Essay Questions & Answers

Free Movement of Persons

Armando, a Portuguese national, travelled to Frankfurt in Germany four months ago to look for work. He was accompanied by his wife, Beatriz, who is a Brazilian national, and their 12-year-old son, Chico, who has dual Portuguese-Brazilian nationality.

Within a few days of arriving in Frankfurt, Armando submitted an application for unemployment benefit. However, this was rejected on the basis that he had not been resident in Germany for the minimum eligibility period of 12 months. The family had to pay their rent and bills from their savings, which Armando regards as being very unfair.

Two months ago, however, Armando was successful in an interview for a part-time job as a trainee chef at a Portuguese restaurant. The job is not very well paid so, last week, he applied for a post as a chef working in Frankfurt City Hall. However, his application form was returned, stamped “Rejected — post only open to German nationals”. Armando is very surprised at this and plans to contest his rejection.

1 Armando is an EU Citizen by virtue of Article 20 TFEU. He has rights of free movement by virtue of Article 21 TFEU.
2 He has the right to exit Portugal, enter Germany and live in Germany for three months under Articles 4, 5 and 6 of Directive 2004/38.
3 The fact that he has been living in Germany for four months means that he needs to comply with Article 7 of Directive 2004/38. Or does he?
4 Could he rely on the cases of Antonissen and Collins to claim a right of residence as a work-seeker? If so, is this right limited in time?
5 What rights does Beatriz have? See Directive 2004/38, Article 2(2)(a)? Does it matter when or where they got married? See Metock & Others. The marriage must be genuine (Akrich) – what do we know about Armando and Beatriz that suggests their marriage is genuine?
6 Beatriz is NOT an EU Citizen.
7 What rights does Chico have? Is his age relevant? See Directive 2004/38, Article 2(2)(c) and Regulation 1612/68, Article 12.
8 Can Chico claim rights as an EU Citizen? Is his dual nationality relevant? See Micheletti, Collins. Again, is his age relevant? See Zhu & Chen.
9 In principle, Armando is entitled to equal treatment with German nationals. EU Citizenship rights are not dependent on economic activity. In principle, therefore, he can submit a claim for benefit (Martinez Sala, Collins).
10 This is indirect discrimination on grounds of nationality, prima facie contrary to Article 18 TFEU. However, it is justifiable. On what ground could the German government argue that there is a need to restrict benefits? See Collins, Bidar, Förster etc.
11 Does this make Armando a “worker”? Is it relevant that it is only part-time work? What are the implications now for his right to residence under Article 7 of Directive 2004/38? What other rights might Armando gain on the acquisition of “worker” status?
12 Is the fact that he is a trainee relevant? See Lawrie-Blum
13 Is the amount of remuneration relevant? See Kempf, Trojani
14 This is direct discrimination on grounds of nationality, prohibited by Article 18 TFEU, and by Article 3 of Regulation 12612/68. It is potentially justifiable under Article 45(4) TFEU but how likely is it that a chef would be regarded as a public service employee? See Lawrie-Blum
Meanwhile, Beatriz has decided that their relationship is over. She has moved out of their apartment in Frankfurt and is staying on her own in a hotel. Ideally, she would like to stay in Germany. She intends to seek a divorce from Armando and to get custody of Chico.

Advise the parties of their rights under EU law.

Knowledge Requirement

You need to:

- Explain the provisions of the TFEU concerning the rights of Citizenship of the EU, in particular the rights of free movement and residence (Articles 20 and 21 TFEU)
- Explain the detailed free movement rights in Directive 2004/38, Articles 3 – 7
- Explain the prohibition of discrimination on grounds of nationality in Article 18 TFEU
- Explain the difference between direct and indirect discrimination
- Explain the circumstances in which indirect discrimination is capable of being justified, by reference to case law, e.g. Collins, Bidar, Förster
- Explain the additional rights afforded to workers by Article 45 TFEU and Regulation 1612/68
- Define “worker” by reference to case law, especially Lawrie-Blum
- Explain the “public service” derogation in Article 45(4) TFEU and associated case law, e.g. Sotgiu, Commission v Belgium, Lawrie-Blum
- Explain the rights given to genuine work-seekers by reference to case law, e.g. Antonissen, Collins
- Explain the meaning and scope of the Citizen’s family members in Directive 2004/38, Article 2, and associated case law, e.g. Reed, Diatta, Akrich, Metock & Others
- Explain the rights of Citizens’ family members in Directive 2004/38, Articles 23 and 24, and in Regulation 1612/68, Article 12
- Explain the implications of divorce on the rights of a non-EU national by reference to Directive 2004/38, Article 13(2) and caselaw, e.g. Baumbast & R
- Define the “primary carer” concept by reference to case law, e.g. Baumbast, Ibrahim, Teixeira

Application Requirement

Identify

- That Armando is a Portuguese national and hence EU Citizen under Article 20 TFEU
- That, as such, he has rights of free movement and residence under Article 21 TFEU and Directive 2004/38
- That he has the right not to be discriminated against on grounds of nationality (Article 18 TFEU)
- That the 12-month eligibility period for entitlement to unemployment benefit is a form of indirect discrimination on grounds of nationality
- That it is potentially justifiable if necessary to achieve an overriding public interest objective
- That, if he wants to stay in Germany for longer than 3 months, he needs to comply with Directive 2004/38, Article 7
- That, if he becomes a “worker”, he will be further protected by Article 45 TFEU and Regulation 1612/68

15 Armando and Beatriz are now separated. Has Beatriz retained her status as his ‘spouse’? See Diatta
16 As long as she retains her spousal status, she has rights to live in Germany under Article 7 of Directive 2004/38.
17 If she divorces Armando does she cease to be a ‘spouse’? See Baumbast & R. What implications will this have for her long-term residence rights? How important is it whether or not she succeeds in getting custody of Chico? See Directive 2004/38, Article 13(2)
18 Could Beatriz claim a right to reside in Germany under the ECJ’s “primary carer” doctrine? See Baumbast, Ibrahim and Teixeira.
• That the refusal to employ him is a form of direct discrimination on grounds of nationality
• That it is potentially justifiable using Article 45(4) TFEU, public service employment.
• That Beatriz is a Brazilian national and therefore not an EU Citizen
• That Beatriz is married to Armando and therefore the “spouse” of an EU Citizen
• That, as such, she has the right to live and work in the same Member State as her husband
• That separation will not affect her spousal status nor rights
• That divorce will bring an end to her spousal status, but that she may be able to remain in Germany under Directive 2004/38, Article 13(2) and/or using the “primary carer” doctrine
• That in either case it will be important to decide whether or not she gets custody of Chico
• That Chico is a dual national, but is still an EU Citizen because of his Portuguese nationality
• That he can claim rights as a Citizen, notwithstanding his young age
• That he is also the “direct descendant” under the age of 21 of a Citizen
• That he is also the “child” of a worker with the right to education in the host State under Regulation 1612/68, Article 12

Discuss
• Whether the German authorities would be able to justify the 12-month eligibility period for entitlement to unemployment benefit
• Whether Armando becomes a “worker”, given that the job is (a) part-time; (b) low-paid; (c) he is only a trainee
• Whether employment as a chef is ‘public service’ employment
• Whether Beatriz’s plans to divorce Armando will affect her right to remain in Germany – in particular, whether it will be necessary for her to get custody of Chico.