



**LAW 413 EUROPEAN UNION LAW  
RESEARCH PAPER**

**THE *GLOSZCZUK* CASE**

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## TABLE OF CONTENTS

<b>1. INTRODUCTION.....</b>	<b>1</b>
<b>2. TERMS .....</b>	<b>1</b>
<b>3. THE SCOPE OF AND THE SITUATION BEFORE THE CASE .....</b>	<b>3</b>
<b>4. FACTS .....</b>	<b>4</b>
<b>5. NATURE OF ASSOCIATION AGREEMENTS AND THEIR PROVISIONS .....</b>	<b>5</b>
<b>6. THE VERDICT.....</b>	<b>7</b>
<b>7. SIMILAR CASES .....</b>	<b>8</b>
<b>8. DISCUSSION.....</b>	<b>10</b>
<b>8.1. IMPORTANCE OF THE CASE .....</b>	<b>10</b>
<b>8.2. ABUSE OF RIGHTS .....</b>	<b>11</b>
<b>8.3. THE BEST INTERESTS OF THE CHILD .....</b>	<b>12</b>
<b>9. CONCLUSION .....</b>	<b>13</b>
<b>BIBLIOGRAPHY .....</b>	<b>15</b>

## 1. INTRODUCTION

The case C-63/99 (*The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk*) is a preliminary ruling of the Court of Justice of the EU (hereinafter the Court), delivered on September 27, 2001. The case is about the situation of two Polish nationals residing in the United Kingdom under false pretences and against national immigration regulation, who revoked their right to establishment under the Europe Agreement with Poland, which was concluded before the accession of Poland into the EU in 2004.

The main problems that arose in the case are whether the provision regarding the freedom of establishment in the Association Agreement with Poland is directly effective and whether it is applicable if the individuals invoking the right had been residing illegally in the country. The main importance of the ruling is about the interpretations of provisions regarding their direct effect in different sources of the EU and how wide of a scope of discretion the Member States have when it comes to granting entrance and remain to leave to third-country nationals (hereinafter TCNs).

Some argue that this ruling of the Court alongside two other cases delivered on the same day (C-235/99, *The Queen v Secretary of State for the Home Department, ex parte Kondova*; C-257/99, *The Queen v Secretary of State for the Home Department, ex parte Barkoci and Malik*) was politically charged against the fourth wave of enlargement experienced by the EU with the Central and Eastern European countries (CEEC).

## 2. TERMS

To understand the full scope of the judgement, there are certain terms to be made clear. These are the principle of direct effect of EU law provisions, freedom of establishment, self-employment within the scope of EU law and the leave to remain in the scope of United Kingdom legislation.

Direct effect of provisions in EU law is a principle developed by the Court through its case-law. This principle creates positive obligations for the States while also providing rights for the individuals. Provisions that are declared to be directly effective by the Court after interpretation create a hierarchy between national law and EU law regarding the topic: A directly effective provision prevails the national law. In addition to this, direct effect creates a

set of rights that can be invoked before the national courts of Member States by individuals. The principle of direct effect is one of the most important parts of EU law that makes it *sui generis*.

The right to establishment in the scope of the Association Agreement concluded with Poland includes the right to pursue economic activities as self-employed persons, the right to set up companies and manage subsidiaries, branches and agencies. Economic activities in this provision relate to activities of industrial or commercial character and of craftsmen or professions. It is important to note that freedom of establishment is a right arising from one of the main objectives of the EU: establishment of an internal market. Without the correct application of the right of establishment, the internal market could not function to its full capacity. The provision containing this right in the Treaty establishing the European Economic Community was first made directly effective in 1974.<sup>1</sup> However, this does not make the provision that deals with the same issue in the association agreements directly effective even if it is worded exactly the same. Another interpretation by the Court is needed and in this case that interpretation is provided.

While self-employment has its own meaning in other contexts, we need to know the definition provided by the Court in its jurisprudence: Self-employment is defined as an individual working outside any relationship of subordination, under their own responsibility and in return for remuneration paid to them, directly and fully.<sup>2</sup> The definition was made to include two other aspects in a later ruling: “The actual establishment of that undertaking in the host Member State and the pursuit of genuine economic activity there”.<sup>3</sup>

Leave to remain refers to the right to reside in a country. In the UK there are two types of leave to remain: Limited and indefinite. With limited leave to remain, individuals are expected to accommodate and maintain themselves or any dependents without any recourse to public funds. However, indefinite leave to remain holders broadly have the same rights and entitlements as a UK citizen.<sup>4</sup>

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<sup>1</sup> Case 2-74 *Jean Reyners v Belgian State* [1974] ECR-00631

<sup>2</sup> İlke Göçmen ‘The Freedom of Establishment and to Provide Services: A Comparison of the Freedoms in European Union Law and Turkey-EU Association Law’ (Ankara Law Review 2011) 75

<sup>3</sup> *ibid*, 75-76

<sup>4</sup> Anne Morris ‘Leave to Remain in the UK (Apply to Settle)’ (DavidsonMorris 2021)

### 3. THE SCOPE OF AND THE SITUATION BEFORE THE CASE

This preliminary ruling on the interpretation of several articles of the European Agreement with Poland conspicuously revolves around freedom of establishment of Polish nationals. It ultimately relates to the free movement of persons, one of the four freedoms on which European law is based upon, and to the formation of the internal market, which was the aim of European integration since the EEC.

The case deals with questions on the direct effect of the article on the right of establishment of Polish nationals, and to what extent Member States can apply their laws and regulations regarding entry, stay and establishment, especially to those persons who are present in their territory unlawfully.

The relationship between Community law and national laws had not been established explicitly in the treaties. Before the present judgement, the principle of direct effect had already been interpreted in the Court's case law, in the *Van Gend & Loos*<sup>5</sup> and the *Costa v. E.N.E.L.*<sup>6</sup> judgments.<sup>7</sup> In addition to this, in the *Sürül*<sup>8</sup> judgement, it was established that provisions of international agreements concluded by the then Community could be interpreted as directly effective if the provision involved a clear and concise obligation that is not subject to further adoption of measures when construed within the aim and wording.<sup>9</sup> In *Gloszczuk*, the Court required the same criteria for direct effect as in its previous judgments and stated that further measures are not to be adopted. In this sense, regarding direct effect, *Gloszczuk* does not bring a novelty.

Within the European Community, rights of free movement and residence are granted only to European Community nationals. Europe Agreements eventually aim the accession of the non-Member State to the Community,<sup>10</sup> and in this direction, some of the rights accorded to European Community nationals can be extended to Europe Agreements nationals<sup>11</sup> in order to achieve this aim. The Europe Agreement with Poland does not provide freedom of

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<sup>5</sup> Case 26-62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] 61962CJ0026

<sup>6</sup> Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] 61964CJ0006

<sup>7</sup> Alfred E. Kellermann, 'The Rights of Non-Member State Nationals under the EU Association Agreements' [2008] *European Journal of Law Reform* 342

<sup>8</sup> Case 262/96 *Sema Sürül v Bundesanstalt für Arbeit* [1999] ECR I-02685

<sup>9</sup> Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] ECR I-6393 para 30

<sup>10</sup> *ibid*, para 50

<sup>11</sup> Norbert Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union' [2005] *European Law Journal* 684

movement of workers or freedom of establishment for Polish nationals; however, it provides a non-discrimination clause which grants them the right to equal treatment with Community nationals in regards to the right of establishment.<sup>12</sup> Before the judgments of the Court, opinions on whether these rights are accompanying rights of the right of establishment were divided. While in a 1995 judgment the Belgian Council of State ruled that the non-discrimination principle in the Europe Agreement with Poland granted the rights of entry and work, the district court of the Hague initially ruled in the *Jany*<sup>13</sup> case that Europe Agreements could not be directly invoked to obtain a residence permit.<sup>14</sup>

In the *Royer*<sup>15</sup> judgment of 1975, which is about the free movement of persons between Member States, it was ruled that the right to enter and reside is conferred directly on a person who falls within the scope of Community law under treaty articles on workers, freedom of establishment, and services.<sup>16</sup> In *Savaş*<sup>17</sup>, which was decided one year before *Gloszczuk*, the Court decided that the rights of entry and residence are conferred as corollaries of the right of establishment<sup>18</sup>. However, since the former judgment related to the free movement of European Community nationals whereas *Gloszczuk* concerned third-country nationals, and the latter to an Association Agreement concluded with a different third country, the Court in *Gloszczuk* required a separate interpretation<sup>19</sup> of the articles. On the corollary rights matter, the Court followed the principles it had laid out in *Royer* and *Savaş*.

#### 4. FACTS<sup>20</sup>

The mentioned Association Agreement with Poland was concluded in 1991 but it is important to note that it entered into force in 1994, alongside the national legislation adopted on the topic. The year 1994 is five years after the first entrance of Mr. Gloszczuk into the United Kingdom.

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<sup>12</sup> Alfred E. Kellermann, 'The Rights of Non-Member State Nationals under the EU Association Agreements' [2008] European Journal of Law Reform 350

<sup>13</sup> Case C-268/99 *Aldona Malgorzata Jany v Staatssecretaris van Justitie* [2001] ECR I-08615

<sup>14</sup> Ronald Van Ooik, 'Freedom of Movement of Self-Employed Persons and the Europe Agreements' [2002] European Journal of Migration and Law 382

<sup>15</sup> Case C-48/75 *Jean Noël Royer* [1976] ECR 1976-00497

<sup>16</sup> *ibid*, 519

<sup>17</sup> Case-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* [2000] ECR I-02927

<sup>18</sup> Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] para 47

<sup>19</sup> *ibid*, para 49

<sup>20</sup> *ibid*, para 15-28

In October 1989, Mr. Gloszczuk entered into the United Kingdom with a visitor's visa of six months, which he later tried to extend in July 1990. This request was denied on the account that visitors visas cannot be longer than six months. In August 1991, Mrs. Gloszczuk entered the United Kingdom on the same grounds as her husband, the same year in which Mr. Gloszczuk started working in the building industry. After the Europe Agreement entered into force in 1994, Mr. Gloszczuk registered himself as a self-employed building contractor and subsequently requested a leave to remain in 1996. It needs to be considered that if Mr. Gloszczuk's request had been accepted; his wife could reside in the country as well without further procedures. However, the application was declined on the ground that the couple had been residing in the United Kingdom illegally, considering that they made false representations during their entry to the country. No deportation proceedings followed this decision.

The United Kingdom relied on Article 58 of the Association Agreement while denying the couple's leave to remain, which states that nothing within the agreement shall prevent parties from applying their national law regarding entry, stay, work and establishment. So, they could apply their national law – the Immigration Rules adopted in 1994: “(...) Grounds on which an application to vary leave to enter or remain in the United Kingdom should normally be refused: (2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave (...)”. The reference by the national court raised two questions: Whether the provision on the freedom of establishment in the Association Agreement is directly effective, and if it is directly effective, would it apply to individuals residing unlawfully at their time of application and to what extent could the Member State apply its laws regarding entry and stay.

## **5. NATURE OF ASSOCIATION AGREEMENTS AND THEIR PROVISIONS**

Association agreements are agreements concluded with third countries with the usual aims of political dialogue, trade liberalisation and sector specific cooperation.<sup>21</sup> The most important characteristic of association agreements is their flexibility: They can take many different forms and may include different aspects of association. Association is regarded as a process itself rather than an end in these agreements. The most important piece of information to remember about these agreements is that they do not have to be a part of the pre-accession process of a country.

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<sup>21</sup> Peter van Elsuwege, Merijn Chamon, ‘The meaning of ‘association’ under EU law: A study on the law and practice of EU association agreements’ (European Union 2019) 8

Within academic circles, association agreements are defined as primary written sources of EU law. This may be arising from the fact that the possibility for third countries to associate with the EU is provided in the founding treaties. Article 217 of the Treaty on the Functioning of EU (TFEU) states that:

“The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”

Since an association agreement was deemed to be a steppingstone towards membership and third countries would act accordingly, Article 8 of the Treaty of EU (TEU) was added later stating that;

“(1) The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

(2) For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.”

However, for the case at hand the Court concludes that the Association Agreement with Poland is for the harmonisation of relations for a possible accession of the country to the EU.<sup>22</sup> Hence, it is not needed to speculate about which article is the legal basis of the agreement.

The direct effect of association agreements was tested before the Court regarding different provisions. The general understanding is that even if an identical provision of the founding treaties is included in the association agreements, since the latter has different aims than the former, they need separate interpretation to be made directly effective. This understanding, however, was disturbed by two different Council decisions in 2014. In these decisions the association agreements with Ukraine, Moldova and Georgia were declared not to be construed as having direct effect.<sup>23</sup> Since one of the provisions from these association

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<sup>22</sup> Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] ECR I-6393 para 50

<sup>23</sup> Elsuwege and Chamon ‘The meaning of ‘association’ under EU law: A study on the law and practice of EU association agreements’ 20



agreements are not tested before the Court yet, what would happen if the Court reached a separate decision than the declared will of the Council, remains to be seen.

Aside from the legal basis of association agreements, association agreements with CEEC have political significance and signifying this, they are called 'Europe Agreements'.<sup>24</sup> Europe Agreements that were concluded before the Copenhagen Summit were actually seen as an alternative to membership, which includes the mentioned Association Agreement with Poland. Since they were seen as an alternative to membership, they still aimed for a harmonisation of the legal system and gradual creation of free trade.<sup>25</sup>

## **6. THE VERDICT<sup>26</sup>**

The Court interpreted the provision on freedom of establishment in the Association Agreement to be directly effective as it establishes a precise and unconditional principle that can be applied by national courts, and which can therefore govern the legal position of individuals. The Court construed the provision in this manner precisely because it has a purpose to integrate a new Member State into the Community more easily. This is related to the fact that the Community (and the Union today), unlike other international organisations, not only creates obligations for Member States but also creates rights for the individuals of the Community and accepting that this provision has direct effect allows these individuals to invoke their rights before national courts.

However, the Court ruled that just because the provision is directly effective, the rights to entry and remain, that are corollaries to the right of establishment, are not absolute privileges, meaning that the Member State can still govern the entry of individuals with the rules that are a part of their national legal system.

The last but the most definitive decision was that Articles 44 and 58 do not in principle preclude a system of prior control to confirm the intention of establishment of the individual, and the Member State can reject an application of establishment 'on the sole ground' that the individual had been residing illegally in the State prior to application. The Court accepted that prior control has a legitimate objective of verifying the intention of establishment of Polish nationals to the extent that it does not restrict the rights of Polish nationals they are granted

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<sup>24</sup> *ibid*, 26

<sup>25</sup> *ibid*

<sup>26</sup> Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001]

under the Association Agreement. The Court noted that since such a system of prior control is largely dependent on the correctness of the declarations made by the Polish national, it is consistent that the national authorities can reject an application that consists of false declarations which mask the fact that the substantive requirements are not met, and such an application can be rejected on the sole ground that the applicant was residing illegally under national legislation at the time of the application. The Court also reiterated Advocate General's comment in his Opinion<sup>27</sup> that a contrary interpretation might lead Polish nationals to remain in the territory illegally, and hence would render the Association agreement ineffective.

## 7. SIMILAR CASES

As freedom for establishment is a frequently invoked right by third-country nationals of candidate countries, a case law has emerged with similar subjects that can be beneficial to compare and contrast the verdicts.

### a. *Kondova* (C-235/99)<sup>28</sup>

As a part of its transition period to becoming a Member State, Bulgaria concluded an Association Agreement with the Community in 1993 that entered into force in 1995. The provisions regarding the free movement of workers and establishment are identical to the ones found in the agreement with Poland. Ms. Kondova, a veterinary student, entered the UK in July 1993 for a work period of three months. However, a week after her entry, she claimed for political asylum which was subsequently denied in April 1994. After this denial, Ms. Kondova married a Mauritian national who had permanent leave to remain and applied for a leave to remain herself on the basis of her marriage in August 1995. However, she withdrew this application after she started working as a self-employed person in 1996 and made another application for leave to remain on the basis of her self-employment. Similar questions were referred to the Court regarding the contrast between the individual's right to establishment and the illegality of Ms. Kondova's entry to the UK. In the verdict, accepting the directly effective nature of the provisions regarding establishment, the Court stated, similar to the *Gloszczuk* case, that a Member State may reject an application for leave to remain on the grounds that the applicant was residing illegally in the Member State with an entry permit achieved through false representation. In addition to this, the Court ruled that the Association Agreements do not

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<sup>27</sup> Case 63-99 *Opinion of Advocate General Alber* [2000] para 75

<sup>28</sup> Case 235/99 *The Queen v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova* [2001] ECR-I6455

preclude a system of checks in entry and for this reason, the UK can apply its own rules for permitting entry.

One unique part of Ms. Kondova's case is that while applying for a leave to remain as a part of her right of establishment, she was first denied on the grounds that the business plan was not profitable, and she did not have the funds to support such a business plan. Ms. Kondova stated that since the UK did not ask from its own nationals for such a plan, this rejection reason was of discriminatory nature, which is prohibited by the Founding Treaties themselves. The Court, in this case, accepted that individuals can ask a national court to set aside these kinds of discriminatory national measures. Reflecting upon the decision of *Gloszczuk* shows that while the Court gives discretion to the Member State in terms of illegally resident TCNs, it is not willing to compromise from the main principle of prohibition of discrimination. In addition to this, the Court declared that Association Agreements do not protect TCNs if or when they intend to establish themselves in a Member State but enter the country on the basis of seasonal work, as it may cause the fraudulent usage of these provisions.

b. *Tum and Dari* (C-16/05)<sup>29</sup>

The case of *Veli Tum and Mehmet Dari* involve two Turkish nationals wishing to establish themselves in the United Kingdom. What made their case similar to the *Gloszczuk* was that they were considered to be illegally present in the UK at the time of their application and they wanted to invoke their right of establishment through an Additional Protocol attached to the Association Agreement concluded between Turkey and European Communities. After their arrival to the UK they applied for asylum, which was later rejected. Following this rejection, the two applied to establish themselves, relying on the related provision of the Additional Protocol. The provision in question stated that the contracting parties are to prevent the creation of any new restrictions to the freedom of establishment of individuals and was construed to be directly effective in the *Savaş* (C-37/98) decision. The verdict includes an innovation compared to the *Gloszczuk* and *Kondova* cases, stating that the illegal residence at the time of application for establishment is irrelevant in order to invoke the rights conferred in the Additional Protocol. This decision can be interpreted as the Court willing to provide more freedom to individuals from possible Member States as the negotiations for Turkey's accession to the EU had already started two years prior to the verdict. Why this perspective was not

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<sup>29</sup> Case C-16/05 *The Queen, Veli Tum, Mehmet Dari v Secretary of State for the Home Department* [2007] ECR-I-07415

adopted regarding the integration of Central and Eastern European Countries is a political debate rather than a legal one.

In addition to this, the Court stated that since the Additional Protocol entered into force on January 1, 1973, the new immigration rules that were accepted in 1994 which made entry into the state more difficult were to be construed as a new restriction to the right of establishment, which is precisely what the Additional Protocol prohibited. This interpretation may constitute the verdict as a case of judicial activism.

## **8. DISCUSSION**

### **8.1. Importance of the Case**

Even if the verdicts of the Court are binding to every institution and individual except from itself, it is seen that with this decision case law is created about the provisions of freedom of establishment in Europe Agreements. For instance, in the verdicts of *Malik* and *Kondova* which were given on the same day as *Gloszczuk*, the provisions of freedom of establishment in the Europe Agreements concluded with the Czech Republic and Bulgaria respectively were also interpreted as directly effective. This demonstrates how the Court can influence the integration of newer members. However, in terms of these three specific countries, it is needed to analyse the issue from the perspective of the fourth wave of enlargement in general. It is known as an empirical fact that the inclusion of Central and Eastern European countries in the Community had been controversial. The group was too large to include at once, it was not homogenous enough to ease the process, nor the Union had a legal infrastructure that was ready for the load. While some may interpret this decision as the Court assisting these countries in their integration into the EU as per the direct effect verdict, some interpret it as a studied neutrality towards the enlargement. Thus, by declaring that Member States can regulate the entry and stay of TCNs, the Court showed that just because the Council decided and the Commission leads the way for CEE countries, it does not have to be on the same path. Especially the term 'possible accession' rather than 'intended' or 'planned' makes the Court seem reluctant in providing this right to the individuals of the candidate countries.<sup>30</sup> While one thinks that the unlawful presence of a third-country national cannot be made lawful, it could

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<sup>30</sup> Antje Pedain 'With or Without Me: The ECJ Adopts a Pose of Studied Neutrality towards EU Enlargement' (2002) 989

have been possible for the Court to make a commentary in contrast to their final decision if they were more supportive of the enlargement process.<sup>31</sup>

## 8.2. Abuse of Rights

‘Abuse of rights’ as a term can be defined in two different ways. Firstly, derived from French law, it can be used to indicate the aim of gaining excessive advantages driven from a right, and causing disproportionate harm to others.<sup>32</sup> Secondly, which is the broader understanding, it can mean ‘the improper usage of a rule’.<sup>33</sup> Since the EU legal system is centered around the individual and providing rights for the individuals is seen as one of the main duties of the EU institutions, abuse of said rights is presumed to happen quite often. Predicting this, starting from the 1970s to the 1990s, the Court created a jurisprudence of entitling Member States to take necessary precautions to prevent individuals from taking advantage of certain provisions of the EU law.<sup>34</sup> In its *Emsland-Stärk* verdict, the Court laid down two criteria for an action to be considered to be an abuse of rights:

“A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.”<sup>35</sup>

While the Court does not make this discussion, acknowledging that they could have if evidence suggesting the allegation were presented to the Court or if the allegation was made in the national court level<sup>36</sup>, we would like to make the allegation that the Gloszczuks abused the right of establishment provided to Polish nationals. We can test whether this action can cause disproportionate harm to others and whether this is an improper usage of the provisions. In terms of improper usage of a provision, we can refer to the Opinion of the Advocate General for this case: He states that if someone enters a Member State with false representation and resides there illegally, they may create the funds, perhaps through employment, to show

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<sup>31</sup> *ibid*

<sup>32</sup> Takis Tridimas "Abuse of Rights in EU Law: Some Reflections with Particular Reference to Financial Law." *Prohibition of Abuse of Law: A New General Principle of EU Law?* Ed. Rita de la Feria and Stefan Vogenauer. (London: Hart Publishing, 2011) 169

<sup>33</sup> *ibid*

<sup>34</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I - 1484 para. 24

<sup>35</sup> Ana Bobić ‘Prohibition of Abuse of Rights in the EU’ PhD diss. (2011) 12

<sup>36</sup> Case C-16/05 *Veli Tum, Mehmet Dari v Secretary of State for the Home Department* para. 65-66

themselves as self-employed later, thus putting themselves outside of the sphere of protection provided by the Association Agreement.<sup>37</sup> Another important thing to notice is his very precise wording which is choosing to use the phrase ‘abuse of Association Agreement’.<sup>38</sup> Considering that Mr. Gloszczuk’s entry date does not coincide with the conclusion of the Agreement, it may be even said that he was abusing the goodwill of United Kingdom authorities.

The disproportionate harm this action may cause is two-fold. Firstly, considering the possibility of this case becoming public, it may cause a stereotyping of TCNs as ‘criminals’ and cause future nationals wanting to invoke this right to face discrimination. Even though discrimination is strictly forbidden by the EU legislation, the social risks of discrimination remain. Secondly, considering that individuals claiming to be workers will as well be competing for jobs in the Member State, someone residing in the country under the pretence of visiting, but in fact looking for a job, will create an unfair competition for the legally residing TCNs in the same Member State. As a result, this action by Mr. Gloszczuk can be construed as an abuse of rights.

### **8.3. The Best Interests of the Child**

Kevin Gloszczuk was born on October 1, 1993, by which time his parents’ visas had expired. He lived in the UK during the time period in which his parents were residing in the UK illegally. While the verdict of the Court in 2001 does not presuppose a deportation decision, the Member State can take such a decision based on the verdict, hence the child can be deported alongside his parents. In the main proceedings, the national court did not consider the child separate from his parents, and the Court did not further elaborate on this matter. However, as international human rights principles establish, children have rights independent from their parents.<sup>39</sup> The situation of Kevin Gloszczuk and the verdict can be examined in light of this contrast.

One of the main principles of children’s rights is the principle of the best interests of the child. This principle is put into words in Article 3 of the Convention on the Rights of the Child, to which the UK is a party and which is almost universally ratified, and according to which the best interests of the child shall be a primary consideration in all actions, including

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<sup>37</sup> Case 63-99 *Opinion of Advocate General Alber* [2000] para 73-75

<sup>38</sup> *ibid*

<sup>39</sup> Olga A. Khazova, ‘International Children’s Rights Law: Child and the Family’ in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer 2019) 167

those undertaken by courts of law and administrative authorities.<sup>40</sup> Although the EU is not a party to the CRC, it is guided by the rights and principles laid out in it, and thus its actions and policies that impact children shall make the best interests of the child a primary consideration.<sup>41</sup>

Being almost 8 years old at the time the judgment was given by the Court, Kevin Gloszczuk was likely to be affected adversely by a possible deportation order, as he was at an age in which he was vulnerable to drastic lifestyle changes and would be sent to an environment to which he has no connection to. Therefore, a deportation order issued by the UK would be against the principle of the best interests of the child, and the referring court did not consider this principle in holding that the child enjoys his rights, if he has any, only as a dependant<sup>42</sup> of Mr. Gloszczuk.

Through the preliminary rulings procedure, national courts can request the Court of Justice to interpret European Union (at the time of the case, European Communities) law.<sup>43</sup> In *Gloszczuk*, the Court interpreted two articles of the association agreement between the European Communities and their Member States, and the Republic of Poland. Here, it may be discussed whether in its judgment the Court could have elaborated on the child's enjoyment of his rights as a dependent of his father according to the referring court. Although the Court's judgment elicited a possible deportation decision that would be contrary to the child's rights, in our view, the Court could not have elaborated on this matter as this relates to the substance of the dispute, whereas a preliminary rulings procedure concerns only the interpretation of European Union law in a general, non-case-specific manner. This procedure cannot be used to determine a Member State's infringement of European Union law.<sup>44</sup> Still, the verdict paves the way for the infringement of the child's rights.

## 9. CONCLUSION

While building up on previous case law in regards to the verdicts on direct effect and the corollary nature of the rights of entry and residence, the Court in *Gloszczuk* provided for an important novel interpretation on the possibility of prior control by Member States on third-

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<sup>40</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1500 UNTS 3

<sup>41</sup> Ingeborg Odink, 'Children's Rights in the EU: Marking 30 Years of the UN Convention on the Rights of the Child' [2019] European Parliamentary Research Service

<sup>42</sup> Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte: Wieslaw Gloszczuk et Elzbieta Gloszczuk* [2001] ECR I-6393 para 22

<sup>43</sup> Bertrand Wägenbaur, *Court of Justice of the EU: Commentary on Statute and Rules of Procedure* (C. H. Beck-Hart-Nomos, 2013) 317

<sup>44</sup> *ibid*, 317

country nationals and the possibility for rejection of an application for a leave to enter by a third-country national on the sole ground of illegal presence on territory under national legislation at the time of application. The *Gloszczuk* case reiterated the importance of the Court of Justice not just as a court resolving conflicts arising from European Union law but also as a motor working for or against the widening of the European Union.



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