

CENTRAL AND EASTERN EUROPEAN MOOT COURT COMPETITION

MOOT QUESTION 2008

A. The Kingdom of LAREDEF as a federal State

1. The Kingdom of LAREDEF is a Member State of the EU and is divided into 3 autonomous Regions (DEINOM, ELDDIM, ROOP) and 3 linguistic regions.
2. The DEINOM region contains the national capital city and uses Deinom (language) as its regional tongue. Since it also contains the most developed industrial and commercial areas, it has traditionally been the richest of the 3 autonomous regions in the Kingdom. The percentage of school-leavers who attend University or are engaged in other higher-education is 75%. Unemployment amongst the same age group is 5%.
3. The ROOP region is predominantly English-speaking and is comprised mainly of agricultural land. It has historically been the poorest autonomous region in the Kingdom. The percentage of school-leavers who attend University or are engaged in other higher-education is 25%. Unemployment amongst the same age group is 25%.
4. The Constitution of the Kingdom of LAREDEF grants the autonomous regions mutually exclusive spheres of competence for certain matters and empowers them to act as autonomous legislators in regard to these competences. Regional legislative competence is exercised by way of decrees, which have the same force as federal laws. The relevant constitutional provisions states as follows:

Section 4: Issues devolved to the autonomous regions [...]

4.10 Autonomous regions shall be entitled to regulate all issues concerning the availability, content, organisation and financing of higher educational courses within their territorial borders.” [...]

4.12 Autonomous regions shall be entitled to regulate employment policy within the territorial borders.

B. The Sumsare University

5. The Sumsare University is located in the ROOP region and was created in 2000 as a “non-public University”. There had previously been a public university on the same site, but this had closed due to a shortage of funding. The Sumsare University deliberately chose not to seek official status as a “public University”, despite the fact that this precluded the possibility of it receiving guaranteed government financial subsidies, because the status of “non-public University” allowed it to be exempted from many of the requirements imposed on “public Universities” by the national *Higher Education Act 1989*.
6. Non-public Universities in ROOP are entitled to recruit staff from a wider category of persons and to attract teaching staff from amongst celebrities and politicians who did not meet the statutory requirement that staff need to possess a Masters degree that applies in the case of public Universities. They are also exempt from statutory rules applicable to public Universities which limit the fee levels chargeable for courses and require such Universities to disregard candidates’ financial positions (i.e. whether or not they have the finances to pay for the course) when deciding whether or not to admit them to a particular course. Furthermore, non-public Universities are exempt from a statutory list of compulsory courses which must be offered by every public University. Nevertheless, many of the provisions of the *Higher Education Act 1989* apply to all higher education institutions, regardless of their status. For example, all Universities must obtain a license from the ROOP regional government before they may lawfully offer educational services. They must also supply the ROOP Ministry of Education with annual statistical data on a wide range of issues laid down by statute.
7. While the Sumsare University is financed from a number of sources, the principal source of finance comes from student fees. In 2006-7, almost 70% of students attending the University were recipients of an educational loan available in ROOP. The University has also received a number of discretionary educational research grants awarded by the ROOP Regional government, amounting to approximately 10% of the Sumsare University’s annual budget. It has also received some financial support as part of the regional government’s Youth Employment Scheme, which is aimed at encouraging employment of young workers (see paragraph E.3 below).

C. First claimant – Slamina

8. Slamina, a 20 year old national of the Kingdom of LAREDEF, was born in DEINOM and, until recently, resided

there. He wished to study agricultural law but no such course was available at Universities in DEINOM so he applied to the Sumsare University where he was accepted to study for a 3-year Degree in animal husbandry, beginning in the academic year 2007-2008. Slamina moved to ROOP and planned to live there for the duration of his studies and subsequently to seek employment within the region.

9. In order to finance his studies, Slamina applied for an educational loan offered by the ROOP regional government. The loan is available for students on all higher-education courses studied in the ROOP region and is repaid by students following completion of their studies, once they have begun to earn an income which exceeds the national average income.

10. Slamina's application for the loan was rejected. The rejection letter explained that Slamina was ineligible to claim the loan since he did not fulfil the requirements laid down by *Decree 1066/2000 on Educational Loans for Higher Education Courses* (adopted by the government of ROOP on 18th January 2000). This legislation ('the 2000 Decree') states that the loan sought by Slamina was available only to persons who were either (1) born within the ROOP region or (2) who have been granted permanent resident status within that region. Permanent resident status is obtainable by citizens of other EU Member States under Directive 2004/38, following 5 years of continual and lawful residence within ROOP, but is not obtainable by people who are nationals of Kingdom LAREDEF but who were not born in ROOP. Since Slamina was born in DEINOM and is a national of LAREDEF, he was ineligible to claim the loan on the grounds that he was neither born in ROOP nor did he have permanent resident status there.

11. Slamina challenged this decision to refuse him a loan before the Educational Loans Dispute Resolution Authority (ELDRA), a public body set up by the ROOP region's Ministry of Education, alleging that the reasons for the decision were discriminatory and contrary to European Community law. When his appeal was turned down, Slamina initiated proceedings in the ROOP High Court against the regional government of ROOP, alleging that the conditions of eligibility laid down by the 2000 Decree contravened EC law. They were therefore unlawful and so could not be taken into account when assessing his eligibility for the loan. Slamina relied on the principle of non-discrimination (*Article 12 ECT*) in conjunction with the rules governing citizenship of the Union (*Articles 17 and 18 ECT*).

12. The government of ROOP region argued that this was a purely internal matter concerning only the Kingdom of LAREDEF and therefore fell outside the scope of EC law competence. Accordingly, the issue was governed exclusively by national law and, pursuant to *section 4* of the Constitution, the applicable law in this case was *the 2000 Decree*. Furthermore, the government of ROOP argued that, as the aim of *the 2000 Decree* was to implement a regional policy encouraging and assisting young nationals up to the age of 25 from ROOP to enter higher education courses, ROOP's policy in respect of the loans was entirely justified from the perspective of both national and Community law. This regional policy sought to improve the employment prospects of young persons and thereby reduce unemployment so helping to redress the historically poorer economic situation of the ROOP region. The ineligibility of other Kingdom LAREDEF nationals to claim the loan merely reflected limitations in the budgets of each regional government and had to be reviewed in the light of the finances and other opportunities already available to members of the other two autonomous regions within LAREDEF.

D. Second Claimant – Rekees

13. When Slamina moved to ROOP, he found shared accommodation with Rekees, a citizen of REDISTOU (an EU Member State). Rekees is 24 years old and came to ROOP 3 years ago following the death of his grandmother, from whom he inherited sufficient money to prove that he had the right to enter and reside in Kingdom LAREDEF on the basis of *The Citizens' Rights Directive 2004/38*. Unfortunately, Rekees began to run out of money in early 2007 and was forced to register as a job seeker in ROOP. Hoping that some agricultural knowledge would give him a better chance of obtaining employment in ROOP, Rekees applied for a place on the 3-year degree course in animal husbandry at the Sumsare University.

14. Rekees also applied for the educational loan offered by ROOP, but his application was refused. The rejection letter stated that, although Rekees is an EU national lawfully resident in ROOP within the meaning of the Citizens' Rights Directive, he had not yet acquired permanent resident status. Accordingly, he did not fulfil the criteria laid down by *the 2000 Decree*.

15. Rekees appealed against this decision, arguing that the criteria laid down in *the 2000 Decree* constituted a breach of the right to non-discrimination as guaranteed by EC law, in particular *Articles 12, 17 and 18 ECT*. This appeal was rejected by ELDRA, which declared that *the 2000 Decree* was lawful on the basis of *Article 24(2)* of the *Citizens' Rights Directive*. ELDRA also rejected Rekees' arguments that, as a job-seeker, he fell within *Article 39*

ECT and therefore fell outside the scope of Article 24(2) and in the scope of Article 7(2) of Regulation 1612/68 instead.

16. In the meantime, Rekees began to seek alternative funding opportunities and was thrilled to see an advertisement for a part-time job at the Sumsare University. Rekees estimated that the wages for the job were sufficient for subsistence purposes but was most attracted by the fact that the successful applicant would be entitled not only to payment but also to subsidised University accommodation, since the job involved being ‘on call’ at weekends. The job was described as a “logistics assistant” and involved the carrying-out of various unskilled tasks at, or on behalf of, the University. One such task was using a University car to provide a courier service to deliver letters or packages between the University sites and local businesses.

17. Rekees applied for the job and was originally invited for interview but was later advised that he was ineligible because the conditions laid down by the University stated that all applicants must either be a minimum of 25 years old or, if under this age, must sign an employment contract for a minimum of 4 years. Since Rekees’s course would last only 3 years, the University thought he would not satisfy the 4 year requirement.

18. Rekees informed the University authorities that he considered the restrictive employment conditions to be discriminatory on the grounds of age contrary to the provisions of *EC Directive 2000/78* (‘the Employment Directive’). The University informed Rekees of the following reasons for imposing the aforementioned conditions:

- a) Regional law (*Decree 49/2004*) allows employers to impose “*restrictive measures*” in employment contracts with persons aged below 25 in order to facilitate the aim of guaranteeing more long-term employment for younger persons.
- b) The Central Body of the University passed a resolution in January 2005 supporting the initiative of the ROOP Regional government to improve the employment prospects of young persons in the region by encouraging them and employers to enter into long-term contracts and so to encourage young persons to remain within the ROOP region.
- c) The financial costs of employing persons under the age of 25 are greater than employing persons over this age, since the University is required to pay higher car-insurance rates for young employees. Furthermore, past experience shows that younger workers have tended to seek alternative employment fairly soon after beginning employment as a “logistics assistant” and so this increases the University’s recruitment and re-training costs. If not for the fact that the University received financial support as part of the regional government’s Youth Employment Scheme, the University admitted that it would be completely unwilling to employ anyone under the age of 25.

E. National employment policy law

19. The government of ROOP implemented *Decree 49/2004* (“*The 2004 Decree*”) on 18th January 2004. The decree was adopted on the basis of recommendations made by the regional Ministry of Employment, following consultation with the ROOP Regional Trade Union Association, the regional Chamber of Commerce and various organisations representing employers’ interests.

20. The preamble to the decree expresses the desire to encourage more stability and continuity in employment of young persons. It cites statistics showing that, of those persons aged below 25 and lawfully employed, only 25% had employment contracts lasting more than 6 months and a further 60% of such persons had contracts for no longer than one year’s duration. The decree also noted the need to encourage employers to invest in younger workers and to provide employers with incentives to be more willing to offer longer-term contracts to younger workers. Such incentives include government subsidies paid to private employers to cover the costs of any additional training that may be necessary in respect of young workers. Funds are also payable to private employers who are willing to offer long-term contracts (classified as 4 years or above) to first time workers aged below 25, in order to promote job security. All such financial assistance is provided via the regional government’s “Youth Employment Scheme (YES!)”.

21. The relevant part of the 2004 decree states that: “...*employment contracts entered into between an employer and a person aged below 25 may be subject to minimum age limits or other restrictive measures whose aim is to increase employment opportunities or stability for such young persons.*”

22. Since *Section 4.12* of the Constitution empowers autonomous regions to regulate employment policy within the

territorial borders, the duty to implement EC law in relation to employment policy (including *Directive 2000/78*) also falls within the competence of the various autonomous regions of Kingdom. Although that Directive was to have been implemented by 2nd December 2003, *Article 18* permits a further 4 year extension period which the Kingdom of LAREDEF utilised on behalf of ROOP, given the poor economic situation in that region and its problems with youth unemployment. Accordingly, ROOP was not required to implement *the Employment Directive* until 2nd December 2006. (*see note)

F. Rekees's action in the High Court

23. Rekees began proceedings before the ROOP High Court against both the Sumsare University and the ROOP Government, seeking the annulment of the employment conditions imposed by the University and the 2004 decree upon which they were based. Rekees alleged that these measures constituted a breach of the equal treatment provisions governing access to employment contained in *Article 2* of *Directive 2000/78*. Rekees alleges that neither the terms of the 2004 decree nor the employment conditions imposed by the University are justified under *Article 6(1)* of that Directive.

2. *Article 6(1)* of the Employment Directive states that:-

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
- b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;.....*

24. In the event that the court found *the Employment Directive* to be inapplicable, Rekees argued that the aforementioned measures contravened various provisions of the EC Treaty (*Articles 12, 13, 18 and 39 ECT*) and/or infringed a general principle of Community law prohibiting age discrimination, as reflected in *Article 13 ECT* and *Article 21* of the *EU Charter of Fundamental Rights* ('the Charter').

25. The Sumsare University argued that, as a private body, it could not be held liable under the provisions of an unimplemented EC Directive, especially in light of the fact that, at the time, the 2007 deadline for implementing the Directive has not yet expired. Furthermore, the contested employment conditions complied fully with *the 2004 Decree* and, even if the court found that *the Employment Directive* was applicable, those conditions were justified by *Article 6 (1)* of that Directive.

26. The government of ROOP agreed that *the Employment Directive* is incapable of applying until the expiry of the 2007 extended implementation deadline. It argued that it would undermine the ECJ's jurisprudence regarding *Article 249 ECT* and the capacity for Directives to have direct effect if Directives were capable of producing legal results prior to expiry of their date of implementation, even if this was an extended period of implementation. The only exception to this principle was to be found in the case of *Inter-Environnement Wallonie ASBL v Région wallonne* which permitted a Directive to create legal effects prior to expiry of the implementation date only where the Member State had introduced new legislation which blatantly infringed the aims of the Directive, which was not the case here. In the event that the court concluded that the *Employment Directive* was capable of producing legal effects, the regional government argued that, in any case, *the 2004 Decree* was justified on the basis of *Article 6(1)* of that Directive. Relying on the recent jurisprudence of the Court of Justice, and in particular *Case C 411/05 Félix Palacios de la Villa*, the government argued that the Member States are permitted a wide margin of discretion in the application of *Article 6(1)*. The government denied that *Article 13 ECT* was capable of being relied upon directly, since it is simply an empowering provision, enabling the Council to take appropriate action to combat, *inter alia*, discrimination on grounds of age. As such, it cannot have direct effect; nor can it preclude the application of a national law such as the 2004 Decree. Equally, it argued that the *EU Charter of Fundamental Rights* was not binding and that *Article 21* thereof was an insufficient basis on which to declare the existence of a general principle of Community law against age discrimination.

27. The ROOP High Court decided to conjoin the cases of Slamina and Rekees in view of the linked issues and factual background, and further decided that it required clarification of a number of points of Community law before

it could give judgment in these cases. Accordingly, the court referred the following questions to the European Court of Justice, pursuant to *Article 234 ECT*.

The questions referred for a preliminary ruling

Question 1

(a) *Do the ECJ decisions in Palacios (C-411/05) and Mangold (C-144/04) mean that a Member State is bound by the provisions of a Directive in respect of which an extended time-limit for implementation has been granted, prior to the expiry of such extended period, solely on the basis that an autonomous region within that Member State has adopted legislation falling within the legal area covered by that Directive?*

(b) *Is it possible to derive a general principle of Community law prohibiting age discrimination from Article 13 ECT and/or Article 21 of the EU Charter of Fundamental Rights?*

Question 2

(a) *In the event that question 1(a) is answered in the affirmative, where a Member State wishes to introduce an exception to the prohibition against age discrimination laid down in Directive 200/78, is it incumbent upon that Member State to prove before the national court that such an exception is appropriate and necessary in order to achieve a legitimate aim, or should the national court assume that such an exception is lawful unless it is apparent that the Member State measures adopted to pursue that aim are inappropriate and unnecessary?*

(b) *In the event that question 1(b) is answered in the affirmative is a Member State entitled to enact exceptions to the prohibition against age discrimination arising from a general principle of Community law and, if so, are the requirements for introducing such exceptions the same as those laid down in Article 6(1) of Directive 2000/78?*

Question 3

(a) *Is a private body such as the Sumsare University a body which falls within the definition of the State and so is required to comply with the obligations contained in secondary EC law such as the Employment Directive 2000/78 and the Citizens' Rights Directive 2004/38, implementing the principles contained in Articles 12, 13 and 18?*

(b) *If the answer part (a) is in the negative, does any prohibition on age discrimination age arising from the answer to question 1 also apply directly between private employers, on the one hand, and prospective employees, on the other hand?*

Question 4

Must Articles 18 ECT, 39 ECT be interpreted as precluding an autonomous region of a federal EC Member State from adopting provisions which, in the exercise of its powers, allow only persons born in that autonomous region and, in relation to citizens of the European Union, persons exercising their right of free movement who have acquired permanent resident status in that region, to be entitled to a loan designed to facilitate their access to a course of higher education, to the exclusion of persons who were born in another autonomous region of the same federal State?

Question 5

(a) *In the event that question 4 is answered in the affirmative, is a citizen of a federal Member State who was born and resided within one autonomous region of that Member State entitled to rely upon Articles 12, 17 and 18 EC to seek the benefit of an educational loan awarded by another autonomous region of that federal Member State, despite the provisions contained in Article 24 (2) of Directive 2004/38 ('the Citizens' Rights Directive)?*

(b) *Is an EU citizen lawfully resident in another Member State and registered as a job seeker in that state outside the scope of Article 24 (2) of Directive 2004/38 by virtue of that status and therefore eligible to receive an educational loan such as that in the facts of the present case on the basis of Article 7 (2) of Regulation 1612/68?*

(*In para 22, for the purpose of this moot please assume that Article 18 of the Employment Directive allows a 4 year extension to Member States rather than the 3 year extension set out in the original text).