



**Re Residency Requirement for Student Fees**

**Introduction**

An issue has arisen in relation to the question as to whether, in a post referendum independent Scotland, it would be legal for the Scottish Government to continue with the existing regime allowing Scottish Universities to charge fees greater than the limits set in the Education ( Fees and Awards) Scotland Regulations (The Regulations) to students who do not satisfy a residency requirement. This note represents a preliminary view only. If the matter were to be taken forward more detailed analysis of the relevant cases and legislation would be required.

**Background**

Under the current regime it is not unlawful for Universities to charge relevant fees beyond the limits set in The Regulations to students who are not “exempt” as set out in Schedule 1 to the regulations.

Schedule 1 as currently drafted includes all EU students as exempt under the principles of Article 18 of the Treaty on the Functioning of the European Union (TFEU) (prohibition of discrimination on grounds of nationality ) article 21 TFEU (which provides for freedom of movement) and the European case law *Forcheri*<sup>1</sup>, *Gravier*<sup>2</sup> and *Blaizot*<sup>3</sup> which confirm that Higher and University Education falls to be considered under these principles and that, in effect, as citizens of Europe all EU students should be entitled to access higher education on equal terms regardless of their “home” state.

The current arrangements are predicated on the notion that RUK students are, as citizens with the UK member state, not to be dealt with under the treaties and that ( except in relation to those with dual nationality in relation to which specific legislation has been introduced which will require those asserting a right arising from their membership of a non UK member state to have exercised their free movement rights ) so far as discrimination within the UK is concerned the UK national law permits differential treatment on grounds of residency.

---

<sup>1</sup> Case 152/82 ECR 1983 02323

<sup>2</sup> Case 293/ECRT 1985 00593

<sup>3</sup> Case 24/86 ECR 1988 00379



Whilst it would be unlawful, in EU law, to discriminate directly on grounds of nationality, The UK Equality Act in so far as it applies to Education provides at para 1 of Schedule 23 that there is no contravention of that Act where, in pursuance of an enactment, discrimination on grounds of nationality or residence occurs. Those provisions have been used to underpin the rationale of the existing regulations.

Universities each have their own process for the setting of relevant fees but, in general, this has meant that RUK students are charged fees by Scottish Universities at a rate equivalent to the fees which would be charged were they to attend Universities in England.

### **Objective Justification**

In a series of European cases there have been discussions as to the extent upon which indirect discrimination might be objectively justified and thus not unlawful. The notion of objective justification is that there may be circumstances under which a condition or practice which applied equally to a group would have adverse impact upon a protected group but where that might be considered lawful if an objective justification can be established. To succeed in any argument on the basis of an objective justification it is necessary to establish that the policy or practice which has the indirectly discriminatory impact is nonetheless lawful because it is required

- to achieve a **legitimate** aim;
- is **necessary** to achieve that aim; and
- is an **appropriate** way to achieve that aim.

### **Relevant Cases**

In *Forster*<sup>4</sup> the European Court said :

“A student who is a national of a Member State and travels to another Member State to study there can rely on the first paragraph of Article 12 EC ( now Article 18 TFEU) in order to obtain a maintenance grant where he or she has resided for a certain duration in the host



Member State. The first paragraph of Article 12 EC does not preclude the application to nationals of other Member States of a requirement of five years' prior residence.

It is legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State. In that regard, the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time.

As regards, specifically, the compatibility with Community law of a condition of five years' uninterrupted residence, it is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State. Furthermore, such a condition of five years' uninterrupted residence cannot be held to be excessive having regard, *inter alia*, to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State. Moreover, in order to be proportionate, a residence requirement must be applied by the national authorities on the basis of clear criteria known in advance. By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the residence requirement laid down by the national legislation at issue is, by its very existence, such as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students. Thus, the residence requirement of five years, such as that laid down in the national legislation, does not go beyond what is necessary to attain the objective of ensuring that students from other Member States are to a certain degree integrated into the society of the host Member State. That finding is without prejudice to the option for Member States to award maintenance grants to students from other Member States who do not fulfil the five year residence requirement should they wish to do so.

(see paras 43, 49-52, 54, 56-60, operative part 2)

The principle of legal certainty – which is one of the general principles of Community law – requires, particularly, that rules of law be clear, precise and predictable in their

---

<sup>4</sup> Case c- 158/07



effects, in particular where they may have negative consequences on individuals and undertakings. Since making the right of students from other Member States to a maintenance grant subject to a residence requirement, as an essential element of that right, does not have any negative consequences but gives greater rights to the students concerned than those to which they were entitled under the former national rules, Community law, in particular the principle of legal certainty, does not preclude the application of such a residence requirement which makes the right of students from other Member States to a maintenance grant subject to the completion of periods of residence which occurred prior to the introduction of that requirement.

In *Bressol*<sup>5</sup> the Court examined the setting of quotas which limited the number of non nationals who might access Belgian University medical courses. In that case they did not deal expressly with arguments advanced to the effect that a flood of French students to access free courses might create an excessive financial burden on the funding of Belgian Higher education on the basis that there was no real evidence that that was the case but did accept that there might be a valid argument based on evidence of damage to Belgian Public health if insufficient doctors were retained in Belgium. They said

“Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students.”

In relation to the establishment of objective justification they said ;-

“... it is for the competent national authorities to show that such risks actually exist. According to settled case-law, it is for those authorities, where they adopt a measure derogating from a principle enshrined by European Union Law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments ...Such an objective, detailed analysis, supported by figures, must be

---

<sup>5</sup> Case C 73/08



capable of demonstrating, with solid and consistent data, that there are genuine risks to public health.”

In *Austria*<sup>6</sup> the court examined a rule that required non Austrian applicants to evidence that, in addition to their qualifications, they were capable of undertaking Higher education studies satisfactorily. The court determined that

“although applicable without distinction to all students, a provision of national law providing that students who have obtained their secondary education diploma in a Member State other than the Member State concerned and who wish to pursue their higher or university studies in a given area of education in that State must not only produce that diploma, but also prove that they fulfil the conditions of access to higher or university studies in the State where they obtained their diploma, is liable to have a greater effect on nationals of other Member States than on nationals of the Member State concerned, and therefore the difference in treatment introduced by that provision results in indirect discrimination contrary to the principle of non discrimination on the grounds of nationality contained in Article 12 EC.

Such differential treatment could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions.

### **Application**

- **Is a residency requirement potentially defensible ?**

Yes - It seems from the case law of the European Courts that whilst Article 12 of Directive 2004/38 and Article 21 TFEU will require member states to honour the principles of freedom of movement and Article 18 TFEU will prohibit direct discrimination on grounds of nationality so that we must allow access to Higher Education by students from other member states that the indirectly discriminatory impact of requiring students to have established a degree of integration in the host Member State is potentially objectively justifiable.

---

<sup>6</sup> Case C 147/03



*Forster*, (a case about access to maintenance grants and perhaps therefore to be seen in light of Article 24(2) of the 2004 Freedom of Movement Directive which makes express reference to maintenance grants) , suggests that a five year residency requirement is capable of being objectively justified. *Bressol* suggests that steps to introduce direct quotas might be justified on Public Health Grounds.

- **Objective Justification**

It is clear that it is not sufficient to simply assert an hypothesis that the Higher Education regime would become unsustainable in the absence of a residency requirement. In *Austria* the court recognised that whilst there might have been objectively justifiable aims in introducing restrictions on non nationals to HE courses the Austrian Government had failed to do so and thus their policy was declared illegal . In *Bressol* whilst there was a rejection of a “cost” justification that appears to have been on the basis that the argument was not substantiated against the data submitted to the court. In general objective justification on grounds of cost alone has not found favour with the Court but a “costs plus” argument of the sort that suggests that the very existence of the service provided is imperilled ( rather than it just having an unacceptable cost ) has in other cases been found to meet the objective justification test. Whether it would be possible to advance an argument that was focused on the potential cultural impact in the severe reduction in opportunity for Scots-domiciled learners if RUK students were entitled to 'free' HE in Scotland could only be established after careful analysis and research of the sort that would meet the scrutiny of the European Court and which Belgium failed to present in *Bressol*.

### **Further issues**

- **Tuition Fees or Student Loans ?**

The Commission has produced guidance on these issues in the form of a working document “Youth on the Move: A guide to the rights of Mobile Students in the European Union”<sup>7</sup>. That seems to suggest that any differentiation in treatment of applicants in relation to Student Fees might be treated differently under EU law to the way in which maintenance grants are managed and in particular that the ratio of the *Forster* decision which seems to

---

<sup>7</sup> Com(2010) 477/ SEC(2010)1047



accept that a residency qualification is justifiable in relation to maintenance grants would not be extended to the treatment of Tuition Fees. That is likely to arise from the express provision contained in Article 24 (2) of the Freedom of Movement Directive 2004/38 which records that member states shall not be obliged to grant maintenance aid for student grants or student loans to students who have not acquired a right of permanent residence. That paper suggests that the only sort of objective justification likely to be considered satisfactory would be one which evidenced potential damage to Public Health. That may overstate the position in that it (correctly) refers only to the Bressol case as being the only example of potential derogation from the principles. It may be possible to advance other objective justification arguments dealing with cultural or sustainability issues successfully. There is no doubt however that any such arguments would have to be carefully articulated and evidenced.

On more thorough reflection and consideration that might suggest that a switch from a policy centered on the capping of tuition fees to one where fees were applied equally to all students but grants made available on a residency basis might sit more easily within the EU legal framework.

- **The Principle of Non-regression**

One issue which will require to be considered will be the principle of non-regression. If we understand the situation correctly the current position is that the Scottish Government has taken the position that EU ( but not RUK) students should be treated as if they were the same as students falling within the current definition of those who have a relevant connection with Scotland and are accordingly “exempt” under the regulations.

RUK students will require to be treated no differently from other EU students in a post independent Scotland and if we are to be able to retain the ability to charge RUK students then the situation for EU students will require to change and, in effect, only those students satisfying the residency requirements would be able to benefit from the more beneficial terms offered to “Scottish Resident” students.

In that event an aggrieved (say) “Belgian” student who prior to independence would have been permitted to attend a Scottish HE without having to meet the fees currently charged to RUK students is ( assuming the objective justification point has been established ) likely to



now have to pay if they cannot satisfy the residency requirement. It will require to be examined whether, given that, in effect “Scotland” will be a new member of the EU that it would require to honour positions previously adopted by the devolved Scottish pre Independence Government. Whether that can be dealt with by way of transitional arrangements or whether to avoid that problem a “new start” approach will need to be adopted would require to be considered.

The question of non regression may have broader application which is likely to have become part of broader independence considerations and is, accordingly not developed further in this paper.

### **Conclusion**

As a matter of EU law it would appear that it *may* be possible to rely upon a residency requirement for access to preferential fees and grants regimes as long as that requirement is applied to all students regardless of their nationality and can be objectively justified.

It will be for the government seeking to introduce such a regime to establish, on evidence, that there is a legitimate aim which can be objectively justified which would allow them to derogate from the overriding principles of freedom of movement and non discrimination.

I would be happy to consider these issues further or to commission further work on these issues were that felt to be helpful.

Alun Thomas

25<sup>th</sup> April 2013