ARTICLES

Immigration into an Internal Borderless Europe: ECJ Jurisdiction.

William Robinson[1]

As commuters pass through Heathrow airport from other European Community countries, they are required to perform the so-called "Bangemann wave" - the flashing of EEC passports at an official - in order to gain entry to the UK. Should they be of non-Community nationality, they are required to undergo more substantive border controls. This situation, at least for the United Kingdom government, constitutes the Internal Market; although, of course, when compared to the crossing of the English/Scottish border, one might be forgiven for believing that Heathrow does not form part of the embodiment of Lord Cockfield's *"area without internal frontiers in which the free movement of goods, services, persons and capital shall be ensured."* [2]

In this article, it is hoped to introduce three current jurisdictional problems which have arisen as a result of the European initiatives in the immigration field, of which the removal of internal border controls is one. First, however, I should address two points concerning rights and remedies in Community law. The extent of the rights conferred by Community law, and the obligations incumbent upon national courts to provide remedies for these rights, is expanding[3] under two conditions:

First, the requirement placed upon national courts to grant effective remedies for rights conferred by Community law has been based upon the principles of the protection of the individual and of the respect for fundamental rights and freedoms. Both of these principles have long been established in the jurisprudence of the Court as part of the general principles of Community law. The protection of fundamental rights and freedoms has now been formally recognised, beyond the references in the preamble to the Single European Act, in Articles F and K.2 of the Treaty on European Union (TEU).

Second, the Court of Justice has no inherent jurisdiction. Its jurisdiction is based upon the treaties establishing the European Communities, as supplemented by express jurisdiction under international conventions. Therefore, should a matter fall outside the field of Community law, such as the provision of abortion information by students' organisations in Ireland, the *Grogan* case[4], the Court will not have jurisdiction. This jurisdictional limit has recently been criticised by Professor Joseph Weiler in relation to fundamental rights and freedoms, as non-EC nationals may fall only sporadically within the remit of Community law[5].

The availability to individuals of the extensive and effective remedies for the enforcement of their Community rights therefore depends upon the remit of Community law, and its uniform and coherent application upon recourse to the Court of Justice.

The jurisdiction of the Court of Justice in relation to third country nationals has been challenged by the Member States, both before the Court, most recently by Germany in a case concerning the rights of Turkish workers in Germany under the association agreement[6], and expressly in Article L of the TEU. The following current problems might question the coherence of the inter-governmental and Union measures which exclude the jurisdiction of the Court, thereby re-affirming the Court's essential role and dispelling the implied doubts cast upon it through the adoption of such inter-governmental measures.

Legal Background

The TEU inserts Article 100C into the Treaty of Rome. Article 100C provides for the Council to determine a uniform visa format and which third country's nationals shall require a visa when crossing the Community's external borders. The inclusion of visa policy within the jurisdiction of the Court, once the TEU is ratified, must be welcomed. However, this inclusive measure is the exception to the rule in the immigration field. Article L of the TEU explicitly limits the jurisdiction of the Court of Justice to three areas:

- the treaties establishing the three Communities,
- international conventions drawn up under inter-governmental Cooperation in the fields of Justice and Home Affairs (CJHA) pillar of the TEU which expressly confer jurisdiction upon the Court, and,
- the final provisions of the TEU.

The measures which have been, or are being, taken at an inter-governmental level do not provide jurisdiction to the Court of Justice. However, the Court of Justice itself will have to determine whether a matter brought before it falls within its competence. The inter-governmental measures include:

- the CJHA pillar of the TEU,
- The Schengen Agreement[7],
- The Dublin Convention[8],
- the draft External Frontiers Convention, and, - the draft Convention on the European Information System.

Therefore, although the creation of the Internal Market has been the impetus for the harmonisation of immigration rules, the goal has been approached through diverse means. The only "bridge" between the inter-governmental and Community measures is contained in Article K.9, which allows certain matters[9] including asylum, immigration and treatment of third country nationals to be transferred to Community competence upon a unanimous Council vote and, probably, the ratification by Member States.

International Court of Justice jurisdiction? (ICJ)

The first current problems relates to this overt restriction of the jurisdiction of the Court of Justice and the reliance upon the inter-governmental approach. The question to be posed is this: who has jurisdiction to regulate the application of this melange of measures? According to the jurisprudence of the Court of Justice, the treaties establishing the European Communities constitute integrating treaties which have created their own legal order, and should be interpreted as such. They are not therefore subject to either the Vienna Convention on the Law of Treaties, international law sanctions or the jurisdiction of the International Court of Justice in the Hague[10].

However, the Schengen, Dublin and External Frontiers conventions are all international measures which are subject to international law. Not only does this mean that adhering States may apply reservations and withdraw, but potentially jurisdiction for the International Court of Justice and the use of sanctions to settle disputes. The CJHA pillar is of a hybrid nature: an integral element of the Union, itself an integrating treaty, but outside the coherence creating jurisdiction of the Court. The view that the ICJ would have jurisdiction over the Union must be severely doubted, although this

would seemingly leave Member States without redress against another's failure under the CJHA pillar. The suggestion made by the British Prime Minister[11] that the post-referendum provisions for Denmark, concluded at the Edinburgh European Council[12], are justifiable by the International Court of Justice therefore seems extremely dubious. Therefore, although individuals have access to the non-binding remedy of petition to the Commission and Court of Human Rights in Strasbourg, the method by which the harmonising measures may be uniformly enforced, if at all, is not obvious.

Article 8A: legal effect?

Whether non-Community nationals may travel unhindered throughout the Community is the second current problem. The debate questions the legal effect of Article 8A of the Treaty of Rome, and may be summarised as follows:

The Commission believes[13] that Article 8A creates a clear and precise obligation on Member States to abolish all internal border controls for all persons, a goal which can be traced back to Lord Cockfield's 1985 White Paper. Borders between Member States would resemble the English/Scottish border, where nationality, work and residence rights are irrelevant to movement, thereby ensuring the absolute free movement of all those within the Community of whatever nationality.

The United Kingdom, Ireland and Denmark, the non-Schengen countries, believe that the use of the phrase *"shall be ensured in accordance with the provisions of this Treaty"* contained in Article 8A, read in conjunction with several declarations to the Single European Act, enable Member States to maintain border controls within the current limits of Community law.

The legal effect of Article 8A is therefore a key issue in determining the consequences for the movement of third country nationals within the Community and awaits adjudication by the Court of Justice. Although the Edinburgh European Council concluded[14] that the free movement of persons cannot be completely assured on lst January 1993 and the Commission has announced an amnesty on non-implemented Internal Market measures, the Commission may still bring infringement proceedings against a Member State which has maintained controls, a route presently being advocated by the European Parliament. The seizing by the Court of Justice of this problem, which may alternatively be achieved through an Article 177 reference from a national court, would clarify several issues concerning the movement of non-EC nationals and the remit of Community law.

Overlapping Provisions

The third current problem concerns the considerable degree of substantive overlap between the provisions within the uniform jurisdiction of the Court. This may lead to the "indirect" jurisdiction of the Court of Justice in matters which overlap with the EC Treaty. It is unsurprising that given the plethora of measures, overlap and conflicts abound. One area shall be examined:

In a case decided in 1987, Germany and several other Member States challenged a Commission decision which provided a communication and consultation procedure on migration

1. William Robinson is an Associate of the European Law Institute, University of Durham. The opinions expressed are purely personal. This article is a revised version of a paper presented at an EC immigration law conference organised by JUSTICE & ILPA, 29/30 January 1993.
2. Article 8A of the Treaty establishing the EEC.
3. See Advocate General Van Gerven's proposal for the Horizontal direct effect of directives, Opinion of 26 January 1993, Case C-271/91, Marshall, at point 12.
4. Judgment of 4 October 1991, Case C-159/90, *Society for the Protection of Unborn Children Ireland v. Grogan e.a.* [1991] ECR I-4685: no economic link existed between the free distribution of the information in Ireland and the clinics in the United Kingdom to which it pertained, with which to bring the matter within Community law.
5. See J.Weiler, "Thou shalt not oppress a stranger: On the judicial protection of human rights of non-EC nationals - a critique" 3 EJIL (1992) 65. See the House of Lords Select Committee on the European Communities, 10th Report, Session 1992-1993, 'Community policy on Migration', at points 56 & 76.
6. See Judgment of 16 December 1992, Case C-237/91, Kus, not yet reported.
7. The Schengen Agreement of 14 June 1985 on the gradual abolition of controls, at common frontiers, as supplemented by the Convention of 19 June 1990: signed by 9 Member States (excluding UK, Ireland & Denmark), not yet in force (July 1993 is the revised goal).
8. The Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed 15 June 1990, now by all 12 Member States, not yet in force. Cm 1623.
9. Those areas contained in Article K.11)-(6).
10. See Article 219 of the Treaty of Rome and Article 171(2), to be inserted by the TEU.
11. See the reply of the Prime Minister, Mr.J.Major, to a question posed by Mr Denzil Davies MP, Hansard, 14 December 1992, p34.
12. Conclusions of the Presidency, Part B, see *Agence Europe*, No 5878, 13 December 1992: 9.
13. See Commission position on the Interpretation of Article 8A of the EEC Treaty, Agence Europe, No 1773, 12 May 1992.
14. Conclusions of the Presidency, Part A, point 17, see *Agence Europe* No 5878, 13 December 1992:6.
15. Judgment of 9 July 1987, Joined Cases C-281, 283-285 & 287/85, *Germany etc. v Commission, [1987] ECR 3203.*
16. See Opinion of 16/12/92, Joined Cases C-181/91 & 248/91, *Parliament v. Council and Commission,* at point 16 et seq.
17. supra, note 4, at points 71 & 86.
18. See The Independent, 5/12/92.

policies[15]. The Member States challenged the decision's legal case of Article 118 EEC, by which the Commission is charged with promoting closer cooperation in the social field. The Court, diverging from the Advocate General Mancini's Opinion that migration policy fell entirely outside the Treaty, held that migration policy was capable of falling within Article 118 to the extent that it affects employment market and working conditions. The wider "cultural integration" aspects of the decision fell outside Article 118, and were therefore annulled. Article 118A was inserted by the SEA concerning working conditions for workers. Although applicable to the working conditions of all workers, this article has not been used as a legal basis for non-EC nationals legislation.

Whether the Court would find in a similar manner post-TEU ratification is debateable as the TEU includes a widely phrased Article 128 concerning "Cultural" measures. This inclusion, combined with the potential consequences of Article 8A, indicate that migration policy may now fall within the EC Treaty.

A significant general overlap therefore emerges between the EC Treaty and the CJHA pillar. The question then raised is: how is the Court of Justice to determine whether a Council measure is based on the EC Treaty, in which case it has jurisdiction, or on the CJHA pillar, in which case it does not?

The Court has constantly held that the content and effects of an act, rather than its form or title, determine whether the Court may exercise its function of judicial review. The passing of legislation under the title of Article K.3 may not therefore of itself deny the Court's jurisdiction. Advocate General Jacobs has suggested in his Opinion in a case currently pending before the Court[16], that the Court should also have the jurisdiction to determine the capacity of the author of an act in order that the legislature may not avoid the judicial review of Community measures by merely ascribing the acts a title which would render the measure outside the jurisdiction of the Court of Justice. It remains to be seen whether the Court will follow this approach, and the impact that such jurisdiction would have upon the immigration field which consists of overlapping Community and non-Community provisions.

Conclusion

In conclusion, I would advocate against the findings of the most recent House of Lords Select Committee on the European Communities on migration that the inter-governmental approach is curently appropriate,[17] and endorse the remarks made by Commission President Jaques Delors at the 40th anniversary of the Court of Justice,[18] namely, that it is in the interests of the protection of the individual's Community and human rights that the Court of Justice should have jurisdiction in the immigration field, rather than proceeding to apply common rules through inter-governmental means. The Court of Justice is the only judicial body which can oversee the uniform interpretation and application of these common rules which have all been passed with the goal of creating *"an ever closer union amongst the peoples of Europe"*. It is to be hoped that the Article 177 reference procedure will be invoked in the wide ranging problematic areas in order that the jurisdictional problems inherent in the approach adopted by the Twelve, can be clarified, and that the resulting jurisprudence refutes the overt criticisms of the Court currently being made by some Member States.