Walter Demmelhuber
University of Osnabrück

The European Court of Justice advancing Student Mobility

A comprehensive European education policy concerning the exchange of students during their studies and the rights of free movers has to be introduced as soon as possible. Otherwise spillovers from related legislation might be used to justify claims brought before the ECJ which where either not intended or do not serve the public good. This can only be solved through the Council of Ministers and the Commission taking into consideration that this issue has been neglected way too long and needs immediate attention.

Introduction

European Student Mobility has become an ever more important issue in the European Union (EU). Not only is the possibility of learning languages in foreign countries seen as an effective method for obtaining rapid results but it also enhances greatly the student's academic, professional and personal horizon.

The introduction of Erasmus in 1987, its incorporation into and expansion through Socrates in 1995 and the introduction of the European Credit Transfer System (ECTS) in 1988, extended in 1996, increased greatly short and medium-term study periods in other EU Member States up to 12 months. A voluntary network of student exchanges at university level is supported and financial subsidies for students to cover additional expenses incurred abroad are provided. Unfortunately, for budgetary reasons grants have had to be reduced and the overall demand of students for participation outnumbers the places available greatly with about 100,000 students currently going abroad each year at the moment via Erasmus[1].

On the other hand statistics provided by the OECD and UN show quite clearly that the majority of European students (also called 'free movers') studying in other Member States are pursuing under- or postgraduate courses which are not covered by any national or European exchange programme.

Also increasing, although still from a low base, are studies offered by universities in some countries in which after four years of study the student obtains academic certificates from up to four different countries using the ECTS – starting usually for 2 semesters in the university of origin, which will then confer the final diploma.

Such students move in a grey area regarding their legal status in the host country and the financial support they can expect. Students pursuing the whole or part of their academic career in other Member States are confronted with a multitude of obstacles that hinder or might even prevent students from going abroad.

The European Commission highlighted some of these problems in 1996 in its green paper on obstacles to transnational mobility and suggested that the Council of Ministers push for the introduction of measures to facilitate student mobility.

What it ignored is that student mobility, especially from free movers, has a long history. Since there appeared to be no support in the Council of Ministers to regulate the obligations and privileges of free movers between the 1960s up to the 1990s, it was effectively left to the European Court of Justice (ECJ) to define their legal rights.

Legal rights of students

Up until the 1980s, rights of full-time students[2] from the European Union wishing to take up studies in other Member States depended solely on national legislation in the host country. Such EU Students could be charged (higher) study fees and did not have general access to state grant systems for maintenance support. Furthermore, EU students did not have any right

1) Decision 576/98/EC (7)

2) Excluding children of migrant workers wishing to take up studies in their host country

of residence regulated at the European level, and hence could be treated like any other nationalities under national law with limited rights[3].

With a landmark decision in 1985[4] and following cases it was decided by the ECJ that access to university was indeed covered under European primary legislation and any discrimination based on nationality would be against European law. As a result EU Students can only be charged the same (if any) study fees as national students. Access to maintenance grants in the host country was disputed in 1988 in the Sylvie Lair case[5] arguing that it to be part of having access to university education. The ECJ nevertheless came to the conclusion that maintenance grants are not closely enough related to university education (more to social policy) and hence EU Students could not derive any supplementary rights to claim such grants under European legislation. Only migrant workers could request such benefits in the case of involuntary unemployment.

The automatic right to residence of EU Students was discussed in several cases[6] because some Member States intended to use it as an excuse to charge EU students additional study fees. The ECJ came to the conclusion that access to higher education in the EU is a basic right covered under EU primary legislation covered by the same principles as those for 'migrant workers'[7]. A residence permit for an EU Student is only a written expression of their rights and it cannot be left to the Member States to come up with its own definition of the status of an EU Student.

Student finance

The issue of student finance of free movers still remains unsolved. National financial support for students is not regulated at European level and the issue of accessibility to grants for EU Students is quite complicated. The European Commission proposed in its green paper that maintenance grants available in the students' home country should be transferable for complete courses in other Member States. This would avoid contradictions where students from, for example Germany go onto full undergraduate courses in the UK and do not receive any state support, although maintenance grants and loans for national students exist both in Germany and the UK.

Instead of setting up a legal framework for European student support through the Council of Ministers and the European Commission, it is left to the ECJ to interpret shortcomings and sort out legal positions of EU Students. But such decisions taken by the ECJ might lead to undesirable effects since, for obvious reasons, the ECJ does not follow a policy strategy concerning political policy. Consequently, outcomes might produce further dilemmas or legal problems as discussed in the following example.

The argument of the ECJ, that only migrant workers can claim maintenance grants for university education, might lead to an interesting paradox. The decision in D.M. Levin[8] can be used to argue that EU Students who pursue some part-time work in the host country at the same time might be able to claim maintenance grants in the host country. It can also be reasonably argued that EU Students need some additional income through work since they cannot claim benefits either in the host or their home country (with exceptions). If EU Students take up work in the host country they automatically receive the status of 'migrant worker' with all its possible rights to social advantages in the host country as defined in 'Sylvie Lair'. Additionally EU Students will not lose the status of 'migrant worker' because of their studies, since employment continues during the stay at university.

In D.M. Levin the ECJ stated that part-time work presents an effective source of income for a large group of people although the actual salary might be below the national minimum for subsistence. The ECJ concluded that for the status of 'migrant worker' part-time employment with an income even below the national minimum for subsistence is enough, as long as it is not perceived as being on such a small scale as to be purely marginal and ancillary.

Additionally, it is stated that the reasons for entering the host country cannot be taken into account as long as a real employment situation exists.

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3) Interesting in this context is the balance of power between student's rights and national governments. After Françoise Gravier refused to pay higher study fees as an EU Student believing that it was against European legislation the Belgium university denied her the registration as a student. As a consequence she lost her residence permit and then, because of French capital control regulations (no money transfer possible to somebody without a residence permit), her parents were not allowed to transfer money to her account. Only the interference by a Belgium court broke this spiral by ordering the university to authorise a temporary registration until the case was solved.

4) Françoise Gravier – Case 293/83

5) Sylvie Lair – Case 39/86

6) G.B.C. Echternach und A. Moritz – Combined Cases 389+390/87 V.J.M. Raulin - Case 357/89

7) Slg. Royer - Case 48/75

8) D.M. Levin – Case 53/81

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Students and workers

National legislation in many Member States says the status of 'worker' is incompatible with that of 'student' to prevent students claiming unemployment, housing or other benefits. On the other hand, student incomes from employment are taken into account and maintenance grants are accordingly reduced. The ECJ concluded that the status of 'migrant worker' is defined by European rather than nation legislation to avoid individual national interpretation of the status.

For this reason an EU Student can base a claim for a maintenance grant in the host country as a 'migrant worker' obtained by working part-time in some profession.

It should be recalled that, by definition in 'D.M. Levin', the reasons for actually moving to the host country and an income even below the national minimum for subsistence do not nullify the status as a 'migrant worker' and its accompanying rights.

Hence we face the paradox that an EU Student has to pursue some kind of (part-time) employment while studying to acquire the status of a 'migrant worker' and thus to be able to claim maintenance grants in the host country. At the same time it is most likely that the maintenance grant will be offset against the income from employment and accordingly reduced, as would happen to nationals from the host country. The only possibility for Member States to avoid such claims would be to stop national and EU Students working while receiving grants, an unlikely situation since most state grants and loans in Member States hardly cover the full cost of living.

Only recently other major issues have been worked out by the Council of Ministers concerning the legal right to residency as a full-time student in other Member States and social protection concerning mainly full medical coverage as a student while abroad instead of only emergency coverage. Moreover with the regulation EC 307/1999, EU Students gained additional social rights formerly limited to migrant workers and the self-employed.

However, this caused another problem over entitlement to state pensions in the host country. Some Member States include time spent in education after finishing compulsory schooling in the overall time necessary to accumulate increasing rights to the state pension scheme (i.e. in Germany up to a maximum of 3 years). Neither the German Ministry in charge nor the European Commission seem able to comment nor deny this issue at the moment. Most likely an interpretation will be necessary to clarify the situation.

A European educational policy

It should not be left to the ECJ to define a European educational policy via case law, because its interpretation will not take the complexity of the issue into account. On the other hand, academic autonomy of universities should not automatically include issues such as financial support, administrative procedures or even academic recognition of diplomas. Reclusive behaviour by academic institutions in this context might only create an additional obstruction of access to foreign academic education. For effective mobility of labour, barriers in education have to be dismantled and to permit an easily accessible and truly functioning higher education system in Europe. National self-interest, similar to the reasoning in the economic sector, will only protect systems that are out of date and do not cover the needs of modern society.

In the 1980s the ECJ stated repeatedly that access to higher education falls into European primary law but accompanying (social) policies do not fall into its jurisdiction. But since then primary law has changed in favour of student mobility without actually having any perceivable effects. Article 126 of the old Maastricht Treaty referred to the promotion of student mobility and the encouragement of the mutual recognition of diplomas. This cannot only be meant to apply to organised student exchanges but to free movers as well[9]. The preamble of the Treaty of Amsterdam refers to comprehensive access to education. Precious little has been done since then to provide EU Students with the legal base and security to

9) A parallel scenario would be a situation where only organised labour mobility would be allowed in Europe and 'migrant workers' moving on their own are not covered by EU legislation regarding their social protection

allow for an effective student flow within the EU. The Council of Ministers and the Commission should see themselves obliged to push this forward in the European field of higher education; if this is not going to happen soon complaints of students to the ECJ might have unexpected effects on European legislation.

What is needed in the field of short and medium term stays of students in other Member States is a large expansion of the system under Erasmus. It cannot be that the exchange programme is limited financially both in size to about 100,000 per year and limited to 12 months abroad. A first step could be made by increasing the capacity of the Erasmus programme. Although it seems not to be feasible to increase Erasmus scholarships to the amount where they would cover demand, students should be able to use the Erasmus network for a period of time and to go to several countries. Some Member States already provide additional national grants for their students who participate in exchange programmes to increase the possibility of access to foreign studies.

The rights of free movers have to increase and be supported by an efficient market of higher education. Additionally the range of problems concerning study fees, state maintenance grants, and related obstacles need to be solved by putting them on a firm legal base.

Students having access to state maintenance grants in their home country should not be limited in their choice to national higher education. A greater choice for students should create additional interest among universities to compete for students. On the other hand, the EU should compensate Member States that experience a high influx of EU Students. A theoretical model supported by empirical evidence[10] suggests there might be a trend in Member States introducing study fees to compensate for the additional financial strain through EU Students. Formerly, in the UK, it was possible to charge foreign students the real cost of taking up studies in the country. The case of 'Gravier' brought this down to equal charging as for nationals. The only way to compensate for the loss of study fees (or additional cost) from EU Students is to charge every student a certain amount of fees, as introduced in the UK in 1998. EU Students will be the only reason for introducing fees, but it may be a potent one.

Conclusion

A comprehensive European education policy concerning the exchange of students during their studies and the rights of free movers has to be introduced as soon as possible. Otherwise spillovers from related legislation might be used to justify claims brought before the ECJ which where either not intended or do not serve the public good. This can only be solved through the Council of Ministers and the Commission taking into consideration that this issue has been neglected way too long and needs immediate attention.

European students are entitled to make the most of European higher education and should be able to prepare themselves for the challenges of an ever more European labour market.

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