

EU MoMi Exam 17/02/20223
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QUESTION 1

Please contextualize and comment the following extract from case 66/85, Lawrie-Blum:

"16. Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. [...]

17. [...] The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration"

ANSWER 1

This excerpt of the case 66/85 Lawrie-Blum makes a reference to the definition of "worker", which has an autonomous notion under EU law.

The Court highlighted the fundamental importance of the autonomy of such term to avoid Member States to modify the meaning and the concept of "migrant worker" and to eliminate at their will the protection afforded by the Treaty to certain categories of persons, as recalled in the Unger case (1964).

The homogenous interpretation of the notion of worker within the Union aims at protecting migrant workers' equal treatment according to the principle of non-discrimination and to ensure fair completion within the EU labour market, pursuant to Art. 45 TFEU which affirms that the freedom of workers "shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work employment".

The case tries to further clarify the notion of "working relationship", which has to be interpreted extensively, including part-time employment with salary lower than the minimum required for subsistence (Levin, 1982).

The notion has been defined as a way to improve the living conditions of the worker: accordingly, preparatory service of trainee teachers, if remunerated and job-seekers have been included under this notion (Bettray, para. 17).

The notion of worker has been used as a sort of gateway in the EU for employment protection as well as linked to the notion of migrant. In fact, pursuant to art. 45(4) TFEU the freedom of movement entails the abolition based on nationality between workers of the Member State and allows to accept offers of employment and move freely for this purpose, as well as to stay in another Member State according to national provisions embodied by regulations by the Commission.

Art 7.2 Regulation 492/2011 allows migrant workers to get access to social advantages, which are traditionally granted to nationals of the Member State in question, pursuant to the principle of non-discrimination. The main rationale is that workers contribute to the financing of the welfare state by paying taxes and social contributions: so it would be unfair to exclude them from getting access to social benefits.

QUESTION 2

Clarify whether you agree with the following statement or not, and support your position with appropriate legal arguments, including references to legal texts and case law: "The Member States must always refrain from conducting police controls within a 10 Kilometers area from their border with other Member States, as these measures clash with the prohibition to check any person crossing an internal border of the Schengen Area."

ANSWER 2

The free movement of people within the Schengen area is secured by the Schengen Agreement. and the regulation giving effect to the agreement, namely Regulation 2016/339/EC, whose legal basis is Article 77(2)(b) TFEU. In fact, the main pillar of the Schengen Area are the abolition of controls at internal borders and the common management of EU external frontiers.

The so-called Borders Code, as exemplified in art. 2 of the Regulation, covers all types of border crossing points between States that are part of the Schengen Agreement, such as land borders, airports, water borders and regulates the activities of controls, checks and surveillance carried out by national authorities of the participant States.

For what concerns internal border, Article 22 of the Border Code establishes that internal borders may be crossed at any point without a border check on persons being carried out, irrespective of their nationality.

Nonetheless some forms of checks and control may be still carried out by Member States.

Pursuant to art. 23 states can exercise police powers insofar the those powers does not have the same effect of a border check: it shall be based on general police information regarding possible threats to public security and cross-border crime.

The activities carried out by the competent national authorities shall not have a excessive impact on the traffic flow as to preclude the free movement of people within the Union.

States may also temporary reintroduce border controls at internal borders pursuant to art. 25 and following - nonetheless it must be applied as a last resort measure for exceptional situations, respecting the principle of proportionality and necessity.

Being an exceptional measure the reintroduction is temporary and should be limited to the bare minimum needed by the State to cope with the emergency situation - notification must be made to the Commission, which can issue an opinion. In cases requiring immediate action art. 28 allows the reintroduction of border controls for 10 days without notification.

As recalled in case C-188/10 Melki and Abdeli, in which two Algerian nationals unlawfully present in France were subject to police control pursuant to the French Code of Criminal Procedure 20 kilometres from the border with Belgium - both made subject of a deportation measure, the Court affirmed that Art. 67(2) TFEU precludes national legislation granting police authorities the power to check, solely within an area of 20 km from the internal border, to identify any person in absence of a behaviour or specific circumstances giving rise to a risk of breach of public order and to ascertain whether the obligation to hold, carry and produce documents are fulfilled - nonetheless this exercise cannot have the same effect as a border checks.

Moreover, police forces need to operate with discretion and even controls pursuing public order objectives must be subject to limitations in terms of frequency and intensity - such limitations must be set up by a national legal framework orienting that discretion in view of the Border Code. In light of all of these considerations, Member States cannot resort to ordinary police activities as a means for eluding the abolition of controls at internal borders in the Schengen Area.

Nonetheless, national authorities still enjoy a margin of discretion when carrying out their activities on the borders and violations of the Code have been made quite frequently, since it can be difficult to establish the real emergency of an issue or the systemic/non-systemic of the activities carried out by national police forces.

To conclude, Member States may impose border controls within 10 kilometres from their internal borders, but only exceptionally in case of necessity and for public security purposes and not as a way to elude the requirements of the abolition of internal checks established by the Schengen Agreement.