

S.S. LAW P.A.

THE SOCIAL SECURITY LAW PRACTITIONERS ASSOCIATION

Social Security Law Practitioners Association Minutes of meeting held on 11th January 2006

Present.

Desmond Rutledge	Garden Court Chambers (Chair)
Neil Bateman	Welfare Rights Writer/Trainer
Finola O'Neill	Wandsworth and Merton Law Centre
Joanna Newth	Mary Ward Legal Centre
Reza Choudhury	Mary Ward Legal Centre
Emma Baldwin	FRU
Nadine Clarkson	Ole Hansen & Partners
Andy Campbell	West Kent Social Services
Yikka Adedgi	6 KBW Chambers
Adrian Marshall Williams	Garden Court Chambers
Alban Hawksworth	Age Concern England
Khalid Rashid	LB of Redbridge
James Willam	FRU
Darins Azami	FRU
Katherine Dunseath	FRU
Naina Patel	FRU & Blackstone Chambers
Gareth Mitchell	Pierce Glynn
Adam Hundt	Pierce Glynn
Duran Seddon	Garden Court Chambers
Sue Willman	Pierce Glynn Solicitors
Adrian Berry	6 KBW Chambers
Ranjiv Khubber	6 KBW Chambers
Beth Lakhani	CPAG
Sarah Clarke	CPAG
Stefan Kezyzewski	TJSK Ltd
Vivien Gambling	Hodge Jones & Allen
Polly Glynn	Pierce Glynn Solicitors

Apologies

Jo Silcox Hertfordshire Money Advice

Guest Speaker: Robin White **Subject: The "Right to Reside" Test**

The following minutes can only give a rough outline of some of the areas covered by Professor White's presentation. Members are referred to the article in the Journal of Social Security Law by Robin White on '*Residence, Benefit Entitlement and Community Law*' (2005) 12 JSSL 10-25 for a fully argued presentation of the issues.

The Government takes the view that social assistance is already provided to EU citizens by their own member states. This is too simplistic and does not

take account of developments in Community Law. The present position can be summarised as follows:

It is true that the EC Treaty gives more rights to the economically active compared to the economically inactive. But there is a second line of case law which essentially says that as a Citizen of the Union, nationals of the 27 states should be treated on a non-discriminatory basis. But does this have the same consequences for EU nationals as other nationals? Is there any difference between the above and 3rd country citizens who are settled in the member state? There is some concern that the law seeks to draw a distinction between these nationals and EU nationals.

The groups of nationals with long term residence are:

1. UK nationals;
2. Citizens of EU;
3. 3rd country nationals with settled status.

Free movement workers' rules apply under the EEA agreement (but EEA national are not necessarily citizens of EU Union, e.g. Norway). Only 25 member states are Citizens of the Union.

Prior to the creation of the European Union there were association agreements. These gave self-employed access to EU states. [Note UK registration scheme for A8 nationals does not apply to self-employed workers.]

Under the recent arrangements for Enlargement, Member States are allowed to apply their own laws for 5 years. The process of Enlargement goes through the following stages: -

STAGE 1

Commission report – immigration patterns – member states asked to define their position.

STAGE 2

This continues for 3 years: 2006-2009 – Member states still applying national law should move over to the second phase - when EU law applies.

STATE 3

In 2009 member states who are still applying national rules to move over to the final phrase.

STATE 4

2010 EU law applies.

The UK Government was going to allow full access to Accession State nationals but appears to have lost its nerve at the last moment - following stories in the press that thousands of A8 nationals would flood the UK. Legislation was passed days before Accession due to come into force on 1 May 2004. The DWP website suggests that the UK has extended free movement rights to A8 nationals. It has not. The UK is applying national measures.

The Treaty has allowed migration under controlled conditions within the derogation. For example, a residence test which requires that a genuine link be established is acceptable.¹ But the UK is getting into dangerous territory by continuing to give a special status to the Common Travel Area (CTA).

Under the legislation introduced by the UK, A8 nationals are required to register their employment after 1 month.² See Annex to the Treaty of Accession and the paragraphs under Freedom of Movement for Persons (eg for Hungary).

“Hungarian nationals legally working in a present Member State at the date of accession and admitted to the labour market of that Member State for an uninterrupted period of 12 months or longer will enjoy access to the labour market of that Member State but not to the labour market of other Member States applying national measures,” (para. 2).

Hungarian nationals admitted to the labour market of a present Member State following accession for an uninterrupted period of 12 months or longer shall also enjoy the same rights.”

Once the A8 national has worked interim period of 12 months they will enjoy access to the labour market and be covered by Community Law. But note;

“The Hungarian nationals mentioned in the second and third subparagraphs above shall cease to enjoy the rights contained in those subparagraphs if they voluntarily leave the labour market of the present Member State in question.”

Under EU law, an EEA national has the right to enter the UK. Right to reside will turn on the purpose for which they have entered.

If someone is engaged in economic activity they get a significant bundle of rights. See the new Residence Directive (Citizen Directive) 2004/38.³ [Note

¹ See Mr Commissioner Mesher in *C/S/2580/2004*, subsequently upheld in [2006] EWCA Civ 376.

² Accession (Immigration and Worker Registration) Regulations 2004 (SI 121) which also amends the Immigration (European Economic Area) Regulations 2000 (SI 2326), which defines which EEA nationals are entitled to reside in the UK without the requirement for leave to enter or remain.

³ “*Directive 2004/38 OJ 2004 L158/77 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 Arts 10 & 11 Reg 1612/68 & repealing Drs 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96). Note it is 38 not 58, this is a typing error not found in the version for other languages.

the new Directive gives Unions citizens a right of residence in another Member State for a period of up to three months but s/he can be excluded from entitlement to social assistance during this initial period by national law.]

A Tribunal of Commissioners⁴ has been convened to consider the "Right to Reside" test ("R to R") and it will need to consider the following issues: -

1. Does R to R apply to all claimants or against A8s only?
2. Is it discrimination on ground of nationality or EU law & ECtHR?
3. Do all citizens of EU with right of entry also have right to reside?
4. Does a citizen of EU who worked in UK but now suffers from mental illness now have right to reside in UK?
5. Do words "treated as" mean a person who is "actually habitual resident" is not caught by test.

The concept of citizenship was first introduced on 1 November 1993 but represented a political aspiration and did not have any real legal significance. From an unpromising beginning, real constitutional substance has subsequently been given to the concept of citizenship.

"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 with the scope of rationae materiae of the Treaty the same treatment in law irrespective of their nationality, subject to exceptions as are expressly provided for,"⁵

"...Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States".⁶

Chen⁷

Baby born in Northern Ireland – returned to GB – Parents said we need to stay in UK to look after baby – Baby exercising EU right.

Grzelczyk⁸

A French national went to Belgium to study. Directive dealing with Students. When started course – realistic expectation of having money. Grant/money ran out – G not entitled to claim assistance - not a worker – no residence permit – but did have a right to access financial help as a Citizen of the Union.

⁴ CIS/2559/2005; CIS/2680/2005; CIS/2920/2005. The case was heard on 12 – 13 January 2006, 23 – 24 February 2006 and 29 March 2006

⁵ Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31)

⁶ *Baumbast and R v Secretary of State for the Home Department* Case C-413/99 (para. 81)

⁷ Case C-200/02 *Chen*,

⁸ Case C-184/99 *Grzelczyk* [2001] ECR I-6193

Collins⁹

HRT not inherently unlawful. Had right to equal treatment. HRT had to be a clear test known in advance – genuine link to UK.

Trojani¹⁰

T was someone who had fallen on hard times – not worker – claimed equivalent of IS. Court more circumspect – open to Member State to treat as someone who can be removed. T had been there without anyone raising any concerns about the legality of his presence. T did not have a R-to-R. However, his presence was lawful – this was enough to bring citizenship rights into play.

Bidar¹¹

Citizenship entitled to equal treatment. Once there is a genuine link EU citizenship flowed from this. UK government tried to argue that B should be taken care of in his own member state. The Court in effect held that if you allow someone to stay – you must take responsibility for them – treat equally - basic social solidarity.

Case law shows a constant trend – court adding rather than taking away.

1. Does R-to-R apply to *all* claimants or against A8s only?

Motivation to bring in registration scheme was to deal with access to benefit – the issue was seen as specific to A8 nationals. But wording in R-to-R test for benefits is not limited to A8 nationals – it applies to all EEAs.

2. Is it discrimination on the ground of nationality or EU law & ECHR?

Put in place for purpose – transitional period – This is why UK put in national measures. *R (H & D) v SSWP* EWHC 1097 (Admin) gives some support for the view that the measures are not discriminatory per se – regime falls within terms of derogation. But limited authority - EU law not argued. But may be enough to give some guidance to tribunals.

If the scheme is not discriminatory what about the application of the R-to-R test? Is the strict application of the test a disproportionate response? In *Grzelczyk*, G had run out of funds – He had no R to R – but the Court felt the complete denial of assistance was a disproportionate response. Accordingly there may be specific cases and specific circumstances where the operation of the RtoR test would be disproportionate to cut off without a penny.

⁹ *Collins v Secretary of State for Work and Pensions* (Case C-138/02).

¹⁰ *Trojani v Centre public d'aide sociale de Bruxelles* (Case C-456/02)

¹¹ *The Queen on the application of Dany Bidar v London Borough of Ealing and the Secretary of State for Education* (Case C-209/03).

3. Does right entry = right to reside?

Distinction between right to visit – e.g. holiday maker – and right to reside to access a service - resident student – 6 months - R-to-R for duration of course.

4. Worked but suffers misfortune

Greek national – (EU national) – If EU national in UK for 9 months on an open-ended contract and then becomes ill - Would retain the status of a worker – on entry he was entitled to a residence permit lasting at least 5 yrs – therefore sickness has no effect on RtoR. Should be treated in the same way as UK national, e.g. sick leave - entitled to same benefits as UK national.

Hungarian (A8 national) – If A8 national becomes ill after nine months - are they still employed? – a registered worker only 'employed' when working. The A8 is not a worker under EU Law. Governed by UK law. But A8 national's presence is lawful under national law.

Application of R-to-R may be a disproportionate response – must leave at the point you lose job. This argument appears to be a step beyond *Grzelczyk* but within *Trojani*. If you say A8 can stay – then s/he deserves to be treated equally.

5 The "treated as" argument.

This relies on the unexpected consequence of the way legislation has been drafted. At first brush, argument does not seem very convincing but will need to be considered by Commissioners.

Q & A Session

Q: Adrian Berry – 6 KBW - In *Bidar* – what is the legal basis for the reference to B's presence in UK "not objected to" - by whom?

A: No one at the Home Office had made any decision. EEA national has the right to cross blue line at airport – any immigration problems have to be unravelled afterwards. If the EEA national is doing something in some way related to work etc governed by Treaty. Other activities less clear – Article 18 – does it have an independent existence? No one objected to B's entering the education system. There was nothing to trigger an immigration decision on B's presence in UK.

Q: Sara Clarke CPAG - Croup worse affect – single women who stop work – pregnancy – EU does not protect economic inactivity.

A: Import of *Collins* decision – have to show genuine link – also applied to Income Support - *Bidar* – 3 years doing secondary education. Residence tests could be justified but not complete bar due to immigration status.

Q: Nadine Clarkson - Ole Hansan - Dependents of work-seekers – can siblings acquire right to reside as dependent of sister who is working or seeking work?

A: Sibling not a dependent - Worker status is an indivisible right – Article 39. In order to give practical effect – let potential worker come for 3 months to look for work. In *Antonissen*¹² Government wanted to get rid of A – but A claimed he was about to get a job – Court ruled that if there is an evidential basis – can retain status of a work seeker beyond 3 months.

Q: Duran Seddon - A8 nationals appear to lose RtoR on losing job. The Minister, Beverley Hughes MP said¹³ that if an A8 national became unemployed they would not be deported.¹⁴ Is that a statement of policy?

A: Would need to check whether meets the *Pepper and Hart* criteria – if A8 is here lawfully then test for removal according to *Remillen*¹⁵ – is there a legal requirement to leave?

Minutes prepared by
Desmond Rutledge
7 April 2006

¹² Case C-292/80 [1991] ECR 1-745

¹³ House of Commons Home Affairs Committee, 9th March 2004:

¹⁴ Asked whether a non self-financing, unemployed A8 national would be 'deported' Beverley Hughes MP stated "Not unless they are causing a nuisance or committing offences. If they are self-sufficient and they then become not self-sufficient because their money runs out, they will either have to go home or they can, if they have got any resources, start a business and become self-employed but they cannot, as a work seeking person who has not got work, access support from the state". She later added "It really does not make any sense to mobilise any special removal process because we could not implement it...".

¹⁵ *Remillen v Secretary of State for Social Security and Anor* (R(IS) 13/98)