JUDGMENT OF THE COURT (Fifth Chamber)
12 September 1996 *

In Case C-278/94,

Commission of the European Communities, represented by Marie Wolfcarius, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by J. Devadder, Director of Administration at the Ministry for Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, and C. Denève, Director General at the Ministry for Labour and Employment, acting as Agents, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that by requiring that young people seeking their first employment have completed their secondary education in an establishment subsidized or approved by the Belgian State (or by one of its communities) in order to be eligible for tideover allowances, and by encouraging employers at the same time to take on beneficiaries of those unemployment allowances by providing for the State to assume responsibility in such a case for the remuneration and social security contributions for such workers if they are wholly unemployed and on benefit, the Kingdom of Belgium has failed to fulfil its obligations

* Language of the case: French.

under Article 48 of the EC Treaty and Articles 3 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet, C. Gulmann, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 October 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by requiring that young people seeking their first employment have completed their secondary education in an establishment subsidized or approved by the Belgian State (or by one of its communities) in order to be eligible for tideover allowances, and by encouraging employers at the same time

to take on beneficiaries of those unemployment allowances by providing for the State to assume responsibility in such a case for the remuneration and social security contributions for such workers if they are wholly unemployed and on benefit, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EC Treaty and Articles 3 and 7 of Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The Commission thus makes two complaints, one concerning the grant of 'tideover allowances' and the other access to special employment programmes.

The Belgian rules

3 The Belgian rules provide for the grant to young people who have just completed their studies and are seeking their first employment of unemployment benefits, now known as 'tideover allowances', which allow them to be regarded as 'wholly unemployed and on benefit' within the meaning of the rules on employment and unemployment.

4 Article 124 of the Royal Decree of 20 December 1963 provides that, '... to qualify for the unemployment allowances, young workers seeking their first employment must in all cases have completed full-time secondary education or technical or vocational training at a centre run, recognized or subsidized by the State or have obtained in respect of such studies a diploma or school-leaving certificate from the central board'.

5 That article was replaced by Article 36 of the Royal Decree of 25 November 1991 on unemployment (*Moniteur Belge* of 31 December 1991), which maintains the same conditions of eligibility, in that it provides:

'To qualify for the tideover allowance, the young worker must have:

(1) completed his compulsory education;

(2) either (a) completed secondary education or technical or vocational training at a centre run, recognized or subsidized by a community;

or (b) obtained from the competent authority of a community the diploma or educational certificate corresponding to the studies mentioned in (a) above'.

6 Other provisions reserve special employment and re-employment programmes for, in particular, people who are 'wholly unemployed and on benefit', including therefore the beneficiaries of the tideover allowance.

7 First, the Law of 22 December 1977 on budgetary proposals for 1977 to 1978 (*Moniteur Belge* of 24 December 1977) provides, in Article 81(1), section 3, entitled 'Special temporary category':

'The State may take over responsibility for the remuneration and social contributions of workers who are recruited by promoters for projects in the general interest and who fall within the following categories of job-seekers:

(1) wholly unemployed persons in receipt of benefit;

...

"Promoters" may be the State, provinces, conurbations, federations or groups of municipalities ...'.

Article 84 provides:

'Unless the parties decide to conclude a contract of indefinite duration, workers employed under the provisions of this subparagraph shall be bound by an employment contract for workers or employees co-terminous with the State's assumption of responsibility for their remuneration and social security contributions (which period shall not, however, exceed one year).

...'.

8 Secondly, Royal Decree No 123 of 30 December 1982 on the recruitment of unemployed persons assigned to specified projects for economic expansion for the benefit of small and medium-sized businesses (*Moniteur Belge* of 18 January 1983) provides, *inter alia:*

'Chapter II — State action

2. Paragraph 1: Subject to the availability of budgetary resources, the State may, for a period not exceeding two years, assume responsibility, to the extent specified in Article 3(2), for the remuneration and social security contributions of the workers referred to in Article 5 who are recruited for a project.

...

Chapter III — Workers

5. The employment covered by this decree is restricted to people who are wholly unemployed and on benefit.

For the application of this article, unemployed persons working for the public authorities, workers employed within the special temporary category and persons engaged in the non-commercial sector shall also be regarded as wholly unemployed and on benefit.'

The Community provisions

9 The Commission's action is based on Article 48 of the Treaty, which is concerned with freedom of movement for workers and prohibits discrimination on grounds of nationality as regards employment, remuneration and other working conditions, on Article 7(1) of Regulation No 1612/68 with regard to the complaint concerning the grant of Belgian tideover allowances, and on Article 3(1) of that regulation as regards the complaint concerning access to special employment programmes.

10 Article 3(1) of Regulation No 1612/68 provides:

'1. Under this regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

...

— where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.'

11 Article 7 of Regulation No 1612/68 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work ...

2. He shall enjoy the same social and tax advantages as national workers.'

Procedure

12 The Commission considered that application of the various national provisions mentioned above resulted in the exclusion of young nationals of other Member States seeking their first employment, who had not completed their secondary education in an establishment subsidized or recognized by the Belgian State (or by one of its communities), from, first, the benefit of the tideover allowances provided for by Article 124 of the Royal Decree of 20 December 1963, and later by Article 36 of the Royal Decree of 25 November 1991, and, secondly, from access to the special employment or re-employment programmes provided for by Articles 81 to 84 of the Law of 22 December 1977 and Articles 2 to 9 of Royal Decree No 123 of 30 December 1982.

13 Considering that situation to be contrary, as regards social advantages, to Article 48 of the Treaty and Article 7(2) of Regulation No 1612/68 and, as regards access to employment, to Article 3 of Regulation No 1612/68, the Commission, by letter

of 21 May 1992, formally called on the Belgian Government under Article 169 of the Treaty to submit its observations within a period of two months on the alleged failure to fulfil its obligations.

14 By letter of 17 July 1992 the Belgian Government denied any failure to fulfil its obligations.

15 On 13 August 1993, the Commission sent a reasoned opinion to the Kingdom of Belgium.

16 By letter of 12 January 1994, the Belgian Government maintained its position and the Commission therefore instituted the present proceedings.

Clarification of the Commission's position

17 In answer to a question put to it by the Court, the Commission stated that the complaint concerning the grant of tideover allowances was limited to the dependent children of Community migrant workers living in Belgium and was based on Article 7 of Regulation No 1612/68, whereas the complaint about access to special employment and re-employment programmes concerned all young 'workers who are nationals of any Member State and are seeking their first employment' and was based on Article 48 of the Treaty and Article 3(1) of Regulation No 1612/68. It emphasized that it was of the utmost importance to distinguish between the two complaints, particularly as regards the categories of people affected.

Substance

18 The Belgian Government contends, as a preliminary point, that the Commission has not proved the existence of the infringement, and cannot for that purpose rely on any presumption. In its view, the Commission must show that a clear majority of the young people excluded by the provisions in question are nationals of other Member States.

19 The Commission considers that such a requirement is contrary to the principle prohibiting all discrimination on grounds of the nationality of workers laid down in Article 48(2) of the Treaty. In its view, it is clear from settled case-law of the Court that it is sufficient that the contested provision is liable to have a discriminatory effect for it to be contrary to Community law, regardless of the number of people adversely affected. The Commission submits that the contested Belgian provisions are capable of having such an effect.

20 In that connection, it must be borne in mind that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect (see, in particular and most recently, Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraphs 20 and 21).

The complaint concerning grant of the tideover allowance

21 The Commission criticizes the Kingdom of Belgium for not granting to the dependent children of Community migrant workers living in its territory and seeking their first employment the tideover allowances that are granted to young Belgians

in the same situation. The result is indirect discrimination on grounds of nationality since such children complete their studies in establishments subsidized or recognized by the Belgian State less frequently than their Belgian counterparts. The Commission relies on Article 7(2) of Regulation No 1612/68, which provides that Community workers are to enjoy the same social advantages as national workers, and on the judgment in Case 94/84 *ONEM* v *Deak* [1985] ECR 1873, in which the Court classified the Belgian tideover allowances as a social advantage within the meaning of that article. It considers, on the other hand, that the judgment in Case 66/77 *Kuyken* v *Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2311, which was concerned not with Regulation No 1612/68 but with Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) is irrelevant. It adds that to impose on the children of migrant workers the obligation to complete their studies in Belgium is tantamount to imposing a condition of prior residence condemned by the Court in its judgment in Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817. It also refers to the effectiveness of provisions under which the children of Community migrant workers are to be treated in the same way as those of national workers concerning grants for training where it is provided in the State of which they are nationals (Case C-308/89 *Di Leo* v *Land Berlin* [1990] ECR I-4185).

22 The Belgian Government states first, with regard to tideover allowances, that the condition concerning education applies without distinction to all Community nationals. It states that in *Deak*, Mr Deak, who was of Hungarian nationality, fulfilled the condition at issue here since he had completed his studies in Belgium, where his mother, who was of Italian nationality, worked. However, he had been denied the benefit of the tideover allowance solely because he was a national of a non-member country. The Court's judgment did not therefore deal with the condition concerning completion of education in Belgium.

23 The Belgian Government then submits that, in practice, two possibilities arise in the circumstances referred to by the Commission: either the young person has not yet completed his studies and will do so in Belgium (as in Mr Deak's case), thus fulfilling the condition at issue and entitling him to the tideover allowance, or he has completed them in his country of origin and he will be entitled, or not entitled as the case may be, by reason of his studies, to unemployment benefit in that country. If he is so entitled, his situation will be governed by Regulation No 1408/71, in particular Article 67 thereof. If he is not so entitled in his country of

origin, the Belgian Government can hardly be expected to grant him benefit merely because he has emigrated to Belgium. In the Belgian Government's view, it would be, at the very least, paradoxical to consider that an obstacle to the free movement of workers arose from Belgium's failure to grant rights which the dependents of those workers could not have claimed in their own countries. It submits that the present case falls within the scope of *Kuyken*, cited above.

24 However, *Kuyken* is not relevant to this case, it being concerned only with the possible application of Regulation No 1408/71.

25 Next, it need merely be borne in mind that, in its later judgment in *Deak*, the Court held that Regulation No 1408/71 could not be relied on to claim the Belgian tideover allowance (paragraphs 16 and 27), but that that allowance constituted a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

26 That finding cannot be affected by the fact that, in the present case, the dependent children of migrant workers living in Belgium will have finished their studies not in Belgium but in their country of origin or indeed in another Member State.

27 Finally, regarding the fact that the contested condition applies without distinction, according to settled case-law the requirement of equal treatment laid down both in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see in particular Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11; Case C-27/91 *URSSAF* v *Le Manoir* [1991] ECR I-5531, paragraph 10; *Commission* v *Luxembourg*, cited above, paragraph 9; Case C-419/92 *Scholz* v *Opera Universitaria di Cagliari and Cinza Porcedda* [1994] ECR I-505, paragraph 7, and, very recently, *O'Flynn*, cited above, paragraph 17).

28 Thus, among others, conditions applied without distinction which may be more easily fulfilled by national workers than migrant workers are prohibited. For example, in *Commission* v *Luxembourg*, cited above, the Court considered, in paragraph 10, that such a prohibition applied to a requirement that a mother be resident within the territory of the Grand Duchy for a year before the birth of a child, such a condition being in practice more easily fulfilled by a Luxembourg national than by a national of another Member State.

29 The same applies to the condition at issue here, which is akin to a condition of prior residence, and which will be fulfilled more easily by the children of Belgian nationals than by those of nationals of another Member State.

30 The fact that that condition applies also to young Belgians who complete their secondary education outside Belgium does not affect that finding.

31 The first complaint must therefore be upheld.

The complaint concerning access to special employment and re-employment programmes

32 In response to a written question from the Court, the Commission made it clear that this criticism concerns all young Community nationals seeking their first employment and is based on Article 48 of the Treaty and Article 3(1) of Regulation No 1612/68.

33 According to the Commission, the combined provisions of Articles 81 to 84 of the Law of 22 December 1977 and Articles 2 to 9 of Royal Decree No 123 of 30 December 1982 are incompatible with the free movement of workers, that is to say with Article 48 of the Treaty and Article 3 of Regulation No 1612/68, in that they encourage Belgian employers, when recruiting young people, to give preference to those in receipt of tideover allowances, a majority of whom, in view of the condition imposed for the grant of those allowances, namely that they must have completed their secondary eduction in a recognized Belgian establishment, are Belgian.

34 The Commission relies on the principle of freedom of access to employment actually offered in other Member States, laid down in Article 48 of the Treaty and implemented by Regulation No 1612/68, in particular Title I thereof, entitled 'Eligibility for employment'. Article 1 provides that 'any national of a Member State shall ... have the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State ...'. It considers that the requirement that those young people should have completed their secondary education in a recognized Belgian establishment gives rise to indirect discrimination. The combined application of the various provisions thus has in its view at least the primary effect of excluding nationals of other Member States from employment offered within the meaning of the second indent of Article 3(1) of Regulation No 1612/68.

35 The Belgian Government contends that entitlement to benefits which become available on completion of studies does not come within the scope of freedom of movement for workers, at least where that entitlement is enjoyed by the young person in his own right, irrespective of any link with a parent who is a migrant worker. It contends that the situation of a young person who is a migrant worker is governed, as regards unemployment benefit, by Regulation No 1408/71 and that he must therefore meet the conditions laid down by that regulation. Finally, it considers that the special programmes form part of the social policy of the Member States, for which they retain competence, so that, in accordance with settled case-law of the Court, they enjoy a reasonable degree of latitude concerning the nature of social protection measures and the procedures for implementing them. What is involved in this case, according to the Belgian Government, is the implementation of the positive and preventive aspect of unemployment insurance and it draws

attention to the fundamental difference between the normal employment market and the exceptional and limited market represented by the various measures for combating unemployment. It also invokes the principle of subsidiarity.

36 In that connection, it must be held that the category of persons covered by the Commission's action, in so far as it relates to the conditions for access to the special employment or re-employment programmes, comprises the young nationals of a Member State who have completed their secondary education and who, not being members of the families of migrant workers employed in Belgium, seek their first employment in the latter State.

37 It is necessary, as a preliminary point, to ascertain whether the rules in question fall within the scope of the rules on free access to employment, as guaranteed by Article 48 of the Treaty and Article 3(1) of Regulation No 1612/68, which the Commission alleges to have been infringed.

38 It must be observed in that connection that, as emphasized by the Belgian Government, those special programmes constitute active measures in the sphere of unemployment insurance. Thus, pursuant to Article 87 of the Law of 22 December 1977, workers benefiting from such programmes are paid by the Office National de l'Emploi (National Employment Office), which is deemed to be their employer for the purposes of applying tax and social security provisions (including those relating to accidents at work and occupational illness). Similarly, under Royal Decree No 123 of 30 December 1982, the State, when involved, assumes responsibility for 50, 75 or 100% of their remuneration and social security contributions.

39 It follows that the special programmes in question, which, in view of their special features, are linked to unemployment, fall outside the field of access to employment in the strict sense, as provided for in Title I of Regulation No 1612/68, in particular Article 3(1) on which the Commission relies.

40 The application of Community law on freedom of movement for workers in relation to national rules concerning unemployment insurance requires that a person invoking that freedom must have already participated in the employment market by exercising an effective and genuine occupational activity, which has conferred on him the status of a worker within the Community meaning of that term (see in particular, with regard to a study grant, Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 21; regarding the grant of public financial assistance, Case C-357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, paragraph 10). By definition, that is not the case where young people are seeking their first employment.

41 Consequently, the second complaint is unfounded.

42 It must therefore be held that, by requiring that young people seeking their first employment have completed their secondary education in an establishment subsidized or approved by the Belgian State or by one of its communities in order to be eligible for tideover allowances, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the Treaty and Article 7 of Regulation No 1612/68. The remainder of the application must be dismissed.

Costs

43 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Commission's application has been only partially upheld, each party should bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that by requiring that dependent children of migrant workers of the Community residing in Belgium have completed their secondary education in an establishment subsidized or approved by the Belgian State or by one of its communities in order to be eligible for tideover allowances, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;**

2. **Dismisses the remainder of the application;**

3. **Orders the parties to bear their own costs.**

Edward Puissochet Gulmann

Jann Sevón

Delivered in open court in Luxembourg on 12 September 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber