Published on *The Parliament Magazine* (https://www.theparliamentmagazine.eu)

Do ut Des - I give, so that you may give

Written by Henry Rodgers on 30 August 2019 in Opinion
Opinion

That a member state's exit from the EU should be occasion for its expatriate citizens working in another member state to finally be awarded what should have been their automatic rights under the Treaty, might on first acquaintance seem an outlandish and far-fetched proposition, argues Henry Rodgers.

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That a member state's exit from the European Union should be occasion for its expatriate citizens working in another member state of the Union to finally be awarded what should have been their automatic rights under the Treaty, might on first acquaintance seem an outlandish and far-fetched proposition.

Yet, with reciprocal agreements on non-national workers' rights to be reached under Brexit, whether through the retention of the terms of Brexit Phase One or, in the event of a hard Brexit, the EU Green

Card Proposal, it is now a real prospect, a quite likely outcome, for British citizens working as foreign-language lecturers in Italian universities.

The story of the British and foreign language lecturers' long battle for parity of treatment in Italian universities is worth the telling if only for the light it sheds on how an intransigent member state can under existing arrangements evade its Treaty obligations with apparent impunity. The story begins three decades ago, when the European Court of a Justice in 1989 found in favour of Spanish national Pilar Allué's challenge to a discriminatory Italian law under the terms of which foreign-language lecturers were employed on annual contracts, which could be renewed up to five times, while Italian national teaching staff enjoyed open-ended contracts.

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Allue's victory back then should have ended the discrimination against foreign language lecturers. Instead, in the first of three misreadings of ECJ rulings, Italy interpreted the verdict as legitimising annual contracts but outlawing the limit on the number of renewals. Even to an impartial observer, this interpretation would seem cynical and self-serving. Allué contested Italy's restrictive reading of the ruling in her case. Recourse to the Court of Justice takes time. It would be four years later before the Court ruled on Allué 2. The landmark 1993 verdict clarified beyond all ambiguity that the import of the earlier ruling was that foreign-language teaching staff had a right to the open-ended contracts enjoyed by Italian nationals.

A simple change to the discriminatory law to convert the temporary contracts into permanent contracts from the date of first employment would have satisfied EU justice. But while a new law introduced by Italy in 1995 did provide for open-ended contracts, it simultaneously sought to cut the cost of the Allué case law to the universities by demoting the foreign language lecturers to a newly created category of collaborators and linguistic experts and removing the parameter of Italian teaching faculty as a basis for determining salaries and the financial settlements for the backdated reconstruction of careers due under Allué.

A peculiar feature of Italian labour relations arrangements should be pointed out here. Only Italian unions are allowed to represent workers in contract negotiations with employers. Effectively, this has disenfranchised foreign language lecturers seeking to have their rights under ECJ case law incorporated into their local contracts. The national contract signed by the Italian unions in the wake of the Alluè ruling, and binding in its general terms on the foreign language lecturers, diluted the import of that sentence and in a sense recovered for Italy a lot of what it had lost in law before the ECJ.

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The subsequent cases in the sequence of jurisprudence can be briefly summarised. In 2001 the European Commission won its infringement case, C-212/99, against Italy for its inadequate implementation of the Allué case law. Because Italy failed to implement the ruling in C-212/99, the Commission then proceeded to open enforcement proceedings, with the attendant pecuniary penalties. In the event, the last-minute enactment by Italy of Law 05 March 2004, averted the imposition by the Court of Justice of the daily fines of €265,500 recommended by Advocate General Poiares Maduro in his opinion in the follow-on case, C-119/04.

The threat of the daily fines then lifted, Italy made no move to actually implement the law of March 2004. Because of the disenfranchisement of the foreign language lecturers in contract negotiations and a most regrettable laxity on the part of the European Commission, the parameter to which foreign lecturers' salaries were pegged had slid over time from part-time associate professor to part-time researcher, the lowest rank in the Italian docenza. It is for a reconstruction of career with reference to that reduced parameter that the Commission opened its ongoing infringement proceedings (Pilot 2079/11/EMPL).

"In the light of its lamentable track record, the incoming parliament and the incoming commission need to be particularly vigilant to ensure that Italy correctly implements the ruling in Case C-119/04"

Adoption of the terms either of Brexit Phase One or the EU Green Card Proposal would open an important window of opportunity for the expatriate foreign language lecturers, who by now have been battling for redress under EU law for almost three decades. Under the terms of these alternatives the UK would agree to recognise the rights of all non-national citizens of the EU living and working in the UK in return for a reciprocal recognition by all EU member states of the rights of UK citizens living and working throughout the Union.

My tried and tested British colleagues at La Sapienza university in Rome responded with a sort of gallows humour to the news of the initiative of the reciprocal "do ut des" agreement as foreseen in Brexit Phase One and the Green Card Proposal. "So, in the final analysis, the only condition under which British citizens can get their rights under EU law in Italy, is that Britain should first exit the EU" was the general response.

Nonetheless, there is optimism about the window of opportunity opened. At La Sapienza we have formed our own labour association and written to the administration requesting that we be allowed to represent ourselves in contract negotiations. The British Ambassador to Italy has met with a representative of our association, and the embassy will closely monitor how the Italian universities respond to the European Commission's infringement proceedings for the implementation of ECJ ruling, C-119/04.

Caught between the pincers then of a Commission infringement proceedings and a hopefully vigilant UK government demanding a reciprocal "des" in return for its "do" of guaranteeing the rights of Italian workers in the UK, it might seem to a neutral observer that Italy will finally be compelled to grant the foreign language teaching staff their Treaty rights. I am not so sure: Italy so far has displayed an almost Houdini-like ability to escape its obligations to our category under EU law.

In the light of its lamentable track record, the incoming parliament and the incoming commission need to be particularly vigilant to ensure that Italy correctly implements the ruling in Case C-119/04.

This requirement of caution extends also to the UK. Widely perceived as a reluctant European, the UK has nonetheless been a comparatively good European as its record in honouring its Treaty obligations shows. If in its “do ut des” Brexit agreement with the member states, the UK holds Italy to its own exacting standards, then in tandem with the commission’s infringement proceedings, there may be a happy ending in store for the foreign language lecturers after all.

About the author

Henry Rodgers teaches English at University of Rome, La Sapienza. He is a founder member of Assoc.CEL.L, an association set up to represent foreign language lecturers in contract negotiations with the Universities.

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