# EU LAW ON IMMIGRATION AND LABOUR: AN ADVISORY OPINION

## Advice to Angela as to whether EU law gives her the right to enter Italy despite the decision of the Italian Border Officials

The first issue is whether Angela has a right to freely move between Croatia and Italy in search of any job, whether permanent or temporary. If the freedom of movement is guaranteed, the other issue in this regard is whether she is free to work in Italy and reside in Croatia. Furthermore, the third issue would be whether the decision of the Italian border officials would affect her entitlement to enter and reside in Italy. In order to determine these issues, reference shall be made to the TEU, Charter of fundamental rights of the European Union (CFR), Treaty on the functioning of the European Union (TFEU), and case law. Moreover, this advisory opinion shall draw from scholarly journals, EU regulations, and directives.

The preamble to the Treaty of the EU captures some of the founding aims of the supranational organization. In this regard, the founding members resolved among others to establish a common EU citizenship and encourage free movement of persons between the member countries (The Open University 2017). In addition, the founding fathers envisaged the free movement of labour across the member states’ borders without hindrance (Craig & De Burca 2011). Consequently, citizens of EU are free to move from one country to another for private and business purposes (Baldoni 2003). Also, they are free to seek employment in other member countries subject to Article 45 of TFEU.

In light of the aforementioned, the European Court of Justice in *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* set the record straight. At paragraph 31 thereof, the court asserted that “Union citizenship is the fundamental status of the nationals of the member states.” Consequently, Angela cannot be treated discriminatively since the Maastricht treaty only recognizes the citizenship of the Union (Favell 2009). Moreover, the federalisation of the different nationalities comprising the EU does not apply since TEU came into effect (Kochenov 2014). Her citizenship of the Union is irrevocable through administrative actions of a condescending member state (Isin 2013).

Notably, nothing bars Angela from moving across the border in search of work in Italy since Croatia is a member of the European Union (Dolvik & Visser, 2009. This is because subject to Article 20 of the TFEU, Angela is a citizen of the EU by virtue of being a citizen of an EU member country, namely Croatia. Specifically, Article 20 establishes the citizenship of the Union and this is further anchored in the Maastricht treaty that guarantees citizenship rights (Kochenov & Plender 2017). Consequently, she is free to move between Croatia and Italy without restriction and cannot be questioned as to the reason for her entry therein as was the position in [*ECJ case C-68/89 Commission v Netherlands [1991]*](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi%21celexplus%21prod%21CELEXnumdoc&lg=en&numdoc=61989J0068).

In light of the above, Angela has the right to seek and accept employment in Italy is not in dispute. However, public policy considerations may be a justifiable cause to deny her entry into Italy to work. This is because Italy wants to reduce addiction to Gambling and is a public health justification reason for denying her entry to work. As such, article 45(3) of TFEU permits Italy to limit her right to accept the job offer by the Casino in pursuit of its internal public health policy goals (Downward, Parrish, Pearson, & Semens 2014).

Angela’s situation is further complicated by competing regulatory frameworks for EU border controls or lack of it thereof (Atger 2008). From experience, state parties to the Convention Implementing the Schengen Agreement (CISA) preferit over CFR to ensure a borderless Europe (Zaiotti 2011). Despite this, the issue is whether she is entitled to the benefits that accrue from a borderless Europe under CFR since Croatia is not a member of the Schengen, but of the EU. Notably, the action of Italian border officials to restrict movement of EU citizens may comply with Article 2 of CISA and simultaneously contravene Article 45 of TFEU. Secondly, under article 22 of CISA, border checks are legal if carried out on aliens or on EU citizens in the interest of public policy or security.

Angela was discriminated against by the Italian border officials on the basis of her Croatian nationality. EU law specifically prohibits member states from taking biased actions that prohibit free movement of citizens from other member states (Fribergh & Kjaerum 2011). Specifically, this goes against the founding principles of the EU that favour equal treatment as is codified by Article 2 of TEU. In addition, Article 20 of CFR commits parties to treat all EU citizens equally while Article 21 thereof prohibits all forms of nationality based discrimination among others. To the extent that they treated her differently on account of her nationality, the Italian border officials acted contrary to the EU treaties anti-discrimination provisions (Kraleva 2013).

The other issue arising is whether the Italian border control officials appropriately denied her entry on account of her being in part-time employment. Importantly, the anti-discrimination provisions of the EU protect those seeking either permanent or temporary employment within a member state (Kraleva 2013). This is grounded in *Regulation (EEC) 1612/68* that guarantees that the right of job seekers for equal treatment shall apply to both permanent and seasonal employees (par 4). It was further established in Article 6 of Council directive 68/ 360/EEC (Repealed) in which seasonal workers had a right to be provided with temporary permits. Consequently, the assertion by Italian border officials that Angela should be denied entry for being a temporary worker is illegal.

With regard to the freedom of movement within the EU, the European Court of Justice cemented the supremacy of Article 45 concerning the freedom of movement of workers. This view was expressed in the case of *Clean Car Autoservice v Landeshauptmann Von Wien (Case C-350/96)*. In making this ruling the judges of the honourable court stated the following:

Those rules could easily be rendered nugatory if Member States could circumvent the prohibitions, which they contain merely by imposing on employers requirements to be met by any worker whom they wish to employ which, if imposed directly on the worker, would constitute restrictions on the exercise of the right to freedom of movement to which that worker is entitled under Article 48 of the Treaty. (par 21)

From the foregoing, it is clear that any conditions imposed by the Italian government in contravention of the freedom of movement among workers are illegal by EU standards.

In conclusion, Angela has the right to enter Italy despite the refusal by Italian border officials. This is because their action was discriminatory as against her contrary to Article 45 of TFEU. Also, the right to seek temporary employment is guaranteed by EU law and cannot be derogated from on account of an administrative decision of a government official. Italian public policy considerations may be a ground for her to preclude Angela from entry. However, the *Clean Car Autoservice* case upholds workers freedom of movement above any claw back provisions against this right.

## Advice to Jacky and Sam as to whether they can live in Italy with Angela

Jacky and Sam can move to Italy to live with Angela, her registered partner, under the European Union laws. The first issue is whether Angela’s status fits the definition of a worker within the scope of EU regulations. Secondly, if the first issue is in the affirmative, the issue is whether Jacky and Sam qualify to be family within the definition of directive 2004/38/EC. Next is whether Jacky and Sam’s U.S. citizenship can be a sufficient ground to deny them entry into Italy. Finally, the issue is whether EU regulations recognise registered same sex unions and thereby affording spouses same rights as those in heterogeneous marriages.

Angela fits the definition of a worker within the provisions of the relevant EU laws. To understand this, the CJEU (European Court of Justice) in *Bosman* gave the fundamentals of what it means to be a worker. In its ruling, the court seems to suggest that a worker is one who engages in an economic activity either through gainful employment or provision of services for a pay in return (paragraph 73). Therefore, Angela is an employee of the Casino in Italy, which is an economic activity under the ambit of the community’s regulations. Consequently, she is entitled to the protections and obligations that are due to and from (respectively) a worker within the EU.

A worker is defined in the *Martinez Sala v Freistaart Bayern* as a person who is a beneficiary of an obligatory or voluntary insurance scheme for one or more risks covered by a social security scheme. In the opinion of Mr La Pergola, such a person may be self-employed or not. Therefore, if Angela is entitled to insurance from the employer or if her potential employer voluntarily insures her for risks at work then she is a worker. Notably, it is immaterial whether she is a permanent or temporary employee.

Having gotten an affirmative response to the first issue, this opinion seeks to delve on whether their registered partnership and living arrangements fits the definition of a marriage. Sam and Jackie are entitled under the EU to relocate unhindered to Italy together Angela to live therein because they are a family. Significantly, directive 2004/38/EC states that the freedom of movement and residence of EU citizens should also be granted to their family members. In this regard, the definition of family covers also those in a registered partnership if a member state (like Croatia) holds it as equivalent to a marriage. Thus, this regulation affords EU citizens the right to move in other member states in search of opportunities together with their immediate family members (Woodruff 2008).

Registered marriages, as mentioned above, are popularly known as civil partnerships and are treated in a similar fashion to avoid discrimination on the basis of sexual orientation. This is on the condition that the state in which the partnership is registered recognises the same as a marriage (Guth 2011). Specifically, this applies to persons who are in a committed marriage relationship whether heterosexual or not. To this end, Article 2 of Directive 2004/38/EC defines family to include persons who are in a registered marriage. Therefore, Angela and Jackie's union is registered and recognised in Croatia and they fall under the definition of family.

This right of family members to move with one of their own is one of the derivative benefits of Article 45 of TFEU (White 2011). The family is defined to include spouse and direct descendants of an EU citizen below 21 years of age as well as the dependents of any of the partners. It also includes the direct relatives of any of the parties to a marriage or registered partnership. In recognising these persons to be part of a family, the EU seeks to uphold and protect family life (Stratigaki 2004; Staver 2013). Furthermore, the EU does so in recognition of the importance of integration at the socio-political and economic sphere of its citizen’s lives (Shimmel 2006; Menendez 2009).

Finally, Jackie is a third country national (TNC) because she is a citizen of the United States and has a Croatian Visa. However, Sam is a Croatian citizen since her father was one under Article 4 of the law on Croatian citizenship therefore she cannot be treated as a U.S citizen. However, Jackie cannot be denied entry into Italy since Article 1 (c) of Directive 73/148/EEC prevents Italian border officials from deporting her as a spouse of a Croat. Similarly, under *Council Regulation 2317/95* she does not need her US visa because her country is not on the common list attached to the Annex subject to Article 1. As such for the Italian government to set visa requirements before entry of Jackie and Sam contravenes the EU position and hinders free movement of persons (Shaw 2012).

## References

Atger, A.F., 2008. *The Abolition of Internal Border Checks in an Enlarged Schengen Area: Freedom of movement or a scattered web of security checks?* (Vol. 8).

Baldoni, E., 2003. The free movement of persons in the European Union: A legal-historical overview. *State of the Art Report, Pioneur Working Paper*, *2*.

Craig, P. and De Búrca, G., 2011. *EU law: text, cases, and materials*. Oxford: Oxford University Press.

Dølvik, J.E. and Visser, J., 2009. Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles? *Industrial Relations Journal*, 40(6), pp.491-509.

Downward, P., Parrish, R., Pearson, G. and Semens, A., 2014. An assessment of the compatibility of UEFA’s home grown player rule with Article 45 TFEU. *European Law Review*, 39(4), pp.493-510.

Favell, A., 2009. Immigration, migration and free movement in the making of Europe. *European identity*, pp.167-189.

Fribergh, E. and Kjaerum, M., 2011. Handbook on European non-discrimination law. *Publication Office of the European Union, Luxembourg*.

Guth, J., 2011. When is a Partner not a Partner? Conceptualisations of ‘Family’in EU free movement Law. *Journal of social welfare and family law*, 33(2), pp.193-204.

Isin, E.F., 2013. Claiming European citizenship. In Isin, E.F.,and Saward, M. eds., 2013. *Enacting European Citizenship*. Cambridge: Cambridge University Press.

Kochenov, D. and Plender, R., EU Citizenship: From an Incipient Form to an Incipient Substance?’(2012). *European Law Review*, 37, pp.369-396.

Kochenov, D., 2013. The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?. *International & Comparative Law Quarterly*, 62(1), pp.97-136.

Kraleva, D., 2013. *Free movement of workers in the EU. Legal aspects of the transitional arrangements. ZEI Discussion Paper No. 217, 2013*.

Menéndez, A.J., 2009. European Citizenship after Martínez Sala and Baumbast. *Has European Law Become More Human but Less Social*.

Shaw, J., 2012. EU citizenship and the edges of Europe.