
FREE MOVEMENT OF WORKERS: MIGRATION IN THE EUROPEAN UNION**LIVRE CIRCULAÇÃO DE TRABALHADORES: MIGRAÇÃO NA UNIÃO EUROPEIA****MÁRIO LUIZ RAMIDOFF**

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ABSTRACT

Objective: This article is intended for studies and research on the free movement of workers within the European Union, the purpose of which is to provide a critical analysis of not only its current foundations, but also to provide contributions to demonstrate that the migratory flow of workers is fundamental for maintaining the integration of the respective economic bloc.

Methodology: The methodology used in the studies and research carried out is the critical-reflexive one, which operates through a bibliographic review and the analysis



of concrete cases that are jurisdictionalized before the Court of Justice of the European Union.

Results: The existence of a legal framework is of paramount importance for maintaining the free movement of workers within the European Union, so that their workers can settle in another State and exercise their craft in a dignified manner, with the right covered by labor and social security legislation, under penalty of violation of the provisions of the Charter of Fundamental Rights of Europe.

Contributions: The demonstration of the importance of worker migration within the European Community, with respect to the guarantee of fundamental freedoms and non-discrimination. Such a guarantee is not understandable, finally, without a reflection on the contemporary role of the Court of Justice of the European Union and its extended jurisdiction.

Keywords: European Union; free movement; workers; migration.

RESUMO

Objetivo: O presente artigo destina-se aos estudos e pesquisas sobre a livre circulação de trabalhadores na União Europeia, cujo objetivo é o de oferecer uma análise crítica acerca não só dos seus atuais fundamentos, mas, para também assim oferecer contribuições que se destinam a demonstrar que o fluxo migratório de trabalhadores é fundamental para a manutenção da integração do respectivo bloco econômico.

Metodologia: A metodologia empregada nos estudos e nas pesquisas até então levados a cabo é crítico-reflexiva, que se opera através da revisão bibliográfica e da análise de casos concretos que se encontram jurisdicionalizados perante o Tribunal de Justiça da União Europeia.

Resultados: A existência de um marco jurídico legal revela-se de suma importância para a manutenção da livre circulação de trabalhadores na União Europeia, a fim de que os respectivos trabalhadores possam estabelecer-se em outro Estado e exercerem o seu ofício de forma digna, com direito à residência e abarcados, inclusive, pela legislação trabalhista e previdenciária, sob pena de violação aos preceitos da Carta dos Direitos Fundamentais da Europa.

Contribuições: A demonstração da importância da migração de trabalhadores na Comunidade Europeia, em respeito à garantia das liberdades fundamentais e a não discriminação. Tal garantia não é compreensível, por fim, sem uma reflexão quanto ao papel contemporâneo do Tribunal de Justiça da União Europeia e sua jurisdição estendida.



Palavras-chave: União Europeia; liberdade de circulação; trabalhadores; migração.

1 INTRODUCTION

This paper attempts an overview of the juridical status of migrant workers in the European Union regarding non-discriminatory treatment inside its Member-States. Beginning with a brief analysis of the European Union legislation regarding migrant workers, followed by a quick review of legal doctrine, it will be finished with an outline of some key legal cases faced by the Court of Justice of the European Union.

The increasing workers migration represents a significant part of economic, social, political, demographic and cultural changes taking place inside the European community, which is extremely important for maintaining the integration of the respective bloc. Nevertheless, while European workers have already won the right to free movement, they still face some obstacles to the effectiveness of their rights.

Having these challenges in mind, it is necessary to analyze the issue of the migratory workers movement in the European Community in order to ensure non-discrimination and the effectiveness of their rights.

2 MOVEMENT OF WORKERS IN THE EUROPEAN UNION

The migratory movement in the European Union came about with the consolidation of the free movement, through Regulation no. 1,612/68. In the same way, the Schengen Agreement (1985) promoted the freedom of movement of European citizens and border controls were extinguished between Member States, and even controls over the entry of immigrants from other States were strengthened (EUR-LEX:2015).



The development of society, the formation of economic conglomerates and the free movement of workers have become an essential element for integration processes and can even be recognized as a fundamental right (BABACE:2004, p.183-185). It is still possible to understand it as a fundamental social right.

The free movement of workers goes beyond the single objective of maintaining and growing the economic bloc (European Union), as it represents the union of the populations, the efforts and experiences of the member countries, which certainly culminates in the growth of the feeling of acceptance, belonging and integration (BARROS:2000).

According to the International Labor Organization (ILO), the free movement of workers also facilitates the creation of trade links between countries, the development of new markets, political and economic reforms, and the sharing of technology, including the strengthening of change of life experiences between nationals and foreigners (ILO:2019).

Diogo Pereira Machado conceptualizes that The EU internal market is characterized by the abolition of obstacles to the free movement of goods, persons, services and capital. Workers do not find barriers to freely respond to job vacancies, to enter the territory of other Member-States, to move freely and to reside in any of the States, to work there and to stay in the territory of another Member-State where they are performing services (MACHADO:2013, p. 146).

Although the migratory movement of workers is greatly encouraged by the Economic Block, free movement of workers cannot be exercised fully and in relation to the burdens of the public administration, which are the exclusive competences of the member countries of each Member-State (MACHADO:2013, p. 146).

On December 9, 1989, the Community Charter of the Fundamental Social Rights of Workers was approved, which established principles based on the European model of labor law, including employment, free movement, the improvement of living and working conditions, social protection, vocational training, equal treatment for men and women, information and worker participation, safety in



the environment; health protection; the protection of the elderly and disabled (CEC:1989).

The important contributions of Jacques Delors and Vasso Papandreou are herein highlighted, who participated decisively in the formulation of the Community Charter of the Fundamental Social Rights of Workers:

Inspired by framework texts such as the Council of Europe's Social Charter and the Conventions of the International Labor Organization, this letter is now an essential pillar of the social dimension of European integration, in the spirit of the Treaty of Rome supplemented by the Single European Act. [...] Already in 1972 the heads of state or government of the European Community, meeting in Paris, agreed to affirm the social dimension of European construction. In later years, it will be the turn of the social action program, presented by the Commission and adopted by the Council. This does not mean that the Commission has been inactive since its inception: the first regulations on the free movement of workers date from 1968, and as early as 1963 the Council had laid down the general principles of vocational training. However, on the eve of its first enlargement, it seemed necessary to underline that Europe was more than just the common market and the elimination of customs barriers. [...] The << Community Charter of the Fundamental Social Rights of Workers >>, as adopted in Strasbourg a few weeks ago by the eleven Heads of State or Government, therefore has its history. On the basis of a text - actually a preliminary draft which, after consultation with the social partners, became a project - proposed by the Commission in September 1989, the << Social Affairs >> Council first, and then the European Council dealt with this. issue with results that are in the public domain. As we know it, this letter is a first step, the first step that needed to be taken (CEC:1989, p. 3, 5-6).

On February 7, 1992, the Treaty on European Union was signed, which provided for in point "c" of its article 3, an internal market characterized by the abolition between Member-States of obstacles to the free movement of goods, persons, services and capital (TEU:1992).

Although there is a scenario of protection for the migrant employee, such as the right to residence, it is observed that many workers still face several difficulties to be able to qualify their professional courses in the destination (receiving) State, which can be constituted in a major factor in the search for informal work.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by Resolution no. 45/158 of the General Assembly of the United Nations on December 18, 1998, which states that



the States must respect the fundamental human rights of all migrant workers, with the suppression of illegal migrations and the illegal employment of migrant labor (UN:1990).

The principle of non-discrimination of workers as a result of their nationality should be analyzed on the basis of fundamental individual and social rights, which have a common origin in international human rights guidelines. In this sense, Angel G. Chueca Sancho supports the understanding that in general it can be noted that the prohibition of discrimination is one of the most fundamental rights of any system of protection of human or fundamental rights, whether domestic or international, because a medically evolved legal system is not conceivable in which racial discrimination or segregation, religious or political discrimination etc; If such a situation arises, one is faced with something very different from the rule of law (CHUECA SANCHO:1989, p. 147).

In order for migrant workers to be able to work fully in any Member-State of the European Union, they must be guaranteed access to work in the same way as in their State of origin, under penalty of discrimination in job offer and selection by the employer. In fact, it is hoped that someday the migrant worker can be recognized and respected as a subject of the right to full employment.

3 COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union was established by the Treaty of Paris (1952), with the main purpose of ensuring a secure construction of the Community order and also functioning as one of the seven institutions of the European Union¹.

Although the performance of the Court of Justice of the European Union is governed by the Treaty on European Union, Treaty on the Functioning of the

¹ The European Union has seven institutions: the European Parliament; the Council of the European Union; the European Commission; the European Council; the European Central Bank; the Court of Justice of the European Union and the European Court of Auditors.



European Union and the Protocol on the Statute of the Court, it is expected that their decisions are appropriate to favor the guarantee of order and the maintenance of the integration of the Economic Block.

João Mota de Campos and João Luiz de Campos have pointed out that the constitutional jurisdiction has largely contributed to maintaining a healthy balance at the institutional level, as follows:

[...] as an Administrative Court it has been able to impose on the EU institutions and other bodies strict respect for legality; - as a body sometimes assimilated to an international court, it has succeeded in obliging Member States in their relations with each other and with the Union; - as a civil court adjudicates on the non-contractual liability of the European Union arising from the activities of its institutions, bodies and agents; - As an Labor Court, it must rule on labor disputes which oppose the Union to its officials and agents; - as the jurisdiction responsible for the uniform interpretation and application of Union law, has succeeded in satisfactorily ensuring the unity, coherence and effectiveness of the corpus juris which the Union legal order constitutes (CAMPOS; CAMPOS:2007, p. 184).

The Court of Justice of the European Union has no general jurisdiction; its main activities focus on verifying the compatibility of the Treaties with acts of public and private institutions, as well as ruling on the validity or interpretation of Community law, request of the national courts (GOMES:2009, p. 111). However, as a result of the increasing number of court complaints, the Court of First Instance of the European Communities (CFI) was set up in 1989, which adopted some functions of the Court of Justice and became the body of first instance. Some functions that were originally related to TJ started to function as a judge body of first instance.

In order to ensure the interpretation and application of the Treaties, the Court of Justice of the European Union is responsible for examining and adjudicating disputes linked to labor law, which include migrant conflicts.

Concerning about right to free movement and free residence in the territory of the Member-States, some of the judgments stand out (EUR-LEX:2019), including the following:



Judgment of the Court (Eighth Chamber) of 14 March 2019. Maria Vester v Rijksinstituut voor ziekte- en invaliditeitsverzekering. Reference for a preliminary ruling from the Arbeidsrechtbank Antwerpen. Reference for a preliminary ruling - Social security schemes - Invalidity benefits - Articles 45 and 48 TFEU - Freedom of movement for workers - Regulation (EC) n. 883/2004 - Different allowance schemes according to Member States - “Grace period incapacity for work” - Duration - Disability benefit allowance - Disadvantages for migrant workers. Case C-134/18. European Case Law Identifier (ECLI): ECLI: EU: C: 2019: 212.

Judgment of the Court (First Chamber) of 10 July 2019. Nicolas Aubriet v Minister for the Enseignement Supérieur et de Recherche. Reference for a preliminary ruling from the Tribunal administratif. Reference for a preliminary ruling - Free movement of persons - Equal treatment - Social advantages - Regulation (EU) No 492/2011 - Article 7 (2) - Financial aid for higher education - Non-resident students - Period requirement working time of their parents in the national territory - Minimum period of five years - Reference period of seven years - Method of calculating the reference period - Date of submission of the request for financial aid - Indirect discrimination - Justification - Proportionality. Case C-410/18. ECLI identifier: ECLI: EU: C: 2019: 582.

Judgment of the Court (Eighth Chamber) of 18 September 2019. Tiroler Gebietskrankenkasse against Michael Moser. Reference for a preliminary ruling from the Oberster Gerichtshof. Reference for a preliminary ruling - Social security - Migrant workers - Regulation (EC) No 987/2009 - Article 60 - Family benefits - Right to pay the difference between the amount of the parental leave allowance awarded in the priority competent Member State and the amount child-care allowance provided for by the Member State with subsidiary jurisdiction. Case C-32/18. ECLI identifier: ECLI: EU: C: 2019: 752.

Judgment of the Court (Third Chamber) of 11 April 2019. Neculai Tarola v Minister for Social Protection. Reference for a preliminary ruling from the Court of Appeal. Reference for a preliminary ruling - Citizenship of the Union - Free movement of persons - Directive 2004/38 / EC - Right to move and reside freely within the territory of the Member States - Article 7 (1) (a) - Salaried and self-employed workers - Article 7 (3) (c) - Right of residence for more than three months - National of a Member State who has been employed in another Member State for a period of 15 days - Involuntary unemployment - Maintaining quality for at least six months - Entitlement to jobseeker's allowance. Case C-483/17. ECLI identifier: ECLI: EU: C: 2019: 309.

Judgment of the Court (Sixth Chamber) of 25 October 2018. Walltopia AD v Direktor in the Teritorialna direksia in the Natsionalnata agentsia za prihodite - Veliko Tarnovo. Reference for a preliminary ruling from the Administrativen sad Veliko Tarnovo. Reference for a preliminary ruling - Social security - Regulation (EC) No 883/2004 - Article 12 (1) - Regulation (EC) No 987/2009 - Article 14 (1) - Posted workers - Applicable legislation - Certificate A 1 - Subjection of the worker to the law of the Member State in



which his employer is established - Assumptions. Case C-451/17. Digital reports (Court Reports - general - 'Information on unpublished decisions' section). ECLI identifier: ECLI: EU: C: 2018: 861.

Judgment of the Court (Tenth Chamber) of 23 January 2019. K.M. Zyla v Staatssecretaris van Financiën. Reference for a preliminary ruling from the Hoge Raad der Nederlanden. Reference for a preliminary ruling - Free movement of workers - Equal treatment - Income tax - Social security contributions - Worker who left the Member State of employment during the calendar year - Application of the pro rata temporis rule to the reduction of the contributions due. Case C-272/17. Digital reports (Court Reports - general - 'Information on unpublished decisions' section). ECLI identifier: ECLI: EU: C: 2019: 49.

Judgment of the Court (Grand Chamber) of 10 May 2017. Wenceslas de Lobkowicz v Ministry of Finance and Comptes publics. Reference for a preliminary ruling from the Cour administrative d'appel de Douai. Reference for a preliminary ruling - Officials of the European Union - Staff Regulations - Compulsory enrollment in the social security scheme of the institutions of the European Union - Property income earned in a Member State - Subject to generalized social contribution, social contribution and additional contributions under the national legal system. Member State - Participation in the social security financing of that Member State. Case C-690/15. Digital reports (Court Reports - general). ECLI identifier: ECLI: EU: C: 2017: 355.

Judgment of the Court (Fourth Chamber), 6 October 2016. Jean-Michel Adrien and Others against Premier ministere and Others Reference for a preliminary ruling from the Conseil d'État (France). Reference for a preliminary ruling - Freedom of movement for workers - National officials seconded to a Union institution or body - Retirement pension - Right of option - Suspension or continuation of membership of the national pension scheme - Limitation of the cumulation of pension acquired under the pension scheme with the pension acquired under the Union pension scheme. Case C-466/15. Digital reports (Court Reports - general). ECLI identifier: ECLI: EU: C: 2016: 749.

4 FINAL CONSIDERATIONS

The migratory process of workers within the European Union nowadays has determined the construction of a new procedure and the construction of differentiated judicial instances, which, in fact, requires the theoretical and pragmatic reconstruction of the jurisdiction and the process. For this reason, it was possible to



observe the legislative evolution and the proposals to protect the migrants` rights, especially in regard to Labor Law.

In fact, the Treaties have as their object the greater legal and social (Community) realization of the rights, relative to / pertaining to the free movement of migrant workers. In the same manner, these treaty regulations set objective criteria for identifying and preventing all forms of discrimination.

However, it is important to emphasize that the social reality in States that are part of the European Union is very different from the purposes of such regulation. This is evident from the case law issued by the Court of Justice of the European in recent years.

The subjective and community implications linked to Labor Law must be highlighted by the extreme importance they have for the recognition of the migrant worker person as a subject of rights, and, consequently, as an inclusive and sustainable strategy of production activities free from violations of public freedoms (individual, subjective and objective interests).

It is extremely important to study the subjective implications linked to labor law, such as the recognition of the person of the migrant worker as a subject of rights under the penalty of repeated incidence in violation of fundamental freedoms and discrimination.

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