

BALTISCH-DEUTSCHES HOCHSCHULKONTOR
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Autumn Semester 2009

EC INTERNAL MARKET LAW

concerning § 4 II and § 8 of the Course

Case 2
(facts of the case)

The Danish citizen Anton and his Angolan wife Berta are living happily in Copenhagen. Berta does not work but cares for the children of Anton from a former marriage. She speaks well Danish, is well integrated into the Danish society and does not show any illegal activities. Anton works as an independent broker of advertising space in journals and newspapers. Many of his clients are German or Swedish, and therefore he often has to travel to Germany and Sweden. If Berta did not care for his children, he could not do that.

One day, Berta receives an order to leave the country from the Danish immigration authority. As well, her application for a residence permit as the wife of Anton is dismissed. She had entered Denmark in 2006 with a tourist visa and had not applied for years for a residence permit after the tourist visa had expired. According to Danish law, therefore the residence permit could not be granted.

The whole family thinks that the Danish authorities do not have the right to expel Berta from Denmark, because she is the wife of a Danish citizen who provides his professional services not only in Denmark but as well in Germany and Sweden and depends on the help of his wife with his children. They think that the fundamental freedoms in the FEU Treaty, combined with the right to respect for their family life, will protect them.

1. Berta thinks that the order of the Danish immigration authority violates fundamental freedoms which are granted to her in the FEU Treaty. Is that correct?
2. Anton really loves his wife but is a bit of a "macho". He stresses that he is the one who makes the money in their family. He thinks that the order of the Danish immigration authority violates *his* fundamental freedoms from the FEU Treaty. Is that correct?

Question 1: Violation of fundamental freedoms granted to Berta in the FEU Treaty: (-)

- potentially concerned: the freedom to provide services (art. 56 et seq. FEU Treaty)
- personal sphere of protection: (-), because not citizen of a member state
- material sphere of protection: (-), because not working herself (→ no services within the meaning of art. 57 FEU Treaty)

Question 2: Violation of fundamental freedoms of Anton granted in the FEU Treaty

- concerned: the freedom to provide services (art. 56 et seq. FEU Treaty)

I. Sphere of protection

- 1) Personal sphere of protection: (+)
- 2) Material sphere of protection
 - a) Service within the meaning of art. 57 FEU Treaty: (+)
 - b) Situation of cross-border mobility: (+)
 - constellations: moving provider, moving service
 - c) Protected activities: (+)
 - in particular travelling to Germany and Sweden for broking advertising space in journals and newspapers
 - d) No excluded special sector: (+)

II. Encroachment

- 1) Acting of an addressee of the freedom to provide services: (+)
- 2) Acting to be qualified as an encroachment
 - a) Open discrimination: (-)
 - b) Hidden discrimination: (-)
 - c) Restriction
 - Problem: Can the expulsion of one's wife be an encroachment on a fundamental freedom?
 - see ECJ, case C-60/00, *Carpenter*
 - see CRITICISM OF MANY AUTHORS
 - OWN ARGUMENTATION:

III. Illegality of the encroachment (no justification by the fundamental freedom's limits)

- 1) Justification by the limit in art. 62 read together with art. 52(1) FEU Treaty
 - (-) because concerning Anton it is not a question of "special treatment for foreign nationals" [DISPUTABLE]

2) Justification by the inherent limits of the freedom to provide services

- a) **Applicability of the inherent limits: (+) (→ restriction)**
- b) **Fulfilment of the preconditions of the inherent limits: (+)**
 - **enforcing law as pursuit of imperative reasons of public interest**
- c) **Compliance with the limits of limits [Schranken-Schranken] - here: violation of the fundamental right to respect for one's family life (art. 7 EU Charter of fundamental rights)?**
 - aa) **Encroachment on the right to respect for family life: (+)**
 - bb) **Illegality of the encroachment (no justification by the fundamental right's limits): (+)**
 - **the limits correspond to those of art. 8(2) ECHR (see art. 52(3) Charter)**
 - **order to leave the country is not proportional (in its strict sense)**

- **closing sentences ("resurfacing" from the depth of the construction of the solution of the case)**