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RETAINING EU WORKER STATUS – JUDICIAL APPROACHES

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Abstract
Under certain circumstances, EU law provides for the possibility of retaining worker status even if the employment relationship has come to an end. Although relatively unexplored, this issue become relevant in times of economic crisis when national governments are scrutinizing very closely the entitlement of EU nationals to reside in their host states because retention of EU worker status has consequences in terms of the worker's capacity to remain in the host Member State and to access equal treatment in the same way as national workers. This contribution focuses on retention of EU worker status in view of the Court's case law and the legal provisions applicable. The recognition that an employment relationship may produce certain effects even after it has terminated stems from the idea that EU nationals may not be willing to exercise free movement rights as workers should they not be entitled to protection in cases of involuntary unemployment. Directive 2004/38 has introduced clear limits to the possibility of retaining worker status. It requires the existence of an employment relationship of a certain duration, involuntary unemployment and registration with an employment office as evidence of the EU worker's intention to resume employment.

Key words
EU workers, worker status, involuntary unemployment, Court of Justice, Directive 2004/38

1. Introduction

Among the array of rights enjoyed by EU workers is the possibility to retain worker status even if the employment relationship has come to an end. This is a relatively unexplored aspect of free movement law but in times of economic crisis when there is a move towards the stricter scrutiny of EU workers' rights at the national level, this issue becomes relevant. Retention of worker status has consequences in terms of the worker's capacity to remain in the host Member State and to access equal treatment in the same way as national workers. This contribution focuses on this particular aspect of the legal treatment of EU workers in view of the Court's case law and the legal provisions applicable.

2. The relevance of EU worker status

Free movement of persons is one of the four fundamental freedoms on which the European Union is built. The Union's economic origins and its fundamental aim of establishing an internal market explain why initially 'persons' was un-

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derstood to mean persons who were economically active, that is, workers and the self-employed. Enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU), the free movement of workers goes back to the Treaty of Rome of 1957 and forms one of the backbones of the internal market. For a considerable amount of time, due to their intimate connection with the market, workers were seen as a privileged category of Community and later on, Union law, since they were entitled to benefit from free movement rights in opposition to economically inactive nationals who had to rely on traditional arrangements of international law when exercising mobility.[1]

The rights awarded to workers by the Treaty, now listed in Article 45 TFEU, include the right to look for a job in another EU country, to work in another Member State and to reside there for that purpose, and to stay there even after employment has finished. In addition, EU workers enjoy equal treatment with nationals regarding access to employment, working conditions and all other social and tax advantages. One of the main preoccupations in this field of law has been the abolition of all obstacles that may impinge upon the exercise of free movement rights, as attested by various pieces of secondary legislation.[2] The most recent and important measure adopted is Directive 2004/38 on the right of Union citizens and their family members to move and reside freely within the territory of the Member States that had the stated aim of simplifying the legal framework developed along the years in the field of free movement of persons. At the same time, the Directive takes stock of the introduction of European Union citizenship by the Maastricht Treaty and the case law of the Court of Justice regarding the rights of workers and citizens. The Court's case law has played an important part in the development of the rights of EU workers. By acknowledging the fundamental character of the free movement rules, the Court has interpreted the concept of EU worker in a broad manner and, generally, made it easier to move and take up work in another Member State. The introduction of the legal status of European Union citizenship in 1993, has not changed the privileged position enjoyed by workers and their family members, as they continue to enjoy a stronger position in compari-

1 R. Cholewinski (2009) Free Movement of Workers and Residence Rights, in: P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishing, pp. 61-68.

2 For a description of these instruments see, E. Guild (2009) Free Movement of Workers: From Third Country National to Citizen of the Union, in: P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishing, pp. 25-29.

son with the general category of EU citizens, and sometimes even nationals of the host Member State.[3]

3. Retention of worker status – the legal framework

The possibility to retain worker status upon cessation of employment is based on Article 45 TFEU, according to which among the rights workers enjoy is that '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'. The Treaty of Lisbon has not changed the substance of the rights enjoyed by workers moving to another Member State, as indicated by the reading of former Articles 39 EC and 48 EEC, which both provided for the right to remain in the host Member State after the employment relationship had ended. As the Treaty makes it clear, the right has to be implemented via secondary legislation. Currently, Directive 2004/38 sets out in secondary legislation the right of a Union citizen to reside in another Member State, which finds expression in primary law in the fundamental freedoms and the rules on European Union citizenship. In interpreting the rights provided for in Directive 2004/38, *Recital 3* and the therein-stated objectives of the instrument should be kept in mind:

> '*Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.*'

Also relevant are the abandonment of the residence permit system in as far as EU citizens exercising free movement rights are concerned, and the introduction of the concept of permanent residence which is acquired after five years of continuous residence (Article 16 of Directive 2004/38).

Article 7 of Directive 2004/38 deals with the right of residence for longer than 3 months and is applicable to all categories of EU citizens regardless of whether or not they are involved in an economic activity. The right remains sub-

3 This is particularly true in case of reverse discrimination, that is, the situation where nationals of the host Member State are treated less favorably than EU citizens deriving rights from EU law. Family reunification is a most problematic area. See, K. Groenendijk (2006) Family Reunification as a Right under Community Law, *European Journal of Migration and Law* 8, pp. 215-230; H. Verschueren (2009) Reverse Discrimination: An Unsolvable Problem?, in: P. Minderhoud and N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Nijmegen: Wolf Legal Publishing, pp. 99-118.

ject to several conditions in the case of students and economically inactive citizens, who must show sufficient resources and comprehensive sickness insurance. Workers do not need to meet other conditions, except that of being an EU worker. Paragraph 3 of Article 7 deals with the situation in which the status of worker and therefore the right of residence for longer than 3 months is maintained although employment has ceased. It reads as follows:

> *Article 7:*
> *[…]*
> *3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:*
> *(a) he/she is temporarily unable to work as the result of an illness or accident;*
> *(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*
> *(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;*
> *(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.*

Prior to the adoption of Directive 2004/38, this issue was regulated by Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers and their families. Together with Regulation 1612/68, the Directive implemented the Treaty provisions on free movement of workers.[4] Article 1 declared that the scope of Directive 68/360 was to abolish restrictions on the movement and residence of nationals of said States and of members of their families to whom Regulation 1612/68 applied.[5] Article 7 of the Directive dealt with the possibility of withdrawing a residence permit from a former worker, which in the general context of the instrument should be interpreted as a restriction on the exercise of the worker's right to free movement.

4 Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community is now replaced by Regulation 492/2011; Directive 68/360 EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families has been abrogated by Directive 2004/38.

5 Article 1 of Directive 68/360.

According to Article 6 of the same Directive, the residence permit had to be valid for at least five years from the date of issue and automatically renewable.[6] According to Article 7 of Directive 68/360, the right of residence of a person who became involuntarily unemployed enjoyed a certain level of protection. If involuntary unemployment occurred during the first five years of residence, the host State was not allowed to withdraw the residence permit solely on grounds of involuntary unemployment - Article 7(1). The host State was allowed to restrict the right of residence upon the first renewal of the residence permit, if involuntary unemployment occurred or existed at that moment. Even in this scenario, the right of residence had to be awarded for a max of 12 months, if the person had been involuntarily unemployed for the last 12 consecutive months - Article 7(2). *Per a contrario,* Article 7(2) suggests that if involuntary unemployment occurred or existed at the time that the residence permit was renewed for a second time, the host State could no longer restrict residence. In addition, if unemployment did not occur during the last 12 consecutive months but at some other point during the first five years, the first renewal of the residence permit could not limit the duration for which the second residence permit was issued.

Thus, prior to the adoption of Directive 2004/38, the Member States had some scope for restricting the residence of an involuntarily unemployed person, but that scope was limited to the first renewal of the residence permit. They nevertheless retained the power to end residence in case the person no longer fulfilled the additional conditions of being involuntary unemployment and duly registered with the employment office. Moreover, it was generally understood that a voluntarily unemployed national may have his residence permit revoked.[7] This interpretation of Article 7 of Directive 68/360 takes into account the scope of the measure, which was the abolition of restrictions on the exercise of the right to free movement for workers and the *effect utile* of the provisions on the free movement of workers, more generally. The possibility of ending the right of residence because of involuntary unemployment is a measure that could deter EU nationals from trying to make use of the right to free movement as workers.

During the negotiation process of Directive 2004/38, some Member States wished to limit the possibility of retaining worker status in case of unemployment. In its original proposal, the Commission argued that Article 7(3)

6 Article 6(1)(b) of Directive 68/360

7 C. Barnard (2004) *The Substantive Law of the EU – The Four Freedoms*, Oxford: Oxford University Press, p. 270.

> '*broadly takes over certain provisions of Directive 68/360 with clarifications and incorporates Court of Justice case law regarding retention of worker status where the worker is no longer engaged in any employed or self-employed activity*'.[8]

During the negotiations in the Council, Denmark and the Netherlands have proposed the introduction of a deadline by which the person in involuntary unemployment ceased to be entitled to residence.[9] The 2003 amended version of the Commission's proposal did not contain changes to the initial text (the same requirements applied: involuntary unemployment and registration as a jobseeker with the relevant employment office).[10] However, the final version of Article 7(3)(b) expressly states that the person must have been employed for at least one year before the involuntary unemployment takes place in order to retain worker status. Article 7/3/c has also been changed during the negotiation process in order to make it clear that in case of employment for less than one year or expiration of a short-term contract for less than one year, the retention of worker status is limited in time. *By implication*, it results that in case of Article 7(3)(b), the legislator did not wish to limit the retention of worker status. The joint reading of paragraphs 3(b) and 3(c) of Article 7 indicates that a difference in treatment was envisaged that sets the completion of at least one year of employment as a threshold. Once the threshold and the rest of the conditions are met, the retention of worker status cannot be limited.

4. The Court's case law

Through its jurisprudence, the Court of Justice has played an important part in ensuring that the rights of EU workers are properly and fully implemented at the national level. Although, retention of worker status has not been one of the most litigated provisions relating to the free movement of workers, it has been examined by the Court in relation to claims to benefits and equal treatment with nationals of the host State. In such cases, holding EU worker status becomes important as it reduces substantially the capacity of the host Member State to deny benefits or to reserve them only for own nationals. This remains the case under the legal regime introduced by Directive 2004/38 since based on Article 24(2) of the Directive workers and persons who retain such status may not be excluded from social assistance as opposed to economically inactive EU citi-

8 Com (2001) 257 final, p. 12.
9 Council Doc 10572/02 p 22 and Council Doc 6147/03, p. 19.
10 Com (2003) 199 final.

zens who may have to wait until acquiring permanent residence in the host state before being entitled to equal treatment on the basis of EU law.[11]

The Court's position on retention of worker status is well summarized by its findings in the *Martinez Sala* case.[12] The applicant, a Spanish national, resident in Germany for about 25 years had a very patchy employment history with interruptions due to unemployment periods. She applied for a child benefit which was refused due to her lack of a residence permit and/or entitlement and lack of worker status. Although, the Court decided the case on the basis of the applicant's EU citizenship status, regarding her possible worker status it held that

> '*once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker*'.[13]

This position is explained by the definition of the concept of EU worker according to which, the essential characteristic of a worker is that he performs services for and under the direction of another in return for remuneration during a certain period of time.[14] Equally important, in one of its earliest cases on workers, the Court had acknowledged that the concept had a Community meaning and that the Treaty and its implementing legislation

> '*did not intend to restrict protection only to the worker in employment but tend logically to protect also the worker who, having left his job, is capable of taking another*'.[15]

The idea that worker status may survive the end of an employment relationship has been upheld in the Court's case law. In *Lair*,[16] the applicant, a bank clerk, was a French national residing in Germany who had a mixed employment record, consisting of periods of unemployment, retraining or brief employment.

11 P. Minderhoud (2013) Access to social assistance benefits for EU citizens in another Member State, in: *Online Journal of Free Movement of Workers within the European Union*, no. 6, pp. 26-33.
12 Case C-85/96 *Martinez Sala* [1998] ERC I-2691.
13 Case C-85/96, para 32.
14 Case C- C 66/85 *Lawrie-Blum* [1986] ECR 2121.
15 Case 75/63 *Hoekstra* (Unger). In this case, the Court had to interpret the meaning of the concept of 'wage-earner or assimilated worker' for the purposes of Regulation No3 on social security for migrant workers, which was implementing Article 48 EEC (now Article 45 TFEU).
16 Case 39/86 *Lair* [1998] ECR I-3116.

After embarking upon university studies in Roman and Germanic languages, Ms Lair applied for maintenance and study grants but was denied them due to her lack of worker status. The Court argued that the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship[17] and that persons who have been engaged in an effective and genuine activity as an employed person but who are no longer employed are nevertheless considered to be workers under certain provisions of Community law.[18] However, the Court imposed an important limitation in respect of the retention of worker status in as much as it required the existence of some continuity between the former employment and the course of study

> '*unless the person has become involuntarily unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field*'.[19]

This approach has been confirmed in later cases, such as *Raulin*[20] or *Ninni-Orasche*[21] and is now codified by Directive 2004/38 in Article 7(3)(d).

Another category of cases examined by the Court, concerns former frontier workers[22] who claimed benefits from their former state of employment relying on the preservation of worker status. In cases such as *Meints*[23] or *Leclere,*[24] the Court has decided that retention of worker status operates only regarding benefits relating to the prior existence of an employment relationship and to the applicant's objective status as worker. (Former) Article 48 EEC and (former) Regulation 1612/68 protect the worker against any discrimination affecting rights acquired during the former employment relationship but benefits relating to events occurring after the end of that relationship are excluded.[25]

17 *Lair*, para 31.
18 *Lair*, para 33.
19 *Lair*, para 36.
20 Case C-357/89 *Raulin* [1992] ECR I-1027.
21 Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.
22 Under EU law, a frontier worker can be defined as someone who lives in one Member State and works in another, returning home at least once a week.
23 Case C-57/96 *Meints* [1997] ECR 1-6689. The applicant was a German national who had worked in agriculture in the Netherlands but became involuntarily unemployed. In the Netherlands, he applied for a benefit intended to compensate persons in his situation. His claim was rejected on grounds that he was not resident.
24 Case C-43/99 *Leclere* [2001] ECR I-4265. The applicant was a former frontier worker residing in Luxembourg. As a result of an accident at work he was receiving an invalidity pension from Luxembourg, and he never returned to work. He claimed child benefits in Luxembourg for his child who had been born after he stopped working.
25 *Leclere*, para 59.

While it can be generally argued that migrant workers are granted certain rights linked to their status of worker even when they are no longer in an employment relationship, the Court's case law is silent on whether temporal limitations can be applied to the retention of worker status. In *Collins*[26] the Court has limited itself to arguing that there is no retention of worker status in case of an absence of 17 years from the host Member State as '*no link can be established between the activity and the search for another job more than 17 years after it came to an end*'.[27] It can be inferred from *Collins* that as long as the link to which the Court refers can be shown to exist, worker status may be retained. This interpretation would be in line with the manner in which the Court has interpreted the right of first-time job-seekers to remain in the host Member State and look for work. In *Antonissen*[28] the Court was asked to decide on the right of the host Member State to impose limits as to how long a person may remain there in search of a job. It decided that six months were an appropriate period of time, after which the host State may require the person to leave. However, if the person could show that he was still looking for employment and had genuine chances of being engaged, he cannot be required to leave the territory of the host state.[29] It can be argued that the condition of being duly registered with the employment office in order to retain worker status on the basis of Article 7(3)(b) of Directive 2004/38 captures well the Court's overall philosophy that retention of worker status is generally related with the person's willingness to continue to look for a job, formulated as early as the *Hoekstra* case and therefore, continue to have links with the host State's labour market.

Under the legal regime of Directive 2004/38, being involuntarily unemployed remains one of the main conditions for enjoying the retention of worker status. This means that in practice, the difference between voluntary and involuntary unemployment will be extremely relevant. As discussed previously, in case a person stops working in order to engage in university studies that have no connection with the former occupation, the Court has considered that such a person should not retain worker status and the advantages associated with it. The idea that voluntary unemployment does not deserve the same level of protection fits well with the Union's economic goals and the worker's privileged position in that system. In *Ninni-Orasche*, the Court of Justice has nuanced its position as to what constitutes involuntary unemployment by arguing that a person on a fixed-term contract may nevertheless be considered involuntarily un-

26 Case C-138/02 *Collins* [2004] ECR I-2703.
27 *Collins*, para 29.
28 Case C-292/89 *Antonissen* [1991] ECR I-745; see also case C-258/05 *Ioannidis* [2005] ECR I-8275.
29 *Antonissen*, para 21.

employed at the end of that contract, despite its essentially temporary nature.[30] The following circumstances were judged relevant: (a) practices relevant in the sector of economic activity; (b) the chances of finding employment in the sector which is not fixed-term; (c) whether there is an interest in entering into only a fixed term employment relationship or (d) whether there is a possibility of renewing the contract of employment. The Court acknowledged that labour market conditions play a considerable part in the type of contract a person may be awarded in specific sectors and equally, that the worker may not have any bargaining power over the type and duration of contact he may conclude. Directive 2004/38 takes an even stricter stand as in cases of employment for less than one year the retention of worker status is limited in time by Article 7(3)(c).

5. Conclusions

Retention of worker status upon involuntary unemployment has important consequences in terms of the protection an EU worker is entitled to in his host State. The recognition that an employment relationship may produce certain effects even after it has terminated stems from the idea that EU nationals may not be willing to exercise free movement rights as workers should they not be entitled to protection in cases of involuntary unemployment. Bearing in mind that the Union's objective is to ensure that all obstacles to the exercise of the free movement rights of workers are removed, affording protection to this category of persons is justifiable. Moreover, the Court has explained the privileged position of workers in contrast to first time-jobseekers or economically inactive citizens as relating to them having participated in the employment market of a Member State. As such,

> '*they have in principle established a sufficient link of integration with the society of that state, allowing them to benefit from the principle of equal treatment, as compared with respectively, national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant workers and frontier workers also contribute to the financing of the social policies of that State.*'[31]

Directive 2004/38 has introduced clear limits to the possibility of retaining worker status. It requires the existence of an employment relationship of at least one year, involuntary unemployment and registration with an employment

30 Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187 para 39.
31 Case C-379/11 *Caves Krier Frères Sàrl* [2012].

office as evidence of the EU worker's intention to resume employment. In such cases, retention of worker status cannot be limited in time. Employment relationships shorter than one year receive less protection since worker status will be retained for no less than six months. The Court's case law reviewed in this contribution has not revealed any grounds to suggest that time limits may be imposed beyond those expressly mentioned by Article 7(3) of Directive 2004/38. The jurisprudence suggests that the involuntary character of the unemployment coupled with the person's willingness to find another job are the main factors that explain why EU law allows for the retention of worker status in the first place.