



**25**  
years



# Krystyna Kowalik-Bańczyk

Judge at the General Court of EU, formerly Associate Professor at the Institute of Law Studies, Polish Academy of Sciences

## ■ 25 Years of Free Movement of Persons under EEA Agreement

- Legislation - Mirror Solutions
- Mutual Inspirations in definition of scope of rights
- Transborder situations– home state/host state rules?



# Legislative landscape

- **In and out of EU** simultaneously
- EEA Agreement **extends** the **internal market** established within the European Union to the EFTA states of **Iceland, Liechtenstein and Norway**
- „**Unique market**” with two sets of integration mechanisms
- Prior to *Icesave* the EFTA Court always underlined similarities (now – *Chalmers* – „limited homogeneity”)
- EU secondary law on free movement → **INCORPORATION** to **ANNEXES** of EEA by EEA Joint Committee Decisions + sometimes **ADAPTATION** → C-431/11 *UK v Council*

# Mirror solutions?

- **Art. 28 EEA - abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards **employment, remuneration and other conditions of work and employment** [+ Annex V]**
- **Art. 31 EEA – no restrictions on the freedom of establishment, also for setting up of agencies, branches and subsidiaries** [+ Annex VIII]

[also: indirect discrimination – *E-2/06 ESA v Norway – Waterfalls*; admissible stricter rules – *E-8/16 Netfonds Holding* ]

NOT: art. 16 of the Charter – freedom to conduct a business

- **Art. 36 EEA – broad definition of services, more lenient approach to reviewing national measures** [+ Annex X]

[For services: *Bosman* and *Deliège* mirrored in *E-8/17 Kristoffersen* ; *STX versus Laval*]

- **Recognition of professional qualifications – Annex VII → E-1/11 Dr A**
- **Social security coordination – Annex VI → E-4/07 Polkersson**

# What scope of rights?

- Narrower aims for EEA: **only economic integration**
    - Only **market citizens** – no apparent analogy with EU citizenship
    - **But:** inclusion of Citizenship Directive into EEA acquis → social welfare rights and family members rights [next to Annex VIII – particular situation of Liechtenstein]
  - EFTA Court: E-4/11 *Clauder* – right to **family reunification** should be protected in a host state [even in case of economically inactive], E-26/13 *Gunarsson*, E-28/15 *Jabbi* – also at **home state after return**
- **Secondary law was used to grant rights under EEA that in EU are derived from EU citizenship**

# Rights for every worker within EEA (regardless of transborder element)

- **Equal pay for equal work** - art. 69 EEA
- **Working time requirements** → E-19/16 Thue [dir. 2003/88] working time versus travel time / rest time ; E-5/15 Kumba – consent of worker
- **Right to parental leave** – art. 70 EEA (equal treatment, dir. 2006/54), dir. 2010/18 + pending case E-1/18
- **Transfer of undertakings** – dir. 2001/23
- **Health and safety at work** – art. 67 EEA

[ secondary legislation: dir. 89/391 - improvements in the safety and health of workers at work; dir. 89/654 - minimum safety and health requirements for the workplace; dir. 89/656 - **use of personal protective equipment**; dir. 92/58 - **safety and/or health signs**; dir. 2009/104 - **use of work equipment**]

# Rights linked with free movement

- **No discrimination – art. 4 EEA** → E-5/10 Dr Kottke
- **Mutual recognition of medical findings** in the context of invalidity pensions → E-13/15 Bautista, E-24/15 Walter Waller [reg. 987/2009]
- **Prior authorisation schemes** to provide services → E-19/15 ESA v Principality of Liechtenstein [dir. 2006/123]
- **Requirement of surveillance** from „home state specialist” → E-17/14 ESA v Principality of Liechtenstein – profession of „Dentist”
- **Unemployment benefits** → E-3/12 Stig Arne Jonsson [reg. 1408/71]
- **Freedom of movement v public security** → E-15/12 Wahl [dir. 2004/38]

# Transborder situations - Posted workers and foreign service providers – home state or host state rules?

- At the EU side:

- C-113/89 *Rush Portuguesa*

- C-341/05 *Viking Laval* – collective action is a **restriction** and it **cannot** be justified

- At the EEA side:

- E-12/10 *ESA v Iceland*

- E-2/11 STX – host state conditions **can be applied** but it cannot render EEA obsolete

- E-14/15 *Holship* – using a boycott by a trade union against a company in order to adopt a collective agreement – is a **restriction but it can be justified**



# Conclusions

- Lasting alternative for EU membership
- Broad scope of protected rights
- Resulting integration remains narrower than at EU → market dimension
- Issues touching upon national citizenship or social justice are not to be imposed
- Not a logic of „all or nothing” – gradual adaptation

