Directive 64/221/EEC, Article 4. (1)

⁴⁶ ASZTALOS, Zsófia: *Új irányelv az uniós polgárok és családtagjaik szabad mozgásáról*, p. 105.

nationals of the host Member State."⁴⁷ The basis of expulsion order shall not be a disease occurred more than three months after the entry.⁴⁸ Member States have the right to require persons with residence permit to bring themselves under medical examination free of charge in three months upon their arrival.⁴⁹

SUMMARY

Although the one of the most important goals of the European Union is to bring everyone in the position to be able to use the opportunities of free movement and to realise the four freedoms to the highest possible extent, there are some cases when the Member States are interested in to not to admit certain persons into their territory or expel them from there. The main purpose of my paper was to present such cases where the principle of free movement could be restricted. The grounds for such restrictions might be the public policy, public security or public health. I summarised the safeguards, which ensure free movement against restrictions; the strict conditions of expulsion and denial of entry; and the most important cases related to this topic.

Literature

Books and articles:

[1] ASZTALOS, Zsófia: *Új irányelvek az uniós polgárok és családtagjaik szabad mozgásáról.* In: Európai Tükör, 2004/7 október sz., p. 99-106.

[2] BANKÓ, Zoltán: *Válogatás az Európai Bíróság munkajogi ítéleteiből, Munkavállalók szabad mozgása,* Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft, 2004., p. 21., ISBN 963 224 774 4

[3] DR. GELLERNÉ DR. LUKÁCS, Éva: *A munkavállalás feltételei az Európai Unióban.* In: Európai Tükör, A Kormányzati Stratégiai Központ Folyóirata, Különszám, 2004., p. 39.

⁴⁷ Directive 2004/38/EC, Article 29. (1)

⁴⁸ Directive 2004/38/EC, Article 29. (2)

⁴⁹ Directive 2004/38/EC, Article 29. (2)

[4] DR. JUHÁSZ, Judit: *A nemzetközi vándorlás fogalmai és mérése*, Európa Tükör Műhelytanulmányok 61., p. 11.

[5] GYULAVÁRI, Tamás: *Az Európai Unió szociális dimenziója*, Budapest: Szociális és Családügyi Minisztérium, 2000., p. 58., ISBN 963 00 3854 4

[6] GYULAVÁRI, Tamás – KÖNCZEI György: *Európai szociális jog*, Budapest: Osiris Kiadó, 2000., p. 86., ISBN 963 379 641 5

[7] KIRÁLY, Miklós-LUKÁCS, Éva: *Migráció és Európai Unió*, Budapest: Szociális és Családügyi Minisztérium, 2001., p. 118., ISBN 963 00 6654 8

Directives:

[1] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
OJ 56, 4.4.1964, p. 850–857, English special edition: Series I Chapter 1963-1964 P. 0117

[2] Council Directive 72/194/EEC of 18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
OJ L 121, 26.5.1972, p., English special edition: Series I Chapter 1972(II) P. 0474

[3] 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
OJ L 158, 30.4.2004, p. 77–123

Cases:

[1] Case 41/74. Yvonne van Duyn v. Home Office, Judgment of the Court of 4 December 1974., European Court reports 1974 Page 01337

[2] Case 67-74. Carmelo Angelo Bonsignore v Oberstadtdirektor der Stadt Köln, Judgment of the Court of 26 February 1975., European Court reports 1975 Page 00297

[3] Case 30-77. Régina v Pierre Bouchereau, Judgment of the Court of 27 October 1977., European Court reports 1977 Page 01999

[4] Joined cases C-482/01 and C-493/01. Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, Judgment of the Court (Fifth Chamber) of 29 April 2004., European Court reports 2004 Page I-05257

[5] Case C-503/03. Commission of the European Communities v Kingdom of Spain, Judgment of the Court (Grand Chamber) of 31 January 2006., European Court reports 2006 Page I-01097

[6] Case C-50/06. Commission of the European Communities v Kingdom of the Netherlands, Judgment of the Court (Third Chamber) of 7 June 2007., European Court reports 2007 Page I-04383

Website:

A személyek szabad mozgása az Európai Unióban - munkavállalás és tanulás a magyar állampolgárok számára, Forrás: Külügyminisztérium,
see: <http://mathom.dura.hu/mszeib/eubovites/szabadmozg.htm> (20.04.2008.)

Contact-email:

janosiandrea@t-online.hu