

JUDGMENT OF THE COURT (Fourth Chamber)

20 June 2002 \*

In Case C-299/01,

**Commission of the European Communities**, represented by H. Michard, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Grand Duchy of Luxembourg**, represented by N. Mackel, acting as Agent,

defendant,

APPLICATION for a declaration that, by maintaining a condition relating to duration of residence in the territory of Luxembourg for the grant of a guaranteed minimum income, the Grand Duchy of Luxembourg has failed to fulfil its

\* Language of the case: French.

obligations under Article 7(2) 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) and Article 43 EC,

THE COURT (Fourth Chamber),

composed of: S. von Bahr, President of the Chamber, D.A.O. Edward (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,  
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2002,

gives the following

### Judgment

- 1 By application lodged at the Registry of the Court on 26 July 2001, the Commission of the European Communities brought an action under Article 226

EC for a declaration that, by maintaining a condition relating to duration of residence in the territory of Luxembourg for the grant of a guaranteed minimum income, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 7(2) 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) and Article 43 EC.

2 Article 43 EC provides:

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

3 Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State is to enjoy, in the territory of other Member States, the same social and tax advantages as national workers.

- 4 Article 2 of the Luxembourg Law of 26 July 1986 on (a) the establishment of entitlement to a guaranteed minimum income; (b) the establishment of a national social work service; and (c) the amendment of the Law of 30 July 1960 establishing a national solidarity fund, as amended, provides that income support can be paid only to a person who has resided in Luxembourg for at least 10 years during the last 20 years. Article 2(2) of the Luxembourg Law of 29 April 1999 establishing entitlement to a guaranteed minimum income, which came into force on 1 March 2000 and repealed the Law of 26 July 1986, as amended, provides that ‘the person in question must have resided in the Grand Duchy of Luxembourg for at least five years during the last 20 years’ in order to claim the benefit provided for therein.
  
- 5 Taking the view that the Luxembourg legislation was incompatible with the principle of non-discrimination, the Commission initiated the infringement procedure. On 26 January 2000, after giving the Grand Duchy of Luxembourg formal notice to submit its observations, the Commission issued a reasoned opinion calling on that Member State to take the measures necessary to bring its legislation into line with Article 7(2) of Regulation No 1612/68, with respect to employees, and with Article 43 EC, with respect to self-employed persons, within a period of two months.
  
- 6 By letters dated 31 May and 15 June 2000, the Luxembourg authorities gave notification of their decision to amend the Law of 29 April 1999 in compliance with the reasoned opinion. They later stated that the legislative amendment would be submitted to the vote during the parliamentary session 2000-2001.
  
- 7 By letter of 24 July 2000, the Commission’s staff drew the attention of the Luxembourg authorities to the need to rectify immediately the situation of those persons who had been deprived of entitlement to the guaranteed minimum income because they did not satisfy the residence requirement. On 26 October

2000, the Luxembourg authorities responded that they could not rectify the situation of those persons in the absence of a legal provision.

- 8 In those circumstances, the Commission decided to bring the present action.
  
- 9 The Commission submits that the Luxembourg legislation constitutes a clear breach of the principle of equal treatment which forbids not only overt discrimination by reason of nationality but also all forms of disguised discrimination which, by the application of other distinguishing criteria, lead to the same result.
  
- 10 Without disputing the failure to fulfil its obligations, the Luxembourg Government states that on 22 March 2000, it submitted a draft law amending Article 2 of the Law of 29 April 1999 and that it will inform the Commission immediately of that law's adoption. It requests that the Court dismiss the action or stay the proceedings until the Commission withdraws its application.
  
- 11 In that regard, it should be borne in mind that, in accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-394/00 *Commission v Ireland* [2002] ECR I-581, paragraph 12). The Court has also consistently held that the object of an action for failure to comply with Treaty obligations is established by the Commission's reasoned opinion and, even when the default has been remedied after the time-limit prescribed by that opinion, pursuit of the action still has an object. That object may consist in

particular in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default (see, *inter alia*, Case 154/85 *Commission v Italy* [1987] ECR 2717, paragraph 6).

- 12 The Grand Duchy of Luxembourg has not fulfilled the obligation to adapt its domestic law to the provisions of Article 7(2) of Regulation No 1612/68 and of Article 43 EC within the period prescribed by the reasoned opinion. Those provisions preclude the requirement of a five-year period of residence in the territory of Luxembourg in order to benefit from the guaranteed minimum income, since that requirement constitutes indirect discrimination.
- 13 In those circumstances, the action brought by the Commission is well founded.
- 14 It must therefore be declared that, by maintaining a condition relating to duration of residence in the territory of Luxembourg for the grant of the guaranteed minimum income provided for by its legislation, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 7(2) of Regulation No 1612/68 and Article 43 EC.

### Costs

- 15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Declares that, by maintaining a condition relating to duration of residence in the territory of Luxembourg for the grant of the guaranteed minimum income provided for by its legislation, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Article 43 EC;
2. Orders the Grand Duchy of Luxembourg to pay the costs.

von Bahr

Edward

Timmermans

Delivered in open court in Luxembourg on 20 June 2002.

R. Grass

Registrar

S. von Bahr

President of the Fourth Chamber