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The ECJ Simutenkov Case: Is Same Level not Offside after All? Katharina Anna Schuilenburg

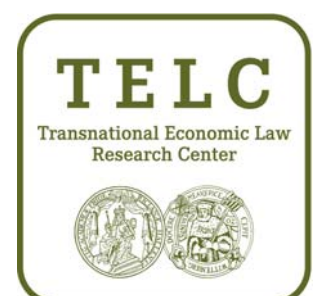
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I.

On 9 May 2003, the Spanish Audiencia Nacional (National High Court) Sala de lo Contencioso Administrativo (Chamber for Contentious Administrative Proceedings) made a reference for preliminary ruling to the Court of Justice of the European Communities (ECJ) in the case of Igor Simutenkov v Abogado del Estado, Real Federación Española de Fútbol and Ministerio Fiscal (Case C-265/03, 12 April 2005). The question referred to the ECJ concerned the area of external relations of the European Union with so-called Third Countries, i.e. countries outside the European Economic Area (EEA). In particular, the Spanish National High Court requested a preliminary ruling on the application of an agreement on partnership and cooperation between the European Communities (EC) and the Russian Federation, signed in Corfu on 24 June 1994 (the Agreement). The ECJ was asked to rule on the direct effect and meaning of Art. 23 (1) of the Agreement, which states that:

‘Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free

from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.’

Igor Simutenkov, a professional Russian football player, disputed before the Spanish High Court a provision of the General Regulations of the Real Federación Española de Fútbol (Royal Spanish Football Federation; ‘RFEF’) which lays down that clubs may use in competitions at national level only a limited number of players from countries outside the European Economic Area. Under Spanish national law, it was necessary for Simutenkov to hold the appropriate federation licence (RFEF licence) in order to participate in those competitions. As a holder of a residence card and a work permit for Spain, Simutenkov applied for a conversion of his RFEF licence into a Community licence on the basis of the Agreement. As holder of a Community licence Simutenkov would not have to comply with the Spanish General regulations. Hence, he could be listed for participation in all football games.

Following its Kupferberg I findings (104/81, *Hauptzollamt Mainz v. C.A. Kupferberg*, [1982] ECR 3641), the Court adopted a two-step examination. First of all, it determined whether the nature of the Partnership Agreement as such qualifies for the applicability of direct effect. Second, it examined whether

an individual before the courts of a Member State can rely on Article 23(1) of the EU-Russia Partnership Agreement. Since in the present case the answer was to the affirmative, the Court went on to determine the scope of the principle of non-discrimination which that provision lays down. The Court found the provision to be clear and precise enough and hence creating a direct effect for individuals.

So far as the conditions of employment, remuneration and dismissal of lawfully employed non-EU workers in the territory of a Member State are concerned, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as enjoying under the EC Treaty precludes any limitation based on nationality. In other words, the direct effect of a Partnership Agreement is limited to situations where a non-EU national is already a lawful resident of a Member State, where he/she holds a work permit for that respective Member State, and where a national regulation precludes him or her from enjoying the same conditions of employment as are granted to EU nationals in a similar situation. In the specific context of the Simutenkov case, the ECJ added that a limitation based on nationality could not find its justification on sporting grounds.

For the above-mentioned reasons, the ECJ ruled that the EC–Russia

Partnership Agreement precludes the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State, which provides that clubs may field in competitions organised at national level only a limited number of players from non-EU countries which are not parties to the EEA Agreement.

The well-known ECJ doctrine of case C-415/93 *Bosman* ECR [1995] I-4921, restated in the recent Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, lays down that nationality restrictions in sports are incompatible with Article 39 EC, the basic provision on free movement of workers within the European Community. The present case of the Russian football player Simutenkov seems to open the floodgates for proceedings of non-EU nationals who want to rely on Art. 39 EC. One should not forget though that in *Deutscher Handballbund* the ECJ already transferred the *Bosman* doctrine into the sphere of international agreements. As the law now stands, Article 39 EC seems to be able to ‘catch’ non-EU nationals through the mere existence of Partnership Agreements between the EU and Third Countries. From a dogmatic point of view, the ECJ has made a revolutionary statement by allowing for direct effect to be created by provisions in Partnership Agreements. After all, these Agreements do not aim at creating a-

nothing more than mere political dialogue between the contracting Parties and 'soft' cooperation in certain areas. Hence the following questions require further clarification:

1. Which specific provisions in international agreements were meant to have direct effect and where are those to be found?
2. What consequences will this judgment have, i.e. will non-EU nationals be able to enforce their rights before European national courts on grounds of free movement for workers?
3. Has the ECJ opened the floodgates for proceedings brought by non-EU nationals?
4. What consequences does the current case have for Member States?
5. Does *Simutenkov* constitute a case of judge-made law on EC level?

II.1.

The first question relates to the category of provisions having direct effect and their legal habitat. To start off with the second part of the first question, most of EU's Partnership Agreements with Third Countries outside the EEA have the objective of promoting overall cooperation between the Contracting Parties, in particular in the field of economic relations and development. They are to be found in the field of EU External Relations and EU Development Policy. According

to the preamble and objective of various agreements, Third Countries as well as Member States are bound at two levels: Community and international. Moreover, the commitments oblige not to use any mechanisms that would lead to disintegration, which is contrary to the objectives on the progressive approximation of the Contracting Parties' economic policies under the Agreement. In other words, as the Court remarked in its famous judgment *C-149/77 Defrenne* [1978] ECR 1381 "...the contrary view would be at risk raising violation of the law to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 EC". Furthermore, as the ECJ has made clear in the case *C-18/90 Kziber* [1991] ECR I-199, the fact that the Agreement is confined to instituting cooperation between the Parties without referring to any intentions of association or accession to the EU is not as such preventing its provisions from being directly applicable. In other words, it is irrelevant for the purpose of direct effect whether the Partnership Agreement is one of the so-called first generation or one of the second generation. The ECJ judges using teleological and literal interpretation methods, taking into account the intentions of the Contracting Parties. Bearing this in mind, it is possible to find several Partnership Agreements suitable for analysis, thereby providing answers to the open questions.

An excellent example is the EU-ACP Partnership Agreement (Cotonou Agreement) signed on 23 June 2000 between the EU and the group of African, Caribbean and Pacific (ACP) States (OJ L 317, 15/12/2000). Art. 13 (3) Cotonou Agreement states that:

‘The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State.’

With regard to the category of provisions having direct effect, the ECJ clearly encountered a non-discrimination provision when judging on Art. 23 (1) of the EU-Russian Agreement. *Simutenkov*'s case is one of direct discrimination based on nationality. Whether cases of indirect discrimination would receive similar treatment is not clear from the present case. Indirect discrimination encompasses cases where the national rule in question divides at first glance by some other criterion, not being nationality, but in fact this criterion correlates with nationality. The line of cases following Case C-237/94 *O'Flynn v Adjudica-*

tion Officer [1996] ECR I-2617 provides good examples of such situations. Seen previous ECJ case law on covert discrimination and the Court's efforts to eliminate *any* form of discrimination in *any* legislation in force, one is tempted to answer in the affirmative. Looking at the wording of the provisions, one has to acknowledge that only cases of direct discrimination will be caught by the new system. Turning to Art. 13 (3) Cotonou Agreement, one finds a clear and unconditional provision on non-discrimination, similar to the one in the EC-Russian Federation Agreement of 1994. Hence it is wise to limit this discussion for the time being to direct discrimination cases only.

II.2.

With regard to the second question, the answer is yes and no. Obviously, merely persons fitting within the tight limits of the *Simutenkov* judgment will qualify for the effective enforcement of their rights before Member States' courts. Only after obtaining the status of a lawful resident and worker, the non-EU national shall be treated in a non-discriminatory manner. Interesting in this context is a walkthrough to the underlying Art. 12 EC when invoked as gap-filling provision for cases where a non-EU national lawfully resides in a Member State but has not become a worker yet. After all, being a worker in the EU depends on residing in the EU and one cannot happily reside without work to secure a living. It is more

than questionable that the ECJ would walk this path though. The potential political and socio-economic consequences for the tense European labour markets speak a clear language to the contrary.

When compared to Art. 23 (1) of the EU-Russian Agreement, it is striking that according to Art. 13 (3) Cotonou Agreement, ACP workers are accorded a treatment 'free from any discrimination based on nationality' whereas Art. 23 (1) EU-Russian Agreement speaks of 'Member States [which] shall ensure that the treatment accorded [...] shall be free from any discrimination based on nationality'. From a purely literal interpretation of the ordinary wording, the EU-Russian Partnership Agreement seems to put a stronger emphasis on the obligation of Member States to ensure a non-discriminatory treatment. Although both Agreements are not intended to lead to association or accession of any of the Third Countries involved, one might think that a Russian national is closer to his/her goal when invoking Art. 23 (1) of the EU-Russian Agreement than a Fijian national referring to Art. 13 (3) Cotonou Agreement. Similar differences are to be found in Agreements with Latin American States or with Mediterranean Third Countries. Hence, there seems to be a qualitative difference in the two superficially similar, clear and unconditional provisions. A Frenchman would say *boni soit qui mal y pense*.

II.3.

With regard to the third question, discrimination between Partnership Agreements with geographically close EU neighbours and those with distant neighbours is indicated. Even assuming that the case of Russian and Fijian nationals is similar with regard to cultural and lingual barriers to migration, it is very obvious that the incentive for a Russian national to move to the EU is higher than the motivation of the Fijian national. From this perspective, one might simply expect more Russian nationals to make use of the new opportunity to invoke a Partnership Agreement provision before a national court in the EU than nationals from ACP states. For the Pacific ACP region, estimates show that per year only some 100 workers from a population of more than six million Pacific Islanders are willing and able to migrate to the EU. Much more interesting for Pacific Islanders would be a *Simutenkov* precedent before Australian or New Zealand courts with regard to regional Agreements; in theory, non-discrimination provisions in regional Agreements between the Pacific Island States and Australia / New Zealand (e.g. Pacific Agreement on Closer Economic Relations, PACER) could lead to a backdoor opening for Pacific people keen on entering the foreign labour markets. Unfortunately, some of the more important regional Agreements, such as the Pacific Island Countries Trade Agreement (PICTA) currently exclude the provision of labour

and services. Again as a walkthrough, one could imagine a very indirect effect of *Simutenkov* on non-EU nationals. When negotiating their position vis-à-vis a regional giant such as Australia for the Pacific region, Pacific Islanders might be in a position of negotiating a better deal with their major trading partners by pointing out the advantages from Partnership Agreements with the EU. Whether Australia will be willing to play this strategic game remains to be seen in the South Pacific context.

II.4.

Generally speaking, the fourth question raised in this paper is the following one: "Should Member states apply the criteria set out in the Partnership Agreement?" There are obviously different expectations involved from the side of Member States on one hand and Third Countries on the other. Hence, it should be taken into account that the legal situation of EU citizens under the EC Treaty is not identical to the situation of persons under Europe Agreements. There are three different situations: the right to enter and stay in a Member State, and subsequently the right to work and to equal treatment at the workplace. In the first situation (comparable with the case C-63/99 *Gloszczuk* [2001] ECR I-6369), the Member State is permitted to apply its own criteria and is able to impose the immigration control under its own legal system. In the second and third situations (comparable to cases

such as C-268/99 *Jany* [2001] ECR I-8615 or C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049) the person who has already legally resided on the territory of a Member State is under the protection of the Partnership Agreement as far as a treatment no less favourable than that accorded to its own companies and nationals for the establishment is concerned. It is here that one finds a dogmatic revolution within the *Simutenkov* judgment. Third Country nationals, who might lose their legal status, for example as a result of a divorce, might now be able to claim an equal treatment on the basis of the Partnership Agreement. The created loophole is small though and it is more than questionable whether the groundbreaking effect of the present judgment will ever be felt on a large scale on the ground.

II.5.

One can be short on the last question whether the *Simutenkov* case is an example for judge-made law. It is certainly a case of judicial activism in an evolving area, which is delimiting the interplay of internal market rules and obligations under international agreements. But foremost it is about solving a 'neighbourhood' case against the background of open textured EC Treaty provisions. Hence the current case does not represent a breathtaking transgression of the ECJ's judicial powers.

III.

Seen the earlier analysis, the following concluding remarks are pos-

sible: In *Simutenkov*, the ECJ went further than ever before by allowing for a Partnership Agreement provision to create direct effect in the Community legal order. Seeing that the usual aim of these Agreements is to create 'soft' political commitments, rather than 'hard' legal obligations, the present judgment amounts to a small revolution. But on exact review, it seems that if non-EU nationals seek protection of their fundamental right not to be discriminated against on the ground of their nationality and if they rely in doing so on a Partnership Agreement concluded between their home country and the EC, they will face severe limitations. The ECJ has not opened the floodgates for litigation in this respect. Rather, it has carefully selected the main characters and the scenery for the game. Having learned from earlier judgments and their possible, unexpected and even disastrous outcomes in the area of Internal Market law, the ECJ became more careful in broadening the scope of fundamental treaty rights through its case law. The limitations for non-EU nationals already begin where the Partnership Agreements start. That is to say in the home countries of non-EU nationals. There are not many ACP nationals motivated to migrate, although TV reports try to suggest differently. Those few who do legally enter the EU, are further limited by the double criterion of lawfully residing and working in a EU Member State.

Fact is that non-EU football players or sportsmen in general can look forward to rapidly increased access to Europe's top teams but it is more than questionable whether sugar-industry workers from Fiji can claim similar working conditions as their European counterparts in the EU on grounds of the Cotonou Agreement. Fact is also that not many Fijian workers would try to penetrate the European labour market since geographic, cultural, economic and language barriers would prevent them from doing so. Therefore the limitations of the scope of the assessed judgment are not only internal but also external in nature. Preferential access to European markets will diminish in terms of trade but nothing like access for humans to European labour markets will replace it. Hence the overall effect of *Simutenkov* on Partnership Agreements and Third Country nationals should not be overemphasized. One of the main laws of the game for football states that same level is not offside. In the present case, it is questionable whether this law of the game is also fully applicable to everyday life of Third Country nationals legally residing and working in the EU.

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