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R (on the application of Low) v Secretary of State for the Home Department [2010] I.C.R. 755

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The Court of Appeal in *R (on the application of Low) v Secretary of State for the Home Department* [2010] 2 C.M.L.R. 34 [2010] I.C.R. 755 [2010] EWCA Civ 4 has given an important judgment holding that companies established in the European Union cannot rely on the free movement of services provisions in Article 56 TFEU and the law relating to “posted workers” in order to circumvent domestic immigration laws of the Member States. The appeal was made in a test case – some 650 similar applications for judicial review being stayed pending judgment in this matter – involving non-EU nationals unlawfully present in the United Kingdom who entered into formal contracts of employment with an Irish company and were immediately “posted” by the Irish company to work in Chinese catering establishments in the UK. The Irish company sought to regularise the UK immigration status of its non-EU national employees on the basis of its alleged right under Article 56 TFEU to bring its workforce into the UK for the purpose of providing services to the UK catering establishments. Permission to appeal to the Supreme Court (Lord Rodger, Baroness Hale, Lord Mance) was refused in this matter on 26 March 2010.

Factual background

The first three appellants were nationals of non-EU Member States (“the third country nationals” or “TCNs”) who were, at all relevant times, unlawfully present in the United Kingdom; they had each entered into individual contracts of employment with the fourth appellant, a company established in the Republic of Ireland (“the Irish company”); they had never lawfully resided or been employed in the Republic of Ireland, or in any other EU Member State. The Irish company had a contract to provide catering consultancy services to the fifth appellant, a company operating a Chinese restaurant in the UK (“the UK company”). The Irish company proposed to discharge its obligations under the consultancy contract by “posting” its TCN employees to the UK to provide kitchen and front of house services to the UK company for the term of the contract.

The Irish company applied to the Secretary of State for temporary residence and work permits for the TCN employees for the duration of the consultancy contract. They sought confirmation that the TCN employees were “posted workers” within the meaning of the Posted Workers’ Directive.¹ These applications were premised on the Irish company’s right under Article 49 EC (now Article 56 TFEU²) to provide services in another Member State of the Community (the UK) and to bring its work force into that Member State for the purpose of providing said services. The Irish company asserted that its TCN employees derived a right to reside in the UK from the Irish company’s exercise of its Article 49 EC freedom.

The Secretary of State rejected all three applications as “*spurious*”, maintaining that Article 49 EC has no relevance to the “posting” of employees who are neither EU nationals nor legally resident in their employer’s country of establishment (“the Decision”). Arrangements were accordingly put in place to remove all of the TCN employees from the UK. The appellants sought judicial review of the Decision on the grounds that the Secretary of State had failed correctly to apply Article 49 EC.

On 21 January 2009, His Honour Judge David Pearl sitting in the High Court gave judgment dismissing the applications for judicial review and upholding the Decision (see *R (on the application of Low et. al.) v Secretary of State for the Home Department* [2009] 2 C.M.L.R. 22 [2009] EWHC 35 (Admin) at para. 2). His Honour found that Article 49 EC was not engaged in these circumstances and, even if Article 49 EC were engaged, the Irish company’s business scheme amounted to an abuse of Community law, such that the Irish company would be precluded from relying on its Article 49 EC rights.

The Court of Appeal judgment

The Court of Appeal (Rix LJ, Lloyd LJ, Sir David Keene) upheld the judgment below on both grounds. The appellants argued that “*lawful residence or employment in the country of establishment is not a necessary condition of the derivative right of a posted worker to reside temporarily in a host country for the purpose of being employed there in the establishment’s business, nor is there correspondingly any need for a posted worker to move from the country of establishment to the host country*” (para. 16). The appellants further argued that, by prohibiting the TCN employees from remaining and working in the UK, the UK government had placed a disproportionate restriction on the exercise of the Article 49 EC freedom.

In support of their arguments, the appellants relied on the ECJ case law on TCN posted workers beginning with C-113/89 *Rush Portuguesa* [1990] ECR I-1417³ and, in particular, C-43/93 *Vander Elst* [1994] ECR I-3803; C-445/03 *Commission v Luxembourg* [2004] ECR I-10191; C-244/04 *Commission v Germany* [2006] ECR I-885; C-168/04 *Commission v Austria* [2006] ECR I-9041. In each of these cases, the ECJ was asked to consider the lawfulness of restrictions placed by the host Member State on the entry and presence of posted workers: for example, *Vander Elst* concerned the French requirement that work permits be obtained for all posted workers in advance of deployment and at considerable cost to their employer; *Commission v Luxembourg* concerned Luxembourg’s requirement that all posted workers have an indefinite contract of employment with a foreign EU employer entered into at least six months prior to their deployment in the host Member State in order to be granted the necessary work permit; *Commission v Germany* concerned the German requirement that TCN posted workers be employed in the Member State of establishment for 12 months prior

¹ Directive 96/71/EC concerning the posting of workers in the framework of services

² The remainder of this note, like the Court of Appeal decision, refers to Article 49 EC only.

³ Note that *Rush Portuguesa* was not strictly a case involving TCN posted workers, but it concerned Portuguese nationals who were, at the relevant time, in a similar position to TCNs as there was a derogation from the free movement of workers provisions of the EC Treaty in place in respect of Portugal.

to deployment in the host state in order to be eligible for the necessary residence visa. In each case, the ECJ found that the restrictions placed by the host Member State on the entry and presence of posted workers – and so on their employer's Article 49 EC right to provide services within the Community - was disproportionate and not objectively justified.

The Court accepted Counsel for the Secretary of State's analysis of the posted workers case law. In all of the cases cited by the appellants, the ECJ had highlighted the "*important*" fact that the TCN posted workers in question were lawfully resident and employed in the Member State of establishment. The posted workers cases concerned the limitations placed by Article 49 EC on excessive domestic regulation of immigration and employment conditions for posted workers within the EU; they did not suggest that Article 49 EC gave EU employers a right to "post" workers who had never been lawfully resident in the Member State of establishment or, indeed, anywhere in the EU.

The appellants argued that the ECJ case law did not state that lawful residence of the posted workers in the country of establishment was a "*necessary condition for the exercise of the article 49 right*", but merely that it was an "*important*" factor to be taken into account (paragraph 23).

However, the Court of Appeal (Rix LJ delivering the judgment of the court) rejected this submission and held that "*it was a presumption and requirement*" of all of the relevant posted worker cases that the posted workers "*should have lawfully resided and worked for the undertaking concerned in the country of establishment*" and noted that "*the cases are replete with a reference to such conditions.*" (para. 32). Accordingly, the Court of Appeal held, on the basis of the posted workers jurisprudence cited to it, that Article 49 EC did not apply on the present facts to give the Irish company a "*novel and unique right, not enjoyed by such an undertaking in its own country and lacked by any and all undertakings in a host country, to employ workers who have no lawful presence or right to work either in the country of establishment itself, or in the host country, or indeed anywhere in the European Union*" (paragraph 35).

The Court of Appeal further held that the Irish company's reliance on Article 49 EC in these circumstances would infringe the principle that EU law is not to be relied upon for abusive ends. Drawing upon, *inter alia*, the summary of the authorities dealing with the abuse doctrine in C-255/02 *Halifax v Commissioners of Customs and Excise* [2006] 2 CMLR 36, it held that the Irish company had specifically targeted its recruitment practices at the UK because it was aware that recent changes in UK immigration policy made it more difficult for UK-based Chinese restaurants to retain their staff. The Court also drew upon more oblique references to an abuse of EU law principle in the posted workers case law itself. The Irish company had "*sought to put between the UK restaurant and its staff the fiction of an undertaking established in another EU member state*" and this was done "*solely in order to attempt to translate those unlawfully present and illegally working in the UK into workers protected under Community law*". Accordingly, the Court of Appeal characterised the whole notion of the Irish company's employing the TCNs as a "*charade*" and found that it was right for the Secretary of State to refer to the applications for temporary residence as "*spurious*" (paragraph 47). The appeals were, therefore, dismissed.

The Court of Appeal was invited by the appellants to refer both the issue of interpretation of Article 49 EC and the issue of abuse of Community law to the ECJ, but declined to do so on the grounds that EC law position in relation to both issues was *acte clair*.

On 26 March 2010, the Supreme Court refused permission to appeal in this matter.

Ian Rogers appeared for the Secretary of State at all stages of the proceedings.

For more information on **Ian Rogers** and **Ligia Osepciu** contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' section at www.monckton.com.