European court of justice has consistently refused to award eu law protection

The European Court of Justice has consistently refused to award EU law protection to cases it defines as purely internal to a Member State (Maduro, 2000). This non-involvement by the ECJ has brought about numerous problems and criticism.

Maduro, (2000) suggests that the concept of purely internal situations has been mainly used to justify the lack of protection granted by EU law to numerous cases of reverse discrimination where a state does not extend to its own nationals the same treatment it is required by EU law to award to national of Member States. The ECJ first established its approach to reverse discrimination and purely internal situations in the cases of Knoors1, Auer2 and Saunders3. Purely internal situations were first given voice in Knoors but were applied foremost in Saunders. It was held by the ECJ that there was no factor connecting Saunders with any of the situations envisaged by Community law. Therefore Miss Saunders was prevented from relying upon the former Article 48 (now 39) to challenge a binding order which excluded her from part of the national territory for a period of three years.

A comparable conclusion appeared in Morson4, where two Dutch nationals wished to bring their parents who were non EC members into the Netherlands to live with them. In the judgement it was stated that their parents would have been covered by Article 10, Regulation 1612/68 and would have been entitled to join their children if their children had been nationals of another Member State working in the Netherlands. The children were nationals working in their own Member State and had not exercised their right of free movement within the Community therefore EU law would not apply to them as it their situation was wholly internal. In was established

in Moser5 that the cross border element must be real, not just potential or hypothetical. It does appear that it is the intention of the ECJ to discriminate and neither EU measure nor the national measure would appear unlawful if considered independently. It is possible to obtain a more liberal attitude by the ECJ in recent cases and this can be seen as a separation from their earlier hard stance on internal situations.

The nationality of a Member State is still an essential aspect in recent cases nonetheless Article 228 can be depended on as long as there is some cross border element. In Scholz6 the ECJ held that any EC national who, irrespective of his place of residence and nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State falls within the scope of Article 39 and Regulation 1612/68. The judgement in Kulzer7 produced the component that the cross border nexus may be established by residence of a dependant family in another Member State and not necessary by the worker himself. The wholly internal rule is still apparent however the outcome of Kulzer demonstrates that significant gaps have arisen in its effect due to the broad scope given to Article 39 and secondary legislation. These gaps are illustrated in the case of Singh8. Mr Singh was an Indian national who married a British national.

They both worked in Germany before returning to the UK. The UK argued that Mr Singh’s right to re-enter the UK derived from national and not EU law and therefore it was an internal situation. The ECJ held: This case is concerned not with a right under national law but with the rights of movement...

granted by Article [39 and 43] of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in...

Her own country of origin to the entry and residence of her spouse. Accordingly, when a Community national who has availed… herself of those rights returns to..

. her country of origin… her spouse must enjoy the same rights of entry and residence as would be granted to him..

. nder EC law if… his spouse chose to enter and reside in another Member State.

‘ The case of Singh has established the situation whereby a UK national, with a non-EC spouse living in the UK but never having moved to another Member State, is in a worse position in the UK then a French national with a non-EC spouse, who has moved to work in the UK. The situation has arisen because the former is governed by domestic law (the wholly internal situation) and the latter case by EC law (due to the cross border element). The test in Singh has come in the case of Carpenter9. Mrs Carpenter, a non-EC national claimed the right to residence in the UK with her UK spouse on the grounds that he provided services, from time to time in other Member States. Her claim was that a person who has and is providing services should not have reduced privileges. The element of reverse discrimination comes into play when Mrs Carpenter raises the issue that her spouse must have the same Community law rights in the UK as in another Member State.

Fundamentally Mrs Carpenter is requesting the court to grant her residence rights which entirely contravene the guidelines and objectives of the UK's immigration authority through Mr Carpenter's questionable connections with EC law. An idea of deterrence was put forward in Singh however the Advocate General did make sufficient reference to the connection factor. It was not considered by the Advocate General that Mrs Carpenter made it possible for her husband to provide services through the provision of her care to his children. This could be said to reflect both the connecting factor and deterrence approaches (Shuibhne, 2002). The Advocate General debated the consequences of reverse discrimination in the perspective of spousal residence rights in advance of verbalizing that the provision of services can eliminate a set of circumstances from the wholly internal reserve.

It was underlined that the dissimilarities between Carpenter and Singh were not legally critical therefore Mr Carpenter the provider of services which falls in to the regime of EC law should derive benefit from the same rights in his own Member State as in any of the other 14 potential host states. Shuibhne (2002), claims this reflects the philosophy of Singh however it does not invoke a deterrence principle which was decisive in Singh. It is evident from the words of the Advocate General in Carpenter that the factor of importance is the respect for fundamental rights. There is an impermanent restriction present in Carpenter. Mrs Carpenter may only have residence rights in the UK if her husband continues to provide services in other Member States.

This has raised concern that nationals may abuse this impermanent restriction to their advantage however in Carpenter the Advocate General

held that there was no concern regarding this element. The above examination of Carpenter produces a progression of diversity of choices for the court. The strictest route would be to follow the precedent in Singh and not grant Mrs Carpenter residence rights in respect of her husband's service provision. A more generous approach would be to allow Mrs Carpenter to reside in the UK so long as her husband provides services to other Member States. This approach would highlight the aspect of deterrence. Finally, the principles founded in Singh could be taken further and this would certify a comprehensive defence for nationals applying Community rights or freedoms.

However if these cross border trips can be used to rationalize the residence rights for third party nationals the actual movement as the connection factor in EC law becomes empowering and futile (Shuibhne, 2002). If it was the decision of the court to expand past the conditions of movement and residence rights it would result in Carpenter being a start to a conclusion regarding reverse discrimination in the context of persons. The TEU introduced the status of citizenship of the Union. The citizenship provisions are set out in Part II EC, Articles 17-22. The rights of free movement are granted by Article 18. Due to the ambiguity regarding Article 18(1) EC the issue of citizenship is neither concluded nor straightforward to grasp.

The scope of EC protection can be seen to be expanding through the ECJ's movement of citizen provisions. This may be an indication that the ECJ's stance on citizenship is becoming progressively more fundamental as a concept. The fundamental regulatory shift effected by citizenship strongly challenges the legitimacy of maintaining the wholly internal rule (Shuibhne,

2002). With regards to EU citizenship the foremost criteria to be satisfied is one of nationality. They require that a citizen must have the nationality of at least one Member State. Coupled with this is the requirement of movement.

The presence of these two criteria will open up the issue of EU citizenship. The judgements in Bickel ; Franz10 and Wijsenbeek11 highlight's the issue that the requirements for movement have lessened further since the judgements in earlier cases. Bickel & Franz and Wijsenbeek evidence the right to move freely within the territory of the Member States but which does not drain the Member States resources. The ECJ's interpretation in Bickel ; Franz concluded that virtually the slightest cross border activity could affect the receipt of services. This cross border activity could then fall within the compass of EC law regarding equal treatment. In Wijsenbeek the ECJ seemed more open to exploiting the potential of Article 18 and boiled the requirement of movement down to its authentic form.

If you cross a border, you activate EC law. It held that there was no requirement for economic activity or a nexus between the individual and host state Member State as previously held in Kulzer. The residence rights discussed in Martinez Sala12 and Grzelczyk13 relate to the wording contained in the second part of Article 18(1). Specifically to the conditions for lawful residence in another Member State laid down in the residence directive with regards to adequate sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the host Member State. It is more apparent that the ECK must look at the extent to which they must take responsibility for third party nationals not due to the status of the workers but to the status of citizenship. In Martinez Sala the ECJ

held she was entitled, as an EU citizen, to equal treatment in relation to welfare and other benefits in line with nationals of the host state.

Her lawful residence in Germany was construed as a starting point for the application of equal treatment. The ECJ based their argument in Martinez Sala on Article 17(2) and the rights granted to persons as citizens of the Union. Their argument was then developed in the Grzelczyk where a French national studying in Belgium was denied the right to social security payments. He was refused this payment on the grounds that he was now without ‘ sufficient resources’. However the ECJ over ruled this decision and awarded Grzelczyk the payment by virtue of his position as an EU national.

The ECJ stated, “ 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 the same treatment in law irrespective of their nationality”. The Courts reasoning in Grzelczyk may be similar to that in Martinez Sala however it is difficult to ascertain what is meant by sufficient resources and when lack of them could invoke the right of residence to be withdrawn. It is the opinion of Shuibhne (2002), that a special distinction has been concluded for the category of EU citizens who are students even though this may not fit with the ‘ fundamental status’ of all free movers the Court had earlier extolled. In reaching an alternative view the Portuguese Government offers a legal opinion on the complex issue of citizenship, “ the only ‘ limitations and conditions’ attached to freedom of movement now are those imposed on grounds of public policy, public security and public health” The Commission has recently projected a new directive that endeavours to both refine and develop the right to reside in another Member State14.

This will take the place of much of the operating secondary legislation. A proposed ‘ sweeping revision’ would replace the existing sectoral and contextually specific legislative framework with a specific set of rules on freedom of movement for all citizens of the union and their families. The new rules would be irrespective of the intention for which they had relocated to another Member State. The Commission’s justification behind this approach is depicted from the ‘ new legal and political environment established by citizenship of the union15.

It makes a contrast between economic and non economic activity by maintaining sickness insurance and sufficient resources fall in the bounds of a non economic activity. These restrictions however are confined to the first four years of residence in the host state and after this period seeks to verify a new permanent right of residence which is no longer subject to financial requirements thus maintaining an almost complete equality of treatment with nationals. However there are still special rules relating to students and the ECJ have taken a more complex approach to student’s residence rights. Article 7 states initially those sickness insurance and sufficient resources criteria do not apply to them. Article 21(1) then reiterates this.

The comments of the court in Grzelczyk maintain that student’s, ‘ may not be discriminated against in other fields on grounds of nationality, such as when it comes to grants other than maintenance grants or medium term loans with special low interest for students’. The proposals from the Commission can be translated into legal obligations but the residence directives of the Community still hold much of the understanding for Member States. It is the view of the Advocate General that the residence directives

restrict the substance of Article 18 (1) EC and that EU citizenship is far from complete. It has moved forward however and the extent to which movement and residence in another Member State has undergone fundamental development. It is not apparent was it meant by the concept of citizenship and this unclarity has been affirmed in Grzelczyk therefore leading us to make little sense of the criteria required. The decisions in Kulzer, Singh and Grzelczyk do not pass the requirement of movement.

If the requirement of movement was to be bypassed then the consequences of reverse discrimination could no longer be accepted. An idea of community harmonisation could be seen as a way in which this should be accomplished. One must agree with the statement of Maduro (2002), that, " aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is self contradictory". The fundamental freedoms have been pushed aside to make way for ' human' freedoms thus making the issue of free movement more complex.

The implications of citizenship in the Member States is now of great importance however we have not moved on from the notion that some sort of movement is required, even if temporary or financially insignificant. The element of reverse discrimination is still evident in the Community but evidence in cases such as Carpenter and Grzelczyk, along with the Commission's proposals direct us to ascertain that this element may be reversed. Although reverse discrimination still exists within the Community is seems more likely that a person will not be denied rights of citizenship as they have not exercised their right to movement.