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The politics of EU migration

Public Law analysis: As the political parties continue to debate the issue of EU migration, Oshin Shahian, consultant solicitor at Gulbenkian Andonian Solicitors, considers the current proposals around migrant's access to state benefits.

Original news

Concerns raised over Cameron's migrant plans, LNB News 17/10/2014 42

Daily Telegraph, 17 October 2014: Senior EU diplomats have cast doubts over the Prime Minister's plans to limit the number of migrants entering the UK. David Cameron is said to be looking for an 'emergency brake' to be built into EU migration rules on that would allow Downing Street to block new arrivals if numbers had reached a set level.

What is the background to the latest discussion on migration in the UK?

Backed by the judgment handed down in the Grand Chamber of the European Court of Justice in *Dano v Jobcenter Leipzig*: C-333/13 [2014] All ER (D) 142 (Nov), Mr Cameron has boldly set out measures to ban EEA citizens in the UK from receiving state benefits, including tax credits and social housing for a minimum of four years.

In contrast, despite the bold promises to the UK public on limiting net migration, Mr Cameron has had to face the embarrassing report that net migration is now higher than when the Conservatives came to power and almost 100,000 off the target set for cutting migration to below 100,000 by 2015.

In either case [reducing net migration and/or a ban on the access to public funds], the real question is the fiscal impact of immigration. Some claim that immigrants are a burden on the tax payer, while others strongly advocate that they are the backbone of the country's economy.

In my experience, as an immigration solicitor, most of my EEA national client's and their family members are hardworking, and far less likely to have recourse to public funds. Those few who have received benefits were only looking to meet a shortfall in their income in order to make payment towards their subsistence, such as their monthly rent. I would not say that 'benefit tourists' exist among the EU immigration clients that I have served.

To what extent can access to state services be limited for EU migrants?

In the UK, entry and stay of migrants is controlled through the Immigration Rules, which are used as a mechanism for the administration of the Immigration Acts laid by Parliament. Therefore, the UK has retained the power to control immigration through such Immigration Rules and, for instance, uses a points-based system within the Immigration Rules to cap/limit the numbers of migrants entering the UK for work/business purposes. However, the Immigration Rules do not apply to those migrants who are entitled to enter or remain in the UK by virtue of the provisions of the EEA Directives, which set out the free movement rights of EEA nationals.

The right to move freely in the EU for work, study or retirement has been the founding principle of the EU, which has aimed to promote economic growth and unity. The Free Movement of Citizens Directive 2004/38/EC (adopted by the European Parliament and European Council on 29 April 2004) sets out the free movement and residency rights of EEA nationals and their family members within the EU.

EU member states and their citizens have benefited greatly from the founding principles. However, it is clear that immigration is, and continues to be, a contentious issue across Europe. The courts, as well as governments across Europe, must continue to exercise balance and discretion to ensure preservation of the principle of free movement without over-burdening member states.

The landmark ruling in *Dano* confirms to the rest of Europe that any EU member state may ban access to social assistance to jobless EU migrants and that they may prevent EU citizens who are nationals of other member states from becoming an unreasonable burden on their social assistance systems. While the ruling confirms that EU free movement is non-negotiable and that EU citizens can access other member states benefits, it will also serve to confirm that free movement is not an unrestricted right and can make it easier for member states to bring in further measures restricting the right of free movement of persons and threatening the rights of genuine workers from the EU.

Furthermore, the principle of free movement is enshrined in the EU treaties which maintain equal treatment of EU citizens irrespective of their country of origin. The treaties essentially prohibit member states from applying their rules on, for example, the job market or benefits differently for their own citizens and other union citizens.

However, EU citizens' free movement does not grant an unfettered right to access social security systems across the EU, and the Free Movement of Citizens Directive allows member states to decide whether to allow access to benefits during the first three months of residence, or for a longer period in the case of job seekers. This is governed in the UK by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 which implements the Free Movement of Citizens Directive. For instance, after three months, the EEA national in the host member state can only have a right to stay in the host country if they are economically active or have enough resources to be self-sufficient with sickness insurance to ensure they are not a burden on the host member state's social assistance system.

Further, since there is no restriction within the directive on member states deciding whether to allow access to benefit during the first three months of residence or longer, Mr Cameron is able to amend the Regulations [subject to them being compatible with the EU treaties and in keeping with basic human dignity] to meet his new measures for EU citizens to be denied social assistance benefits for up to four years after arriving in the UK. This is despite his exaggerated claims of having to renegotiate treaties and possibly coming out of the EU in order to enforce such changes to access to the social security system for EU migrants.

How would any treaty negotiation work in practice?

With regard to Mr Cameron's intentions, any such change to the provisions to deny benefits to EU migrants in the UK on a general basis would not directly violate EU law--specifically Regulation (EC) No 883/2004 on the coordination of social security systems as amended--or require any drastic treaty re-negotiations, provided that the measures implemented only apply to those EU migrants that cannot show a genuine link to the UK/pass a residence test.

As politicking around immigration and the EU builds, what are the key legal considerations in these areas?

It is clear that the judgment in *Dano* has legal significance. To consider its impact on the flow of EU migration to the UK, would require an understanding of the cases that have gone before it and settled a number of questions in regard to access of social assistance by EU citizens in host states, such as:

o *Abdirahman and Ullusow v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2007] 4 All ER 882--where the Court of Justice of the European Union (CJEU) assessment of the case concludes that a member state can restrict the right of economically inactive Union citizens from accessing its social assistance system

o *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 3 All ER 1--where the Supreme Court held that the restriction to access non-contributory cash benefits such as state pension credit can be refused to certain EU migrants and it was justified to discriminate against certain migrants in view of the importance of protecting the UK from what the Advocate General in *Trojani v Centre Public d'Aide Sociale de Bruxelles*: C-456/02 [2004] All ER (EC) 1065, described as 'social tourism'

o *Pensionsversicherungsanstalt v Brey*: C-140/12 [2013] All ER (D) 198 (Sep)--where the CJEU decided that the principle of proportionality must be exercised in considering individual circumstances when making a decision to refuse an EEA national from accessing state benefits on the basis of their right to reside

It has been abundantly clear that, over the course of 2014, high on the government's agenda has been the issue of access to benefits for EEA nationals in the UK. These judgements, in particular *Brey*, have had an effect on the government's politicking around immigration and the EU. For instance, it was only after the ruling in *Brey* case the European Commission's infraction proceedings, based on their requests to the UK to end discrimination of EEA nationals in the UK in relation to their right to access all social benefits, was narrowed to only questions on access to child tax credit and child benefits.

Therefore, it is evident that the European Commission is taking a milder approach towards the UK in regard to the UK's general discrimination of EEA citizens based on a right to reside condition. The need to assess cases on their individual merit is key, but the recent politicking and the language of the courts in *Dano* do not assist genuine EEA national workers and may pose a serious threat to their free movement rights and protection. It may lead to further discriminatory measures claimed to be in the interest of protecting the UK from the 'benefit tourists' and cause unintended damage to the UK economy by discouraging hard working EEA nationals from migrating to the UK.

Oshin Shahiean of Gulbenkian Andonian is a qualified solicitor and founder of OTS Legal. He is a senior immigration adviser with supervisory status awarded to him by the Law Society. Oshin graduated with a Law LLB (Hons) from the University of South Wales and an MA Masters degree from Queen Mary University of London. Oshin specialises in immigration law and he provides advice and representation on all types of complex personal and business immigration matters, and European Community free movement applications, appeals and judicial reviews.

Interviewed by Jane Crinnion.

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