

The Czech Republic and Movement of Workers: A Missed Opportunity?¹

Jakub Tomšej

Abstract: *The paper contains reflections of the author on the Czech labour market and on diverse aspects of the Czech legal regulation of working abroad. The Czech Republic stands in a versatile position of both a “sending” and a “receiving” country in terms of movement of workers and it has its historical experience with migration. The author summarises arguments for creating an open and competitive labour environment. An analysis of the applicable legal regulation, however, shows that these arguments may not have been heard by the Czech lawmakers. In case of the non-European Union/European Economic Area workers, the applicable laws and processes create unnecessary hurdles for obtaining a work permit and performing work within the territory of the Czech Republic. The author debates the current legal regulation of the employee card and proposes measures to make the system more accessible for applicants.*

Key Words: *Labour Law; Immigration; Employment of Foreigners; Work Permit; Employee Card; the Czech Republic.*

Opening remarks

Very few topics are as crucial and relevant to individuals and society as work. Work is the activity which creates the values and assets that surround us, gives meaning to human life and represents an important differentiator in terms of personal satisfaction.

Competitiveness is nowadays one of the most desired features of the labour market. Only in a competitive market will employers have an opportunity to find skilled workers matching their requirements. Only in a competitive market can an employee find a position that corresponds

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to his or her expectations and allows him or her to develop and to enjoy satisfying working conditions. From that viewpoint, national labour markets may not provide for sufficient opportunities. The movement of workers among countries and the extension of labour markets to a regional or even global level may be the only answer.² In this context, A. Hyde even speaks about a “right to migrate” and considers the introduction of such as “the most important labour law”.³

With the integration of the European countries which resulted in the European Union, the free movement of workers has become one of the European Union’s cornerstones and an asset from which many employers and employees have benefited.⁴ In this context, we should not forget that the European labour market represents just a small fraction of the global labour market and the competitiveness target may not be fully achieved without granting access to persons coming from the non-European Union/European Economic Area countries (often referred to as so-called third countries). This can also be seen in case of the Czech Republic where – as this paper documents – most foreigners working in the Czech Republic come from outside the European Union.

In the recent past, actions have been taken and opinions have been expressed which may lead to an increase in restrictions on migrants, intensifying workplace segregation on the basis of ethnicity, imposing restrictive immigration controls and in general taking steps towards more closed national labour markets. The challenge of today is to convince ourselves that such trends are not advantageous to the target countries involved.

It is beyond doubt that hiring from other countries, in particular where larger groups of migrants target a certain labour market, can lead to tensions and fears among the local workforce. They are likely to wonder whether the increased number of foreign workers has a negative im-

² See CONNELL, J. and J. BURGESS. Migrant Workers, Migrant Work, Public Policy and Human Resource Management. *International Journal of Manpower*. 2009, vol. 30, no. 5, pp. 412-442.

³ See HYDE, A. *The Most Important Labour Right, Labour Law Research Network 3rd Conference in Toronto, Canada on June 29th, 2017* [online]. 2017 [cit. 2018-02-28]. Available at: <http://llrn3toronto.org/papers/>.

⁴ See Article 3(2) of the *Treaty on European Union*; Articles 4(2)(a), 20, 26 and 45 – 48 of the *Treaty on the Functioning of the European Union*; *Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States*; *Regulation No. 492/2011 on Freedom of Movement for Workers within the Union*.

pact on overall domestic unemployment or on a worsening of local employees' position in the market and what downward pressures the increased worker migration has on local salaries and on the worsening of working conditions etc. Very recently, the migration crisis centring on migrants from the Arab and the North African countries revealed how unprepared some countries are for the arrival of refugees and how difficult it may be to manage local populations' fears of the culture that the migrants attempt to import as well as of the profiles that some of them may have. Showing an overly welcoming attitude to these new joiners may create frustration within certain parts of the population which can be easily targeted by populist parties calling for the closing of borders. We are in need of a balanced approach where we explore all of the opportunities that the movement of workers brings us, without allowing certain individuals to take advantage of our developed social system while not making any contribution.

With the globalisation and the development of modern technologies, changes to working methods and environment also affect the work abroad. Multinational companies, present all around the world, open positions which support whole regions or continents from one workplace. Optimisation of costs has led companies to establish shared service centres where an employee can support his or her own country from a distance of hundreds or thousands of kilometres. Digital nomads connect to work using their computers while travelling and exploring the world. This could trigger an impression that location no longer matters. Such an impression may, however, be false. Very recently, two large international companies, IBM⁵ and Honeywell,⁶ have restricted their generous work from home programmes, claiming that people work better in close proximity to other employees where ideas readily can be exchanged and decisions can be made faster. The need for staff working abroad can sometimes not be replaced by being available over phone or e-mail and it is unlikely that the future will change this.

⁵ According to the articles from business media, such as KESSLER, S. IBM, Remote-work Pioneer, Is Calling Thousands of Employees back to the Office. In: *Quartz* [online]. 2017-03-21 [cit. 2018-02-28]. Available at: <https://qz.com/924167/ibm-remote-work-pioneer-is-calling-thousands-of-employees-back-to-the-office/>.

⁶ According to the articles from business media, such as DePASS, D. Honeywell Ends Telecommuting Option. In: *StarTribune.com* [online]. 2016-10-21 [cit. 2018-02-28]. Available at: <http://www.startribune.com/honeywell-ends-telecommuting-option/397929641/>.

The Czech labour market

All of the above-mentioned reflections are relevant for the Czech Republic – a smaller country located in central Europe with a total workforce of around 5.28 million people.⁷ Since the fall of the communist regime in year 1989 and the country's accession to the European Union in year 2004, the Czech Republic has grown into the versatile position of being both a “sending” and a “receiving” country in terms of workers' migration.

Since the country's accession to the European Union, the number of the Czech employees working abroad has been growing, in particular since the termination of all temporary restrictions in May 2011.⁸ The statistics show that around 110,000 Czech workers currently work in other European Union countries.⁹ These workers are spread across all European countries, with their strongest presence in the United Kingdom and Germany.

At the same time, the country's low unemployment rate of about 3.4 percent makes it attractive for the job applicants from other countries. In May 2017, the local Labour Offices reported a total number of

⁷ For the purpose of this paper, the term workforce shall include all natural persons who are employed, act as individual entrepreneurs or are registered job-seekers at the Czech Labour Offices. The data is taken from the overview of the Czech Statistical Office and reflects the state as of December 31st, 2014. See *Pracovní síla podle regionů soudržnosti a krajů [1993 – 2014]*. In: *Český statistický úřad* [online]. 2014-12-31 [cit. 2018-02-28]. Available at: <https://www.czso.cz/documents/10180/20552655/25013015041.pdf/9469dd47-7c0b-4cde-9efe-fab494441624?version=1.0>.

⁸ In accordance with the applicable European Union laws and the Accession Treaty, the old European Union Member States could apply a temporary restriction on the free movement of workers for up to 7 years following the accession. Only three European Union Member States have fully opened their labour markets to the Czech workers since the accession: the United Kingdom, Ireland and Sweden. Some countries have feared that the access of workers from the “new” European Union countries to their markets could lead to an increase of unemployment. Representatives of these “new” European Union countries would argue that no such phenomenon was observed following the termination of the restriction period and that the application of temporary restrictions only leads to issues with the illegal work.

⁹ See *Počty občanů ČR zaměstnaných na území států EU/EHP a Švýcarska v letech 2006 – 2014*. In: *Ministerstvo práce a sociálních věcí* [online]. 2014-12-31 [cit. 2018-02-28]. Available at: https://www.mpsv.cz/files/clanky/20796/tabulka_2014.pdf. No statistics relating to the non-European Union countries are available, however, it is anticipated that the share of the Czech citizens working outside the European Union is relatively low.

308,521 job applicants (lowest figure since May 2008) and of about 174,000 job vacancies.¹⁰

According to the statistics, the Czech Republic is home to around 493,000 foreign workers. Of this number, approximately 20 percent are self-employed individuals who do not share the status of an employee under local laws.¹¹ Since year 1989, the total number of foreign workers has grown 14 times. Roughly a quarter of the total foreign workforce is represented by the Slovak citizens who can hardly be deemed “foreigners” in practice; as the Czechs and the Slovaks used to form one country for most of the 20th Century and speak a very similar language, the Slovak workers are usually fully integrated into the local communities. In the Czech Republic, there is also a bigger presence of workers from Ukraine (approximately 70,000 workers, mostly blue-collar jobs with low qualifications), Vietnam (approximately 40,000 workers, mostly self-employed in trades and gastronomy), Poland, Romania, Bulgaria and Russia.¹²

Legal regulation for incoming workers

Local legal requirements do not represent a hurdle for citizens of the other European Union/European Economic Area countries. There are no restrictions on hiring these individuals. Employers are only bound by a notification obligation towards the Labour Offices regarding the commencement of work by such individuals. They can also conduct business as self-employed subject to registration with a local Trade Office which is a relatively easy process.

A more difficult regulation has been adopted for the non-European Union citizens. Primary concerns usually relate to timing. Statutory deadlines for local authorities to issue all relevant permits usually range between 3 – 4 months since the local employer’s first interaction with the

¹⁰ This may be influenced by the fact that employers do not have a legal obligation to report vacancies to the Labour Office, unless they want to hire an applicant from a third country. It is still unarguable that the low unemployment rate makes it often difficult for employees to hire.

¹¹ Based on data published by the Czech Statistical Office. See Tab.0102 Cizinci trvale a dlouhodobě žijící v České republice (bez azylantů) [1989 – 2016]. In: *Český statistický úřad* [online]. 2018 [cit. 2018-02-28]. Available at: https://www.czso.cz/documents/10180/46173161/32018117_0102.pdf/9bc8f7af-46e9-48ee-9f98-fb521d3a49a5?version=1.0; and Cizinci: Zaměstnanost. In: *Český statistický úřad* [online]. 2018 [cit. 2018-02-28]. Available at: https://www.czso.cz/csu/cizinci/2-ciz_zamestnanost.

¹² Based on data published by the Czech Labour Office. See *Úřad práce České republiky* [online]. 2018 [cit. 2018-02-28]. Available at: <https://portal.mpsv.cz/upcr>.

authorities. In some cases, even these deadlines are being missed by the authorities and delays of a number of months have been reported. As speed is usually of the essence in the hiring process, this barrier may influence the employer's interest in accepting applicants who have not yet started the procedure.

Since its introduction in June 2014, the most frequently applied for permit is the employee card. It has a dual nature and combines a right to reside in the territory of the Czech Republic and, at the same time, to work in a certain pre-approved job. The main specifics of the employee card lie in the fact that it is always issued for a certain position for which the employee has already signed an employment contract (or a future employment contract) with a local employer. The employee's job must be for at least 15 hours a week and the local minimum salary rate (currently 11,000 CZK a month – approximately 440 EUR)¹³ must be observed. In case of a job change (including promotion within the same employer), prior consent of the Ministry of Interior of the Czech Republic must be sought and obtained.

In this context, the employee card can only be issued in the event the Labour Office does not find a suitable local candidate for the position in question. For this reason, employers have an obligation to notify the Labour Office all positions that they are considering to fill with an employee card holder. An application for the employee card can be filled by the foreigner only if the position is still vacant 30 days after the notification has been made.

In practice, the database of job-seekers registered with the Labour Office contains more applicants with a lower level of qualification and the Labour Office is likely to act decisively where an employer's notification relates to a job that can be easily filled by such job-seekers. For qualified and managerial positions, it is less likely that the Labour Office's search for a local candidate will be successful and, therefore, we often don't observe any activity on the part of the Labour Office. Notwithstanding that there is currently no option for the Labour Office to waive the 30 day notification period.

The application for an employee card must be accompanied with a number of documents, including a valid travel document, an extract from the criminal register, a copy of the employment contract and

¹³ See Section 42g of the Act No. 326/1999 Coll.

a signed confirmation of accommodation.¹⁴ The application must be filled at a Czech embassy outside the territory of the Czech Republic, unless the applicant already possesses any form of long-term visa in the Czech Republic. Citizens of some countries have the right to choose the embassy at which they apply; for other countries' nationals, an obligation to file at the home embassy of the applicant applies. This sometimes leads to practical complications as the preparation for the application usually requires the presence of the applicant in the Czech Republic (e.g. based on visa-free stay or based on a short-time tourist visa) in order to attend interviews, to find accommodation etc., but afterwards the applicant is required to leave the country to file the application and to wait until it is processed.

Local regulation is not in line with the Acquired Rights Directive as it requires consent of the Ministry of Interior of the Czech Republic in all cases where the employee card holder changes his/her job. In cases where a TUPE¹⁵ transfer is triggered, the Acquired Rights Directive and the Czech Labour Code guarantee the employee an automatic transfer to a new employer. Practical complications could arise if the employee card holder fails to request the consent sufficiently in advance (or at all). It can, however, be argued that the relevant provisions of the Act on the Residence of Citizens in the Czech Republic requiring such consent must be interpreted in line with the Acquired Rights Directive and can't be applied in cases of the TUPE transfers. Such argumentation has not yet been tested before the Czech courts.

One might expect that a simplified procedure could apply in cases of posted workers assigned to the Czech Republic by their foreign employer to provide services on a temporary basis. On the contrary, posted workers do not enjoy the benefits of the employee card's dual nature and must apply for a residence permit and a work permit separately. This makes the process more complicated but not necessarily longer.

Certain groups of workers are fully exempt from the obligation to seek a work permit in order to carry out work within the Czech Republic. This includes foreigners who permanently study at local educational institutions as well as persons who have been granted asylum protection.

¹⁴ See Section 42h of the Act No. 326/1999 Coll.

¹⁵ Abbreviation for the Transfer of Undertakings (Protection of Employment).

Foreigners who want to conduct business as self-employed individuals within the Czech territory must obtain a visa for business purposes. In order to apply for it, a different set of documents must be submitted than in case of an employee card. Most importantly, all registrations and permits to conduct business must be obtained prior to the filling and the foreigner must prove that he/she has sufficient funds to stay in the Czech Republic.

While employee cards are usually granted to everyone who submits all required documents and passes the local labour market test conducted by the Labour Office, cases have been reported where a business visa was withheld for various reasons, including minor breaches of obligations that do not lead to severe consequences for local businesses¹⁶.

An appeal against the decision on denying a visa would be decided by the Ministry of Interior of the Czech Republic. Unlike most other administrative decisions, a decision denying a visa to a non-European Union citizen is exempt from any court review. This approach has been repeatedly challenged by foreigners in front of the Czech Constitutional Court that has the powers to render inapplicable any provisions of the law that would be contrary to the Czech Constitution. The Constitutional Court has, however, always held that as the Czech law does not stipulate a legal claim of a foreigner to receive a visa or a visa extension, the exemption from the court review does not conflict with constitutional rights.

On the other hand, in year 2009 the Constitutional Court¹⁷ of the Czech Republic rendered inapplicable a provision of the Act on the Residence of Foreigners in the Czech Republic which provided for an exemption from the court review even for repatriation decisions¹⁸ in cases where a foreigner was found to reside illegally within the Czech territory. The Constitutional Court was of the view that the Czech Bill of Fundamental Legal Rights (which forms a part of the Czech constitutional sys-

¹⁶ In one of these cases, an extension of a business visa was not granted to a foreigner due to his failure to publish annual balance sheets and other accounting documents of a company run by him in the Czech Companies Register. The Czech law requires all companies to publish the documents in the Companies Registers but the vast majority of local companies do not comply with the rule due to the confidential nature of the data. In theory, a fine could be imposed for such a breach. In practice, the Companies Register courts claim that they have no capacity to control this and no fines are usually issued.

¹⁷ See Pl. ÚS 26/07 (47/2009 Coll.; N 218/51 SbNU 709).

¹⁸ A repatriation decision represents a legal basis for an involuntary termination of the foreigner's stay within the Czech territory.

tem) grants foreigners certain rights which can be breached upon repatriation, making a reference in particular to repatriation to a country where the foreigner's life or freedom might be at risk. Following this decision, the court review of any repatriation decision is permitted.

Other issues

Under the local antidiscrimination laws, citizens working within the territory of the Czech Republic must not be discriminated against by employers due to their nationality, origin, ethnicity or religion and have the right to enjoy the same salary and working conditions as the local employees. The enforcement of these rights may, however, be difficult in practice. Many cases have been reported where the non-European Union citizens have been working illegally in the Czech Republic – without a valid employee card and even without an employment contract, under poor working conditions and for a very low salary. If discovered by the public authorities, the persons must be repatriated due to having been within the Czech territory without a valid permit and there is little chance of successful redress against their local “employer”.

Foreigners who are duly employed under an employment agreement are granted full protection under the local Labour Code. This includes the right to a minimum wage, protection against dismissal, regulation of working hours, health and safety at work, employer's liability for damage and other important aspects.

Under the older Czech case law, such employee protection could, however, be avoided where parties to an employment contract with an international aspect (consisting for example of the employee being a foreigner) agree on a choice of a different governing law. In a well-known case from year 2009, the Czech Supreme Court¹⁹ upheld an agreement between a Czech branch office of a United States company as the employer and a Croatian citizen as the employee, based on which their employment contract was governed by the Californian law, as valid. The dispute was initiated by the employee after she was dismissed in year 2006 without cause and without a notice period (only with certain payment in lieu of notice). Despite the fact that the employee could validly argue that her position was undoubtedly weaker than the position of the Czech employees protected by the local law (which stipulates that termination of employment is possible only for specific reasons and with a notice period

¹⁹ See Decision file No. 21 Cdo 4196/2007.

of at least two months), courts have applied the then valid Czech Act on International Private Law based on which a choice of law in a contract of employment was valid to the extent that it did not conflict with the public order. Under the view of the Supreme Court of the Czech Republic, termination of employment based on an at-will doctrine did not conflict with the public order and thus the termination was deemed valid. Even though the reasoning of the Supreme Court is in line with the prevailing interpretation of the Czech Act on International Private Law and was approved by the most Czech legal doctrine,²⁰ it must be acknowledged that this approach has significantly increased the vulnerability of foreign employees and weakened their position in comparison to the Czech employees.

From the current perspective, the conclusions of the Supreme Court seem to be superseded by the Rome I Regulation. According to the Article 8.1 of the Regulation, choice of law in an employment contract may not have the result of depriving the employee of the protection afforded to him or her by provisions that cannot be derogated from by agreement under the law that in the absence of choice would have been applicable. This brings a significantly higher level of protection to foreign workers, as all of the protections defined by the Czech Labour Code consist of mandatory provisions that cannot be derogated by an agreement of an employee and an employer. What remains questionable are the extent to which foreign employees are aware of these provisions and the measures they can take to enforce them.

Conclusions

According to the data shown, the Czech Republic has the potential to welcome and to benefit from foreign employees due to its low unemployment rate and high number of vacant positions. The presence of many international employers in the country, along with the high number of the Czechs working abroad, could raise the expectation of a mature labour environment that is open to international influences.²¹

²⁰ E.g. ŠTEFKO, M. Několik poznámek k doktríně At-Will Employment a její aplikaci v České republice. *Práce a mzda*. 2009, č. 11.

²¹ One could also argue that the Czech society could have learned to be open to foreign workers due to its own historical experience. Between years 1948 and 1989, the former communist regime witnessed the migration of approximately 200,000 citizens of the former Czechoslovakia to pursue further lives and careers in democratic parts of the world, mostly in the Western Europe and the North America.

Despite that, it appears that the current Czech legal framework values the protection of the local labour market more than its competitiveness. Although similar tendencies can be found in the laws of the most countries, in summary, the Czech immigration law contains a surprisingly high number of elements which have the effect of worsening the foreign workers' position or creating unnecessary hurdles for them.

If we want to progress towards the goals and ideas summarised in the introductory part of this paper, the implementation of the following steps would seem warranted:

1. Opening the local labour market to the job applicants from the non-European Union countries in a way similar to the way in which it is open to the European Union citizens. Cancelling the obligation on the employer to notify the Labour Office about a vacant position that should be filled by a foreigner. Alternatively, as a minimum measure, introducing an option that permits the Labour Office to waive the 30 days notification period when it appears that there are no suitable candidates in its database of the job-seekers;
2. Simplifying the process for any visa, employee card or similar permits. There is no reason to ask foreigners to obtain confirmation of accommodation before filling the application, as there is no reason why they can't find such accommodation in a matter of a few days after arriving in the country. Visa applications should be accepted also within the territory of the Czech Republic without any restrictions and those who are already present in the Czech Republic (e.g. based on visa-free stay) should be able to accomplish the whole process here;
3. Deadlines for the applications should reflect the need of local employers (if not justified expectations of the applicants). Where a deadline is set by law, it should be followed without exception (in practice, this may require an uptick in staffing at the Ministry of Interior which has been pointing out that delays in proceedings (if not caused by lack of cooperation of the applicants) are usually due to the insufficient capacities at the Ministry);
4. Foreigners who have received all required permits should not be restricted in further career development. Promotions or even changes of employer without an employment gap should only be subject to notification to the Ministry of Interior. As a minimum measure, a notification rather than approval should be required in case of the TUPE transfers;

5. The Czech legal environment should be consistent in its approach to the employees and the Czech employment law should cover all employees working within the territory of the Czech Republic. A choice of governing law in an employment contract should never lead to cessation of the employee's protection defined by the mandatory provisions of the local law.

The Czech Republic seems to have been missing the opportunity to fully benefit from the international labour market and the implementation of the measures set down above seems distant. Defenders of the current protective environment may argue that even with the restrictive approach we have seen sustainable economic growth in the past few years. Creating a more open and competitive environment, in our view, still means creating new opportunities both for the employers and the employees, and the lawmakers should not miss such an opportunity.

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JUDr. Jakub Tomšej, Ph.D.

Faculty of Law
Charles University in Prague
Náměstí Curieových 901/7
116 40 Prague 1

Czech Republic
tomsej@prf.cuni.cz