Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 24 September 2014[1]

Case C-359/13

B. Martens
v
Minister van Onderwijs, Cultuur en Wetenschap
(Request for a preliminary ruling from the

Centrale Raad van Beroep (Netherlands))

(Funding of higher education in overseas territories — Residence condition — 'Three out of six years rule' — Former frontier worker)

1. The request for a preliminary ruling in the present case again concerns eligibility for funding provided by the Netherlands for higher education outside the Netherlands itself — what is termed *meeneembare studie financiering* ('MNSF' or 'portable study finance'). In its judgment in Case C-542/09 *Commission* v *Netherlands*,[2] the Court held that the Netherlands rule under which any applicant for such finance had, in addition to being eligible for funding to study in the Netherlands, also to have resided lawfully in the Netherlands during at least three out of the last six years prior to enrolment (the 'three out of six years rule') fell foul of Article 45 TFEU and Article 7(2) of Regulation (EEC) No 1612/68[3] because it was indirectly discriminatory.

2. The three out of six years rule was nevertheless applied to Miss Babette Martens, a Netherlands national resident in Belgium for nearly all her schooling, who applied to the Netherlands authorities for portable study finance to go to Curaçao to pursue higher education there. Her father (also a Netherlands national resident in Belgium) worked part-time in the Netherlands for a while; and Miss Martens has been granted MNSF for her university studies in respect of that period. However, she was denied study finance for the remainder of her studies once her father ceased to be a frontier worker, because the three out of six years rule was then applied to her situation and she did not satisfy it.

1 — Original language: English.

2 — EU:C:2012:346.

3 — Regulation of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475). Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) repealed Regulation No 1612/68 with effect from 16 June 2011 (and thus after the relevant facts at issue in the present case). In any event, the texts of Articles 7(2) and 12 of Regulation No 1612/68 remain unchanged in Regulation No 492/2011 and therefore I refer to both provisions in the present tense.

3. The Centrale Raad van Beroep (Netherlands) (Central Appeals Court) ('the referring court') asks in essence whether (i) the freedom of movement for workers or (ii) European Union ('EU') citizenship rights preclude the Netherlands from applying the three out of six years rule in such a situation. In particular, it asks whether Mr Martens can rely, as against the Netherlands, on rights derived from free movement of workers after ceasing to be a frontier worker in that Member State. If he cannot, the referring court seeks guidance on whether Miss Martens can rely on her own rights as an EU citizen.

EU law

Treaty on the Functioning of the European Union

4. Article 20(1) TFEU establishes EU citizenship. Pursuant to Article 20(2), EU citizens are to 'enjoy the rights and be subject to the duties provided for in the Treaties'. In particular, Article 20(2)(a) confers on EU citizens 'the right to move and reside freely within the territory of the Member States'. Article 21 confirms that right, adding that it is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

5. Article 45 TFEU states:

'1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall 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.

…'

6. Whilst Article 52(1) TEU provides that the Treaties apply, inter alia, to 'the Kingdom of the Netherlands', of which Curaçao forms part,[4] Article 52(2) TEU cross-refers to Article 355 TFEU for the definition of the territorial scope of the Treaties. In accordance with Article 355(2) TFEU, the special arrangements for association in Part Four of the TFEU are to apply to the overseas countries and territories ('OCTs') listed in Annex II to that Treaty.[5] The list in Annex II contains the Netherlands Antilles, which include Curaçao. These countries and territories are described in Article 198(1) TFEU (the first provision of Part Four) as 'non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom' which the Member States 'agree to associate with the Union'.

7. Part Four of the TFEU concerns 'Association of the Overseas Countries and Territories'. Article 202 TFEU states that '[s]ubject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203'.[6]

4 — See Article 1 of the Statuut voor het Koninkrijk der Nederlanden (point 14 below).

5 — Annex II, Overseas countries and territories to which the provisions of Part Four of the Treaty on the Functioning of the European Union apply (OJ 2012 C 326, p. 336).

6 — The legislation adopted under Article 203 TFEU does not provide guidance on whether Mr Martens and his daughter can rely on EU law in the present case.

Regulation No 1612/68

8. Regulation No 1612/68 provides supplementary rules to secure the freedom of nationals of one Member State to work in another Member State and thereby implements the Treaty provisions on freedom of movement for workers. The first recital in the preamble to that regulation describes its overall objective as being to achieve '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, as well as the right of such workers to move freely within the [Union] in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health'.

9. The third and fourth recitals state, respectively, that 'freedom of movement constitutes a fundamental right of workers and their families' and that that right is to be enjoyed 'by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services'.

10. According to the fifth recital, the exercise of this fundamental freedom, 'by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

11. Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State 'shall enjoy the same social and tax advantages as national workers' in the territory of another Member State.

12. Article 12 of Regulation No 1612/68 reads:

'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.

...'

Directive 2004/38

13. Article 24 of Directive 2004/38/EC[7] provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

7 — Directive 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, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28).

2. By way of derogation from paragraph 1, the host Member State shall not be obliged … prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

Netherlands law

Charter for the Kingdom of the Netherlands

14. The Statuut voor het Koninkrijk der Nederlanden ('Charter for the Kingdom of the Netherlands'), as amended in 2010, provides that the Kingdom of the Netherlands consists of the Netherlands, Aruba, Curaçao and Saint Maarten. [8] The Netherlands and the other entities forming part of the Kingdom of the Netherlands share a single nationality, head of State, foreign policy and defense. However, areas such as education and study finance remain autonomous, although cooperation is possible.

Law on study finance

15. The Wet Studiefinanciering (Law on Study Finance, 'the Wsf 2000') sets out the conditions for funding of study in the Netherlands and abroad. Funding for higher education in the Netherlands is available to students who are between 18 and 29 years old, study at a designated or approved educational establishment and satisfy a nationality condition. Article 2.2 defines the nationality condition. Those eligible include Netherlands nationals and non-Netherlands nationals who are treated, in the area of funding for studies, as Netherlands nationals based on a treaty or a decision of an international organisation.

16. EU citizens who are economically active in the Netherlands and their family members need not have resided in the Netherlands to qualify for this type of funding. Thus, cross-border workers, [9] who work in the Netherlands but reside elsewhere, and their family members are covered. By contrast, EU citizens who are not economically active in the Netherlands qualify for funding after five years of lawful residence in the Netherlands.

17. In accordance with Article 2.13(1)(d) of the Wsf 2000, as of 1 September 2007, a student is not entitled to study finance if, for the funding period concerned, he is eligible for an allowance towards meeting the costs of access to education or for maintenance provided by the authorities responsible for the provision of such allowances in a country other than the Netherlands.

18. Pursuant to Article 2.14(2)(c) of the Wsf 2000, students (irrespective of their nationality) who apply for portable study finance must, in addition to being eligible for funding for higher education in the Netherlands, satisfy the three out of six years rule. That provision applies only to students who were enrolled after 31 August 2007 on a higher education course outside the Netherlands.

8 — The other components of the Netherlands Antilles listed in Annex II to the TFEU (namely Bonaire, Saint Eustatius and Saba) appear to have a slightly different status under the Charter.

9 — This category is wider than that of frontier workers. The latter work in one Member State and reside in a border region of a neighbouring Member State. By contrast, the former also covers those workers who work in one Member State and reside in another Member State but not just in a border region of a neighbouring Member State. See also, for example, judgment in *S*, C-457/12, EU:C:2014:136, paragraphs 38 and 39.

19. In accordance with Article 3.21, second paragraph, of the Wsf 2000, no study finance is granted with respect to a period of study prior to applying for funding. However, certain transitional arrangements apply. Thus, for example, Article 12.1ba states: 'The articles … as they read on 31 August 2007 remain applicable to a student who prior to 1 September 2007 received study finance for the purposes of pursuing higher education outside the Netherlands, as long as he or she receives the study finance without interruption.'

20. Pursuant to Article 11.5 of the Wsf 2000, the Minister van Onderwijs, Cultuur en Wetenschap (Minister of Education, Culture and Science; 'the Minister') need not apply the three out of six years rule in so far as the application of that requirement, having regard to the interests which the Wsf 2000 seeks to safeguard, might lead to a manifest case of grave injustice (the 'hardship clause').

21. Prior to 1 January 2014, the three out of six years rule did not apply to students (irrespective of their nationality) who asked for MNSF in order to pursue higher education in the 'border areas' of the Netherlands. [10]

22. According to the national court, MNSF consists of: a basic grant, the level of which depends on whether the student lives at home (that is, at the address of one or both of his parents) or independently; an allowance for travel costs ('OV vergoeding'); an additional loan, subject to a maximum limit; an additional grant of which the amount depends on the income of the parents; and a loan to cover fees limited in principle to the maximum fee chargeable by Netherlands educational institutions for an equivalent course.

Factual background, procedure and questions referred

23. Miss Martens was born in the Netherlands on 2 October 1987. She lived there until she moved, in June 1993 (when she was a little under six years old), with her parents (also Netherlands nationals) to Belgium where she was brought up and completed her schooling. Her father worked in Belgium and continues to do so. However, between 1 October 2006 and 31 October 2008, he also worked part-time in the Netherlands. It appears from the request for a preliminary ruling that after October 2008 he did not look for employment in the Netherlands and was not otherwise available for its employment market. Instead, he was in full-time employment in Belgium.

24. On 15 August 2006, Miss Martens registered to begin a bachelor degree at the University of the Netherlands Antilles in Curaçao in the academic year 2006/2007. During her studies there, her parents provided significant financial support (living expenses and costs of education) and received a child allowance in Belgium for their daughter. The referring court has explained that that child allowance is distinct from study grants for adult students; and that the Flemish Community does not typically award the latter for education or training pursued at educational institutions outside the so-called European Higher Education Area.

25. On 24 June 2008, Miss Martens applied to the Netherlands authorities for study finance (a basic grant and an allowance for travel costs). She declared that she did not receive study finance from another country and that, during the six years prior to her registration at the University of the Netherlands Antilles (that is, from 2000 to 2006), she had resided in the Netherlands for at least three years. It appears that the referring court does not doubt the good faith of Miss Martens' declaration and considers that there might have been a misunderstanding at the time as regards the three out of six years rule.

10 — Those regions are Flanders and the Brussels-Capital Region in Belgium, and North-Rhine Westphalia, Lower Saxony and Bremen in Germany.

26. By decision of 22 August 2008, Miss Martens was granted study finance for the period starting on September 2007, which means that she received funding starting from the second year of her studies. That grant was renewed on a periodic basis and was based on the assumption that Miss Martens satisfied the three out of six years rule.

27. On 1 February 2009, Miss Martens requested an additional loan which she also obtained.

28. Then, as a result of a check, on 28 May 2010 the Minister established that, during the period from August 2000 to July 2006, Miss Martens had *not* resided three years in the Netherlands and decided that the grants already paid out (EUR 19 481.64) should be cancelled. Miss Martens was asked to refund the sums already received.

29. Miss Martens' complaint against those decisions was declared unfounded, as was her further appeal before the rechtbank's-Gravenhage ('the rechtbank'). She then appealed against the judgment of the rechtbank before the referring court. Miss Martens argued that the decisions breached the principle of legitimate expectations and that the alleged lack of a sufficient connection with the Netherlands could not justify the Minister's decision.

30. On 1 July 2011, Miss Martens obtained her bachelor degree and went to live in the Netherlands.

31. The referring court deferred deciding the appeal until the Court had delivered its judgment in *Commission* v *Netherlands*, which it did on 14 June 2012. [11]

32. The Minister then accepted that Miss Martens' father was a frontier worker in the Netherlands from 1 October 2006 till 31 October 2008 and that Miss Martens was therefore entitled to portable study finance for the period from September 2007 to October 2008. [12] That was because, as a result of the judgment in *Commission* v *Netherlands*, the three out of six years rule could not be applied in such circumstances. However, the Minister maintained the decision to cancel the grant from the time that Miss Martens' father ceased to be a frontier worker in the Netherlands (that is, November 2008).

33. According to the referring court, the Minister did not base his decision on the fact that Miss Martens may have had access to financial support from Belgium (though, according to the referring court, Belgium does not appear to grant study finance for studies at educational institutions established outside the European Union) and therefore the referring court did not consider that matter further. [13]

34. Against that background, the referring court has stayed the proceedings and requested a preliminary ruling on these questions:

'1A. Must [EU] law, in particular Article 45 TFEU and Article 7(2) of Regulation No 1612/68, be interpreted as precluding … the Netherlands from terminating the right to receive study finance for education or training outside the EU of an adult dependent child of a frontier worker with Netherlands nationality who lives in Belgium and works partly in the Netherlands and partly in Belgium, at the point in time at which the frontier work ceases and work is then performed exclusively in Belgium, on the ground that the child does not meet the requirement that she must have lived in the Netherlands for at least three of the six years preceding her enrolment at the educational institution concerned?

11 — EU:C:2012:346.

12 — See also points 19 and 20 above.

13 — See points 17 and 24 above.

1B. If Question 1A must be answered in the affirmative: does [EU] law preclude the granting of study finance for a period shorter than the duration of the education or training for which study finance was granted, it being assumed that the other requirements governing eligibility for study finance have been satisfied?

If, in answering Questions 1A and 1B, the Court of Justice should conclude that the legislation governing the right of freedom of movement for workers does not preclude a decision not to grant Ms Martens any study finance during the period from November 2008 to June 2011 or for part of that period:

2. Must Articles 20 TFEU and 21 TFEU be interpreted as precluding the EU Member State — the Netherlands — from not extending the study finance for education or training at an educational institution which is established in the Overseas Countries and Territories ["OCTs"] (Curaçao), to which there was an entitlement because the father of the person concerned worked in the Netherlands as a frontier worker, on the ground that the person concerned does not meet the requirement, applicable to all [EU] citizens, including its own nationals, that she must have lived in the Netherlands for at least three of the six years preceding her enrolment for that education or training?'

35. Written submissions were filed by the Danish and Netherlands Governments and by the European Commission. These parties also made oral submissions at the hearing on 2 July 2014.

Assessment

Preliminary remarks

36. Education involves costs for at least the Member State providing the education, the student himself (if he is financially autonomous) or those on whom the student is financially dependent and other (public and private) sponsors of education. As a matter of EU law, Member States remain competent to decide whether or not to fund higher education and, if so, to what extent. EU law does not in principle interfere with a Member State's decision to make funding available for studies pursued at higher education institutions established outside its territory and possibly outside the European Union and the conditions it attaches to such finance.

37. However, the situation of certain applicants for that funding may be covered by EU law. Such applicants may therefore derive rights from EU law, including in relation to their Member State of origin. Thus, in the exercise of their (undoubted) competence, Member States must comply with EU law.[14] Specifically, they must ensure that, for example, the conditions for the award of such funding neither create unjustified restrictions of the right to move and reside within the territory of the Member States nor discriminate on the basis of nationality.[15]

38. What is at stake in the present case is therefore not the Netherlands' decision to fund higher education outside the Netherlands; but rather a condition (that is, the three out of six years rule) applied in deciding whether or not to grant that funding to a particular applicant.

14 — See, for example, judgment in *Prinz*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 26 and case-law cited.

15 — See, for example, judgment in *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraph 28 and case-law cited; judgment in *Prinz*, EU:C:2013:524, paragraph 30 and case-law cited; and judgment in *Elrick*, C-275/12, EU:C:2013:684, paragraph 25.

39. Initial cases regarding residence conditions and study finance often involved workers who became students; and who were no longer supported by others.[16] It is not uncommon, however, for students to remain dependent on family members (typically on one or both parent(s)) during all or part of the period during which they study. In that case, obtaining study finance may alleviate the financial burden otherwise borne by those family members. It is settled law that assistance granted for maintenance and education in order to pursue university studies evidenced by a professional qualification, including for children of migrant workers, is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68,[17] but only in so far as the migrant worker continues to support his or her child.[18]

40. In the present case, it is not disputed that Miss Martens' father supported her during her studies in Curaçao. Therefore the portable study finance sought by Miss Martens is a social advantage for her father within the meaning of Regulation No 1612/68. It is now accepted that Miss Martens was entitled to MNSF for the period from October 2007 to October 2008 whilst her father was a frontier worker in the Netherlands. What is at issue is whether she had any entitlement thereafter.

41. By the first question referred, the Court is asked to focus on Miss Martens' position as a dependent child of a former frontier worker. If Miss Martens can rely on her father's status as a former frontier worker in the Netherlands and derive rights therefrom so as to continue to access study finance for the remaining part of her studies in Curaçao, there is no need to consider the second question referred, which focuses on Miss Martens' own rights as an EU citizen.[19] (Only in the latter context did the Netherlands take a clear position on the possible justification for a restriction of rights.)

42. For the sake of completeness, I shall answer both questions. Before doing so, however, I shall look at whether Miss Martens' place of study (Curaçao) raises questions as regards the territorial application of both freedom of movement for workers and EU citizenship rights.

Territorial scope of application of EU law

43. Curaçao forms part of the Kingdom of the Netherlands but is also characterised as an overseas territory. The application of the three out of six years rule to Miss Martens suggests that the Minister took the view that Miss Martens was not studying 'in the Netherlands'.[20] At the hearing, the Netherlands Government confirmed that to be the position.

44. Does Miss Martens' place of study raise questions as regards the territorial application of freedom of movement for workers and/or EU citizenship rights?

16 — See, for example, the judgment in *Förster*, C-158/07, EU:C:2008:630.

17 — See also point 90 below.

18 — Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraphs 34, 35 and 48 and case-law cited.

19 — On the relation between Articles 21 and 45 TFEU, see, for example, the judgment in *Caves Krier Frères*, C-379/11, EU:C:2012:798, paragraph 30 and case-law cited.

20 — See point 15 above. Had the Minister considered that Miss Martens' course of study was 'in the Netherlands' rather than elsewhere (so that she required portable study finance), she would automatically, as a Netherlands national, have been eligible for funding.

45. It is true that, where special arrangements exist between the European Union and OCTs, provisions of the Treaties other than those referred to in Part Four TFEU apply only where they are expressly made applicable.[21] Thus, unless the Treaties expressly state that a particular article also applies to territories outside the European Union or to third States,[22] that article does not apply to OCTs.[23]

46. As I see it, these issues do not arise in the present case.

47. The question here is not whether EU law applies because an EU citizen (economically active or inactive) has moved from a Member State to an OCT. Rather, what matters is whether rights can be derived from an EU citizen's movement between two Member States (the Netherlands and Belgium) and subsequent residence in a Member State (Belgium) that is not the Member State of nationality in the context of study finance that is made available by one of those Member States (the Netherlands) for studies pursued abroad.

48. Specifically, a condition (that is, the three out of six years rule) was here applied to an EU citizen (Miss Martens) who has exercised rights of free movement and residence when moving from the Netherlands to Belgium and who continued to reside in Belgium at least until she moved to Curaçao to study there.[24] She was therefore exercising rights under EU law continuously at least up to the point at which she seeks to rely upon those rights in order to access MNSF.[25] Miss Martens is also the dependent child of an EU citizen who has exercised rights as a worker in moving from his home Member State (the Netherlands) to a host Member State (Belgium) to live and work there, who subsequently worked part-time in the Netherlands whilst continuing to reside in Belgium, before resuming full-time employment in the host Member State in which he resides (Belgium).

49. In such circumstances, the situations of both Miss Martens and her father fall within the scope of EU law.

Question 1: freedom of movement for workers

Introduction

50. The referring court in essence asks whether Mr Martens, who is a former frontier worker, and his dependent daughter seeking MNSF can assert rights by virtue of his worker's status in the Netherlands where he no longer works because he has taken up full-time employment in Belgium.

51. All parties who have filed observations and appeared at the hearing agree that Article 45 TFEU and Article 7(2) of Regulation No 1612/68 preclude the Netherlands from imposing the three out of six years rule as a condition for granting MNSF to migrant workers and frontier workers in the Netherlands. That was also the conclusion of the Court in Case C-542/09 *Commission* v *Netherlands*.[26] So long as Mr Martens worked in the Netherlands (they say), Miss Martens could get her portable study finance. However, they argue that, once a worker is no longer a frontier worker, both provisions no longer apply.

21 — See, for example, judgment in *X and TBG*, C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45 and case-law cited.

22 — Thus, for example, there is no express provision on movements of capital between Member States and OCTs. However, the free movement of capital is expressed in a provision (Article 63 TFEU) which has an unlimited territorial scope and therefore necessarily applies to movements of capital to and from OCTs in their capacity as non-Member States. See, for example, judgment in *Prunus*, C-384/09, EU:C:2011:276, paragraphs 20 and 31.

23 — See judgment in *Prunus*, EU:C:2011:276, paragraph 29 and case-law cited.

24 — It is not clear from the order for reference whether she became resident in Curaçao when she started her studies there; or whether she remained legally resident in Belgium.

25 — See also point 106 below.

26 — See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 64.

52. It seems to me that what someone can (or cannot) claim as a former frontier worker is beside the point. The simple fact is that Mr Martens continues to be a migrant worker. The parties, in focussing on the effects of the loss of Mr Martens' frontier worker status, have overlooked the consequences attached to that fact.

Restriction of Mr Martens' right under Article 45 TFEU

53. Article 45 TFEU entails both 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 and the right to move freely within the territory of Member States for the purpose of accepting offers of employment.

54. The purpose of the Treaty provisions on the freedom of movement for persons is to enable EU citizens to pursue occupational activities of all kinds throughout the Union. In parallel with that objective, they also therefore preclude arrangements that might place EU citizens at a disadvantage for wishing to pursue an economic activity in the territory of another Member State (and thus leave their State of origin).[27] Thus, these provisions preclude measures which are capable of hindering or rendering less attractive the exercise of those freedoms by EU citizens.[28] Measures which have the effect of causing workers to lose, as a consequence of the exercise of their freedom of movement for workers, social advantages guaranteed them by the legislation of a Member State can be characterised as obstacles to that freedom.[29] That applies also where national law, without regard to the nationality of the worker concerned, precludes or deters a national from leaving his country of origin in order to exercise his right to freedom of movement.[30]

55. In the present case, the three out of six years rule is applied to Miss Martens because her father's employment as a frontier worker in the *Netherlands* ended. The facts described by the referring court do not suggest that he retained the status of worker in the Netherlands (for example, that he was seeking work there, or was otherwise available on the Netherlands employment market).[31] However, Mr Martens did not become economically inactive or unavailable for the employment market. Rather, he exercised his freedom of movement rights as a worker to take up full-time employment in *Belgium*, where he continues to reside and work.[32] He can thus rely on Article 45 TFEU to protect him against measures that put him at a disadvantage for having chosen to work in another Member State.

56. The application of the three out of six years rule in essence forces Mr Martens either not to exercise freedom of movement as a worker and merely to seek further employment in the Netherlands (so as to retain MNSF for his daughter) or to exercise that freedom but accept the financial loss of the study finance and the possible risk that no other alternative funding can be found.

27 — See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, C-212/06, EU:C:2008:178, paragraph 44 and case-law cited.

28 — See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 45 and case-law cited.

29 — See, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 46 and case-law cited.

30 — See, for example, judgment in *Terhoeve*, C-18/95, EU:C:1999:22, paragraphs 38 and 39 and case-law cited.

31 — Article 7(3) of Directive 2004/38 sets out the circumstances in which an EU citizen retains the status of worker or self-employed person for the purposes of Article 7(1), namely with regard to their being able to claim the right of residence on the territory of the host Member State for a period of longer than three months.

32 — Mr Martens is thus *not* in the same position as Mrs Esmoris Cerdeiro-Pinedo Amado. In the judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, C-33/99, EU:C:2001:176, the Court held that that lady could not rely on Article 7(2) of Regulation No 1612/68 in order to claim maintenance of a social advantage such as study finance because she has ceased to exercise an activity in the host Member State and returned to her Member State of origin (paragraphs 46 and 47). However, unlike Mr Martens, Mrs Esmoris Cerdeiro-Pinedo Amado did not exercise the freedom of movement for workers in moving (back to) to her Member State of origin.

57. Such a measure restricts the rights of Miss Martens' father under Article 45 TFEU. Unless objectively justified, it is prohibited under that provision. [33]

58. Should the Court disagree with that analysis, it is necessary to turn to the scope of the ruling in Case C-542/09 *Commission* v *Netherlands*, the standard of protection under Article 7(2) of Regulation No 1612/68 (and/or Article 12 of that regulation) and finally to examine the circumstances in which former worker status may continue to produce effects.

Scope of the Court's judgment in Case C-542/09 *Commission* v *Netherlands*

59. The starting point of the parties in the present case is the judgment of the Court in Case C-542/09. The findings in that infringement proceeding were made under Article 45 TFEU and Article 7(2) of Regulation No 1612/68 and concerned indirect discrimination on the basis of nationality against migrant workers and frontier workers as compared to national workers.

60. As I read the Court's judgment in that case, it did *not* also expressly cover the situation of a Netherlands national resident outside his home Member State but exercising his rights of free movement under EU law so as to work in the Netherlands (I shall refer to this category, for convenience, as 'Netherlands frontier workers').

61. The Court ruled in *Commission* v *Netherlands* that the Netherlands had failed to fulfil its obligations under Article 45 TFEU and Article 7(2) of Regulation No 1612/68 by requiring migrant workers and frontier workers and their dependent family members to comply with the three out of six years rule (set out in Article 2.14(2) of the Wsf 2000) in order to be eligible for funding for higher educational studies pursued outside the Netherlands. The Court confirmed that Article 7(2) guarantees that migrant workers residing in a host Member State and frontier workers employed in that Member State while residing in another Member State enjoy the same social and tax advantages as national workers. [34]

62. The Court held that a measure such as the three out of six years rule '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'. [35] The Court said that, for the purposes of establishing indirect discrimination, 'it is not necessary for [the measure] 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'. [36] The Court then identified the situations to be compared, for the purposes of access to portable funding, as being the situation of (i) on the one hand, migrant workers employed in the Netherlands but residing in another Member State and migrant workers employed and residing in the Netherlands but not satisfying the three out of six years rule and (ii) on the other hand, Netherlands workers employed and residing in the Netherlands. [37]

33 — An obstacle to the freedom of movement for workers can be accepted if it pursues a legitimate aim compatible with the Treaties and is justified by overriding reasons in the public interest. The measure must also be appropriate for achieving the objective in question and not go beyond what is necessary for that purpose. See, for example, judgment in *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 38 and case-law cited. However, no material in support of an objective justification under Article 45 TFEU for such an obstacle has been put before the Court in the present case.

34 — Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraphs 32 and 33 and case-law cited.

35 — Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 38 and case-law cited (emphasis added). See also, for example, judgment in *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 44.

36 — Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 38 and case-law cited. See also, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 45.

37 — Judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 44.

63. The Court did not consider separately the position of Netherlands frontier workers. Its focus, in identifying the two categories to be compared with each other, was discrimination on the basis of nationality.

64. A Netherlands frontier worker like Miss Martens' father is in essence treated differently from national workers because he has exercised rights of free movement and residence, *not* because of his nationality, which is the same as theirs. As a result, without further elaboration, it seems to me that he cannot rely on the finding of indirect discrimination in Case C-542/09.

65. It is therefore necessary to explore Article 7(2) of Regulation No 1612/68 in greater depth.

Equal treatment under Article 7(2) of Regulation No 1612/68

66. The rules set out in Article 7 (and those in Article 12) of Regulation No 1612/68 are further expressions of the freedom of movement for workers within the European Union guaranteed by Article 45 TFEU. [38] Pursuant to the fourth recital in the preamble to that regulation, that right must also be enjoyed without discrimination by frontier workers. Thus, Article 7(2) of Regulation No 1612/68 guarantees that migrant workers and frontier workers are to be treated equally with national workers. It protects against direct or indirect discrimination on the basis of nationality. [39]

67. For a worker to be able to claim the right to equal treatment to obtain a grant for funding of studies as a social advantage under Article 7(2), the worker needs to continue to support his family member. [40] That appears to be the case here. It is not necessary for the child to reside in the Member State where the worker resides and works (or the frontier worker works). [41]

68. In the present case, Mr Martens is treated less favourably because he has exercised free movement rights as a worker and *not* because of his Netherlands nationality.

69. In the text of Article 7(2), which reads '[h]e shall enjoy the same social and tax advantages as national workers', the pronoun refers to the worker described immediately before in Article 7(1) — that is, the worker who is a national of a Member State and employed in another Member State. Other provisions of Regulation No 1612/68, in particular those which form part of Title II on 'Employment and equality of treatment', also refer to a worker who is a national of a Member State and who is employed in the territory of another Member State.

70. However, the Court's case-law shows that the equal treatment standard in Article 7(2) of Regulation No 1612/68 is wider than the principle of non-discrimination based on nationality. [42]

38 — See, for example, the first and second recitals in the preamble to Regulation No 1612/68. As regards Article 7(2) of Regulation No 1612/68, see, for example, judgment in *Hendrix*, C-287/05, EU:C:2007:494, paragraph 53.

39 — See, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 37 and case-law cited.

40 — See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 48 and case-law cited.

41 — See, for example, judgment in *Meeusen*, C-337/97, EU:C:1999:284, paragraph 25.

42 — Advocate General Kokott has remarked that, despite the fact that (the text of) Article 7(2) of Regulation No 1612/68 seems to fall short of the guarantee provided by Article 45 TFEU, the Court applies Article 7(2) and Article 45 in parallel and interprets Article 7 in the same manner as Article 45: see Opinion in *Hendrix*, C-287/05, EU:C:2007:196, point 31.

71. Thus, in *Hartmann* the Court confirmed that the scope of the Treaty provisions on the freedom of movement for workers includes 'any national of a Member State, *irrespective of his place of residence and his nationality*, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence'.[43] Such a person also fell within the scope of Regulation No 1612/68.[44] Thus, Mr Hartmann, who resided in another Member State but worked in his Member State of nationality, was deemed to fall within the scope of the provisions of the Treaty on freedom of movement for workers and therefore also those of Regulation No 1612/68.[45] He could claim the status of migrant worker for the purposes of Regulation No 1612/68 and rely on Article 7 on the same basis as any other worker to whom that provision applies.[46] The Court compared the treatment of a person in his situation (a worker having exercised the freedom of movement) with the treatment of national workers (that is, national workers who had *not* exercised rights of free movement and residence).

72. In that context, the Court has also referred to the fourth recital in the preamble to Regulation No 1612/68 which states that the right of freedom of movement is to be enjoyed 'without discrimination by permanent, seasonal and frontier workers …'.[47] A worker can likewise invoke Article 7 of Regulation No 1612/68 against his Member State of nationality where he has resided and been employed in another Member State.[48]

73. It thus appears that the concept of 'the national worker' in Article 7(2) of Regulation No 1612/68 should be understood to mean the national worker who has *not* exercised rights of free movement and residence, and that the standard of protection under that provision is equal treatment irrespective of nationality so as to promote the exercise of freedoms of movement and residence under EU law.

74. It follows that both Article 45 TFEU and Article 7(2) of Regulation No 1612/68 preclude a Member State from putting at a disadvantage workers (be they permanent, seasonal or frontier workers)[49] who have exercised rights of free movement and residence. Despite the literal text of Article 7(2) of Regulation No 1612/68, that provision and Article 45 TFEU thus preclude the Netherlands from denying study finance to the dependent child of a frontier worker holding Netherlands nationality on the basis of the three out of six years rule as long as he is a frontier worker. That is because the three out of six years rule puts a frontier worker at a disadvantage as compared to a national worker in similar circumstances.

43 — See judgment in *Hartmann*, C-212/05, EU:C:2007:437, paragraph 17 (emphasis added) where the Court summarised its position in judgment in *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraphs 31 and 32. There, Mr Hartmann had merely transferred his residence to another Member State. In the present case, Mr Martens first moved both his residence and employment to another Member State and then moved again by going to the Netherlands to carry on a part-time occupation there whilst remaining resident in Belgium. See also, for example, judgment in *Hendrix*, EU:C:2007:494, paragraph 46: Mr Hendrix, a Netherlands national, worked and resided in the Netherlands; he then changed his residence to another Member State and then changed employment in the Netherlands. See likewise, for example, judgment in *Gouvernement de la Communauté française and Gouvernement wallon*, EU:C:2008:178, paragraph 34 and case-law cited; judgment in *Caves Krier Frères*, EU:C:2012:798, paragraph 25 and case-law cited; and judgment in *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 34 and case-law cited.

44 — Judgment in *Hartmann*, EU:C:2007:437, paragraph 19.

45 — Judgment in *Hartmann*, EU:C:2007:437, paragraph 19 and case-law cited.

46 — Judgment in *Hartmann*, EU:C:2007:437, paragraph 24 and case-law cited.

47 — Judgment in *Hartmann*, EU:C:2007:437, paragraph 24 and case-law cited; see also, for example, judgment in *Hendrix*, EU:C:2007:494, paragraph 47.

48 — See, for example, judgment in *Terhoeve*, EU:C:1999:22, paragraphs 28 and 29. In that case, however, the Court found that the measure at issue constituted an obstacle to freedom of movement for workers under (what is now) Article 45 TFEU, and therefore it was unnecessary to consider whether there was also indirect discrimination on grounds of nationality under (what is now) Articles 18 and 45 TFEU and under Article 7(2) of Regulation No 1612/68 (see paragraph 41).

49 — See the fourth recital in the preamble to Regulation No 1612/68.

Loss of worker status

75. I have already explained why I consider that the Court is *not* here required to decide whether (and, if so, to what extent) a person may continue to rely on (certain) provisions regarding the freedom of movement for workers after losing the status of migrant worker or frontier worker.[50] For the sake of completeness, I shall nevertheless address that question in the abstract.

76. As I see it, the question arises only where a person no longer exercises that freedom by working, genuinely seeking to work,[51] or otherwise remaining available for the job market in the host Member State.[52] That would be the case, for example, if a person in the situation of Mr Martens had ended his working life and retired (in Belgium or elsewhere).

77. In principle, such a person can no longer derive rights from his former worker status.[53] The loss of that status means the loss of the protection afforded by it under EU law. However, a mere change in employment may not end that protection.[54]

78. Where such an EU citizen continues to reside in the territory of the host Member State he can, in any event, rely on the principle of equal treatment in Article 24(1) of Directive 2004/38 which protects him by virtue of his EU citizenship.[55] In that context, the very fact that he was previously a worker and/or retained that status may be the basis for the right to residence.[56] In addition, EU legislation may itself provide that rights result from or are attached to former worker status.[57]

79. The Court has also accepted that the status of former migrant or frontier worker may produce effects after the employment relationship itself has ended.[58] That (greater) protection may still apply notwithstanding that such a person may be protected by EU citizenship rights once he is no longer economically active. Freedom of movement for workers offers greater protection. Specifically, as regards study finance, the Court has held that, for as long as the parent enjoys the status of a migrant worker or frontier worker, a Member State cannot apply a residence condition and rely on the objective of avoiding an unreasonable financial burden as an overriding reason relating to the public interest which is capable of justifying unequal treatment of national workers and frontier and migrant workers.[59] Thus, it cannot adopt a measure such as a residence condition in order to limit the financial solidarity that is to be shown to migrant workers and frontier workers as compared to national workers. As a result, unlike the justification of such a measure on the basis of the *same objective* in the context of EU citizenship rights, questions regarding the proportionality of such a condition do not arise.[60]

80. In what circumstances should a former frontier worker or former migrant worker continue to be protected by rights of free movement for workers (that is, to enjoy protection other than that explicitly conferred by legislation)?

50 — See points 52 to 57 above.

51 — The Court has repeatedly said that a person who is genuinely seeking work is a worker: see, for example, judgment in *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 32 and case-law cited. Thus, the situation of such a person is different from a frontier or migrant worker who has lost that status and who is *not* seeking work.

52 — See, for example, judgment in *Saint Prix*, EU:C:2014:2007, paragraph 41 and case-law cited.

53 — Thus (for example), a worker residing in his Member State of nationality who, after retirement, changes residence to another Member State without any intention of working in that other State cannot rely on the right of freedom of movement for workers: see judgment in *van Delft and Others* C-345/09, EU:C:2010:610, paragraph 90 and case-law cited.

54 — For an illustration, see points 53 to 58 above.

55 — See Article 24(1) of Directive 2004/38.

56 — See, for example, Articles 7(3), 17 and 24(2) of Directive 2004/38.

57 — See, for example, Article 12 of Regulation No 1612/68.

58 — See, for example, judgment in *Saint Prix*, EU:C:2014:2007, paragraph 35 and case-law cited, and judgment in *Caves Krier Frères*, EU:C:2012:798, paragraph 26 and case-law cited.

59 — See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 69.

60 — See also point 102 below.

81. It is clear why the effects of certain social advantages must continue irrespective of the place of residence. That is, most obviously, so where the advantage is intrinsically linked with the termination of an employment relationship or the working life of a worker.[61] Thus, compensation upon termination of an employment contract is by definition available only to a person who was previously, but is no longer, employed. In those circumstances, it must be possible to rely on the former worker status. Secondary legislation confirms that position.[62]

82. Where the event or situation with respect to which a social advantage is granted occurs after the end of the employment relationship and is *not* connected with that fact or with the worker's former occupation, it is in principle not possible to continue to rely on, for example, Article 7(2) of Regulation No 1612/68 or Article 45 TFEU.[63] Thus, where the former worker himself subsequently studies in the host Member State, the Court has held that he retains his worker status and therefore can, in seeking access to maintenance and training grants, rely on Article 7(2) of Regulation No 1612/68 provided that there is a connection between the previous occupational activity and the studies pursued.[64] By contrast, where the previous employment relationship is merely ancillary to the studies to be financed by the grant, he does not retain his worker status and such reliance is not possible.[65] Exceptionally, where a worker has become involuntarily unemployed and is obliged by the conditions on the labour market to undertake vocational retraining in a different field of activity, no connection with former employment is required.[66]

83. What if the event or situation triggering the need to access the social advantage occurred prior to the loss of the frontier worker or migrant worker status, but then continues after the loss of that status?

84. That will depend again, I think, on the scope of the advantage and the reason why it is granted.

85. In this context, several parties have relied on the judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*. I shall therefore examine that case in some detail.

86. The Court there found that no special circumstance justified departing from the principle that loss of frontier worker status or migrant worker status means loss of protection associated with that status in circumstances where a former worker (who was no longer resident in the host Member State) tried to rely on the freedom of movement for workers in order to obtain from the latter study finance under the same conditions as those applied by that State to its own nationals.[67]

87. On its facts, that case concerned a former worker who had enjoyed a child allowance, stopped working, obtained an invalidity allowance and then, as a result of a legislative reform whereby the right to receive a child allowance was transformed into an entitlement to receive a study grant,[68] lost that allowance because her daughter finished her secondary education and therefore no longer satisfied the condition of the transitional arrangement that children must continue to follow the same type of education as they were following on 1 October 1995.

61 — See, for example, judgment in *Leclere and Deaconescu*, C-43/99, EU:C:2001:303, paragraphs 56 and 57 and case-law cited.

62 — See, for example, Article 7(1) of Regulation No 1612/68 which provides for an equal treatment standard as regards '… any conditions of employment and work, in particular as regards remuneration, dismissal, and should [the worker who is a national of a Member State] become unemployed, reinstatement and re-employment'.

63 — See, for example, judgment in *Leclere and Deaconescu*, EU:C:2001:303, paragraphs 58 and 59 and case-law cited.

64 — See, for example, judgment in *Lair*, 39/86, EU:C:1988:322, paragraph 39.

65 — See, for example, judgment in *Brown*, 197/86, EU:C:1988:323, paragraphs 27 and 28.

66 — See, for example, judgment in *Raulin*, C-357/89, EU:C:1992:87, paragraph 21. That principle is also reflected in Article 7(3) of Directive 2004/38.

67 — Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 51.

68 — What was at issue in that case was also MNSF, albeit at an earlier stage of its evolution.

88. The Court said that it could not be claimed that conditions for accessing study finance are capable of impeding rights under Article 45 TFEU in circumstances where a migrant worker has ceased to work and returned to his Member State of origin where his children also live.[69] In reaching that conclusion, the Court confirmed that (i) Article 7(2) of Regulation No 1612/68 should not be read as meaning that former workers can rely on it in order to seek access without discrimination to the social benefits granted by the host Member States;[70] but that (ii) effects could continue where the advantage is intrinsically linked with the termination of an employment relationship or working life of a worker[71] and where legislation expressly provides for them.[72]

89. Shortly thereafter, in *Leclere and Deaconescu*, the Court accepted that, where a worker has ceased to pursue his occupation, 'he continues to be entitled to *certain* advantages acquired by virtue of his employment relationship'.[73] In that case, Advocate General Jacobs took the view that what matters is whether a former national worker (who did not exercise rights of free movement) is granted the advantage because of his status as a former worker *irrespective* of his residence. If the answer is 'no', then the former migrant worker or frontier worker can no longer rely on the protection afforded to that status.[74]

90. I conclude — and I emphasise again that I am dealing with this issue in the abstract — that a former worker is not entitled to continue to enjoy all advantages acquired during his employment relationship. The concept of 'social advantage' in Article 7(2) of Regulation No 1612/68 is very wide and covers benefits that may or may not be linked to the contract of employment and which are 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.[75] A former worker can continue to invoke free movement rights for workers in respect of those social advantages that are linked to his former employment relationship. However, portable study finance such as MNSF is generally not given to workers (or their dependent children) because of their employment relationship. It is a social advantage which the Netherlands has made available to all EU citizens who wish to study outside the Netherlands and who are sufficiently integrated in the Netherlands. EU law therefore precludes the Netherlands from denying such an advantage to EU citizens who have exercised freedom of movement for workers (because their objective status as workers is evidence of integration from the outset).

91. This also means, as Advocate General Jacobs pointed out,[76] that where a Member State continues to provide a social advantage to former workers despite the end of their employment relationship and irrespective of residence, it cannot discriminate against former workers who are nationals of other Member States or who have exercised the freedom of movement for workers. In that context, a former frontier worker or former migrant worker may continue to rely on the protection guaranteed by Article 7(2) of Regulation No 1612/68 with respect to advantages acquired before the end of his frontier worker status or migrant worker status.

69 — Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 43.

70 — Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraphs 46 and 47.

71 — Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 47. See also point 81 above.

72 — Judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, EU:C:2001:176, paragraph 49.

73 — See judgment in *Leclere and Deaconescu*, EU:C:2001:303, paragraph 58 (emphasis added). I do not consider, however, that the mere fact that a person continues to receive the advantage necessarily means that he must be regarded as still having the status of worker within the meaning of Regulation No 1612/68 (see, in that regard, paragraph 59 of the judgment).

74 — Opinion in *Leclere and Deaconescu*, C-43/99, EU:C:2001:97, point 98.

75 — See, for example, judgment in *Even and ONPTS*, 207/78, EU:C:1979:144, paragraph 22.

76 — Opinion in *Leclere and Deaconescu*, EU:C:2001:97, point 98.

92. Thus, it is for a Member State to decide whether (national) former workers continue to enjoy a social advantage such as study finance after the end of the employment relationship because of their former employment. If that is the case, a Member State cannot treat less favourably those workers who are nationals of another Member State and/or have exercised their freedom of movement for workers.

Article 12 of Regulation No 1612/68

93. Despite the fact that the referring court only seeks guidance on Article 45 TFEU and Article 7 of Regulation No 1612/68, all the parties have also discussed Article 12 of that regulation in the context of their answer to the first question (including whether it can apply at all to the child of a frontier worker). For the sake of completeness, I shall conclude this part of my Opinion by dealing with that provision.

94. Article 12 gives a separate, distinct entitlement to children of workers who work or have worked in the territory of another Member State.[77] It guarantees them access to, inter alia, the general educational courses in the Member State where their parent is or was employed (thus, is or was a migrant worker) under the same conditions as nationals of that State, provided that they are residing in the territory of the host Member State.[78] Thus, children in that situation can undertake and, where appropriate, complete their education in the host Member State.[79] They may also rely on Article 12 where the host Member State offers its nationals the opportunity to obtain a grant in respect of education or training provided abroad.[80] To rely on Article 12, a claimant does not have to be the dependent child of a migrant worker, to show that his parents both have a right of residence in the host Member State or to prove that his parents continue to be migrant workers.[81] Nor do his parents have to remain married or both be EU citizens.[82] What matters is that the child lived with his parents (or with either parent) in the host Member State while at least one of the parents resided there as a worker.[83] In that manner, Article 12 contributes to the overall aim of Regulation No 1612/68 to bring about the best possible conditions for the integration of the migrant worker's family in the society of the host Member State.[84] A child of a migrant worker must have the possibility of going to school and continuing his or her education in the host Member State in order to be able to complete that education successfully.[85] For that reason, the right of access to education and the associated right of residence continue until the child has completed his or her education.[86]

95. However, by definition a frontier worker does *not* reside *and* work in the host Member State.

77 — See point 36 of my Opinion in *Commission* v *Netherlands*, C-542/09, EU:C:2012:79; see also paragraph 49 of the judgment in that case, EU:C:2012:346.

78 — See, for example, judgment in *Teixeira*, C-480/08, EU:C:2010:83, paragraphs 44 and 45.

79 — See, for example, judgment in *Baumbast and R*, C-413/99, EU:C:2002:493, paragraph 69.

80 — See, for example, judgment in *di Leo*, C-308/89, EU:C:1990:400, paragraphs 12 and 15.

81 — See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 49 and case-law cited.

82 — See also, for example, judgment in *Ibrahim*, C-310/08, EU:C:2010:80, paragraph 29 and case-law cited.

83 — See judgment in *Commission* v *Netherlands*, EU:C:2012:346, paragraph 50 and case-law cited. See also, for example, judgment in *Ibrahim*, EU:C:2010:80, paragraph 29 and case-law cited; judgment in *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538, paragraph 26.

84 — See, for example, judgment in *Hadj Ahmed*, C-45/12, EU:C:2013:390, paragraphs 44 and 45 and case-law cited.

85 — See, for example, judgment in *Hadj Ahmed*, EU:C:2013:390, paragraph 45 and case-law cited.

86 — See, for example, judgment in *Alarape and Tijani*, C-529/11, EU:C:2013:290, paragraph 24 and case-law cited.

96. Thus, the literal text of Article 12 indicates that it does not apply to children of frontier workers. However, such a reading appears difficult to reconcile with the principle that migrant and frontier workers are to be treated in the same manner, which follows from the fourth recital in the preamble to Regulation No 1612/68 as well as well-established case-law on the freedom of movement for workers. [87]

97. In any event, even if the (frontier worker) parent does not have to reside in the host Member State in order to trigger Article 12 of Regulation No 1612/68 (a point that I expressly leave open), the child does — it seems to me — have to have shown some attachment to or integration in the host Member State through residence or studies there. I do not here express a concluded view on precisely how this boundary should be delineated. In the present case, Miss Martens has not resided in the Netherlands while her father was a frontier worker there and she applied for funding to study at an educational institution outside the Netherlands.

98. I conclude that Article 12 of Regulation No 1612/68 is not of relevance to the present case.

Question 2: rights of free movement and residence of EU citizens

99. I do not think that it is necessary for the Court to answer the second question regarding EU citizenship. Articles 20 and 21(1) TFEU find specific expression in Article 45 TFEU as regards the freedom of movement for workers; [88] and Mr Martens may continue to rely on the latter provision. Should the Court disagree and decide to answer the second question, I consider that existing case-law provides the necessary elements for offering guidance to the referring court.

100. The judgment in Case C-542/09 did not examine the application of the three out of six years rule to dependent children of Netherlands nationals who are neither economically active in the Netherlands nor resident there. However, the Court has considered similar measures on subsequent occasions within the context of EU citizenship rights, particularly in references involving German nationals living outside Germany who have applied for study finance in Germany. [89]

101. In essence, the Court has held that Member States which make available education or training grants for studies in another Member State must ensure that the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States laid down in Article 21 TFEU. [90] A condition requiring uninterrupted residence during a defined period has been held to be such a restriction: it is likely to dissuade nationals from exercising their right to freedom of movement and residence in another Member State, because if they do so they are likely to lose the right to the education or training grant. [91]

102. In examining whether such a restriction can be justified on the basis of objective considerations of public interest (irrespective of nationality) and the proportionality of the measure at issue in relation to the legitimate objective it pursues, the Court has explained that it is legitimate for Member States to make financial support for the entire course of studies abroad dependent on the condition that

87 — See, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 37 and case-law cited. I do not explore further here on whether or not the Court's analysis of the possible justification of the discriminatory treatment in that case undermines the principle of equal treatment of migrant workers and frontier workers.

88 — See, for example, judgment in *S*, EU:C:2014:136, paragraph 45 and case-law cited.

89 — See, for example, judgment in *Thiele Meneses*, C-220/12, EU:C:2013:683; judgment in *Elrick*, EU:C:2013:684; and judgment in *Prinz*, EU:C:2013:524.

90 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 25; judgment in *Elrick*, EU:C:2013:684, paragraph 25; and judgment in *Prinz*, EU:C:2013:524, paragraph 30 and case-law cited.

91 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraphs 27 and 28; and judgment in *Prinz*, EU:C:2013:524, paragraphs 31 and 32.

students demonstrate a sufficient level of integration in the Member State providing the funding. [92] That objective has been described by the Court as a means to another end, namely avoiding placing an unreasonable burden on the financing Member State which could have consequences for the overall level of assistance which may be granted by that State. [93] However, a sole condition of uninterrupted residence during a defined period has been held to be too general and exclusive and to go beyond what is necessary to achieve the objective pursued; it was therefore not regarded as proportionate. [94] Other factors could also demonstrate the existence of a sufficient degree of connection to the financing Member State, such as nationality, education, family, employment, language skills or the existence of other social and economic factors. [95]

103. Thus, even where an EU citizen is not (or is no longer) economically active, employment and family can demonstrate a connection to a Member State from which funding is requested. That covers in particular the (past) employment of the student concerned but potentially also the current or past employment of the family members on whom the student depends (typically parents). [96] Since the degree of connection is merely a condition used to limit the group of beneficiaries in order to avoid the risk of creating an unreasonable financial burden on the financing Member State, I consider that the fact that the parent has contributed in the past to the public purse cannot be ignored.

104. In certain circumstances, it is possible that the place and type of study can also be instructive in assessing whether an EU citizen shows a sufficient degree of connection with the financing Member State; but I regard that as an additional, rather than a mandatory, element.

105. In the present case, Miss Martens is, through her nationality, a citizen of the Union who exercised her freedom to move and reside within the territory of the Member States when she moved as a young child with her parents from the Netherlands to Belgium. She can accordingly rely on Articles 20 and 21 TFEU, even against her Member State of nationality (the Netherlands).

106. The mere fact that some considerable time has elapsed since she exercised those free movement rights cannot in itself affect the question whether rights can be derived from Articles 20 and 21 TFEU in circumstances where there has been a continuing exercise of the right to reside in another Member State. [97]

107. Whilst it might be true that MNSF did not yet exist at the time when Miss Martens and her family moved to Belgium (and for that reason did not restrict the exercise of their free movement rights at that time), the application of the three out of six years rule none the less puts her at a disadvantage because of her continuing residence outside the Netherlands.

92 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 35; judgment in *Prinz*, EU:C:2013:524, paragraph 36 and case-law cited. This justification is not available where the claim to funding is made through Article 45 TFEU and/or Article 7(2) of Regulation No 1612/68: see point 79 above and case-law cited there.

93 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 35; judgment in *Prinz*, EU:C:2013:524, paragraph 36 and case-law cited. See also, on the description of that objective, points 65 to 72 of my Opinion in *Prinz*, C-523/11 and C-585/11, EU:C:2013:90.

94 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 38; judgment in *Prinz*, EU:C:2013:524, paragraph 40.

95 — See, for example, judgment in *Thiele Meneses*, EU:C:2013:683, paragraph 38; judgment in *Prinz*, EU:C:2013:524, paragraph 38.

96 — See also, for example, judgment in *Giersch and Others*, EU:C:2013:411, paragraph 78, and judgment in *Stewart*, C-503/09, EU:C:2011:500, paragraph 100. As I have already observed in my Opinion in *Prinz*, EU:C:2013:90, footnote 30, *Stewart* involved a different type of social advantage. None the less, with regard to the legitimate objective of ensuring that there is a genuine link between a claimant to a benefit and the competent Member State, the Court accepted that family circumstances (including where a claimant's parents had worked and received incapacity benefits and retirement pensions) could show elements capable of demonstrating the existence of such a genuine link.

97 — Thus, for example, Ms Nerkowska, a Polish national, left Poland in 1985 (after having studied and worked there for more than 20 years) in order to settle permanently in Germany. The Court accepted in Case C-499/06 that she could derive rights from her EU citizenship as regards a benefit for which she applied to the Polish authorities in 2000: see judgment in *Nerkowska*, C-499/06, EU:C:2008:300, paragraphs 11 and 12 (on the facts) and paragraph 47.

108. The Netherlands must give the same treatment in law irrespective of applicants' nationality in deciding who obtains the funding which it makes available for studies, whether that be in other Member States or outside the European Union. And, in making that decision, it must not put at a disadvantage applicants who have exercised their rights to move to and reside in another Member State. In *D'Hoop*, the Court explained unequivocally that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'.[98] In such circumstances, the Member State would in fact penalise its national for having exercised his right to freedom of movement.[99]

109. The application of the three out of six years rule to Miss Martens has exactly that effect. Miss Martens cannot satisfy that rule because, having moved to Belgium from the Netherlands as a young child, she continued to reside in Belgium at least up to the point when she enrolled at the University of the Netherlands Antilles.

110. In order to justify the three out of six years rule, the Netherlands relies on the Court's recognition that Member States may grant that assistance only to students who have demonstrated a certain degree of integration into the society of that State.[100]

111. Whilst the Court has indeed recognised that objective, it has also made clear that the use of only residence as a criterion is too exclusive and general. In my opinion, it makes no difference in that regard that, unlike the German residence condition at issue in cases such as *Prinz* and *Thiele Meneses*, the Wsf 2000 does not require a student to have resided in the Netherlands for an uninterrupted period of three years immediately prior to starting education abroad. That distinction does not alter the absolute and exclusive character of the residence condition.

112. For the sake of completeness I note that the three out of six years rule is not an absolute rule (because it is possible for the Minister to override it by applying the hardship clause).[101] However, the Court has little or no information as to the scope and operation of that clause. In any event, the fact that ministerial discretion can be exercised so as not to apply an unjustified restriction of EU citizenship rights in certain circumstances does not alter the analysis. What is precluded by EU law is precluded. (The same applies in respect of the exception for (the children of) frontier workers and persons with Netherlands nationality who live in a border region and want to study at an educational institution there.)

Conclusion

113. In the light of all the above considerations, I am of the opinion that the Court should answer the questions raised by the Centrale Raad van Beroep to the following effect:

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 preclude the Netherlands from denying study finance to the dependent child of a frontier worker holding Netherlands nationality on the basis of the three out of six years rule as long as he is a frontier worker. Where that frontier worker ends his employment in the Netherlands and exercises his freedom of movement for workers in order to take up full-time employment in another Member State, and irrespective of his place of residence, Article 45 TFEU precludes the Netherlands from applying measures which, unless they can be

98 — Judgment in *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 30.

99 — Judgment in *D'Hoop*, EU:C:2002:432, paragraph 31 and case-law cited. See also, for example, judgment in *Morgan and Bucher*, EU:C:2007:626, paragraph 26 and case-law cited; judgment in *Prinz*, EU:C:2013:524, paragraph 28.

100 — See point 102 above.

101 — See point 20 above.

objectively justified, have the effect of discouraging such a worker from exercising his rights under Article 45 TFEU and causing him to lose, as a consequence of the exercise of his free movement rights, social advantages guaranteed them by Netherlands legislation, such as portable study finance for his dependent child.