Global Workplace Law & Policy

The EU Court of Justice rules on the controversial issue of posting third-country nationals in the Union

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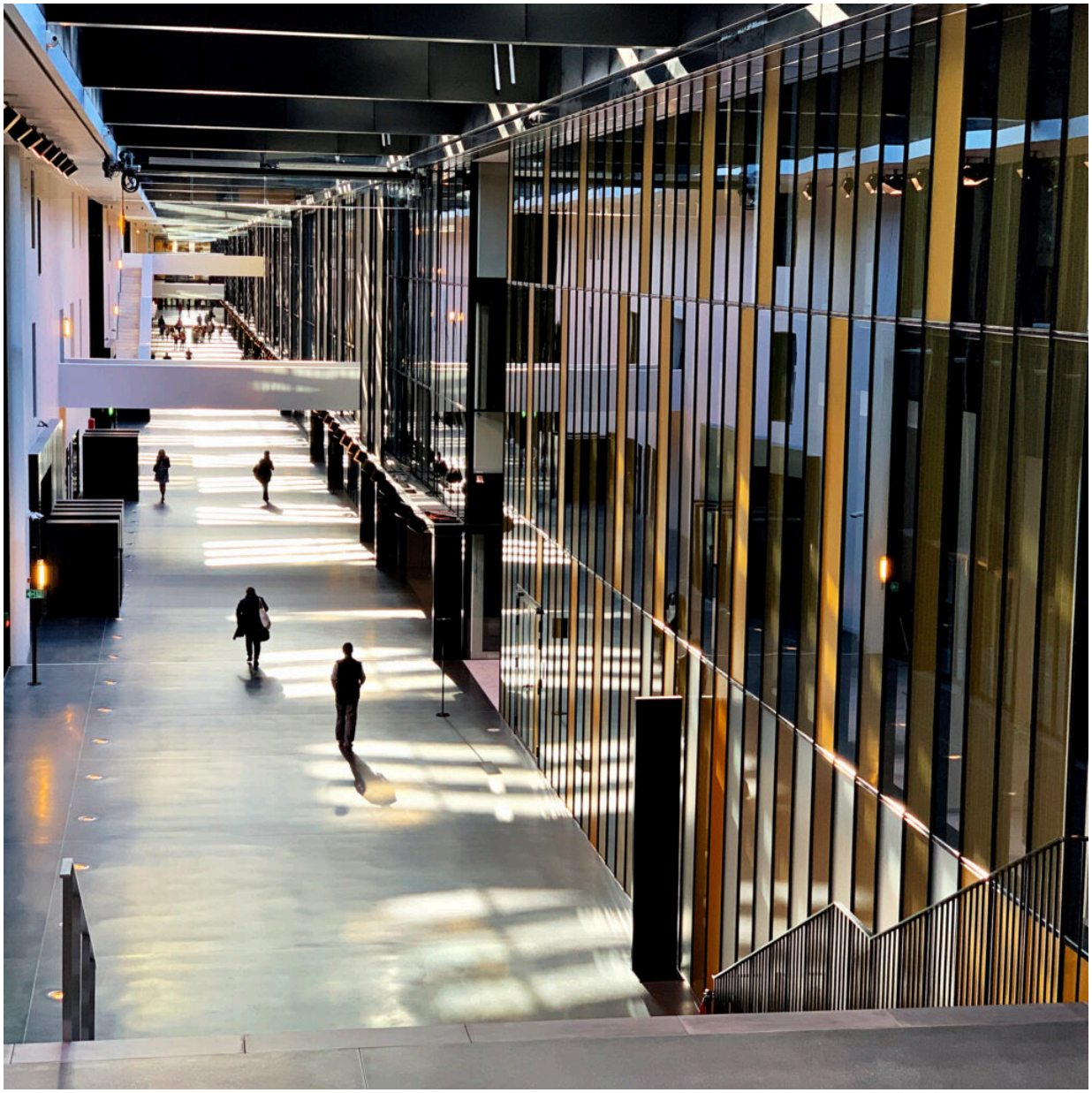

In June 2024, the Court of Justice of the EU (CJEU) delivered an important yet controversial decision in case C-540/22*SN and Others v Staatssecretaris van Justitie en Veiligheid*, referred to

Luxemburg by a Dutch national court. In the judgment, the CJEU attempts to diplomatically tackle the grey area of temporary labour mobility of third-country nationals via the Posted Workers Directive 96/71/EC. In *SN*, the CJEU authorises imposing some limits to such postings despite the possible negative effect on the free movement, with a view to protecting both the Member States' immigration laws and the interests of vulnerable workers.

Facts

The *SN* case concerned Ukrainian nationals posted by a Slovak company called ROBI to carry out construction works in the Rotterdam port in 2019.

The timing of the posting is significant insofar as it occurred prior to Russia's invasion of Ukraine which triggered the Temporary Protection Directive 2001/55/EC, thus enabling Ukrainian nationals to move freely within the EU. Back in 2019, however, Ukrainian citizens still required permits to reside and work in the EU, and the workers at issue held temporary residence permits issued in Slovakia.

ROBI had declared the posting to the Dutch authorities in accordance with Directive 2014/67/EU but later informed them that the construction activities were being extended. This meant that the Ukrainian workers would need to reside in the Netherlands for a period longer than ordinarily permitted by the Convention implementing the Schengen Agreement (CISA). Consequently, ROBI applied to the Dutch authorities for fixed-term residence permits. While these were issued, they were only valid for the same duration as the Slovak residence permits. The permits were thus going to expire before the declared end date of the construction works in the Netherlands.

Whilst the issue was eventually resolved in favour of ROBI and its workers, the company later brought an action for annulment of that initial decision of the Dutch authorities based on Articles 56 and 57 TFEU which guarantee the free movement of services on the EU's single market. ROBI challenged both the obligation to obtain residence permits in the Netherlands given that permits had already been issued in Slovakia, and the duration of the permits, as well as the application processing fees of approximately 300 euro per individual.

Questions

The Dutch court referred three questions to the CJEU. In the first question, it asked whether Articles 56 and 57 TFEU guaranteed a 'derived right of residence' for third-country nationals who were posted from one Member State to another. If not, the referring court wanted to know if requiring residence permits such as those at issue was permissible (Q2). If yes, the domestic court sought to clarify if certain limitations to such permits, e.g. regarding the period of validity or indeed processing fees, were allowed within the free movement of services (Q3).

The judgment

Beginning with the first question, the CJEU pointed out, in paragraph 53, that its caselaw pertaining to the derived right of residence based on Article 21(1) TFEU (e.g. case C 673/16 *Coman*) was intrinsically linked to the EU citizenship. It follows that it applies solely to third-country nationals related to natural persons who are EU citizens. This point had also been made by the Advocate General Rantos in his opinion preceding the judgment. In paragraph 36 of his opinion, the AG stated: 'In the present case, however, the service provider is a legal person, who does not have a right of residence in another Member State from which the right of residence of the

third-country workers it employs would derive'. The derived right of residence, therefore, cannot apply to legal persons such as undertakings that post workers between the Member States.

Regarding the second question, having examined the requirement to obtain residence permits for posted third-country nationals in the receiving state, the CJEU concluded, in paragraph 73 of the judgment, that it did amount to a restriction on the free movement of services. According to established caselaw, however, such restrictions may be justified by the so-called 'overriding reasons of public interest', so long as the measures are proportionate to the pursued aim. In paragraph 77 of *SN*, the Dutch authorities identified four possible grounds for overriding reasons of public interest: 1) the need to protect access to the national labour market, 2) the need to verify that foreign service providers are not using the freedom to provide services for other purposes, 3) the posted workers' right to legal certainty, and 4) the need to check that the posted worker does not represent a public policy threat.

Having dismissed the former two grounds, the CJEU, however, agreed with the Dutch authorities that national legislation restricting the free movement of services with the aim of facilitating the exercise of the right to legal certainty for posted workers could indeed be both justified and proportionate (para 92). As for the grounds of public policy, the CJEU held, in paragraph 102, that restrictions pursuing that aim could also be justified subject to a proportionality test to be carried out by the national court.

As regards the final question, the CJEU did not preclude some of the measures taken by the Member State that further restricted the conditions under which posted third-country nationals might carry out work in the receiving country within the framework of the free movement of services. Specifically, neither national legislation limiting the duration of the work permit, e.g. to match it with the duration as set in the sending country's permit, nor the processing fees, were found to be contrary to EU law (para 122).

Overall, while the CJEU only partially endorsed the rationale behind imposing additional restrictions on the posting of third-country nationals proposed by the Dutch authorities, it effectively upheld all the measures that Netherlands had introduced.

Commentary

The EU framework on the posting of workers has undergone significant reforms in the last decade, beginning with the abovementioned Enforcement Directive 2014/67/EU, and followed by a substantive revision in the form of Directive 2018/957/EU. In pursuing these reforms, the EU institutions trod carefully amid a very divided Union and bitter debates between fierce opponents and proponents of the revision, which eventually succeeded in improving the working conditions for posted workers.

In principle, the posting of third-country nationals within the EU is a lawful practice, as decided by the CJEU three decades ago in the seminal case C-43/93 *Vander Elst* – conspicuous by its absence from both the *SN* judgment and the AG opinion. According to the so-called *Vander Elst* principle, a third-country national lawfully and *habitually* employed in one Member State needs not to obtain a work permit for the purpose of being posted to another Member State.

While this rule clearly applies to third-country nationals who genuinely already reside in the EU, in recent years the Posted Workers Directive is increasingly being relied on to facilitate access to the EU labour market for third-country nationals through 'the back door', thus bypassing national

immigration laws of the receiving countries.[1] Some Member States have preferential immigration rules for nationals from certain non-EU countries (e.g. Portugal for Brazil, Poland for Georgia and Armenia). They are, therefore, being used by service providers as transit countries for posting workers who do not habitually work or reside in them. This practice is, thus, a breach of the *Vander Elst* principle.

In *SN*, there was not enough information to establish whether the Ukrainian workers at issue habitually worked in Slovakia or not and, therefore, whether the posting was genuine or not. Accordingly, the CJEU diplomatically refrained from referring to *Vander Elst*, while at the same time reiterating, in paragraph 61 of the judgment, that the Posted Workers Directive is 'without prejudice to national laws relating to the entry, residence and access to employment of third-country workers'.

Importantly, the two grounds for overriding reasons of public interests that were deemed justified and proportionate in *SN*suggest that the CJEU is aware of the complexities stemming from the practice of posting third-country nationals. Infringements of the *Vander Elst* principle indeed affect the receiving Member State insofar as bypassing its immigration laws may pose a threat to public policy or security, as noted by the CJEU in *SN*. Furthermore, however, relying on the Posted Workers Directive for posting third-country nationals via a sending Member State in which the workers are not habitually employed may incur grave consequences for the workers themselves. As I have noted elsewhere, the sending country's social security institutions that issue A2 certificates for posted workers consider this practice to be a fraud, as third-country nationals passing through that Member State have no links to it and, therefore, should have no entitlement to social security benefits. Once a fraud is reported, upon exiting the EU via the sending country, these third-country nationals face criminal liability, including a ban from re-entering the EU. These risks appear to have been correctly identified by the CJEU in *SN* insofar as the third-country nationals' right to legal certainty was considered a valid reason of public interest justifying proportionate restrictions on the free movement of services.

Conclusion

However successful, the revisions of the EU framework on the posting of workers have not solved all the issues negatively affecting its application and enforcement, of which fraudulent postings of third-country nationals are a primary example. While Directive 2018/957/EU had not yet been fully implemented when the dispute in *SN* occurred, it would not have affected the outcome of this case, as the 2018 Directive did not at all address the posting of third-country nationals. Against this background, statistics show that the numbers of third-country nationals working as posted workers are on the rise.

Yet, it appears that the EU does not intend to address the irregularities affecting the posting of third-country nationals. Earlier this year, the EU institutions published a report on the application and implementation of the 2018 Directive. Regarding the posting of third-country nationals, the document notes the special vulnerability of these workers, and identifies several possible enforcement measures, presumably to be taken by the national enforcement authorities, such as providing better access to information and enhancing transnational cooperation. The report concludes, however, that despite some ongoing concerns the Commission 'does not see any need' to propose further amendments to any of the measures comprising the EU framework on the posting of workers.

References

[1] See further T. Novitz and R. Andrijasevic, 'Reform of the posting of workers regime – An assessment of the practical impact on unfree labour relations' (2020) 58(5) Journal of Common Market Studies 1325; M. Lasek-Markey, *Law, Precarious Labour and, Posted Workers* (Routledge, 2023).

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