Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 June 2012*

(Failure of a Member State to fulfil obligations — Freedom of movement for persons — Access to education for migrant workers and their family members — Funding for higher educational studies pursued outside the territory of the Member State concerned — Residence requirement)

In Case C-542/09,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 18 December 2009,

European Commission, represented by G. Rozet and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C. Wissels, J. Langer and K. Bulterman, acting as Agents,

defendant,

supported by:

Kingdom of Belgium, represented by L. van den Broeck and M. Jacobs, acting as Agents,

Kingdom of Denmark, represented by V. Pasternak Jørgensen, acting as Agent,

Federal Republic of Germany, represented by J. Möller and C. Blaschke, acting as Agents, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Falk, acting as Agent,

interveners,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, Head of Unit,

* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 10 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2012,

gives the following

Judgment

1 By its action, the European Commission asks the Court to declare that, by requiring that migrant workers and their dependent family members comply with a residence requirement — namely, the so-called 'three out of six years rule' — in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands ('portable funding'), the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Council 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), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1) ('Regulation No 1612/68').

Legal context

EU Law

2 Under Article 7 of Regulation No 1612/68:

'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, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

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

...'

3 Article 12 of Regulation No 1612/68 provides:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

Netherlands law

4 Article 2.2 of the Law on the Financing of Studies of 2000 (Wet studiefinanciering 2000; 'the WSF 2000'), which sets out the conditions enabling students to obtain full funding for their higher educational studies if they study in the Netherlands, is worded as follows:

'1. Study finance may be granted to the following:

(a) students who are Netherlands nationals;

(b) students who are non-Netherlands nationals but who, in the area of funding for studies, are treated as Netherlands nationals pursuant to a treaty or a decision of an international organisation …

…'

5 As regards portable funding, it follows from Article 2.14(2) of the WSF 2000 that this funding is available to students who are eligible for full funding of studies in the Netherlands and who have resided lawfully in the Netherlands during at least three out of the six years preceding enrolment at a higher education establishment abroad.

6 Under Article 11.5 of the WSF 2000, the competent minister may, in manifest cases of grave injustice, derogate from the residence requirement laid down in Article 2.14(2) of that law.

7 Until 1 January 2014, the 'three out of six years' rule does not apply to all students who are eligible for funding for higher education in the Netherlands and who wish to pursue higher education in certain border areas, namely Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany.

Pre-litigation procedure

8 In mid-2007, a complaint was made to the Commission concerning the residence requirement laid down in Article 2.14(2) of the WSF 2000, by virtue of which, in order to be eligible for portable funding, a student must, among other conditions, have lawfully resided in the Netherlands for at least three of the six years preceding his enrolment for higher education.

9 Following an exchange of correspondence with the Netherlands authorities, the Commission sent the Kingdom of the Netherlands a letter of formal notice on 4 April 2008. In that letter, the Commission claimed that, in so far as the residence requirement laid down in the WSF 2000 applies to migrant workers, including frontier workers and the members of their families, it infringes the provisions of EU law relating to the freedom of movement for workers.

10 By letter of 4 June 2008, the Kingdom of the Netherlands responded to the letter of formal notice, claiming that the 'three out of six years' rule complied with EU law and that the Kingdom of the Netherlands had fulfilled its obligations under Article 7(2) of Regulation No 1612/68.

11 Following a meeting between Commission officials and the Netherlands authorities, the latter sent the Commission a supplementary response by letter of 24 October 2008. The Netherlands authorities also expressed their intention of putting a bill before the Netherlands Parliament amending the 'three out of six years' rule.

12 By letter of 15 April 2009, the Commission issued a reasoned opinion in which it concluded that the Kingdom of the Netherlands had not respected its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68, and called on that Member State to take the measures necessary to comply with that opinion within two months of its notification.

13 On 15 June 2009, the Kingdom of the Netherlands reaffirmed its position, contending that the residence requirement laid down in the WSF 2000 did not infringe EU law.

Procedure before the Court

14 By order of the President of the Court of 20 July 2010, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, and the Kingdom of Sweden were granted leave to intervene in support of the forms of order sought by the Kingdom of the Netherlands.

The action

Arguments of the parties

15 In its application, the Commission argues that, in Case C-3/90 *Bernini* [1992] ECR I-1071, the Court ruled that assistance granted for maintenance and education in order to pursue secondary or higher education must be regarded as a social advantage for the purposes of Article 7(2) of Regulation No 1612/68. According to that case-law, which was affirmed in Case C-337/97 *Meeusen* [1999] ECR-3289, the child of a migrant worker may rely upon Article 7(2) of Regulation No 1612/68 in order to obtain funding for his studies under the same conditions as apply to the children of national workers, and no additional residence requirement may be imposed upon him.

16 According to the Commission, the Court has consistently held that the equal treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only direct discrimination by reason of nationality but also all indirect forms of discrimination which, through the application of other distinguishing criteria, lead to the same result. It is for the national authorities which plead an exception from the fundamental principle of freedom of movement for persons to show in each individual case that their rules are necessary and proportionate for the purposes of attaining the aim pursued.

17 The Commission claims that the residence requirement laid down in the WSF 2000 constitutes indirect discrimination. According to the Commission, it is clear that, even if the requirement applied in the same way to nationals and other EU citizens alike, it would naturally be easier for national workers to meet and would therefore be liable to disadvantage migrant workers in particular.

18 Moreover, the Commission argues, the requirement is even more discriminatory for frontier workers and their children, who, by definition, reside in a Member State other than the Member State of employment and cannot possibly satisfy the 'three out of six years' rule. In this respect, the Commission highlights the fact that, having become aware of that issue, the Kingdom of the Netherlands has proposed an amendment of the national legislation in order to allow portable funding for students who, although eligible for funding for higher education in the Netherlands, have lived in 'Belgium, in one of the German border areas or in Luxembourg for at least three years during the six years prior to the start of the studies abroad'.

19 The Commission argues that freedom of movement for workers within the European Union constitutes a fundamental right and that any national obstacle can be justified only if: (i) it relates to an objective that is compatible with the TFEU; (ii) it is justified by overriding reasons relating to the public interest; (iii) it is appropriate to achieve the legitimate objective pursued; and (iv) it does not go beyond what is necessary to achieve that objective.

20 The Commission claims that the necessary and proportionate nature of the 'three out of six years' rule is not, as the Netherlands authorities claim, apparent from Case C-209/03 *Bidar* [2005] ECR I-2119 and Case C-158/07 *Förster* [2008] ECR I-8507. In those judgments, the Court's analysis concerned the situation of economically inactive students who did not come under either Article 45 TFEU or Regulation No 1612/68 and of whom the national authorities were allowed to require a certain degree of integration in the host Member State. By contrast, according to the Commission, the access of migrant workers and dependent members of their families to social advantages, such as assistance for the pursuit of higher education, must be assessed in the light of Article 45 TFEU and Regulation No 1612/68.

21 The Commission submits that budgetary considerations are not covered by the concept of an overriding reason relating to the public interest, justifying an obstacle to the freedom of movement for workers. It doubts that the 'three out of six years' rule is the sole means of achieving the objective

pursued. Restriction of the geographic area in which portable funding is applicable and curtailment of the duration of that funding are possible alternative measures. Furthermore, in order to avoid fraud, inspections on the territory of Member States other than the Kingdom of the Netherlands could be carried out through coordination between the Member States.

22 The Kingdom of the Netherlands contends that the action should be dismissed.

23 Primarily, it claims that the 'three out of six years' rule does not constitute indirect discrimination. That rule does establish a distinction, because the two situations are not comparable, between workers who have resided in the Netherlands for more than three years and those who have not. Since the aim of Article 2.14 of the WSF 2000 is to promote studies outside the Netherlands, that clearly implies a requirement of residence in the national territory. The Kingdom of the Netherlands also submits that the case-law of the Court has already allowed differences in treatment based on different places of residence.

24 In the alternative, if the situations at issue must be regarded as comparable, the Kingdom of the Netherlands claims that the scope which the Commission attributes to Article 7 of Regulation No 1612/68 is too broad. It submits that Article 7 concerns, in principle, only the migrant worker himself, whereas the benefits granted to his children in relation to education come under Article 12 of that regulation. The Kingdom of the Netherlands argues that Article 12 of Regulation No 1612/68 imposes a residence requirement on children for which the justification is precisely to establish a link with the community of the host Member State. Since such a requirement is not laid down in Article 7(2) of Regulation No 1612/68, the application of that provision to children of workers would have the effect of circumventing the requirements laid down in Article 12.

25 In the further alternative, the Kingdom of the Netherlands claims that the 'three out of six years' rule is objectively justified and proportionate to the objective pursued.

26 According to the Kingdom of the Netherlands, the promotion of student mobility is possible only if the recipients of the portable funding maintain a real link with the Netherlands. That funding is intended to offer students who would normally pursue higher education in the Netherlands the possibility to do so abroad. Furthermore, abandonment of the 'three out of six years' rule would have unacceptable financial consequences and would risk affecting the very existence of the funding scheme. Attaching certain limits to eligibility so that funding may continue to be ensured has been accepted by the Court in *Bidar* and *Förster*.

27 According to the Kingdom of the Netherlands, the protection of those interests justifies the application of the 'three out of six years' rule to employed workers also, lest certain categories of student receive portable funding even though it is not intended for them. Such would be the case, for example, of student workers who carry out a short period of employment in the Netherlands solely for the purposes of obtaining that funding.

28 As regards the proportionality of the 'three out of six years' rule, the Kingdom of the Netherlands submits that no other measure — such as knowledge of the Dutch language, the establishment of geographic limits beyond which portable funding would be excluded, or the extension of the duration of residence — is liable to protect as efficiently the interests at stake. In addition, there are other possible sources of financial assistance for the children of migrant workers in the Netherlands who are residing outside that Member State, such as the funding of their studies in the Member State in which they reside or in educational establishments in the Netherlands.

29 The Kingdom of the Netherlands submits, furthermore, that Article 11.5 of the WSF 2000 lays down a rule of equity allowing, in particular cases, derogation from the residence requirement in order to prevent grave injustice.

30 Lastly, according to the Kingdom of the Netherlands, the Commission fails to recognise the fact that, since 1 September 2007, the 'three out of six years' rule does not apply to the children of migrant workers who wish to study in areas bordering the Netherlands, namely in Flanders and in the Brussels-Capital Region, in North-Rhine Westphalia, in Lower Saxony and in Bremen. That exception to the residence requirement has been extended to 1 January 2014.

Findings of the Court

31 Article 45(2) TFEU states that freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

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

33 That provision equally benefits both migrant workers residing in a host Member State and frontier workers employed in that Member State while residing in another Member State (Case C-213/05 *Geven* [2007] ECR I-16347, paragraph 15).

34 According to settled case-law, assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification constitutes a social advantage for the purposes of Article 7(2) of Regulation No 1612/68 (Case 39/86 *Lair* [1988] ECR 3161, paragraph 24, and *Bernini*, paragraph 23).

35 The Court has also held that study finance granted by a Member State to the children of workers constitutes, for the migrant worker, a social advantage for the purposes of Article 7(2) of Regulation No 1612/68, where the worker continues to support the child (*Bernini*, paragraphs 25 and 29, and *Meeusen*, paragraph 19).

36 Article 7(2) of Regulation No 1612/68 requires that, where a Member State gives its national workers the opportunity of pursuing education or training provided in another Member State, it must extend that opportunity to EU workers established within its territory (Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 16, and Case C-308/89 *di Leo* [1990] ECR I-4185, paragraph 14).

37 In that respect, it should be noted that the equal treatment rule laid down both in Article 45 TFEU and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result (see, inter alia, Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44, and Case C-269/07 *Commission* v *Germany* [2009] ECR I-7811, paragraph 53).

38 That is the position, in particular, in the case of a measure — such as that at issue in the present case — which requires a specified period of residence, in that it primarily operates to the detriment of migrant workers and frontier workers who are nationals of other Member States, in so far as non-residents are usually non-nationals (see, to that effect, Cases C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14, and C-382/08 *Neukirchinger* [2011] ECR I-139, paragraph 34). In that context, it is immaterial whether, in some circumstances, the contested measure affects, as well as nationals of other Member States, nationals of the Member State in question who are unable to meet such a criterion. In order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing all the nationals of the Member State in question at an advantage or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (see, to that effect, Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14).

39 Article 2.14(2) of the WSF 2000 is based on precisely that type of criterion, in so far as it makes the grant of portable funding conditional, *inter alia*, on the party concerned having resided in the Netherlands for at least three of the six years preceding his enrolment for higher educational studies outside that Member State.

40 The Kingdom of the Netherlands contends, however, that the Netherlands legislation at issue establishes a distinction between workers residing in the Netherlands for at least three years, on the one hand, and those who do not meet that condition, on the other, because those situations are different. From the point of view of student mobility, the situation where students residing in the Netherlands are encouraged to go abroad is completely different from the situation in which students residing outside the Netherlands are encouraged to study outside that Member State. An inherent characteristic of that legislation is that it concerns exclusively individuals who reside in the Netherlands and whose initial instinct would obviously be to study in the Netherlands. Accordingly, the fact that these situations are not comparable rules out any question of discrimination.

41 In that respect, it should be noted that, according to settled case-law, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30, and Case C-253/09 *Commission* v *Hungary* [2011] ECR I-12391, paragraph 50).

42 The non-discretionary application of that principle requires that the criterion by reference to which the situations are compared be based upon factors which are objective and easily identifiable. That criterion cannot be based upon the simple probability that workers employed in the Netherlands but residing in another Member State will pursue studies, not in the Netherlands, but in the Member State of residence.

43 As the Advocate General pointed out in points 52 and 53 of her Opinion, in accepting that children of migrant workers who wish to study in the Netherlands should have access to funding for such studies on the same terms as Netherlands nationals, irrespective of whether or not they reside in the Netherlands, the Kingdom of the Netherlands implicitly accepted that at least some children of migrant workers may, like the children of Netherlands workers, be pre-disposed to study in the Netherlands, irrespective of whether or not they reside there. That being so, the Kingdom of the Netherlands cannot legitimately assert that the place where the migrant worker or his dependent children will study will be determined, in a quasi-automatic manner, by the place of residence.

44 Consequently, for the purposes of access to portable funding, the situation of a migrant worker employed in the Netherlands but residing in another Member State, or the situation of a migrant worker both employed and residing in the Netherlands but for a length of time which falls short of the period of residence required by the measure at issue, is comparable to that of a Netherlands worker who both resides and works in the Netherlands.

45 In the alternative, the Kingdom of the Netherlands argues that the Commission has construed Article 7(2) of Regulation No 1612/68 far too broadly, in so far as that provision concerns, in principle, only migrant workers. Advantages intended for the children of migrant workers as regards access to education come within the scope of Article 12 of that regulation, which lays down a residence requirement applicable to those children.

46 According to the Kingdom of the Netherlands, in *Bernini* and *Meeusen*, the Court, in ruling that Article 7(2) of Regulation No 1612/68 was applicable to the children of migrant workers, seems to have ignored that difference in scope as between the two provisions. However, the Court only did so because, in the cases which gave rise to those judgments, it was dealing with direct discrimination. It was necessary, therefore, to apply Article 7(2) of Regulation No 1612/68. In contrast, in cases which do not involve direct discrimination, such as the present case, that need is not so paramount and Article 12 of that regulation must be applied.

47 With regard to that argument, the following points must be made.

48 The members of a migrant worker's family are the indirect recipients of the equal treatment granted to the worker under Article 7(2) of Regulation No 1612/68. Since the grant of funding for studies to a child of a migrant worker constitutes a social advantage for the migrant worker, the child may himself rely on that provision in order to obtain the funding if, under national law, such funding is granted directly to the student. For the migrant worker, however, that benefit constitutes a social advantage for the purposes of that provision only inasmuch as he continues to support his descendant (Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 12 and 13, and *Bernini*, paragraphs 25 and 26).

49 Article 12 of Regulation No 1612/68, on the other hand, grants the children of a migrant worker an autonomous right to education. That right is not dependent on possessing the status of dependent child (Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 25); nor is it dependent on the right of residence of the children's parents in the host Member State (Case C-310/08 *Ibrahim* [2010] ECR I-1065, paragraph 40). Nor yet is it limited to the children of migrant workers, since it applies also to the children of former migrant workers (*Ibrahim*, paragraph 39).

50 Article 12 requires only that the child have lived with his parents or with either parent in a Member State while at least one of the parents resided there as a worker (Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 52).

51 Although it is true that the scope *ratione personae* of Article 7(2) of Regulation No 1612/68 and that of Article 12 of that regulation are different, the Court has nevertheless held that both those provisions lay down, in the same way, a general rule which, in matters of education, requires every Member State to ensure equal treatment between, on the one hand, its own nationals and, on the other, the children of workers established within its territory who are nationals of another Member State (*di Leo*, paragraph 15).

52 As regards the argument of the Kingdom of the Netherlands relating to *Bernini* and *Meeusen*, it is sufficient to recall the case-law referred to in paragraph 37 above, according to which Article 7(2) of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, lead in fact to the same result.

53 Moreover, as the Advocate General pointed out in point 35 of her Opinion, the personal scope of the equal treatment obligation set out in Article 7(2) of Regulation No 1612/68 is not dependent on the type of discrimination involved.

54 It follows that the residence requirement laid down in Article 2.14(2) of the WSF 2000 creates an inequality in treatment as regards access to portable funding between, on the one hand, Netherlands workers and, on the other, migrant workers residing in the Netherlands or employed in that Member State as frontier workers.

55 Such an inequality constitutes indirect discrimination which, unless objectively justified, is prohibited under Article 7(2) of Regulation No 1612/68. Yet, even if it were objectively justified, it would still have to be of such a nature as to ensure achievement of the aim pursued and not go beyond what was necessary for that purpose (see, inter alia, Case C-325/08 O*lympique Lyonnais* [2010] ECR I-2177, paragraph 38).

56 In the present case, the Kingdom of the Netherlands invokes two reasons to justify the contested residence requirement. First, it claims that the requirement is necessary in order to avoid an unreasonable financial burden which could have consequences for the very existence of the assistance scheme. Secondly, given that the national legislation at issue is intended to promote higher education outside the Netherlands, the requirement ensures that the portable funding is available solely to those students who, without it, would pursue their education in the Netherlands.

57 As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers (see, to that effect, Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 59, and Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 53).

58 To accept that budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as fundamental as non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of Member States (see, to that effect, Cases C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 36, and C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 67).

59 The Kingdom of the Netherlands nevertheless contends that, in *Bidar*, the Court accepted the legitimacy of the objective of limiting, by means of a residence requirement, the recipients of assistance intended to cover the maintenance costs of students from other Member States in order to ensure that the grant of that assistance did not become an unreasonable burden for the host Member State. That case-law was confirmed in *Förster*.

60 However, it should be noted that, in the cases giving rise to *Bidar* and *Förster*, the Court was asked to rule on residence requirements imposed by the Member State concerned, in relation to the grant of funding for studies, on students from other Member States who were not migrant workers or members of their families.

61 Although the Court ruled that the students in question could be required by the host Member State to demonstrate a certain degree of integration into the society of that State in order to receive a maintenance grant, the fact remains that the Court did so only after finding that the interested parties did not come within the scope of the provisions of EU law relating to freedom of movement for workers, in particular Regulation No 1612/68 (see *Bidar*, paragraph 29, and *Förster*, paragraphs 32 and 33).

62 Likewise, in Case C-456/02 *Trojani* [2004] ECR I-7573, before determining whether a Member State national who did not have sufficient resources could rely on his EU citizenship and the rights under Article 21 TFEU in order to be granted a social assistance benefit in another Member State, the Court first left it to the national court to carry out the assessments of fact necessary to determine whether the citizen in question had the status of worker for the purposes of Article 45 TFEU.

63 Although the Member States' power — which the Court has recognised, subject to the respect of certain conditions — to require nationals of other Member States to show a certain degree of integration in their societies in order to receive social advantages, such as financial assistance for education, is not limited to situations in which the applicants for assistance are economically inactive citizens, the existence of a residence requirement, such as that laid down in Article 2.14(2) of the WSF 2000, to prove the required degree of integration is, in principle, inappropriate when the persons concerned are migrant workers or frontier workers.

64 The existence of a distinction between migrant workers and the members of their families, on the one hand, and EU citizens who apply for assistance without being economically active, on the other hand, arises from Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigendum OJ 2004 L 229, p. 35; corrigendum to the corrigendum OJ 2005 L 197, p. 34). Although Article 24(1) of Directive 2004/38

provides that all EU citizens residing on the basis of that directive in the territory of the host Member State are to enjoy equal treatment 'within the scope of the Treaty', Article 24(2) provides that a Member State may, in relation to persons other than workers, self-employed persons, persons who retain such status and members of their families, limit the grant of maintenance aid, consisting in student grants or student loans, in the case of students who have not acquired a right of permanent residence.

65 As regards migrant workers and frontier workers, the fact that they have participated in the employment market of a Member State establishes, in principle, a sufficient link of integration with the society of that Member State, allowing them to benefit from the principle of equal treatment, as compared with national workers, as regards social advantages. That principle is applicable not only to all employment and working conditions, but also to all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory (see, inter alia, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25, and *Commission* v *Germany*, paragraph 39).

66 The link of integration arises from, inter alia, the fact that, through the taxes which he pays in the host Member State by virtue of his employment, the migrant worker also contributes to the financing of the social policies of that State and should profit from them under the same conditions as national workers.

67 That conclusion is borne out by the third recital in the preamble to Regulation No 1612/68, according to which the mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States.

68 As regards the risk of abuse relied upon by the Kingdom of the Netherlands, arising in particular from the performance of short periods of employment solely for the purposes of obtaining portable funding, it should be pointed out that the concept of 'worker' for the purposes of Article 45 TFEU has an autonomous meaning specific to EU law and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to the case-law of the Court, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 89).

69 In the light of the above, the objective pursued by the Kingdom of the Netherlands of avoiding an unreasonable financial burden cannot be regarded as an overriding reason relating to the public interest, capable of justifying the unequal treatment of workers from other Member States as compared with Netherlands workers.

70 According to the Kingdom of the Netherlands, the residence requirement laid down in Article 2.14(2) of the WSF 2000 may be rendered legitimate by an objective justification other than that of avoiding an unreasonable financial burden. The purpose of providing portable funding is also to increase student mobility and to encourage students to pursue studies outside the Netherlands. Those studies are not only enriching for the students, they are also advantageous for Netherlands society in general and for the Netherlands employment market in particular.

71 It is not disputed that the objective of encouraging student mobility is in the public interest. It suffices, in this respect, to point out that it is one of the actions which Article 165 TFEU assigns to the European Union in the context of educational policy, vocational training, youth and sport. Moreover, it follows from the first recital to the Recommendation of the European Parliament and of the

Council of 18 December 2006 on transnational mobility within the Community for education and training purposes: European Quality Charter for Mobility (OJ 2006 L 394, p. 5) that mobility in education and training is an integral part of freedom of movement for persons and that it is one of the main objectives of the European Union's action.

72 Viewed in that light, the justification relating to encouraging student mobility, as relied upon by the Kingdom of the Netherlands, constitutes an overriding reason relating to the public interest capable of justifying a restriction on the principle of non-discrimination on grounds of nationality.

73 However, as indicated in paragraph 55 above, legislation which is liable to restrict a fundamental freedom guaranteed by the Treaty, such as freedom of movement for workers, can be justified only if it is appropriate for securing the attainment of the legitimate objective pursued and if it does not go beyond what is necessary in order to attain it.

74 As regards the appropriate nature of the residence requirement laid down in Article 2.14(2) of the WSF 2000, the Kingdom of the Netherlands contends that it is the means of ensuring that the portable funding goes only to the students whose mobility must be encouraged.

75 In asserting that the 'three out of six years' rule is essential to ensuring that the portable funding is applicable exclusively to a clearly defined group of students, the Kingdom of the Netherlands bases its argument on two premises.

76 First, the Netherlands scheme of assistance for studies outside the Netherlands is aimed at students residing in the Netherlands who, in the absence of that scheme, would pursue their education in that Member State. By contrast, the first instinct of students who do not reside in the Netherlands would be to study in the Member State in which they are resident and, accordingly, mobility would not be encouraged. The Member State in which a student is resident, whether it is the Kingdom of the Netherlands or elsewhere, determines, in a quasi-automatic manner, the place where that student will study.

77 Secondly, in underlining the merits of a policy which encourages student mobility by pointing to the enrichment which studies outside the Netherlands bring not only to the students but also to the society and the employment market of the Netherlands, the Kingdom of the Netherlands expects that students who benefit from that scheme will return to the Netherlands after completing their studies, in order to reside and work there.

78 As was pointed out in paragraph 43 above, the Netherlands has also accepted that some children of migrant workers may be inclined to study in the Netherlands, whether or not they reside there. It should nevertheless be acknowledged that the aspects indicated in paragraphs 76 and 77 above reflect the situation of most students.

79 It must therefore be held that the residence requirement laid down in Article 2.14(2) of the WSF 2000 is appropriate for the purposes of attaining the objective of promoting student mobility.

80 It remains to be determined whether that requirement does not go beyond what is necessary in order to attain that objective.

81 According to settled case-law, it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EU law, to show in each individual case that that measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments (Cases C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63, and C-73/08 *Bressol and Others* [2010] ECR I-2735, paragraph 71).

82 Accordingly, it falls to the Kingdom of the Netherlands not only to establish that the national measure at issue is proportionate to the objective pursued but also to indicate the evidence capable of substantiating that conclusion.

83 In its defence, the Kingdom of the Netherlands contended that no other rule would protect as efficiently the interests which the WSF 2000 is intended to protect. A requirement to the effect that the student must know the national language or have a diploma from a Netherlands school would not be an effective means of promoting the objective pursued by the national legislation in question. According to the Kingdom of the Netherlands, besides the fact that such requirements would give rise to discrimination on grounds of nationality, those criteria would make sense only if they related to studies in the Netherlands.

84 In that respect, it should be pointed out that, for the Kingdom of the Netherlands to discharge the burden of showing that the residence requirement does not go beyond what is necessary, it is not sufficient for that Member State simply to refer to two alternative measures which, in its opinion, are even more discriminatory than the requirement laid down in Article 2.14(2) of the WSF 2000.

85 Admittedly, the Court has ruled that the standard of proof cannot be so high as to require the Member State to prove, positively, that no other conceivable measure could enable the objective pursued to be attained under the same conditions (see, to that effect, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 66).

86 Nevertheless, as the Advocate General indicated in point 158 of her Opinion, the Kingdom of the Netherlands would have needed at least to show why it opted for the 'three out of six years' rule, to the exclusion of all other representative elements. It should be pointed out in that regard that the rule is too exclusive. By requiring specific periods of residence in the territory of the Member State concerned, the 'three out of six years' rule prioritises an element which is not necessarily the sole element representative of the actual degree of attachment between the party concerned and that Member State.

87 It must accordingly be held that the Kingdom of the Netherlands has not established that the residence requirement laid down in Article 2.14(2) of the WSF 2000 does not go beyond what is necessary for the purposes of attaining the objective sought by that legislation.

88 It follows that, contrary to Article 45 TFEU and Article 7(2) of Regulation No 1612/68, Article 2.14(2) of the WSF 2000 establishes inequality of treatment as between Netherlands workers and migrant workers residing in the Netherlands or employed in that Member State as frontier workers.

89 In the light of all the foregoing, it must be held that, by requiring that migrant workers and dependent family members comply with a residence requirement — namely, the 'three out of six years' rule — in order to be eligible for portable funding, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68.

Costs

90 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 Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by requiring that migrant workers and dependent family members comply with a residence requirement — namely, the 'three out of six years' rule — in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 45 TFEU and 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, as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]