THE CONCEPT OF THE FREE MOVEMENT OF WORKERS WITHIN THE EUROPEAN UNION UNDER THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE

(Avrupa Adalet Divanı Kararları Işığında
Avrupa Birliği Kapsamındaki İşçilerin Serbest Dolaşımı Kavramı)

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ABSTRACT

One of the four fundamental freedoms of the European Union, enshrined in the 1957 Treaty of Rome is the free movement of persons, along with the free movement of goods, services and capital. The most securely protected group of persons under Union law are workers. The idea of free movement of workers has encouraged the EU to introduce many policies, removing barriers between Member States, ensuring a single market.

Freedom of movement for workers involves a number of rights: the right to enter the territory of another EU Member State; the right to reside there with their families; the right to perform their economic activities under the same conditions as the citizens of the host country and the right to remain there after having ceased employment. The concept of free movement of workers is laid out in Article 45 of the Treaty on the Functioning of the European Union and is consolidated in further Directives and Regulations. Besides, the Court of Justice of the European Union has played an indispensable role in the development and interpretation of this concept through case law.

Keywords: Free Movement of Workers, Treaty on the Functioning of the European Union, The Court of Justice of the European Union, Case Law, Internal Market, Secondary Legislation, Economic Integration

ÖZ

Avrupa Birliğinde dört temel özgürlüklerden birisi; 1957 tarihli Roma Antlaşmasında malların, hizmetlerin ve sermayenin serbest dolaşımı ile birlikte düzenlenen kişilerin serbest dolaşımıdır. Birlik hukukuna göre bu

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kişi gruplarından en güvenli şekilde korunanı işçilerdir. İşçilerin serbest dolaşımı fikri, Avrupa Birliğinin tek pazara ulaşmasını, üye ülkeler arasındaki engellerin kaldırılmasını sağlayacak birçok politika üretmesini teşvik etmiştir.

İşçilerin serbest dolaşımı; herhangi bir AB ülkesinin topraklarına girme hakkı, burada aileleriyle birlikte oturma hakkı, ilgili ülke vatandaşları ile aynı koşullarda ekonomik faaliyetlerini yerine getirme hakkı ve meşguliyeti sona erse bile orada kalma hakkı gibi birçok hakkı içermektedir. İşçilerin serbest dolaşımı kavramı, Avrupa Birliğinin İşleyişi Hakkındaki Antlaşmanın 45. maddesi ile birçok Direktif ve Yönetmelikte düzenlenmiştir. Bunun yanında, Avrupa Toplulukları Adalet Divanı vermiş olduğu karar ve getirmiş olduğu içtihatlarla bu kavramın yorumlanmasında ve gelişmesinde çok büyük bir rol oynamıştır.

Anahtar Kelimeler: İşçilerin Serbest Dolaşımı, Avrupa Birliğinin İşleyişi Hakkında Antlaşma, Avrupa Toplulukları Adalet Divanı, Mahkeme İçtihadı, İç Pazar, İkincil Mevzuat, Ekonomik Bütünleşme

INTRODUCTION

One of the four fundamental freedoms of the European Union (EU), enshrined in the 1957 Treaty of Rome is the free movement of persons, along with the free movement of goods, services and capital. The most securely protected group of persons under Union law are workers. The idea of free movement of workers has encouraged the EU to introduce many policies, removing barriers between Member States, ensuring a single market.

Each of these four freedoms are pillars of a general conception of 'mobility' within the internal market. The free movement of workers, unlike the other three freedoms, affects people most directly, simply because it relates to more than merely the mechanics of market integration[2].

Freedom of movement for workers involves a number of rights: the right to enter the territory of another EU Member State; the right to reside there with their families; the right to perform their economic activities under the same conditions as the citizens of the host country and the right to remain there after having ceased employment.

The concept of free movement of workers is laid out in Article 45 of the Treaty on the Functioning of the European Union (TFEU) and is consolidated in further Directives and Regulations. Besides, the Court of

2 WEATHERILL Stephen, **Cases and Materials on EU Law**, Ninth Edition, Oxford University Press, 2010, p. 405

Justice of the European Union (CJEU) has played an indispensable role in the development and interpretation of this concept through case law.

The main objective of this essay is to analyse the legal structure underpinning the free movement of workers and to clarify how the CJEU has interpreted and broadened this concept. Initially, the legal basis including primary and secondary legislation on this freedom within the EU, and definition of the term worker will be examined. Finally, this essay will address the exceptions and derogations to free movement of workers. The aim here is summarise the case law of the CJEU on this subject to provide the overall perspective of the Court.

I. LEGAL FRAMEWORK OF FREE MOVEMENT OF WORKERS

The right to free movement for workers is one of the basic economic rights of the internal market included in Article 26 TFEU. It is also postulated as a substantial right in the 1989 Community Charter of the Fundamental Social Rights of Workers[3]. Free movement of workers is enshrined in Article 45 TFEU (previously Article 39EC Treaty) and developed by EU secondary legislation and the case law of the CJEU. According to Article 45 TFEU:

"1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the

3 SZYSZCZAK Erika and CYGAN Adam, **Understanding EU Law**, Second Edition, Sweet & Maxwell, 2008, p. 181

public service."

The Article also elucidates the following rights: the right to look for a job in another Member State; the right to work in a Member State without a work permit; the right to reside in a Member State in order to work; the right to remain in a Member State after having been employed; the right to non-discrimination with nationals in access to employment, labour conditions and all other social and tax advantages[4].

In addition to these rights, there are secondary advantages these provisions are intended to provide. These include an increase in living standards facilitated by reductions in unemployment, extended personal rights for workers and consequent political integration engendered by the common application of the provisions across Europe[5].

It should be noted that freedom of movement and non-discrimination on the basis of nationality are both vital and imperative[6]. In this context, article 18 TFEU prohibits the discrimination on grounds of nationality and article 45 TFEU makes reference to the principle stated in article 18 TFEU[7], but specifically regarding workers[8]. This particular clarification strengthens the hand of the CJEU, who are able to actively prohibit discriminatory rules and practices employed by member states[9].

Article 46 TFEU constitutes a legal base which entitles the European Parliament and Council to adopt secondary legislation in relation to the policy of free movement of workers. A range of directives and regulations were adopted under the former Article 40 EC Treaty (now Article 46 TFEU) to specify the conditions of entry, residence and the situation of workers and their families[10].

Notable examples include Directive 64/221, Directive 68/360, Regulation 1612/68 of the Council on freedom of movement for workers within the Community, Regulation 1251/70 and Directive 2004/38 of the European Parliament and the Council on the right of citizens of the Union

4 **Free Movement - EU Nationals**, http://ec.europa.eu/social/main.jsp?catId=457&langId=en, accessed on: 04 March 2014

5 STOELTING David, **The European Court of Justice and the Scope of Workers' Freedom of Movement in the European Economic Community**, in American University International Law Review, Volume: 6, Issue: 2, 1991, p. 181, (pp. 179-201)

6 CRAIG Paul and BURCA Grainne de, **EU Law: Text, Cases and Materials**, Fifth Edition, Oxford University Press, 2011, p. 716

7 According to this article; "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited...*"

8 FAIRHURST John, **Law of the European Union**, Ninth Edition, Pearson Education Limited, 2012, p. 358

9 FOSTER Nigel, **Foster on EU Law,** Third Edition, Oxford University Press, 2011, p. 315

10 Supra note 8, p. 359

and their family members to move and reside freely within the territory of the Member States[11]. Broadly speaking, these pieces of supplementary legislation clarify detail which is not covered by the Treaty itself[12].

Many of directives and regulations related to this subject were repealed or replaced by Directive 2004/38[13]. The secondary legislation (principally Regulation 1612/68) required to implement Article 45 TFEU was limited by design to apply only to workers who were nationals of Member States. An identical interpretation has been followed by the CJEU[14].

Article 45 TFEU causes direct effects both in the vertical relationship with Member States and in horizontal relationships with private employers[15]. In this regard, the CJEU held in the *Walrave/Koch*[16] and *Bosman*[17] cases that Article 45 TFEU was of horizontal as well as vertical direct effect where the employer had powers to regulate conditions. *The Angonese*[18] case went further, granting the provision direct effect against all employers[19].

II. DEFINITION OF THE TERM 'WORKER'

A. An EU Concept

Before outlining the free movement rights that a worker is afforded within the EU, it is necessary to define a worker for purposes of the Treaty. One needs to keep in mind that neither the former Article 48 of the Treaty of Rome, then Article 39 EC, and now Article 45 TFEU nor secondary legislation defines 'worker'. Likewise, the CJEU noted in *Sala Case* that "...there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied[20]." Nevertheless, judicial decisions taken by the CJEU have, to all intents and purposes, created a universal working definition[21].

11 Supra note 6, p. 718-719
12 KIRK Ewan, **EU Law**, Second Edition, Pearson Education Limited, 2011, p. 113
13 KENT Penelope, **Law of the European Union**, Fourth Edition, Pearson Education Limited, 2008, p. 200. Indeed, it was Regulation 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union that repealed Regulation 1612/68 entirely. 2004 Directive abolished solely articles 10 and 11 of Regulation 1612/68.
14 Supra note 6, p. 719
15 DASHWOOD Alan, DOUGAN Michael and others, **Wyatt and Dashwood's European Union Law**, Hart Publishing, 2011, p. 501-502
16 Case 36/74 *Walrave/Koch v AUCI* [1974] ECR 1405
17 Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* [1995] ECR I-4921
18 Case C-281/98 *Roman Angonese* v *Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139
19 NIELSEN Ruth, **Free Movement and Fundamental Rights**, European Labour Law Journal, Volume: 1, No: 1, 2010, p. 31, (pp. 19-32)
20 Case C-85/96, *Maria Martinez Sala v. Freistaat Bayern* 1998 ECR 1-2708, 1-2719, para 31
21 WOODRUFF Brian, **The Qualified Right To Free Movement of Workers: How the Big Bang Accession Has Forever Changed A Fundamental EU Freedom**, in Duquesne Business Law Journal, Volume: 10, 2008, p. 130, (pp. 127-146)

For example, many of basic terms, including scope of the worker, have been clarified by the CJEU. In *Hoekstra Case*[22], they ruled that the definition of the term 'worker' was a matter for the Court (EU law), not the Member States (national law)[23]. They also ruled that a worker remained a worker whether or not they were actually employed – embracing a variety of other possible circumstances, such as the possibility of illness or retirement[24].

Obviously, the lack of a formal definition in the Treaty has led to litigation. This has motivated further, broader definitions[25]. For example, in *Lawrie-Blum Case*[26] the CJEU gave a general definition and the question arose whether a trainee teacher was a worker. The German government attempted to argue that he was not a worker because of his trainee position. Conversely, the CJEU pointed out in this regard that the trainee was a worker and met "...the essential feature of an employment relationship [which] is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[27]"

According to jurisprudence of CJEU, in general, "the concept of worker, within the meaning of [now Article 45 TFEU] and of Regulation 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who pursues employment activities which are effective and genuine, to the exclusion of the activities on such a small scale as to be regarded as solely marginal and ancillary, must be regarded as a worker[28]." In the same vein, as stated in *Jany Case*[29] for an economic activity to be regarded as employment within the meaning of Article 45 TFEU, there must be a relationship of subordination[30].

B. Minimum-Income And Working-Time Requirements

The scope of worker in terms of 'minimum income and working time requirements' was clarified in *Levin Case*[31]. In this Case, Mrs Levin was a British national married to a non-EU national and living in the Netherlands.

22 Case 75/63, *Hoekstra v Bestuur der Bedrijfsvereniging voor Delailhandel en Ambachten* [1964] ECR 177
23 Supra note 6, p. 719
24 WHITE Robin C. A, **Revisiting Free Movement of Workers**, in Fordham International Law Journal, Volume: 33, Issue: 5, 2011, p. 1565, (pp.1564-1587)
25 SHINE D. Bruce, **The European Union's Right of Free Movement of Workers,** in the University of Memphis Law Review, Volume: 30, 2000, p. 824, (pp. 817-856)
26 Case 66/85, *Deborah Lawrie-Blum v. Land Baden- Wurttemberg* [1986] ECR 212
27 *Lawrie-Blum,* para 17
28 Case C-337/97, *Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, para 13
29 Case C-268/99 Jany v Staatssecretaris van Justitie [2001] ECR I-8615
30 Supra note 6, p. 719
31 Case 53/81, *Levin v Staatssecretaris van Justitie* [1982] ECR 1035

Her application for residency was rejected by Dutch authorities because of insufficient income (less than the minimum legal wage) for their livelihood[32].

The CJEU was asked to explain the concept of a 'worker' under Article 45 TFEU where a part-time employee earns less than the minimum required for subsistence as defined within the context of national law[33]. "It should however be stated that whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary[34]."

The CJEU firstly indicated that the rule of free movement of persons is a central tenet of the EU, thus broad interpretations must be borne in mind. It also referred to the importance of the right to start a new job in terms of both the benefit to Member States' economies and the increase in a worker's living standards. Additionally, the court held that the objective of the worker is immaterial, as long as a worker wishes to pursue a genuine and effective economic activity. Hence, it was made clear in this case that a part-time job fell within the rights of free movement, regardless of the amount of income and the motive of the host state[35].

The CJEU took this idea a step further in *Kempf Case*[36]. A German part-time music teacher who was living and working in the Netherlands, giving 12 lessons a week, was refused a residence permit. The Dutch and Danish government held the view that work providing an income below the minimum level of subsistence was not effective and genuine if the person doing the work claimed social assistance from public funds[37].

The Court disagreed and concluded that if an economic activity is effective and genuine, and is not on such a small scale as to be purely marginal or ancillary, he or she may not be excluded from the sphere of the application of rules on freedom of workers merely because the remuneration that he or she derives from it is below the minimum level of subsistence set by national law[38]. Briefly, someone who does not enough to live on and therefore, who must also claim benefits, is still a worker.

32 Supra note 1, p. 406
33 Supra note 24, p. 1565
34 *Levin,* para 17
35 Supra note 6, p. 721
36 Case 139/85, *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741
37 *Kempf,* para 7
38 *Kempf,* para 14

In *Steymann Case*[39] the CJEU took an expansive approach to scope of work and clarified that the work itself must be an economic activity. In this case, Mr Steymann was a German national living in the Netherlands. He worked in the kitchen of a religious community of which he was a member. He received meals, accommodation and was paid in the form of pocket money, but no wages. – on which grounds his application for a residence permit was refused. Despite the fact that his remuneration was 'in kind' rather than monetary, the Court ruled that payment for work did not have to be monetary, but could be a benefit in kind and hence he fell into the scope of EU worker[40].

C. Purpose of Employment

Generally speaking, the purpose of work is not considered to be relevant in deciding whether a person is a worker. Assuming that any particular employment is 'genuine' rather than 'marginal', it will be subject to Article 45 TFEU, though some limits to the purpose of the employment have been drawn.

In *Bettray Case*[41], Mr. Bettray was working under a compulsory social rehabilitation program to overcome his drug addiction. It was restrictively interpreted by the CJEU who ruled that a person under a social employment scheme involving therapeutic work as a part of drug rehabilitation solely as a means of rehabilitation or reintegration cannot be regarded as a worker for the purposes of Union law[42].

Unlike from Levin Case, the court elaborated the purpose of the scheme and held that Mr. Bettray was not a worker. This has been criticized on the basis that ensuring the mobility of the workforce is an important part of the Union's policies and thus that the "reintegration of people into the workforce through sheltered employment would be a part of this" policy[43].

The CJEU, however, considered sheltered programmes from a different perspective in *Trojani Case*[44]. Trojani, a Frenchman, had been given accommodation in a Salvation Army hostel in Brussels and he was paid a small amount of pocket money. The Court held that he had a direct right of residence under what is now Article 18 TFEU to social assistance on the same basis as nationals[45]. The Court, authorized the national court to

39 Case 196/87, Steymann v Staatssecretaris van Justitie [1988] ECR 6159
40 HORSPOOL Margot and HUMPREYS Matthew, **European Union Law**, Sixth Edition, Oxford University Press, 2010, p. 398
41 Case 344/87, *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621
42 *Bettray*, para 20
43 Supra note 6, p. 724
44 Case C-456/02, *Trojani v CPAS* [2004] ECR I-7573
45 Supra note 9, p. 318

decide whether Trojani's work, performed under the direction of Salvation Army was 'real and genuine' paid activity[46].

D. The Job Seeker

The CJEU has expanded the scope of the definition of worker to include those seeking work. However, the issue is how far Article 45 TFEU affects people in this category. This issue was examined directly in *Antonissen Case*[47], where the Court indicated that EU nationals seeking work do not have the full right of a worker, but they are still covered by Article 45 TFEU.

The Court also took the view that Member States have to allow work seekers to enter their territory and to remain there for a reasonable time. The CJEU stated that six months was a reasonable period of time to allow people searching for work to find employment. The Court subsequently ruled, in *Commission v Belgium Case*[48], that three months was a reasonable time.

This particular point has been codified by Directive 2004/38 which ensures a general and unconditional right of residence for all EU nationals for a period of three months[49]. According to Article 14/4-b of Directive 2004/38 job-seekers cannot be expelled from the territory of the host state as long as they provide evidence that they are searching for a job and have a genuine chance of being engaged.

However, the Court held in *Collins Case*[50] that in the light of EU citizenship, it is possible to receive job-seeker's allowance in accordance with the principle of equal treatment, if they are genuinely related to the employment activity of the host state[51].

E. Frontier Workers

EU citizens who work in one Member State whilst they continue to reside in another, returning home daily or weekly are also covered by EU law on the free movement of workers. The CJEU has ruled that whether workers work in another Member State and reside in the host state, or work in the home state and reside across a frontier, they should still be protected by EU law. They should also be protected against discrimination,

46 Supra note 6, p. 725
47 Case C-292/89, *Antonissen* [1991] ECR I-745
48 Case C-344/95, *Commission v Belgium* ECR [1997] I-1035
49 SPAVENTA Eleanor, **Free Movement of Persons in the European Union**, Kluwer Law International Publishing, 2007, p. 3
50 Case C-138/02, *Collins v Secretary of State for Work and Pensions* [2004] ERC I-2703
51 Supra note 9, p. 321

either in the state they reside in, or where they work[52].

In *Hartmann Case*[53], Ms. Hartmann who was an Austrian citizen living in Austria with her German husband and their three children. She was a house wife and her husband worked in Germany as a civil servant. She applied for child benefit from Germany but was refused. The refusal was based on the fact that she was no longer living in Germany nor had a labour contract for that country. The Court ruled that Article 45 TFEU applied to the situation of Mr Hartmann. Consequently, the Court indicated that such frontier workers could rely on the freedom from discrimination in social advantages under Article 7(2) of Regulation 1612/68, including child benefit claims[54]. Similar approaches have been adopted in *De Groot Case*[55] and *Geven Case*[56] by the Court, concerning frontier workers.

F. Worker Training, Education And Benefit

Article 7(3) of Regulation 1612/68 (now Regulation 492/2011) provides that workers shall "...by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres."

The CJEU, however, took a narrower approach in *Lair Case*[57] and adjudicated that universities are not vocational schools because "the concept of a vocational school is a more limited one and refers exclusively to institutions which provide only instruction either alternating with or closely linked to an occupational activity, particularly during apprenticeship"[58].

However, the Court went on to hold that "(a) an educational grant to enable a person to pursue university studies leading to a professional qualification is a social advantage within Article 7(2) of Regulation 1612/68; (b) a person who has been a worker who undertakes university studies leading to a professional qualification is to be regarded as retaining worker status and is entitled to equal treatment with nationals in access to such educational grants, provided that there is a link between the previous occupational activity and the studies in question; and (c) a Member State cannot make access to benefits falling within Article 7(2) of Regulation 1612/68 conditional upon a minimum period of prior occupational activity

52 Supra note 9, p. 319
53 Case C-212/05, *Hartmann v Freistaat Bayern* [2007] ECR I-6303
54 *Hartmann,* para 24
55 Case C-385/00, *De Groot v Staatssecretaris van Financiën* [2002] ECR I-11819
56 Case C-213/05, *Wendy Geven v Land Nordrhein -Westfalen* [2007] ECR I-6347
57 Case 39/86, *Sylvie Lair v Universität Hannover* [1988] ECR 3161
58 *Lair*, para 26

on the territory of that Member State"[59].

In *Brown Case*[60], the Court confirmed that while university education is vocational, rules governing it are the preserve of Article 18 TFEU - a general prohibition of discrimination. Thus, while the principle remains that EU nationals are allowed to use a host country's education system as its own nationals would (i.e., pay the same tuition fees), maintenance grants remain at the discretion of the government concerned (See Article 7(2) of Regulation 1612/68)[61].

Nevertheless, in both these cases the Court stated that a migrant worker should be entitled to equal treatment if they were resident legitimately and through necessity. In a hypothetical situation where a worker gives up a job in order to train in the same host state, the worker can only be eligible for a maintenance grant if it can be shown that there is a connection between the work and the training acquired[62].

III. EXCEPTIONS TO THE FREE MOVEMENT OF WORKERS

While it is unequivocally true that the CJEU has taken a blanket approach to the scope of the worker, it is also a fact that clauses which are hostile to free movement have been interpreted narrowly by the Court. It should be kept in mind that the right of free movement for workers is not absolute. Member States retain the right to refuse entry to workers, force them to leave or to actively restrict certain public sector jobs to certain nationals, albeit under particular circumstances[63].

Article 45(4) TFEU excludes the application of Article 45 to employment in the public service, while Article 45(3) TFEU subjects the right to free movement of workers to limitations on the basis of public policy, public security or public health. Besides, free movement limitations can be found in Directive 64/221 (now Directive 2004/38) and Article 3 of Regulation 1612/68: linguistic requirement (now Regulation 492/2011). They provided an opportunity to clarify the legal rules governing derogation from free movement, in part by taking account of the CJEU's jurisdiction[64].

A. Employment In The Public Service

Article 45(4) TFEU allows Member states to reject or restrict access to employment in the public service from the free movement and non-discrimination principle on the grounds of a worker's nationality. Article

59 Supra note 24, p. 1573
60 Case 197/86, *Brown v Secretary of State for Scotland* [1988] ECR 3205
61 FOSTER Nigel, **EU Law Directions**, Third Edition, Oxford University Press, 2012, p. 317
62 Supra note 13, p. 224
63 Supra note 6, p. 734
64 Supra note 1, p. 417

51 TFEU has a similar restriction where employment includes the exercise of official authority. This is intended to have the same function as Article 45 TFEU in relation to establishment[65].

The extent of Article 45(4) TFEU has primarily been left to the CJEU, not the Member States. The Court has sought to limit its application, in order to give the widest employment opportunities to EU workers, as in *Sotgiu Case*[66]. The underlying philosophy of this exception is that the "functioning of public service is an exercise of full-State sovereignty"[67].

The Court intended to test the concept of public services with its decision in the *Commission v Belgium Case*[68]. It applied two indicators to determine on the matter of public service, the first; "posts must involve participation in the exercise of powers conferred by public law, and the second; they must entail duties designated to safeguard the general interests of the state." Critics point out the former criterion is 'rather vague', but the latter is 'somewhat more concrete' and suggest that they are implemented jointly[69].

B. Derogation On Grounds Of Public Policy, Public Security Or Public Health

Aside from the above restriction, the Treaty allows Member States to refuse an EU national's right to entry or residence on the grounds of public policy, public security or public health. Article 27-33 of Directive 2004/38 contains the minimal procedural measures to protect migrant workers from discrimination. However, all measures adopted on this basis should comply with the principle of proportionality and should be based on the personal conduct of the individual concerned. The Directive clarifies that these three levels of protection cannot be applied to serve economic ends and past criminal conviction[70].

The CJEU interpreted this provision in the *Santillo* Case[71], clarifying that past criminal conviction records may be used and relied on as grounds for expulsion only where the previous conviction in some way gives evidence of a present threat. Further, the Member State must evaluate the threat at time of the decision ordering expulsion. The Court followed its concept in the *Bouchereau* Case[72] emphasising that the personal conduct of the person

65 Supra note 3, p. 184-185
66 Case C-152/73, *Sotgiu v Deutsche Bundespost* [1974] ECR 153
67 Supra note 6, p. 735
68 Case C-149/79, *Commission v Belgium* [1980] ECR 3881
69 Supra note 6, p. 736
70 Supra note 6, p. 755
71 Case C-131/79, *Santillo* [1980] ECR 1585
72 Case C-30/77, *Regina v Bouchereau* [1977] ECR 1999

must present a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society[73].

Public health, however, has a broader scope than public policy and security. According to Article 29 of Directive 2004/38, it is limited to 'diseases with epidemic potential and other infectious diseases or contagious parasitic diseases'. It is important to state that this is also limited in time unlike the other two derogations. If disease occurs after a three-month period from the date of arrival, then it cannot be a reason for expelling the worker.

CONCLUSION

This essay has clarified the framework of free movement of workers with emphasis on the definition of the 'worker' within the Union concept, and has examined certain major restrictions pertinent to the subject.

It is important to recall that the free movement of persons, goods, services and capital have served as the keystones of the internal market since its inception, ensuring an open market economy with free competition. The free movement of workers throughout the EU has proved to be an essential freedom that has enabled further social, economic and political integration. The right to free movement of workers has been primarily protected by the Treaty, secondary legislation and the CJEU's case law.

Article 45 TFEU concerns both labour mobility and the rights of the migrant worker. The case law on free movement of workers has explicated how workers have an extensive range of rights: to move freely within the EU, to take up employment and to enjoy non-discriminatory access to social protection.

Every EU States' citizen has the right to work in another Member State. The term 'worker' has a particular meaning in EU law and cannot be subject to national definitions or be interpreted restrictively. Each Member State is obliged to consider every application on a case-by-case basis.

The CJEU has played a crucial role in extending the scope of the definition of the worker and the principle of free movement, including the implementation of anti-discrimination rules. The Court has interpreted the Treaty provisions and secondary legislation in a generous and purposeful way. They have protected the worker as a person as well as a factor of production in order to achieve the efficient functioning of the internal market. Case law, in particular, has rapidly surpassed its place in the Treaty and played an integral role in promoting free movement rights.

73 Supra note 6, p. 756

However, Article 45 TFEU allows host countries to introduce some restricitons to the free movement of workers, especially in terms of public policy, public safety and public health. In other words, the right to free movement is a fundamental and individual right, but this right might be restricted by a Member State as stipulated by the provisions of the Treaty and secondary legislation.

The EU is composed of 27 states with varying histories, economies, cultures, legal systems and approaches to the balance between public welfare and private right. In this light, EU legislation regarding the right to free movement should be viewed as an essential bulwark against the discretionary power of Member States, who, in the absence of EU-wide legislation would be unlikely to enshrine such principles by their own accord. The CJEU has taken a decisive lead in protecting the right to free movement and is likely to continue in this vein for the foreseeable future.

Despite well-intentioned, humanistic, judgements; I believe that the Court has not fully appreciated the consequences of their broad definition of a 'worker'. Admittedly, the situation was forced upon the court, given the lack of a definition in the Treaty. Nevertheless, the consequences of the broad definition have facilitated the economic migration of low skilled workers from poor countries to rich, creating attendant pressures on public services. The influx of cheap, primarily unskilled, labour has driven down wages, and affected employment opportunities for nationals in recipient countries. These arguments have been articulated by nations such as Britain, who argue that restrictive EU laws prevent it from limiting low skilled migration, thought they are clearly in favour of highly skilled immigrants.

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