

**Rethinking the Free Movement of Workers: The European Challenges Ahead**, by Paul Minderhoud and Nicos Trimikliniotis (eds), (Nijmegen: Wolf Legal Publishers, 2009), 224pp., paperback, €35, ISBN: 978-90-5850-464-7.

Forty years of free movement of workers has proved to be a success. Not only has it played an important role in the creation of the single market, but also paved the way for European Union citizenship. What has began as a project aimed at increasing labour mobility and improving the functioning of European labour markets with a view to stimulating economic growth has now outgrown the limits of the free movement of economic agents and evolved into the right to free movement and residence for all Union citizens. Yet free movement of workers still presents challenges that attract critical analysis of the EU law scholars which is reflected in the title of the book under review.

*Rethinking the Free Movement of Workers: The European Challenges Ahead*, edited by Paul Minderhoud and Nicos Trimikliniotis, is a collection of essays originating in the conference “Celebrating 40 years of Free Movement of Workers: Old Problems and New Issues” held in Rotterdam, the Netherlands, in November 2008, organised by the Centre for Migration Law of Radboud University Nijmegen (the Netherlands), which co-ordinated, under the supervision of the European Commission (DG EMPL), the European Network of Free Movement within the European Union. The book contains 16 chapters, including the introduction by the editors, which are brought together within a very broadly formulated common theme reflected in its title.

The book opens with an optimistic overview of 40 years of free movement of workers by Kees Groenendijk. This contribution provides an intellectually stimulating theoretical framework of assessment from three different perspectives: political, economic and legal. From the political perspective, free movement of persons contributed to the political stability in Europe and introduced the rule of law in the area of immigration policy. From an economic perspective, it has contributed to economic growth of both sending and receiving countries. However, Groenendijk warns that this impact is hard to define and should not be overestimated in comparison with the economic effects of other economic freedoms. From the legal perspective, free movement has created the legal conditions for integration of Community workers into the host society. Groenendijk also emphasises the symbolic message of free movement that changed the symbolic image of the migrant by changing the official label and the public perception of the migrant. The chapter concludes with analysis of effects of free movement rules for third-country nationals. According to Groenendijk, extension of free movement rights to important categories of third-country nationals, such as family members of Union citizens, Turkish workers, their family members and long-term resident third-country nationals, adopting the Family Reunification Directive, and neutralising the effects of the purely internal situation rule following the judgment in *Metock* ((C-127/08) [2008] E.C.R. I-6241) blurred the distinction between Union citizens and third-country nationals. However, the effect of EU law on immigration policies of the Member States can have unpredictable and unwanted effects. Member States can still apply their immigration rules more strictly to their own nationals in situations that fall outside the scope of EU law and, as Groenendijk rightly argues, EU nationals of migrant origin will be affected by such immigration rules to a greater extent.

The following chapters focus on the remaining challenges and obstacles to free movement of workers. Elspeth Guild raises a very interesting question of the transformation from a third-country national to citizen of the European Union in the course of enlargement of the European Union. This contribution provides a brief overview of the history of enlargement, highlights the difference in transitional restrictions on free movement of workers from new Member States in 2004–2006, 2006–2009 and 2009–2011, and

argues that the approach of the Member States towards the potential accession of Turkey undermines the coherence of the most fundamental objective of the European Union to secure the internal market.

A very topical issue of interrelationship between the status of worker and the status of EU citizen is raised by Jonathan Tomkin with a specific reference to the approach of the Court of Justice to jobseeker's rights in the Collins case ((C-138/02) [2004] E.C.R. I-2703). This aspect of free movement of persons deserves a wider scope of discussion to include other contexts in which the boundary between Community workers and non-economically active migrant Union citizens is blurred in real life as, for example, in the case of migrant students who pursue some economic activity in the host Member State. The judgment in the Förster case ((C-158/07) [2008] E.C.R. I-8507) shows that the Court is still not prepared to address the modern socio-economic context of increased flexibility in the nexus between employment and education, and the status of EU citizen offers little help to students who find themselves in such situations.

Ryszard Cholewinski offers a different perspective on the free movement of workers in his chapter, which examines the free movement of persons in the European Union from the vantage point of international human rights. The privileged position of Union citizens compared with other immigrants in the European Union is problematic. Nevertheless, the European Court of Human Rights has not been prepared to challenge the difference in treatment of migrant Union citizens and third-country nationals. Does this mean that the Court has endorsed the exclusionary nature of Union citizenship? In the light of the accession of the European Union to the ECHR, this controversial issue becomes particularly topical.

The next three contributions can be brought together under the umbrella of assessment of the balance between achievements and unresolved problems in the regulation of free movement of workers following the adoption of Directive 2004/38 and a string of seminal judgments of the European Court of Justice. Does Directive 2004/38 ensure the right balance between the rights of Union citizens and the legitimate interest of the Member States to protect their social systems from welfare tourism? Paul Minderhoud's analysis of conditions of access to social benefits in a host Member State highlights the major problem with the implementation of Directive 2004/38, which does not define when a non-active EU citizen applying for social benefits becomes an "unreasonable burden". A critical overview of national legislation implementing Directive 2004/38 provides a new angle for this problem. While Minderhoud agrees with other commentators that, in a individual case, it is difficult to show the unreasonableness of burden, he argues that the condition of habitual residence introduced by several Member States, including the United Kingdom, to protect their social system from welfare tourism, can effectively exclude EU citizens who are neither workers nor self-sufficient from access to benefits. While the potential impact of the judgments of the European Court invariably receives due attention of the scholars of EU law, the implementation of the recent case law is often overlooked. This gap is filled by the contribution of Roel Fernhout, who focuses on the implementation of the recent case law of the Court of Justice on social benefits and family reunification. Finally, in this block of contributions, Hervig Verschuere examines the issue of reverse discrimination. This chapter contains a number of interesting, although controversial, conceptual solutions for this problem, including the possibility of reinterpreting the provisions of the Treaty with regard to the prohibition of discrimination on grounds of nationality in the light of Union citizenship, the possibility of the application of arts 8 and 14 ECHR, and amendment of the Community's secondary legislation.

The impact of Community rules on professional football is discussed by Dimitros Kontizas, who provides a critical overview of the case law of the Court of Justice from its judgment in Bosman ((C-415/93) [1995] E.C.R. I-4921) onwards as well as initiatives of the football governing bodies and the potential impact of Community action in the area of sports activities after Lisbon.

Three very interesting contributions by Nicos Trimikliniotis, Alessandra Lang and François Moysse discuss implementation of free movement of workers provisions in Cyprus, Italy and Luxembourg. The reports on Italy and Luxembourg prove that, at the national level, contestation of acceptance of migrant workers from other Member States is still very strong. This is evident in the reluctance of Luxembourg

to open up access to civil service in compliance with the EU rules on free movement of workers and in the focus of the Italian legislator on the expulsion rules. On a different note, implementation of the EU free movement provisions in Cyprus is complicated by the long-standing political problems concerning the EU borders. The contribution by Nicos Trimikliniotis on this issue is very valuable for drawing our attention to the atypical situation of Cyprus which should not be overlooked in the wider context of free movement of workers.

The volume concludes with four case reports. John Handoll examines the right to family reunion in *Metock*. Kay Hailbronner critically analyses the remaining differences in the residential status between Member States' own nationals and other Union citizens exposed in the *Huber* case with regard to storing and processing personal data. He concludes that the legal situation is still based on the basic different residential situation and that the characterisation of Union citizenship as a fundamental status cannot change this basic legal fact. Gyula Fábián and Emöd Veress analyse restrictions on free movement of the Member State's own citizens in the *Jipa* case ((C-33/07) [2008] E.C.R. I-5157). Henk Vording addresses, in a very sharp comment, the important and complex topic of the judge-made European rules on taxation of cross-border labour, with regard to the development of the *Schumacker* rule in the *Renneberg* case. The overlapping taxation contributes to the cost of immigration incurred by Union citizens who work in a Member State other than their Member State of residence. The axis of the *Schumacker* ((C-279/93) [1995] E.C.R. I-225) and *Renneberg* ((C-527/06) [2008] E.C.R. I-7735) cases helps to eliminate obstacles to free movement of workers by requiring that Member States should take into account non-resident worker's personal circumstances, including all cases of cross-border work whether caused by changing jobs or place of residence and irrespective of whether the tax advantages are related to personal circumstances or source characteristics. However, this approach is one-dimensional and does not take into account how the real cost of migration is affected by the property market and the different cost of public services in the Member States of work and residence. Therefore the judge-made rules on taxation of cross-border labour can unjustifiably interfere with the sovereignty of the Member States regarding taxation and a wider range of social policies. Also, *Renneberg* leaves unresolved a vexed question whether a worker should be compared with a resident worker receiving some income from a domestic source or with a resident worker receiving the same income from a foreign source. Once again, the case law of the Court of Justice exposes the difficulty of not only the application of the principle of non-discrimination but also of elimination of non-discriminatory obstacles to free movement in the area of taxation. It is hard to disagree with Vording that the only solution for this problem is a political one and that the Court is aware of its limitations in pushing for positive harmonisation by the Member States.

On a critical note, the consequence of cramping 16 chapters into 224 pages is that the contributions are quite short and, while most authors succeeded in presenting a concise argument, the limited space did not allow some of the contributors to develop their argument beyond a telegraphic statement of the problem and a brief comment. Also, several chapters begin with a discussion of the status of Community worker. The topicality of this discussion and its relevance for the challenges to free movement of workers in the new context of free movement of persons as Union citizens is questionable. Although it is useful to have an outline of the evolution of free movement of workers, the unfortunate repetition of this point could have been easily avoided had it been limited to the introductory chapter or one of the opening chapters of this book. Despite these limitations, overall, this collection of essays succeeds in achieving the objective stated in the introduction to contribute to the understanding of some of the key issues relating to free movement of workers and challenges for the future. The authors raise important questions with regard to the current state of regulation of free movement of workers and offer some thought-provoking answers. Although the literature on the free movement of persons and Union citizenship is abundant, this volume can be distinguished for its selection of some very interesting topics and aspects that have been insufficiently

covered in the academic debate despite their importance for the assessment of the achievements and shortcomings of the free movement of workers in the European Union.

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