University Fees and rUK Students

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The White Paper affirms that '[f]ree education for those able to benefit from it is a core part of Scotland's educational tradition and the values that underpin our educational system' (p198). In that context, it is clearly stated that the Scottish Government would 'continue to support access to higher education in Scotland for students from elsewhere in the EU in accordance with our support for student mobility across Europe' (p200). On the previous page, however, the Government also asserts that it will 'maintain the status quo by continuing our current policy of charging fees to students from the rest of the UK to study at Scottish higher education institutions'. It is difficult to see how these competing objectives can be reconciled under EU law.

When students holding the nationality of an EU Member State move to other EU Member States for the purpose of attending university, they do so as European Union citizens. This is not just a symbolic status. The EU Treaty provisions on citizenship confer on these students a series of substantive – and enforceable – rights. The right not to be discriminated against on the grounds of nationality is a fundamental element of that legal framework, as confirmed by Article 18 of the TFEU. It is important to remember that EU free movement law does not create an entitlement to *special* treatment for citizens who move to other Member States. But it does create a right to *equal* treatment. In other words, it is not generally permissible under EU law to discriminate against students from another Member State on the basis of their nationality alone.

It is also important to acknowledge that EU free movement law does not create absolute rights. The Treaty itself recognises that citizenship rights are conferred subject to the limitations and conditions that are expressly provided for in the Treaty and in relevant secondary legislation. The White Paper seeks to rely on the principle that Member States may legitimately derogate from their obligation not to restrict free movement rights in limited circumstances. However, the problem is that the analysis presented on this point in the White Paper fails to unpack the layered system of derogation and justification that determines the scope of permitted national exceptions from EU free movement obligations.

First, when national measures discriminate against EU citizens openly or *directly* on the basis of their nationality, then only the derogation grounds expressly included in the Treaty may be relied upon by States seeking to defend the resulting free movement restrictions. For the free movement of persons, these grounds are limited to concerns about public health, public security, and public policy. Despite the potential breadth of the notion of 'public policy', the Court of Justice has always interpreted its scope extremely narrowly in reality, emphasising instead the fact that 'the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively' (Case C-348/96 *Criminal proceedings against Calfa* [1999] ECR I-11, para. 23).

Second, the logic underpinning the idea of *indirect* discrimination in EU law is that while the conditions being imposed by national measures are neutral on the face of it – for example, residence conditions that apply to everyone, including home State nationals – it is, in fact, far more likely that home State nationals will actually be able to satisfy them. By contrast, a distinct burden is placed on the nationals of other Member States to meet the required period of residence, which might in turn deter them from exercising their free movement rights in the first place. Importantly for present purposes, a wider justification system applies in situations involving indirect discrimination. States may rely on the open-ended idea of 'objective justification' in such cases. In other words, they may raise broader public interest arguments than those listed explicitly in the Treaty. There are no conceptual limitations here. In other words, there is no need to attempt to 'mould' a public interest justification into the specified grounds of public health, public security, or public policy. If States can make a good argument rooted in (any) public interest objectives, then the EU institutions will listen to it.

In both cases, however, i.e. whether direct or indirect discrimination is at issue, the contested national measure must also satisfy a proportionality test. In EU law, that test has two limbs. First, is the measure *suitable* or *appropriate* to achieve the stated public interest objective? Second, is the measure *necessary* for that purpose? In particular, it will be asked on the second point: could other measures that are less restrictive of free movement rights achieve the same policy aims?

Against that backdrop, let us consider the Scottish Government's proposal to 'maintain the status quo by continuing our current policy of charging fees to students from the rest of the UK to study at Scottish higher education institutions'.

First, students residing in rUK following Scottish independence would become nationals of another Member State. The White Paper's characterisation of its proposal as a limitation based on residence (p199) is misleading in this respect. It does not require Irish or Latvian or Swedish students to meet residency conditions in order to benefit from free university tuition. The proposed policy cannot, therefore, be classified as *indirect* discrimination under EU law since it is openly targeted at one group of EU nationals. This means that we are in the terrain of *direct* discrimination on the grounds of nationality – not the indirect discrimination generated by more 'neutral' residence conditions – and so any public interest arguments put forward to defend the measures must relate to public health, public security, or public policy only – and the latter in the very narrow sense in which it has been interpreted by the Court to date. For example, prior to the explicit recognition of consumer protection as a policy objective in the Treaties, the Court declined to interpret 'public policy' so as to cover such concerns (Case 177/83 *Kohl KG v Ringelhan & Rennett SA and Ringelhan Einrichtungs GmbH* [1984] ECR 3651). This is not an issue about the legitimacy or worth of the relevant policy arguments in any given situation; it is about the structure and scope of the Treaty provisions on free movement rights – which the Member States have never amended.

Second, a recurring problem in the debate on university fees has been the unfortunate conflation of three quite different strands of case law concerning access to university education. First, for nearly thirty years now, the Court of Justice has made it clear that

directly discriminatory fee structures are incompatible with EU law. Even before the creation of citizenship rights through the Maastricht Treaty, the principle of equal treatment with regard to university fees was established in connection with the Treaty's support of cross-border vocational training (Case 293/83 *Gravier v City of Liège* [1985] ECR 593). Second, residence conditions have been accepted in principle in the sphere of indirect discrimination – but for the award of maintenance grants to students from other Member States. In other words, that line of case law is about the funds paid by States to support students through their university studies, not the fees that are paid by students to access their studies in the first place. Moreover, States are not normally obliged to extend maintenance grants to students from other Member States in the first five years of residence in any event – i.e. before the status of 'permanent residence' is acquired under EU citizenship law (see e.g. Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507). Comparing the case law on university fees to that on maintenance grants is thus a mistaken attempt to compare apples and oranges, since the latter issue sits within the much more complex sphere of the law on access to *benefits*.

Third, the Court of Justice has – once – accepted that a State may justifiably limit access to its university courses, but in very specific circumstances (Case C-73/08 *Bressol and Others and Chaverot and Others v Gouvernement de la Communauté française* [2010] ECR I-2735). The contested national rules restricted access to nine medical and paramedical programmes in Belgium, on the basis of concerns about teaching quality and the sustainability of the affected region's health infrastructure owing to a significant increase in student numbers from other States (especially France). Students who met codified residence criteria had open access to the programmes. All other – i.e. not just French – students were subject to a 30% threshold rule, the places for which were assigned through the drawing of lots. The Court of Justice did not hesitate to find that the rules contravened EU discrimination law. However, it then stated that while 'it cannot be excluded…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…the matters put forward as justification in that regard are the same as those linked to the protection of *public health*, since all the courses concerned fall within that field. They must, therefore, be examined only in the light of the justifications relating to the safeguarding of public health' (paragraphs 53-54, emphasis added). The Court went on to present detailed – and stringent – guidance on the appropriate proportionality test that needed to be applied by the relevant national court in order for the national quota rules to be saved under EU law. Fundamentally, it required proof 'that such risks actually exist' and emphasised that 'an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks to public health' (para. 71).

In the White Paper, the Scottish Government has rationalised its proposal for a differential fee structure for rUK students on the basis of the 'unique and exceptional position of Scotland in relation to other parts of the UK, on the relative size of the rest of the UK, on the fee differential, on our shared land border and common language, on the qualification structure, on the quality of our university sector and on the high demand for places' (p200). But we cannot assume that the Court would apply similar reasoning to that seen in *Bressol* to public interest arguments based on the sustainability of a policy of free university education. First, the Court has consistently asserted that 'the health and life of humans rank foremost

among the assets and interests protected by the Treaty' (Case C-171/07 *Apothekerkammer des Saarlandes and others* [2009] ECR I-4171, para. 19). Second, by singling out a particular group of EU nationals, the Scottish Government's proposal is qualitatively different from the indirectly discriminatory residence conditions challenged in Belgium. In infringement proceedings taken by the Commission against Austria, where differential (more onerous) university entry requirements for holders of qualifications from other Member States were being challenged, the Court focused on the notion of less restrictive – and, crucially, non-discriminatory – alternative measures that Austria could implement, stating that 'excessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade' and it also remarked that 'the risks alleged by the Republic of Austria are not exclusive to its higher or university education system but have been and are suffered by other Member States' (Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para. 62). Significantly, the Court also criticised the Austrian Government for merely asserting its case rather than properly demonstrating it.

All of this means that the Scottish Government would face an extremely steep uphill battle to convince the EU institutions that it should be entitled to retain a practice involving systemic direct discrimination against one particular cohort of EU citizens. If the position were to shift so that residence conditions and/or threshold quotas were proposed for *all* students – i.e. if the Government proposed indirectly rather than directly discriminatory limitations – then the Court's reasoning in *Bressol* might suggest a more successful outcome on one view. But that argument rests on the as yet untested assumption that the Court would be willing to translate the justification arguments made there for the protection of public health across to a different policy objective. Furthermore, how would Scotland actually *prove* that its proposed policy meets 'the need to maintain the current mix of students from different parts of the UK in Scottish universities in order to ensure that Scottish domiciled students have the opportunity to study in Scotland, and that Scotland secures the graduate skills it requires' (p199)? And relatedly, as has been emphasised throughout this comment, the Government would also have to show that, in a legal framework with proportionality at its core, it is unable to introduce any other measures that are less restrictive of free movement rights in order to achieve the same policy objectives.

States aim to achieve many good things, and often for very good policy reasons. But being an EU Member State brings with it, alongside the privileges of membership, a series of parallel responsibilities to try to achieve these things in a certain way, on the basis that treating all EU citizens equally is a good thing too. As an alternative strategy, the Scottish Government might be able to secure a temporary, transitional arrangement as part of the negotiation process that would have to take place following a vote in favour of Scottish independence, in order to protect its education system from an initial financial shock that current funding structures simply could not withstand. Even then, the Government would need to bring to the table very clear empirical evidence of the problem, and the extent of the problem, affecting the sustainability of its university system that charging rUK – and only rUK students – would resolve, also bearing in mind the suitability and necessity elements of the EU proportionality framework. And it would also need to acknowledge that an independent Scotland would be

actively working towards recognising the full equality of all EU students – as EU citizens – in the longer term.

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