ARTICLES

USING THE HISTORICAL ARCHIVES OF THE EU TO STUDY CASES OF CJEU – FIRST PART

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CAUGHT IN THE (RED)ACT: INSIGHTS FROM THE *VAN DUYN DOSSIER*

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ABSTRACT: *Van Duyn v Home Office* (case 41/74) was the UK's first preliminary reference procedure case and is best known for its role in developing the meaning of direct effect, free movement of workers and public policy under EU law. The Court of Justice in the Archives project sought to find the "added value" of analysing the *dossier de procédure* alongside already publicly available documents relating to landmark EU cases. In the case of *Van Duyn*, the dossier did provide some additional insight into the case, such as the inclusion of the UK's High Court decision and references to the UK's domestic political context and policy making. However, the dossier largely reflected already publicly available documents relating to the case, demonstrating the transparency of the Court's decision-making process. This being said, 11 per cent of the dossier was redacted, potentially undermining this *Article*'s aforementioned conclusion. Here, finding the balance between protecting the privacy of individuals and the secrecy of the Court with ensuring public transparency and subsequent academic investigation was particularly apparent. Nonetheless, being granted access to redacted documents would be beneficial to achieve the full potential of the dossier when using the archives of the Court of Justice for research.

KEYWORDS: direct effect – free movement of workers – non-discrimination – public policy – art. 48 EEC – art. 3 Directive 64/2.

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I. Introduction

The archives of the Court of Justice were opened in December 2015 in the Historical Archives of the European Union (HAEU) at the European University Institute in Florence, Italy. These archives contain the *dossiers de procédure* for all cases decided by the Court of Justice of the European Union (CJEU) after an initial 30 years wait period from their judgment dates. These *dossiers* include a variety of documents that were not available to the public before the archives were opened. The Court of Justice in the archives project seeks to demonstrate the opportunities and challenges the *dossiers de procédure* present for relevant academic communities and lay solid foundations for ongoing work as more cases are released. Historical and legal methodologies are combined to analyse landmark cases with the intention to build on recent historical and sociological scholarship in EU law and bring the archives "to life".

This *Article* is on the United Kingdom (UK)'s first preliminary reference procedure (PRP) case, *Van Duyn v Home Office*.[1] *Van Duyn* was selected as a landmark case to explore in the Archives project because of this, and also due to its role in establishing one of the EU's key legal principles, the doctrine of direct effect. The legal reasoning adopted by the courts in *Van Duyn* largely reflects that adopted in *Van Gend en Loos*, another case famously associated with the doctrine.[2] The main effect of *Van Gend en Loos* and *Van Duyn* has been to put the individual at the centre of European law and to transform economic duties to enforceable individual rights which allows private individuals to drive forward the integration process. The legacy of these cases has played a significant role in deciding other landmark EU cases, including *Reyners*,[3] *Defrenne*,[4] and *Jany*.[5]

Van Duyn was also one of the first attempts by the Court to address the concepts of "public policy" and "personal conduct". The *Van Duyn* judgment was actually criticised as erring on the side of caution in terms of establishing guidelines for determining the scope or definition of "personal conduct" and for leaving the public policy exception largely to the discretion of Member States. However, it is important to note that the judgment is significant because, while this broader discretion has not been upheld in subsequent cases,[6] it represented an effort by the Courts to balance the competing interests of Member State and Community goals, including integration and harmonisation.

This *Article* will firstly provide an overview of the case. It will then detail the insights that have been provided from analysing the *dossier*, including information which had not

[1] Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133 (hereinafter: *Van Duyn*).

[2] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1.

[3] Case 2/74 *Reyners v Belgian State* ECLI:EU:C:1974:68.

[4] Case149/77 *Defrenne v Sabena* ECLI:EU:C:1978:130.

[5] Case C-268/99 *Jany and Others* ECLI:EU:C:2001:616.

[6] For the evolution of the case law, see case 30/77 *Régina v Bouchereau* ECLI:EU:C:1977:172; joined cases 115/81 and 116/81 *Adoui and Cornuaille v Belgian State* ECLI:EU:C:1982:183; case C-36/02 *Omega* ECLI:EU:C:2004:614.

been available previously and insights provided by an analysis of the parties' legal argumentation. It will illustrate that the parties' argumentation was largely reflected by the court thus highlighting the transparency of the Court's process. It will then turn to some of the obstacles faced in undertaking archival research. A significant obstacle included the redaction of all documentation from the Oral Proceedings thus undermining our findings and the ability to assess the extent to which the *dossier* "added value" to an analysis of the *Van Duyn* case.

II. Case overview

Miss Van Duyn was a Dutch national who was offered employment in the UK as a secretary with the Church of Scientology. She was interviewed by UK immigration officials on 9 May 1973 and was refused leave to enter on the grounds that it "was undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of... [Scientology]".[7] The case occurred during a period in which the UK government had concerns relating to the practice of Scientology and its impact on society. The UK had condemned the practice of Scientology in a number of government statements,[8] concluded an inquiry into its effects,[9] and taken a number of actions to curb its growth.[10] There was no indication, however, that the activities of the Church of Scientology were considered unlawful in the UK, and no legal restrictions were placed upon such activities for British nationals.[11]

The UK acceded to the European Committees just prior to the case and, even after this accession, the British Government maintained its stance against Scientology in its legal reasoning. It claimed in its defence that EEC law did not "preclude it from continuing to refuse entry and work permits to persons concerned with the Church of Scientology".[12] Miss Van Duyn claimed that her refusal of leave to enter was unlawful on the basis of

[7] *Van Duyn* cit. para 1.

[8] For example, the UK Minister for Health described Scientology as a "pseudo-psychological cult" whose practices were "socially harmful", see K Robinson, Hansard, written answer 25 July 1968 in UKHC Vol. 769, Col.190 hansard.parliament.uk.

[9] J Foster, *Enquiry into the Practice and Effects of Scientology* (DA Information Service 1971).

[10] This included not providing work permits or extensions to foreign nationals who were in the UK. for the purpose of attending the Church of Scientology, see UK House of Common Debate *Scientology* cit. api.parliament.uk

[11] *Van Duyn* cit. para. 1.

[12] *Ibid*. para 3.

Community rules on the free movement of workers and art. 48 of the EEC treaty (currently art. 45 TFEU)[13], Regulation 1612/68[14] and art. 3 of Directive 64/221.[15] Thus, the UK High Court asked the CJEU for a preliminary ruling on three matters: (1) the direct effect of art. 48 of the EEC Treaty; (2) the direct effect of art. 3 of Directive 64/221; and (3) Member State derogations made on the basis on public policy, with a particular focus on the meaning of personal conduct in this context, and whether employment restrictions were allowed to be made for non-nationals when they were not equally applied to nationals.[16]

The Court held that art. 48 and art. 3(1) both had direct effect. In contrast to subsequent Court decisions regarding derogations made on the grounds of public policy, the Court found that it was lawful for the UK government to prevent Van Duyn's entry into the UK, even though practising Scientology in the UK was not strictly unlawful. Whilst this *Article* does not intend to cover the facts of the case in depth, the table below illustrates the positions held by the parties on the matters submitted to the Court (Table 1) for ease of understanding the subsequent analysis of the *dossier*.

Position of Actors	Direct Effect of art. 48	Direct Effect of art. 3 Directive 64/221	Employment amounting to Personal Conduct	The Discrimination of Non-nationals working at Socially Undesirable Organisation
Van Duyn	Directly Effective	Directly Effective	Does not amount to personal conduct	Discriminates
The UK	Directly Effective	Not Directly Effective	Can amount to personal conduct	Does not discriminate
The Commission	Directly Effective	Directly Effective	Can amount to personal conduct	Discriminates
Advocate General (AG)	Directly Effective	Directly Effective	Can amount to personal conduct	Does not discriminate
The Court	Directly Effective	Directly Effective	Can amount to personal conduct	Does not discriminate

TABLE 1. Summary table of positions of actors on submitted questions.

[13] Art. 48 of the Treaty Establishing the European Community [1957].

[14] Regulation (EU) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[15] Directive 64/221/EEC of the Council of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

[16] See *Van Duyn* cit. for the exact questions submitted to the CJEU.

III. Insights from the dossier

There are a number of insights that have resulted from the analysis of the *dossier*. *Van Duyn* is an example where the added value of the analysis of the *dossier* is perhaps less evident when compared to other *Articles* in the Special Section. The *dossier* was the shortest in the project. Moreover, its contents were somewhat standard for a case being heard at the Court. Aside from the case file for the prior High Court Judgment, the content was mostly generic institutional correspondence and official reports (see Table 2). In addition, the procedures, institutional process and legal reasoning are largely accurately reflected in the previously available materials. However, the fact that these submissions were accurately reflected by the Court was an interesting finding in itself. Aside from references to domestic policy or political context, the Court synthesised the arguments of the parties very accurately. This is a positive finding for the reputation and transparency objectives of the Court, as it shows that the public are being correctly informed about Court of Justice cases and their procedure.

Category of Doc	No. of Docs	% of No. of Docs (122 total available)	No. of pages	% of the Dossier (331 pages total)
Submissions by the Parties	5	4%	45	14%
Procedure-related docs	116	95%	191	58%
Report of Oral Hearing	1	0.8%	14	4%
Opinion of AG	1	0.8%	14	4%
Final Judgment	1	0.8%	23	7%
Docs not available to public	N/A	N/A	37	11%

Table 2: Categorisation of *dossier* by document type.

Nonetheless, some nuanced insights into *Van Duyn* were still attained from completing research for the Project on the *Van Duyn dossier*. Firstly, gaining access to the *dossier* enabled analysis of documents which were previously unavailable to better understand the development of *Van Duyn*'s legal argumentation and reveal some of the individualities and realities of the case (I). The *dossier* also provided further insight into different actors' use of political and social context in their legal argumentation (II). The multidisciplinary approach of the Archives Project also enabled consideration of the influence of the judges on the case's progression (III). Lastly, while much of the *dossier* was accurately reflected in the final Court Judgment, the *Van Duyn dossier* did present some methodological limitations as a result of significant redaction of documents related to the case's Oral Proceedings.

III.1. Documents in the *dossier*

While the High Court judgment was available in domestic case reports before the release of the *dossiers*, its inclusion in the *dossier* shows the case in its entirety chronologically, bringing High Court documents alongside Court documentation to follow the case's progression from start to finish.[17] It was interesting to note the Advocate General stated explicitly that the evidence put forth in the High Court Judgment was considered in the formulation of his Opinion.[18] The European Court's judges, on the other hand, did not explicitly refer to the High Court Judgment in its reasoning. The inclusion of the High Court judgment in the *dossier* therefore enabled consideration of how legal argumentation had developed from the beginning of the preliminary reference procedure and whether the different EU actors engaged with Member States' legal reasoning on the national level.

In addition, the *dossier* included some previously unavailable documents that showed some of the realities and peculiarities of Van Duyn bringing her case against the UK Government. For instance, an exchange of letters between Van Duyn's legal team and the UK government showed that Van Duyn's legal team sent correspondence to the Home Office on numerous occasions to request the UK government's position on the admission of EEC nationals who intended to take up employment with a Scientology establishment.[19] It was clear from these letters that Van Duyn's legal team were having to chase up the Home Office for a response to their query. Their request was eventually met, more than two months later, when the UK affirmed its position that EEC nationals could be denied entry on the basis of "public policy".[20] Gaining an awareness of this exchange did not provide any great insight into the legal argumentation used in the case. However, it did serve as a reminder of the realities of litigation and added another dimension to the often clinical interpretations of landmark EU cases such as *Van Duyn*.

III.2. References to political and domestic policies

Whilst the legal arguments presented in the *dossier* were largely reflected in the final judgement, there were a number of references made by the UK to its political and domestic policies, which were omitted in the final Court judgement. For instance, the UK highlighted that it had not made Scientology illegal in the UK despite deeming it "socially harmful" and drew political parallels with similar organisations it deemed contrary to the public good, such as the Irish Republican Army (IRA) in Northern Ireland.[21] The UK em-

[17] High Court of Justice (England), Chancery Division, order of 27/11/1975.
[18] *Van Duyn v Home Office* cit., opinion of the Advocate General (AG) Mayras.
[19] *Dossier de Procédure Original Van Duyn*, HAEU CJEU-1594 37-41.
[20] *Ibid*. 41.
[21] *Ibid*. 135.

phasised that it did not make IRA membership or activities illegal even though they considered them contrary to the public good.[22] The UK stressed that it did not have the policy making powers to make a "socially harmful" organisation illegal even when the individual connected to such an organisation is a national. This perhaps also was an attempt to imply that the UK had a liberal democratic political philosophy that did not permit restrictions on issues such as religious freedom.[23] Additionally, the UK chose to highlight practical lines of reasoning when arguing that it would be difficult for large numbers of officials to implement art. 3(1) on the ground.[24] Yet, specific details of these political examples and practical considerations were omitted in the final Court judgment. This was perhaps an attempt to depoliticise the discussion in the case of the IRA in Northern Ireland. It may also have been an attempt by the Court to streamline their argumentation in the decision (as was the Court's style at the time) to avoid excessive engagement with national policies. The AG, by contrast, did generally highlight the UK's "particularly liberal form of Government" in not penalising organisations it deemed "socially harmful".[25] The AG even stated the UK's liberal stance towards Scientology (i.e., not making its activities illegal) would "doubtless be quite different in other Member States".[26] Paradoxically, the UK deviates from its liberal stance towards association with "socially harmful" organisations when it considered Van Duyn's personal conduct. In fact, the UK deemed Van Duyn's connections with the Church of Scientology was enough to limit her freedom of movement. Nonetheless, the AG did not engage explicitly in his report with the IRA example presented by the UK.[27]

By gaining access to these small omitted arguments provided by the UK from the Archives, it was possible to fully compare the actors' legal reasoning and consideration of political and social context in the case. More specifically, it was possible to delineate that the Court very rarely used contextual sources of argumentation, preferring instead a streamlined, legalistic approach. It also emphasised the differences in legal argumentation between the AG and the Court. The AG, by referring to the High Court judgment and emphasising the "liberal form of Government" in the UK, appeared more willing to engage with Member States' political context than the Court.[28] While neither the AG nor the Court referred to the IRA example provided by the UK, knowing that these actors had access to the examples provided at the time sheds more understanding on why there were differences in their legal reasoning style.

[22] *Ibid*.
[23] *Ibid*.
[24] *Ibid*. 137.
[25] *Van Duyn* cit., opinion of AG Mayras, 13.
[26] *Ibid*.
[27] *Van Duyn* cit. 13.
[28] *Dossier de Procédure Original Van Duyn* HAEU CJEU-1594 cit. 250.

III.3. Influential actors in *Van Duyn*

Carrying out multidisciplinary research into the landmark cases was also an objective of the Archives Project. Undertaking historical and sociological research into the judges deciding the case shed light on the argumentation developed by the Court, even if this insight was not gained solely from the *dossier*. Interestingly, Robert Lecourt and Pierre Pescatore were both judges for *Van Duyn*. Lecourt was renowned for having a strong EU integration focus. He sat as a judge on the *Van Gend en Loos* case and also acted as Judge Rapporteur in other landmark cases, such as the *Costa v ENEL* case, which established EU law supremacy over national law.[29] In *Le juge devant le Marché commun* he provided a detailed discussion on the Court and its cooperation with national judges in PRP which he highlighted as being particularly crucial in preventing diverging interpretations of Community law in different Member States and upholding the uniform nature of EU law.[30] This is one of the core premises of the *Van Duyn* judgment when conceptualising the legal boundaries of the public policy exception. Furthermore, Pescatore's involvement in the case is interesting in light of his subsequent publications concerning the doctrine of direct effect in which he has described the doctrine as "the infant disease of community law".[31] In 2015, Pescatore reiterated his conception of the doctrine whereby he noted that "direct effect is the normal state of health of the law" and that "it is only the absence of direct effect which causes concern and calls for the attention of legal doctors".[32] This perhaps explains why the Courts' reasoning was often not informed by party submissions or contextual references, but by its own overarching motivations, such as ensuring the effective functioning of the Community Order through EU law. Whilst it was possible to identify the judges presiding on the case before accessing *Van Duyn's dossier*, the Project's multidisciplinary focus has enabled a more holistic understanding of the case.

III.4. Methodological issues with redaction

Around 11 per cent of the *dossier* material has been removed from the *dossier* file provided by the Archives of the Court of Justice. It is unclear what was included in these pages, other than knowing that 37 of the 93 Oral Procedure related documents are redacted (around 40 per cent) and all of the Instruction-related pages (4 pages in total). The Court decides which information is redacted and does not need to provide reasons for redacting information from the *dossier*. Redaction is justified where *1)* documents refer

[29] Case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66.

[30] R Lecourt, *Le juge devant le Marché commun* (Institut universitaire de hautes études internationals 1970) 69.

[31] P Pescatore, 'The Doctrine of Direct Effect: An Infant Disease of Community Law' (1983) ELR 155.

[32] *Ibid.*

to the Court's private deliberations[33] and *2)* where documents and records contain information on the private or professional life of individual persons.[34] It is unclear why the oral proceedings were redacted from the *dossier* given that they are usually open to the public and therefore unlikely to contain information that would be regarded as secret or confidential.

This redaction was therefore a limitation of using the Archives for academic investigation as it was not possible to analyse the development of any legal argumentation during the oral proceedings. The absence of these documents from this analysis could even undermine the previous conclusion made that the Court largely accurately reflected the *Van Duyn* proceedings in the final judgement. This highlights the issue of finding the balance between protecting individuals and the secrecy of the Court to ensure judicial freedom[35] and ensuring that public transparency and subsequent academic investigation are possible. Having access to redacted documents, or the reasonings behind such a redaction would be beneficial to fully assess the historical and sociological context of EU case law. This concurs with previous research work that additionally called for French translations and judges' notes on comparative law decision-making to also be added to the *dossiers* to shed light on the Court of Justice's full judicial process.[36] Engaging with broader debates on which court documents should or should not be accessible to the public is beyond the scope of this *Article*. However, it can be said that for future archival research on the *dossiers*, attention should be paid to the redacted sections of the *dossier* as well as the unredacted content. Both can offer insight into the working of the Court at the time and have interesting implications for the historical, sociological and legal research that is being undertaken when exploring the archives of the Court of Justice. This was one of the most significant takeaways from using the case *dossier* to analyse *Van Duyn*.

IV. Conclusion

This *Article* has demonstrated some of the added value that undertaking archival research can have on the analysis of key cases before the Court of Justice. From the UK's references to the Troubles in Northern Ireland to correspondence documenting the realities of liaising with ministerial offices as a lawyer, it is clear that new subtle insights were found on the parties and their positions in the case of *Van Duyn*. Despite this, the *Van Duyn dossier* demonstrated that the Court accurately reflected the arguments and submissions of the

[33] Decision of the Court of Justice of the European Union of 10 June 2014 concerning the deposit of the historical archives of the CJEU at the HAEU (European University Institute) [2015], C 406/2. art. 4(1).

[34] *Ibid*.

[35] The Statute of the Court of Justice of the European Union, art. 2 states "The deliberations of the [ECJ] shall be and shall remain secret."

[36] F Nicola, 'Waiting for the Barbarians: Inside the Archive of the European Court of Justice' in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Courts of Justice* (Oxford University Press 2020) 63, 90.

parties, thereby showing the transparency of the Court when documenting the judicial process in its publicly available documents. Redaction was the main obstacle faced when using the *Van Duyn dossier* to gain a greater understanding of the case. It was not possible to analyse large portions of the case's oral proceedings, which also potentially undermined the aforementioned conclusions on the transparency of the Court. It was beyond the scope of this *Article* to engage in debates concerning the balance between protecting individuals and the secrecy of the Court to ensure judicial freedom with ensuring public transparency and subsequent academic investigation. However, gaining access to redacted documents, or at least the reason behind their redaction, would be beneficial for future research. In the meantime, future archival research should pay attention to the redacted, as well as unredacted, sections of the *dossier.* There is a story to tell behind every redaction, and these stories could help to add further insight into a case beyond that provided by the Court Judgement, the Advocate General's report and additional documents provided in the *dossier*.