Freedom of Movement of Self-Employed Persons and the Europe Agreements

Comments on Case C-63/99, Gloszczuk; Case C-235/99, Kondova; Case C-257/99, Barkoci and Malik (judgments of 27 September 2001); and Case C-268/99, Jany (judgment of 20 November 2001)

RONALD VAN OOIK*

1. Introduction

In the four cases to be discussed in this case report, nationals of several Central and Eastern European Countries (CEECs) sought entry into and residence in the territory of two of the current EU Member States (the United Kingdom and the Netherlands) in order to work there as self-employed persons. Since they did not have such rights of entry and residence under national law, the Eastern European nationals invoked the provisions on the right of establishment laid down in the Europe Agreement which applied to them.¹

In almost identical terms, the various Europe Agreements state that “each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of [CEEC] companies and nationals [...] and shall grant in the operation of [CEEC] companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.”

* Lecturer and researcher in European Union Law at the Europa Institute of the Faculty of Law, Utrecht University, the Netherlands.

¹ In the Gloszczuk case the Europe Agreement between the EC and Poland was invoked (OJ 1993, L 348/1); the Kondova case concerned the EC/Bulgaria Agreement (OJ 1994, L 358/1); in the Barkoci & Malik case the EC/Czech Republic Agreement was at stake (OJ 1994 L 360/1); and in the Jany case the Europe Agreements with Poland and the Czech Republic were relied upon. Europe Agreements have furthermore been concluded between the European Communities (and the Member States) and Hungary (OJ 1993, L 347/1), Romania (OJ 1994, L 357/1), the Slovak Republic (OJ 1994, L 359/2), Latvia (OJ 1998, L 236/1), Lithuania (OJ 1998, L 51/1), Estonia (OJ 1998, L 68/1) and Slovenia (OJ 1999, L 51/1). The terms ‘Europe Agreement’ (EA) and ‘Association Agreement’ will be used interchangeably. Natural persons having the nationality of one of these Eastern European Countries will be referred to as ‘EA nationals’ or ‘CEEC nationals’.
nationals”. According to the applicants in the four cases, a directly effective right of entry and residence could be deduced from this national treatment clause. After all, what is the use of giving to EA nationals a right to national treatment if they cannot enter the host country in the first place?

Consequently, in the Gloszczuk case, a Polish couple argued that they had the right to stay in the UK because Mr Gloszczuk had been working there as a self-employed building contractor since 1995. The Kondova case concerned a Bulgarian national who, after having studied in the UK, intended to commence working as a self-employed person ‘offering general household care services’. Barkoci and Malik were two members of the Roma community who could not find work in the Czech Republic. Following rejection of their application for asylum, they invoked the Europe Agreement EC/Czech Republic in order to work in the UK as a self-employed gardener and to provide ‘domestic and commercial cleaning services’. Finally, the Jany case dealt with two Polish and four Czech prostitutes who invoked the Europe Agreements in order to obtain Dutch residence permits and then be able to work as self-employed prostitutes in the red light district in the centre of Amsterdam.

2. Relevant Provisions of the Association Agreements

Titles IV of the Europe Agreements are entitled ‘Movement of workers, establishment, supply of services’. Regarding the right of establishment, it is stated – as was already pointed out above – that each Member State shall grant, from the entry into force of the Agreement concerned, for the establishment of companies and nationals of the CEECs, and for the operation of their companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals.

For the purpose of the Europe Agreements, ‘establishment’ means, as regards natural persons, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control. It is explicitly added that self-employment and business undertakings by these nationals, does not extend to seeking or taking employment in the labour market of the other parties to the Europe Agreements. Moreover, the provisions of the chapter on establishment do not apply to those who are not exclusively self-employed (but who also work in a salaried capacity). Economic activities are defined as the activities

2 See paragraph 2 below for the specific references to the relevant provisions of the Europe Agreements.

3 See, e.g., Article 45(1) of the Europe Agreement EC/Bulgaria, and Article 44(3) of the EC/Poland Agreement.