Statewatch Analysis

The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms

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Introduction

On 18 November, the UK delegation to the European Union circulated a paper for discussion at the next JHA Council, scheduled for 27-28 November. The paper includes draft conclusions on EU free movement law, which governs the right of free movement for EU citizens who wish to move and reside in other Member States.

The draft conclusions constitute an attack on the rule of law and the fundamental freedom of EU citizens and their family members to move freely within the Community. They indicate an intention to:

- ignore a recent important ruling of the Court of Justice as well as many prior rulings of the Court;
- attempt to dictate to the Court how to interpret EC legislation;
- amend or re-interpret EC legislation at the dictat of interior ministries, without applying any form of legislative process; and
- dictate to the Commission how to perform its independent task as guardian of EC law.

Background

The EU right of free movement of persons also extends to citizens of Norway, Iceland and Liechtenstein, because these states are parties to an agreement with the EC called the 'European Economic Area' (EEA). (This explains why the UK paper refers to 'EEA nationals', which is a term from British immigration law). The right also extends to citizens of Switzerland.

Furthermore, the right extends to family members of EU citizens (and to the family members of the citizens of the associated states mentioned above), regardless of the nationality of the family members. So 'third-country nationals' can benefit from the right, to the extent that they are family members of EU citizens who move between different Member States.

But EU free movement law, including the family reunion rules, does *not* generally apply to citizens who are not exercising free movement rights – ie it does not apply

to UK citizens residing in the UK. The principal exception to this is that EU free movement law, including the family reunion rules, *does* apply to people who leave their own Member State and come back – ie UK citizens who spend some time in Ireland or France and then return to the UK.

The concern of JHA ministers about EU free movement law has until now focused upon the EU Court of Justice judgment in a case called *Metock*, decided in July 2008. In that judgment, the Court ruled that third-country national family members did not have to be legally resident in a Member State before they could enjoy the family reunion rights established by EC free movement legislation. In fact, the Court made it clear that third-country national family members of EU citizens could enjoy free movement rights due to their family relationship with an EU citizen even if those family members had been irregular (ie unauthorised or 'illegal') residents of a Member State before establishing, or in some cases resuming, their family relationship with that EU citizen.

The *Metock* judgment expressly overturned the Court's *Akrich* judgment of 2003, in which the Court had appeared to suggest that there *was* a requirement of prior lawful residence in a Member State in order for third-country national family members of EU citizens to enjoy free movement rights. But the *Akrich* judgment had in turn apparently implicitly overruled prior cases in which it had been assumed, or even expressly stated by the Court of Justice, that there could be *no* such requirement of prior lawful residence of a third-country national family member of an EU citizen as a condition for enjoying free movement rights (see in particular *MRAX* and *Carpenter*). So *Metock* was merely returning to the previous *status quo*.

On the basis of the *Akrich* judgment, several Member States, most notably the UK, Ireland, Denmark and the Netherlands, had introduced rules requiring prior lawful residence of third-country national family members of an EU citizen in a Member State before those persons could enjoy free movement rights. The obvious implication of *Metock* is that those Member States will now have to rescind these rules, and return to the more liberal rules which applied prior to the *Akrich* judgment. Those Member States, apparently joined by others, are reluctant to do this because of concerns about irregular immigration.

At the September JHA Council, the *Metock* case was discussed and JHA ministers agreed to wait for a Commission report on the 2004 Directive on the free movement of EU citizens and their family members. The Commission has announced that this report will be released imminently, on December 10th. The report will, among other things, address the question of what Member States can do to stop 'abuse' of free movement rules, including 'marriages of convenience'. The 2004 Directive expressly allows Member States to address these issues, although the case law of the Court of Justice (even in the *Akrich* judgment) takes a very narrow view of the concept of 'abuse' of free movement law. In *Akrich*, the Court of Justice said that there was not an abuse where the EU citizen was genuinely exercising free movement rights in another Member State, and the family relationship with the third-country national was genuine, even though the EU citizen in that case had admittedly decided to move to another Member State only in order to avoid the expulsion of her third-country national spouse under UK immigration law.

It should be noted that, as the Court of Justice pointed out in its *Metock* judgment, the 2004 free movement Directive does not establish any possibility for Member

States to insist on any requirement of prior lawful residence before third-country national family members of EU citizens can rely on the EU free movement rules.

UK proposal for conclusions

The first draft conclusion by the UK states that the Member States 'reiterate their commitment to protecting this right [of free movement] from being misused as a route for illegal immigration into the EU and will take forward cooperation to this end'. This gives the impression that the judgment in *Metock* will simply be circumvented or ignored by Member States. But Member States are obliged to apply EC legislation as interpreted by the Court of Justice, and it is not possible to alter the EC legislation on this issue without a proper legislative procedure – a proposal from the Commission, qualified majority voting in the Council, and co-decision with the European Parliament.

The second draft conclusion states that 'Member States will continue to take a robust approach to those who break the laws of their host country by expelling persons involved in' various serious crimes. This issue is separate from the *Metock* judgment, which dealt only with the issue of the status of third-country national family members of EU citizens who were not lawfully resident in a Member State. Rather this conclusion applies also to EU citizens and to all of their family members.

Although the EC legislation does provide for expulsion of individuals who 'represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society', the draft conclusion ignores two key points. First of all, the free movement Directive provides that 'previous criminal convictions shall not in themselves' constitute grounds for expulsion, and that 'justifications which are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted'. Member States must also take into account factors including the degree of integration of such persons on their territory. These safeguards – which consolidate prior legislation dating from 1964, as interpreted by the Court of Justice since the 1970s – are ignored by the draft conclusion, which instead suggests an agreement to expel all persons convicted of particular crimes automatically.

Secondly, the second draft conclusion ignores entirely the specific new protections against expulsion provided for in the 2004 free movement directive for some groups of EU citizens and their family members. Persons with a permanent residence right (after residing in a Member State for over five years) can only be expelled 'on *serious* grounds of public policy and public security', and persons who have been resident for more than ten years, or who are minors, can only be expelled on '*imperative* grounds of public security' (and not on grounds of public policy).

The third draft conclusion asserts that Member States:

> *"should also be able to consider that the cumulative damage caused by continuous low-level offending can amount to a sufficiently serious threat to public policy*"

This is a direct and flagrant breach of the general test for establishing a 'sufficiently serious threat' as set out in the free movement Directive and the case law, and of the specific safeguards mentioned above.

Next, the fourth draft conclusion relates to the interpretation of the safeguards for long-staying residents. It asserts that 'Member States do not consider that time spent in prison custody in a host country contributes towards the period of residence' which confers greater protection against expulsion. While there are arguments for this interpretation, there are also arguments against it – and it is up to the Court of Justice, not national interior ministers, to give a definitive interpretation of the Directive. (It is unfortunate that the British courts, which have already faced questions on this issue, have not sent questions to the Court about it).

The fifth draft conclusion states that 'Members [*sic*] States will step up their practical cooperation to tackle sham marriages, fraudulent family relationship claims and illegal immigration. The Council also commits to ensuring fast and effective exchange of criminal record information, so that a person's track record of offending in other Member States can be taken fully into account when considering whether or not their free movement should be restricted.' The first point again raises the question of whether Member States intend simply to ignore their obligations as set out the *Metock* judgment, as regards EU citizens' family members who have not been previously lawfully resident in a Member State. Also, what is meant by 'practical cooperation'? Is the intention to share information on particular cases of alleged activities informally between national ministries? Obviously this raises questions of data protection rights and broader procedural rights – individuals have the right to know what information is being shared in such cases so that they can contest its accuracy and relevance. The same applies as regards criminal records exchange. While this is provided for in both EU criminal law measures and the EC free movement directive, there is no adequate provision in these measures for data protection rights or, for instance, for the application of national rules on 'spent convictions', amnesties, et al.

Finally, the Council asks the Commission to adjust its upcoming communication on the application of the Directive to ensure that it facilitates the Council's security-oriented agenda. But the Commission is an independent body whose task is to ensure the correct application of Community law – not a secretariat created to service the agenda of national interior ministries.

Sources

UK delegation comments on free movement – Council doc. 15903/08:
http://www.statewatch.org/news/2008/nov/eu-uk-proposal-on-free-movement-15903-08.pdf

Metock judgment of Court of Justice, July 2008

Directive 2004/38 on free movement of EU citizens, OJ 2004 L 229

Update

This document before the JHA Council is based on the UK proposal: Presidency Note: Free movement of persons: abuses and substantive problems – Draft Council conclusions on abuses and misuses of the right to free movement of persons:
http://www.statewatch.org/news/2008/nov/eu-restrictions-free-movement-conclusions-nov-08.pdf