

PRESIDENT OF A STATE AND THE RIGHT OF FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN UNION*

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Abstract. The article analyses the decision of the Court of Justice of the European Union C-364/10, Hungary against the Slovak Republic. It explains the personal and material scope of the European Union's right to free movement of persons, focusing on the right to enter the territory of another Member State of the European Union. The judgment solves the situation of the Head of State and the restriction on the right of the Head of State to enter the territory of another Member State freely on the basis of Article 21 of the Treaty on the Functioning of the European Union. The article presents the conclusions of the judgment of Court of Justice of the European Union.

Keywords: Head of the State; president; free movement of persons; EU citizenship; Article 21 TFEU; Directive 2004/38.

1. FREE MOVEMENT OF PERSONS – BASIC ECONOMIC FREEDOM OF EU LAW

The right to free movement allows European Union (“EU”) citizens to travel across member states, a cornerstone of the internal market's fundamental freedoms. This freedom, more sensitive in the integration process than the free movement of goods, often intersects with security, social welfare, and cultural differences. Initially, its legal framework was closely tied to the internal market's economic freedoms. In practice, this freedom has spurred economic growth, especially utilized by skilled professionals engaged in innovative activities. Notably, this right is exclusive to EU citizens, excluding third-country nationals, except for family members whose rights are contingent upon an EU citizen exercising their right to free movement and residency within the EU [Karas and Králik 2012].

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2. FREE MOVEMENT OF PERSONS – LEGAL BASES

The freedom of persons to move and reside¹ within the European Union's member countries is governed by EU legislation at both the primary and secondary legislation [Mazák and Jánošíková 2011]. Following the establishment of EU citizenship with the Maastricht Treaty, it has been a right of EU citizens to freely move and reside anywhere within the EU's member states. This right is a cornerstone of EU citizenship, reflecting the EU's commitment to the free movement of persons. The right to move and reside has a political dimension, which has also been reflected in the case law of the Court of Justice of the EU [Bobek, Bříza, and Komárek 2011]. The treaties, however enable some restrictions to free movement of persons. Some conditions must be met for citizens of EU Member States to be able to exercise their right to free movement of persons. The first condition is that a person must be citizen of the European Union. The second condition is that the person must carry out an economic activity which is required by EU law: whether as a worker (Articles 45-48 TFEU), self-employed person, or provider or recipient of services (Articles 56-62 TFEU). The free movement of persons is also applicable to entities – companies, branches or their subsidiaries (Articles 49-55 TFEU) [Varga 2011]. The unrestricted mobility of individuals is essential for the functioning of the internal market's freedoms. Nonetheless, this freedom can be restricted by considerations of public policy, public safety, health protection, or specific restrictions related to employment in public and civil services [Craig and de Búrca 2011]. These restrictions are in place to balance the freedom of movement with the welfare and security of the public.

The prohibition of discrimination based on nationality² epitomizes the internal market's freedom. Essentially, this stipulates that an individual from any Member State is entitled to identical treatment in similar circumstances as a national of that State. This principle ensures equal opportunities within the Member States, fostering a more integrated and equitable market environment [Weatherill 2010].

The primary rationale for integrating these clauses into foundational legislation by Member States was to facilitate unhindered mobility for those contributing to economic progress. The goal was to harmonize labor costs across the EU, allowing individuals to relocate where their labor was needed, thereby promoting EU-wide prosperity. This objective was realized

¹ Article 21(1) TFEU: Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

² Article 18 TFEU establishes the general principle of non-discrimination on grounds of nationality.

incrementally, with the benefits of person-to-person mobility initially reaching a limited segment of EU residents. The reasons for this phased approach included ensuring mobility for dependents and maintaining social security benefits for EU nationals exercising their right to move freely. Nonetheless, the expansion of the EU has highlighted additional social, cultural, and linguistic barriers.

The primary objective for integrating these clauses into foundational legislation was to facilitate unhindered mobility for individuals contributing to economic progress. The goal was to harmonize labor costs across the EU, allowing migration to regions with labor demands, thereby fostering EU-wide prosperity. Initially, the realization of this goal was incremental, with a limited segment of EU populace availing the benefits of person mobility. This was due to various factors, notably the necessity to accommodate family member mobility and to uphold social security assurances for EU denizens utilizing their right to free movement. Nonetheless, post-EU expansion, other barriers have emerged, including social, cultural, and linguistic challenges [Foster 2011].

The EU has implemented measures to address restrictions on the free movement of persons. Notably, this involved enacting secondary legislation during the 1960s and 1970s. The Court of Justice's case law has greatly shaped the substance of this secondary legislation. There has been a transition in the perception of free movement from merely an economic idea to a broader political one, particularly following the Maastricht Treaty, which established the notion of EU citizenship and conferred new political rights upon EU citizens.

3. EU SECONDARY LEGISLATION ON FREE MOVEMENT OF PERSONS

EU citizenship confers upon individuals from EU Member States the right to freely move and reside within the EU Member States. This right to free movement is a cornerstone of the internal market, characterized by the absence of internal frontiers. Consequently, it is imperative for the EU to implement legislative measures that facilitate the exercise of these freedoms [Tichý, Rainer, Zemánek, et al. 2009]. Except of the Treaties is the most important instrument of secondary legislation the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,

72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.³

The directive in question was enacted to overhaul and update the patchwork of laws that were previously applicable to a diverse group of individuals, including workers, the self-employed, students, and other non-working persons. It also aimed to streamline and reinforce the freedom of movement and residency for all EU citizens and their families. Directive 2004/38 posits that an EU citizen's rights increase with the duration of their stay in another Member State. For stays under three months, an EU citizen is not required to demonstrate any economic ties to the host Member State. This shift underscores the EU's evolution from a focus on economic integration within the internal market to a broader emphasis on civil rights.

3.1. Personal scope of the free movement of persons

The personal scope of the right to free movement encompasses any individual who seeks to exercise this right. To qualify, the individual must be a citizen of an EU Member State⁴ other than the one of which they hold nationality. Additionally, this right extends to family members who may accompany the individual. This fundamental freedom is integral to the EU, allowing citizens to live, work, and travel freely across Member States, fostering economic integration and cultural exchange. It represents a cornerstone of EU policy, promoting unity and solidarity among its diverse member populations.⁵

3.2. Material scope of the free movement of persons

The material scope refers to the rights granted to EU citizens under EU law, particularly when they exercise their right to free movement. Directive

³ Hereinafter: directive 2004/38. The Directive was published in the OJ L 158, 30.4.2004, p. 77-123

⁴ The EU Member States set their own criteria for acquiring citizenship. In order for a person to be able to enjoy rights under EU law, it is important that he or she is a national of an EU Member State. Member States are not entitled to examine the intention, manner or other circumstances before a person acquires the citizenship of another EU Member (see the judgment of the Court of Justice C-200/02, Kunqian Zhu, Man Lavette Chen v Secretary of State for the Home Department (ECLI:EU:C:2004:639), point 37: "Nevertheless, under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.")

⁵ Article 3(1) of the Directive 2004/38. Free movement of persons within the EU would not be possible if the free movement of family members of the primary beneficiary who wishes to exercise the rights associated with the functioning of the internal market were not allowed. The rights of family members are derived from the rights of an EU citizen who exercises one of the freedoms of the internal market.

2004/38 is applicable to all EU citizens who move to or reside in a Member State other than their own.⁶ This directive obligates Member States to facilitate the entry and residence of EU citizens and their families. It stipulates that EU citizens should not be subjected to entry visas or any similar formalities.

3.2.1. Refusal of entry

Denying entry to a country is often viewed as one of the most severe measures a government can implement in response to migration [Barnard 2010]. It is a principle of international law that a state cannot refuse its own nationals the right of entry or residence,⁷ i.e. the refusal of entry may only be applied to migrants⁸ and such derogations may only be found on grounds of public policy, public security and public health. The state which adopts a measure of refusal of entry must prove that such a measure is proportionate and necessary⁹ and compatible with human rights.¹⁰

⁶ See Article 3(1) of the Directive 2004/38.

⁷ See judgment of the Court of Justice of 4 December 1974, 41/74, Yvonne van Duyn *proti* Home Office (ECLI:EU:C:1974:133), point 22.

⁸ *Ibid.*, point 23: “It follows that a Member State, for reasons of public policy, can, where it deems, necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals.”

⁹ See judgment of the Court of Justice of 1 February 2001, C-108/96 (ECLI:EU:C:2001:67), point 31: “That being so, it is necessary to consider whether the prohibition under challenge is necessary and proportionate to secure the objective of attaining a high level of health protection.”

¹⁰ See judgment of the Court of Justice of 27 April 2006, C-441/02, *Commission of the European Communities against Federal Republic of Germany* (ECLI:EU:C:2006:253), point 108, 109: “it is necessary to take into account the fundamental rights whose observance the Court ensures. Reasons of public interest may be invoked to justify a national measure which is likely to obstruct the exercise of the fundamental freedoms guaranteed by the Treaty only if the measure in question takes account of such rights. In that context, the importance of ensuring protection of the family life of Community nationals in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty has been recognised under Community law. It is established, in particular, that the removal of a person from the country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 of the ECHR, which is among the fundamental rights which, according to the Court’s settled case-law, are protected in Community law (see, in particular, the ruling of the European Court of Human Rights of 2 August 2001 in *Orfanopoulos and Oliveri*, paragraph 98). Such interference will infringe the ECHR if it does not meet the requirements of Article 8(2), that is, unless it is ‘in accordance with the law’, motivated by one or more of the legitimate aims under that paragraph and ‘necessary in a democratic society’, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.”

This section of the article examines the legal implications under EU law concerning the incident where the Slovak Republic refused entry into Slovakia to the Hungarian President. The analysis will delve into the complexities of EU legislation, exploring the interplay between national sovereignty and EU principles of free movement. It will also consider the diplomatic nuances and the precedents set by EU case law, providing a comprehensive overview of the legal landscape in relation to such cross-border political matters.

4. CASE C-364/10 – HUNGARY V SLOVAKIA

4.1. Political background of the case

In 2009, Slovak-Hungarian relations were strained, leading to an incident involving the Hungarian President's planned visit to Slovakia. The tension was partly due to the Slovak amendment of the State Language Act, which Hungary had criticized. Despite being invited by Komárno's municipality to unveil a statue of King Stephen I, Slovak officials were not included in the invitation. On the eve of the event, Slovak leaders declared the Hungarian President an unwelcome visitor on the sensitive date of August 21st, recalling the 1968 Warsaw Pact invasion that included Hungarian forces. Ignoring requests to cancel, the Hungarian President held a press conference near the border, criticizing Slovakia's stance before returning to Hungary without entering Slovak territory. This event highlighted the complexities of international relations and the lasting impact of historical events on contemporary diplomacy.

4.2. Diplomatic hot lines on both sides of Danube river

The Hungarian Ministry of Foreign Affairs has expressed its disapproval regarding the recent border incident to the Slovak ambassador in Budapest. Slovak diplomatic officials have raised concerns that the Hungarian President's planned visit violated multiple diplomatic norms and international protocols. These include making critical statements about Slovakia, insufficient notice of the visit's agenda – provided only three days prior – and the visit's political nature, characterized by a public speech. Additionally, no Slovak representatives were included during the visit, and Hungarian authorities disregarded Slovak appeals over the date's sensitivity. In response, Hungary has declared its intention to escalate the matter to the European Union level and pursue legal action against the Slovak Republic for an alleged breach of EU law.

The Hungarian authorities argued that Directive 2004/38 could not form a valid legal basis to justify the refusal of the Slovak Republic to allow the President of Hungary to enter its territory and insufficient reasons had been given to refuse the access to Komárno. The Hungarian authorities insisted that the Slovak Republic had breached EU law. Slovak authorities replied to the Hungarian note of 24 August 2009 that the application of Directive 2004/38 had been the 'last chance' to stop the President of Hungary from entering the territory of the Slovak Republic, and that they had not acted in any way contrary to EU law.

4.2.1. Involvement of the European Commission

The Hungarian Foreign Minister addressed a communication to the Vice-President of the European Commission, inquiring about a potential violation of EU legislation by Slovakia. The Vice-President clarified the conditions under which the free movement of individuals may be limited, as stipulated by Directive 2004/38. Such limitations must adhere to the proportionality principle, be founded on the individual's conduct, and the affected person must be duly informed with a detailed justification as per Article 30. Following this, the Hungarian Foreign Minister urged the Commission to consider initiating infringement procedures against Slovakia pursuant to Article 258 TFEU [Mazák and Jánošíková 2011], citing a possible contravention of Article 21 TFEU and Directive 2004/38. In a letter of 11 December 2009, the Commission expressed the view that EU citizens are entitled to move and reside freely within the territory of the Member States, but expressed a view that under international law, the Member States reserve the right to control the access of a foreign Head of State to their territory, regardless of whether that Head of State is a EU citizen or not. The European Commission stated that the Member States arrange official visits through bilateral political channels, with the result that this is not a sphere in which EU law applies. However, the Head of State may decide to visit another Member State as a private individual. In this case, there was disagreement between Slovakia and Hungary as to the nature of the visit in Komárno. The Commission concluded that Slovakia did not violate EU law, despite having incorrectly invoked Directive 2004/38 and its national implementing legislation. Following this, Slovakia and Hungary submitted their observations during a hearing organized by the Commission. The Commission then issued a reasoned opinion stating that visits by the head of one Member State to another Member State's territory are not covered by the rules governing the free movement of persons. Disagreeing with the Commission's legal assessment, the Hungarian government initiated legal proceedings against the Slovak Republic.

4.3. The action and findings of the Court

4.3.1. Competence of the Court of Justice to hear the case

In the proceedings, the Slovak Republic argued that the Court lacks jurisdiction over the current dispute, asserting that EU law is not pertinent to the case at hand.¹¹ Conversely, Hungary maintained that the Court of Justice of the EU possesses exclusive jurisdiction to resolve disputes between Member States regarding EU law interpretation, especially when one Member State alleges another's non-compliance with EU law. The Court of Justice affirmed that determining the applicability of EU law to the case falls squarely within its jurisdiction.

4.3.2. Infringement of the free movement of persons

Hungary stated that Slovakia has breached its obligation arising from Article 21(1) TFEU and Directive 2004/38 when it refused the President of Hungary entry into its territory. Hungary argued that the (i) free movement of persons is applicable to all EU citizens, including the Heads of State, and to all types of visits, that is to say, both official and private, (ii) the scope of the right of free movement of persons cannot be restrictively interpreted and may be limited only for grounds specified by Directive 2004/38 (public-policy or public-security measures if they are based exclusively on the personal conduct of the individual concerned, while observing the principle of proportionality), (iii) breach of procedural regime consisting in failing the notification of the grounds for any restrictive measure and no possible remedies were available.

Slovakia argued that the visit was not a private visit of a EU citizen but the visit of a Head of State to the territory of another Member State. The crucial question was whether Article 21 TFEU and Directive 2004/38 are applicable to Heads of State of the Member States. Slovakia argues that the movement of Heads of States within the EU falls within the sphere of diplomatic relations between Member States, as governed by customary international law and by international conventions. The sovereignty of the State which he represents is vested in the Head of State, he may enter another sovereign State only with the latter's knowledge and consent.

4.3.3. Findings of the Court

The Court of Justice considered the status of Hungarian president, who is EU national and enjoys all the rights of EU national. At the same time, the Court of Justice confirmed that EU law must be interpreted in the light

¹¹ *Ibid.*, point 22.

of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions.¹² It was crucial in this case whether the Hungarian President was carrying out, at the material time, the duties of the Hungarian Head of State. If this is so, this can constitute a limitation, on the basis of international law, on the application of the right of free movement conferred on him by Article 21 TFEU.¹³ According to customary rules of general international law and multilateral agreements, the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities while on the territory of a foreign State. The status of Head of State has a specific character, resulting from the fact that it is governed by international law, with the consequence that the conduct of such a person internationally, such as that person's presence in another State, comes under that law, in particular the law governing diplomatic relations.¹⁴ Such a specific character is capable of distinguishing the person who enjoys that status from all other Union citizens, with the result that that person's access to the territory of another Member State is not governed by the same conditions as those applicable to other citizens.¹⁵ Accordingly, the fact that a Union citizen performs the duties of a Head of State is such as to justify a limitation, based on international law, on the exercise of the right of free movement conferred on that person by Article 21 TFEU.¹⁶ The Court decided that neither Article 21 TFEU nor, a fortiori, Directive 2004/38 obliged the Slovak Republic to guarantee access to its territory to the President of Hungary.¹⁷

4.3.4. Character of the note verbale

Hungary claimed that the Slovak Republic breached Directive 2004/38 and that the very fact of basing the *note verbale* of 21 August 2009 on that directive comes under the concept of the abuse of rights, the grounds of public policy or public security referred to in Directive 2004/38 cannot be invoked in order to pursue political aims.

The Court of Justice stated that the Slovak Republic was wrong to refer, in its *note verbale* of 21 August 2009, to Directive 2004/38. This was however not sufficient to prove an abuse of rights by the Slovak Republic.¹⁸ The conditions for the application of Directive 2004/38 were not formally

¹² Ibid., point 44.

¹³ Ibid., point 45.

¹⁴ Ibid., point 49.

¹⁵ Ibid., point 50.

¹⁶ Ibid., point 51.

¹⁷ Ibid., point 52.

¹⁸ Ibid., point 57.

complied with and the reference to that directive in the *note verbale* of 21 August 2009 from the Ministry of Foreign Affairs of the Slovak Republic to the Ambassador of Hungary in the Slovak Republic cannot be considered as a decision for the purposes of Article 27 of Directive 2004/38.¹⁹

CONCLUSION

The freedom to move and reside within the Member States' territories is a fundamental right under EU law, encompassing both political aspects linked to EU citizenship and economic aspects integral to the internal market's freedom. This article offers an overview of the EU's legislative framework governing the free movement of individuals and outlines the rights EU citizens derive from this legislation. It also examines a significant decision by the Court of Justice of the EU, which addresses the right of entry into an EU Member State by another Member State's President. The case in question involved the denial of entry to the Slovak Republic by its President, prompted by several factors outlined by the Slovak Ministry of Foreign Affairs. Consequently, Hungary initiated legal proceedings against the Slovak Republic under Article 259 TFEU, seeking a ruling on whether the conduct of a Member State violated EU law and demanding cessation of the unlawful act to rectify the breach and its effects.

The Court of Justice's ruling reaffirms the unique status of a Head of State within international relations, which includes certain privileges and immunities as prescribed by international law. The legal standing of a President, as the leader of a Member State, is distinct due to the fact that their presence in another EU Member State's territory is regulated by international law, particularly the laws pertaining to diplomatic relations. This unique status sets the Head of State apart from other EU citizens, who are not subject to a special legal framework under international law. Consequently, the roles performed by EU citizens as Heads of State warrant certain restrictions on their right to free movement as outlined by EU law.

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¹⁹ *Ibid.*, point 59.

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