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Council Regulation 1612/68: A Significant Step in Promoting the Right of Freedom of Movement within the EEC

I. INTRODUCTION

In 1968, the Council of the European Communities (Council) enacted Council Regulation 1612/68 pursuant to the principle of nondiscrimination on the basis of nationality. This principle stands as one of the primary purposes behind the creation of the European Economic Community (EEC). It establishes the right of workers of the member states to acquire employment and settle in any of the different member states. The right of freedom of movement is supplemented by the different provisions of the regulation. The provisions generally try to further such right of equal treatment among all workers of each member state.

First, this Comment presents the basic purposes and most significant provisions of Regulation 1612/68. Next, it proceeds to analyze the most recent decisions of the Court of Justice of the European Communities (European Court) dealing with the most controversial provisions of the regulation. Finally, the Comment emphasizes the commitment of the different branches of the EEC to abrogate any discriminatory policies based on nationality, within the Community.

II. COUNCIL REGULATION 1612/68

Council Regulation 1612/68 was enacted on October 15, 1968 in order to implement the principle of nondiscrimination on the basis of nationality codified in Article 7 of the EEC Treaty.¹ This regulation represents the most significant measures adopted to implement Article 48 of the EEC Treaty which established the principle of freedom of movement for workers within all the member states of the Community.²

The regulation mandates "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, re-

¹ Paolo Iorio v. Azienda Autonoma delle Ferrovie dello Stato, Common Mkt. Rep. (CCH) ¶ 14,274 at 16,680 (1986).

² *Id.*

muneration, and other conditions of work and employment”³ To that effect, the regulation provides that “freedom of movement constitutes a fundamental right of workers and their families,”⁴ and the right should be enjoyed without discrimination.⁵ In order to implement the freedom of movement principle, the regulation requires that equality of treatment, between foreign nationals and nationals of the member state in question, be ensured “in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing.”⁶ Finally, in a very innovative provision, the workers are granted the right to be joined by their family while working away from home.⁷ Such a right, like the previous ones, is based on the need to provide for the full integration of the worker and his family into the host country.⁸

Article 1 of the regulation grants eligibility to any national of a member state to work within the territory of another member state in accordance with the laws and regulations governing the employment of nationals of that State.⁹ Any law, regulation, or administrative practice of a member state, which limits the rights of eligible workers to pursue employment or subjects them to requirements not imposed upon its own nationals, shall not have effect.¹⁰ Consequently, any eligible worker has the right to “take up available employment” in any member state with the same rights as nationals of the state.¹¹

In order to give effect to the eligible worker’s right to freedom of movement, the regulation requires that each month the specialist service of each member state forward any information relevant to the availability of employment within the state.¹² Such information must be sent to the specialist services of the other member states and to the European Coordination Office, which in turn will forward the information to the appropriate employment services and agencies.¹³

The regulation is concerned mainly with abolishing any discrimination based on the worker’s nationality with regard to any conditions of employment and work.¹⁴ However, it also mandates that the worker enjoy the same social and

³ Regulation 1612/68, C13132 *et seq.* (1968), at Preamble [hereinafter Regulation 1612/68].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at c13,133.

⁸ *Id.*

⁹ *Id.* at art. 1(1).

¹⁰ *Id.* at art. 3(1).

¹¹ *Id.* at art. 1(2).

¹² *Id.* at art. 15-18.

¹³ *Id.* at art. 15(1).

¹⁴ *Id.* at art. 7(1).

tax advantages as national workers,¹⁵ and all the rights and benefits accorded to national workers in matters of housing.¹⁶

In aspiring to help the eligible workers to fully integrate into the host nation, the regulation provides that certain members of the worker's family, irrespective of their nationality, should have the right to reside with the worker in the member state.¹⁷ This provision is supplemented by Article 11 of the regulation, which grants to such family members the right to work in the member state, even if they are nationals of a non-member state.¹⁸

Finally, under certain circumstances, a member state may temporarily suspend the free movement of foreign workers into that state.¹⁹ If a member state undergoes or foresees disturbances in its labor market "which could seriously threaten the standard of living or level of employment in a given region or occupation," such a state is required to inform the Commission and the other member states as to the relevant facts.²⁰ The Commission, after receiving the information, will decide on the suspension request and act within two weeks.²¹

The European Court has been called upon by the courts of the member states to interpret some of the most controversial provisions of Council Regulation 1612/68. In the succeeding section, this Comment will analyze the Court of Justice's interpretation of these provisions.

III. RECENT DECISIONS BY THE COURT OF JUSTICE

A. "*Freedom of Movement*"

The main purpose behind Regulation 1612/68 is the elimination of any discrimination by the member states against eligible workers and their families on the basis of their nationality. To facilitate this purpose, the regulation grants these workers and family members the right to pursue employment in any of the member states without being subject to any discrimination due to their nationality. To promote this right of freedom of movement, the regulation provides for certain rights and privileges that must be granted by the host state. At the same time, the regulation prohibits a member state from enacting a law, regulation, or administrative practice which imposes additional requirements and undue restrictions upon the eligible workers and their families.

¹⁵ *Id.* at art. 7(2).

¹⁶ *Id.* at art. 9(1).

¹⁷ *Id.* at art. 10.

¹⁸ *Id.* at art. 11.

¹⁹ *Id.* at art. 20(1).

²⁰ *Id.*

²¹ *Id.* at art. 20(3).

For example, in *Commission v. French Republic*,²² the French Public Health Code obligated doctors and dentists to be registered only on one register, that of the department in which his place of work was situated.²³ In addition, the French Code prohibited doctors enrolled or registered in another state from registering under the French Medical Society.²⁴ The French Republic claimed that such regulations were needed to ensure that practitioners who occupy a second position as an employee or maintain a second practice comply with France's ethical obligations. In particular, France specified the ethical obligation of the continuity of treatment.²⁵

The European Court agreed with the French government that workers of another member state who pursue their occupation in France must comply with the rules governing the occupation in question.²⁶ Nevertheless, the court concluded that the principle of nondiscrimination commanded that the registration requirements be abrogated due to their undue restriction upon the freedom of movement and the workers' right to equal treatment.²⁷

The European Commission claimed that the rule requiring a practitioner to have only one practice was applied more strictly with regard to doctors and dentists from other member states than those established in France.²⁸ The Commission also asserted that there were no compelling reasons for such absolute and general prohibitions which could justify such infringement of the nondiscrimination principle.²⁹

The European Court's decision in *Commission v. French Republic* was consistent with the principle of equal treatment as proposed by Article 3(1) of the regulation. This article bans any laws, regulations, or administrative practices of a member state which "limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals."³⁰ This article also prohibits any laws, regulations, or administrative practices which "though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered."³¹ The French registration rules were clearly intended to discourage non-French practitioners from pursuing employment in France. Thus, *Commission v. French*

²² *Commission of the European Communities v. French Republic*, Common Mkt. Rep. (CCH) ¶ 14,300 (1986).

²³ *Id.* at 16,857.

²⁴ *Id.*

²⁵ *Id.* at 16,858.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 16,859.

²⁹ *Id.*

³⁰ Regulation 1612/68, *supra* note 3, at art. 3(1).

³¹ *Id.*

Republic demonstrates the commitment of the European Commission and the European Court to prohibit restrictive policies of member states, even when such policies are disguised as mere domestic policies, which at face value seem to apply equally to all workers.

The regulation, however, is only concerned with those domestic rules and practices which directly or indirectly restrict the eligible workers' right to freely pursue employment and fully integrate in the host state. It is not intended to eliminate domestic laws or practices which do not discriminate against nationals of other member states on the basis of their nationality.

For example, in *Iorio v. Azienda*³² the plaintiff was an Italian national who claimed that the Italian rules limiting access to certain trains were incompatible with the principle of freedom of movement under Article 48(3)(b) of the EEC Treaty and Regulation 1612/68.³³ On the other hand, the Italian Government contended that neither Article 48(3)(b), nor any other rule of Community law precludes the regulation of the use of means of public transportation, when such restrictions are of a general nature and do not discriminate on grounds of nationality.³⁴

The European Court held that the provisions of the EEC Treaty and the regulations adopted for their implementation were not meant to be applied to situations, such as the one at hand, where there was no discrimination based on nationality.³⁵ The principle of freedom of movement commands equal treatment between nationals and foreigners within the member states. It does not, however, prohibit domestic rules which discriminate against certain categories of persons, regardless of their nationality. Consequently, the European Commission and the Court will not interfere with appropriate domestic legislation if the plaintiff does not prove that his case falls within the protections afforded by Community law.

B. *Rights of Family Members*

1. Right of Residence

Article 10 of the regulation grants certain members of the eligible worker's family the right to reside with the worker in the host member state.³⁶ Such family members include the worker's spouse and their descendants who are under the age of twenty-one years or are dependent, and any dependent

³² *Iorio*, Common Mkt. Rep. (CCH) ¶ 14,274.

³³ *Id.* at 16,679.

³⁴ *Id.* at 16,680.

³⁵ *Id.* at 16,681.

³⁶ Regulation 1612/68, *supra* note 3, at art. 10(1).

relatives in the ascending line of the worker and his spouse.³⁷ This provision has led to litigation regarding the meaning of "spouse" and the requirement that the worker and his spouse live together in order for the latter to have the right of residence.

The latter issue was discussed in *Diatta v. Land Berlin*,³⁸ where the plaintiff, a Senegalese national married to a French national working in West Berlin, claimed that her right of residence should not be denied due to the fact that she was permanently separated from her spouse.³⁹ The defendant, Land Berlin, contended that the spouse's right of residence under Article 10(1) required plaintiff to live together with her spouse.⁴⁰ Defendant relied on Article 10(3) which mandates the worker to "have available for his family[,] housing considered as normal for national workers in the region where he is employed."⁴¹ Land Berlin further contended that Article 10 was intended to promote full integration of the worker and his family in the host nation and to ensure that his family links were maintained.⁴² Therefore, the defendant claimed that the regulation could not contemplate a right of residence which was not based on a requirement that the family live together.⁴³

The European Court rejected the defendant's argument. The court reasoned that the Council, based on public security and public policy considerations, required, as a condition for the spouse's right of residence, that the worker make such housing available for her, and that such requirement does not prevent the spouse from obtaining her own housing.⁴⁴ The court refused to restrictively apply the regulation as meaning that it imposes upon married couples the requirement of maintaining normal married life together.⁴⁵ Instead, the court concluded that a member of a migrant worker's family has the right to habitate with the worker and this right does not require such member to live permanently with the worker.⁴⁶ Consequently, the plaintiff spouse retained her right of residence, regardless of her permanent separation from her husband, as long as the marital relationship was not terminated by a competent authority.⁴⁷

³⁷ *Id.*

³⁸ *Aissatou Diatta v. Land Berlin*, Common Mkt. Rep. (CCH) ¶ 14,169 (1985).

³⁹ *Id.* at 16,026.

⁴⁰ *Id.* at 16,029.

⁴¹ Regulation 1612/68, *supra* note 3, at art. 10(3).

⁴² *Diatta*, at 16,029.

⁴³ *Id.*

⁴⁴ *Id.* at 16,028.

⁴⁵ *Id.*

⁴⁶ *Id.* at 16,036.

⁴⁷ *Id.* On the other hand, the court rejected plaintiff's claim that Article 11 of the regulation establishes a more extensive right of residence than that provided for under Article 10. *Id.* at 16,029. Such argument was rejected by the court which made it clear that Article 11 does not grant the

Article 10(1) was again the subject of a dispute in *Netherlands v. Reed*,⁴⁸ where the plaintiff, an unmarried British national living together in the Netherlands with a British worker, claimed to be a "spouse" within the meaning of Article 10(1)(a).⁴⁹ She claimed to be a spouse due to her stable relationship of some five years standing.⁵⁰ The Court refused to give such broad construction to Article 10(1), due to the absence of a "general social development" to justify such an interpretation.⁵¹ Therefore, the court held that the term "spouse" in Article 10 refers only to a marital relationship.⁵²

On the other hand, the court agreed with the plaintiff's argument that due to the fact that the Netherlands Government allowed its nationals to bring to the Netherlands a companion of foreign nationality, the plaintiff's companion should not be denied of the same "social advantage" as provided under Article 7(2).⁵³ Consequently, by upholding the principle of equal treatment, the Court accepted the view that cohabitation was a "social advantage" in the Netherlands and the plaintiff was entitled to the right of residence on such grounds.⁵⁴

2. Right to Work

Article 11 of the regulation provides that the worker's "spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State."⁵⁵ The main controversy regarding this provision involves whether the spouse, or child, is entitled to all the same protections and benefits provided by the regulation to the eligible worker. In other words, is the spouse or child of a migrant worker subject to the same rules regarding access to and pursuit of the occupation as nationals of the host member state?

This inquiry was solved by the European Court in *Gül v. Regierungspräsident*.⁵⁶ In this case, the plaintiff, a doctor of Cypriot nationality married to a British national, applied for permanent authorization to practice medicine in Germany under Article 11.⁵⁷ While the plaintiff met all the applicable conditions to receive

members of the eligible worker's family an independent right of residence apart from that conferred under Article 10. *Id.* at 16,036.

⁴⁸ *State of the Netherlands, Ministry of Justice v. Ann Florence Reed*, Common Mkt. Rep. (CCH) ¶ 14,327 (1986).

⁴⁹ *Id.* at 17,059.

⁵⁰ *Id.*

⁵¹ *Id.* at 17,061.

⁵² *Id.*

⁵³ *Id.* at 17,061-17,062.

⁵⁴ *Id.* at 17,062.

⁵⁵ Regulation 1612/68, *supra* note 3, at art. 11.

⁵⁶ *Emir Gül v. Regierungspräsident Düsseldorf*, Common Mkt. Rep. (CCH) ¶ 14,328 (1986).

⁵⁷ *Id.* at 17,064.

such license, the German Government refused to grant the authorization.⁵⁸ Under German law, only German nationals, nationals of other member states, and stateless persons were entitled to a license if they fulfilled the prescribed conditions.⁵⁹ Those nationals of a non-member state, such as the plaintiff, were subject to additional conditions and could only receive a temporary authorization if approved by the competent agency.⁶⁰ In other words, the German Government did not recognize the spouse's right to work under Article 11 as being similar to the eligible worker's right under Article 1.

Due to this right to work under Article 11, the plaintiff claimed that he was entitled to equal treatment under Article 3(1) of the regulation. The plaintiff asserted that such right was extended not only to the eligible workers, but also to their spouses.⁶¹ The European Court accepted the plaintiff's argument as the right one due to its consistency with the purposes behind the regulation. The Court reasoned that if the worker's spouse is to be fully integrated in the host state, he must be subject to the same rules regarding access to and pursuit of an occupation as nationals of the host member state, regardless of the type of employment.⁶² Consequently, the plaintiff was entitled to rely on Article 3(1) and to be treated in the same way as a German national with regard to his application for permanent authorization to practice medicine in Germany.⁶³

The cases discussed previously clearly express the commitment of the Council, the Commission, and the European Court to promote the full integration of the worker and his family into the host nation by granting to family members all the protections afforded to the eligible worker. Once a family member qualifies to reside in the host state under Article 10, such family member receives all the rights and protections granted to the eligible worker and must be treated while leaving there in the same way as nationals of the host nation. The scope of the protections is the same as that granted to those workers eligible under Article 1 of the regulation.

C. "Social Advantages"

Article 7(2) of the regulation mandates that a worker who is a national of a member state in the territory of another member state "shall enjoy the same social and tax advantages as national workers."⁶⁴ The regulation does not define what it means by "social advantages" and consequently the European Court has been called upon by the different member states to interpret the provision.

⁵⁸ *Id.* at 17,065.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 17,066.

⁶² *Id.*

⁶³ *Id.* at 17,068.

⁶⁴ Regulation 1612/68, *supra* note 3, at art. 7(2).

As already seen in *Netherlands v. Reed*, cohabitation may be a social advantage if such relationship is recognized by the member state when dealing with its own nationals.⁶⁵ In general, the European Court has declared that the term "social advantages" covers all the advantages which are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory. This is true regardless of whether the social advantages are linked to a contract of employment.⁶⁶

For example, in *Public Prosecutor v. Mutsch*, the plaintiff, a Luxembourg national who resides in Belgium, applied to have certain criminal proceedings against him brought in German.⁶⁷ Such claim was based on Belgian law which allows an accused person of Belgian nationality, who resides in a German speaking municipality to request that the proceedings before that court take place in German.⁶⁸ The plaintiff contended that as an eligible worker within the meaning of the regulation, and also a resident of a German speaking municipality within Belgium, he should be entitled to the same privilege as German-speaking Belgian nationals are entitled.⁶⁹

The European Court held that the plaintiff had a right, just as nationals of Belgium did, to have the proceedings before the Belgium court done in German. The court stated that this right represents a significant factor in promoting the integration of the worker into the host nation, and thus in achieving the objective of free movement for workers.⁷⁰ Consequently, such right should be included within the meaning of the term "social advantage" as used in Article 7(2) of the regulation.⁷¹

The term "social advantage" has been broadly construed in other cases to include, for example, welfare benefits. In two analogous cases, *Hoeckx v. Openbaar Centrum* and *Scrivner v. Centre Public*,⁷² the plaintiffs, both workers within the meaning of Article 1, applied for certain welfare benefits which the host member state Belgium granted to those working within Belgium.⁷³ These welfare benefits, called "minimex," required that the applicant have resided in

⁶⁵ See *supra* notes 53-54 and accompanying text.

⁶⁶ *Public Prosecutor v. Robert Heinrich Maria Mutsch*, Common Mkt. Rep. (CCH) ¶ 14,221, 16,349 (1985). See also *Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Velzijn*, Common Mkt. Rep. (CCH) ¶ 14,184, 16,107 (1985); *Kenneth Scrivner and Carol Cole v. Centre Public d' Aide Sociale de Chastre*, Common Mkt. Rep. (CCH) ¶ 14,190, 16,135-36 (1985).

⁶⁷ *Mutsch*, at 16,347.

⁶⁸ *Id.*

⁶⁹ See *id.*

⁷⁰ *Id.* at 16,348-49.

⁷¹ *Id.* at 16,349.

⁷² See *Hoeckx v. Openbaar Centrum*, Common Mkt. Rep. (CCH) ¶ 14,184; *Scrivner v. Centre Public*, Common Mkt. Rep. (CCH) ¶ 14,190.

⁷³ See *Hoeckx v. Openbaar Centrum*, Common Mkt. Rep. (CCH) ¶ 14,184; *Scrivner v. Centre Public*, Common Mkt. Rep. (CCH) ¶ 14,190.

Belgium for at least the previous five years.⁷⁴ The residence requirement, however, applied only to community nationals other than Belgians.⁷⁵

The European Court held that a benefit guaranteeing a minimum means of subsistence, such as the *minimex*, constitutes a social advantage within the meaning of Article 7(2) of the regulation.⁷⁶ This conclusion was based on the view that the *minimex* was a social advantage whose extension to foreign nationals working in Belgium would facilitate the mobility of such workers within the EEC.⁷⁷ Therefore, the additional residence requirement imposed on workers, who are nationals of other member states, constituted a clear case of discrimination on the basis of nationality of workers.⁷⁸

The cases discussed concerning this area demonstrate the European Court's broad construction of the term "social advantages." The reason for this construction is to include all those social rights and benefits which help to promote the freedom of movement and the full integration of the worker into the society of the host member state.

IV. CONCLUSION

Each of the previous decisions presents the pervasive conflict between the EEC's policies of nondiscrimination and the restrictive policies of each individual member state. In general, while the Commission advocates a broad interpretation of the provisions of Regulation 1612/68, the individual member states ask the European Court to give a strict construction to such provisions. Regardless of the construction given, however, the court in each case has agreed with the Commission in furthering the EEC's policies to the detriment of the individual interests of the member states.

In conclusion, Regulation 1612/68 and the decisions of the Court of Justice stand as an example of the commitment of the different branches of the EEC to abrogate any discriminatory policies based on nationality within the Community. More specifically, all these branches are committed to promote the right of freedom of movement, even though it may lead to confrontations between the EEC and its member states. Such confrontations will last until all restrictions upon freedom of movement of workers within the Community are abrogated.

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⁷⁴ *Scrivner v. Centre Public*, *supra* note 66, at 16,133; *Hoeckx v. Openbaar Centrum*, *supra* note 66, at 16,105.

⁷⁵ *Id.*

⁷⁶ *Scrivner*, at 16,136; *Hoeckx*, at 16,107.

⁷⁷ *Scrivner*, at 16,135-36; *Hoeckx*, at 16,107.

⁷⁸ *Hoeckx*, at 16,108.