

OPINION OF ADVOCATE GENERAL TESAURO

delivered on 9 February 1995 *

1. The question submitted to the Court by the Bundesverwaltungsgericht for a preliminary ruling concerns the interpretation of Article 12 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (hereinafter 'the Regulation').¹ The national court wishes to ascertain in particular the scope of that article's application *ratione personae* in order to establish whether the concept mentioned therein of the child of a migrant worker should be understood as limited exclusively to a child who is under 21 years of age and/or dependent on a parent.

Article 12 of the Regulation provides that the children of a national of a Member State who is or has been employed in the territory of another Member State are to 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. Furthermore, pursuant to the second paragraph of Article 12, Member States are required to encourage all efforts to enable such children to attend those courses under the best possible conditions.

2. German legislation on education allowances, so far as is relevant for the purposes of this case, consists primarily of the Bundesausbildungsförderungsgesetz (Federal Law on Educational Support; hereinafter 'the BAföG'). The second subparagraph of Paragraph 5 of the BAföG provides in general terms that an education allowance may be granted to students resident on the national territory for attending courses abroad provided that, having regard to the level already attained by the student, such courses are beneficial, that they fall within the candidate's normal period of instruction and that the candidate possesses the necessary linguistic skills. Among those entitled to an allowance, the first subparagraph of Paragraph 8 of the BAföG mentions not only German citizens, but also those students who, as the children of migrant workers, benefit from the free movement of persons in accordance with the Aufenthaltsgesetz/EWG (German Law on the right of residence for Community nationals). Lastly, Paragraph 1(2) of that Law states that, for the purposes of its provisions, the children (of a migrant worker) are to be regarded as members of the family if they have not yet reached 21 years of age or if they are still dependent on the migrant worker or his spouse.

3. Mr Gaal is a Belgian national born in 1967 who, since 1969, has been living in Germany where he completed his secondary education and enrolled at university to study biology. Since 1987, following the death of

* Original language: Italian.

1 — OJ, English Special Edition 1968 (II), p. 475.

his father, he has been in receipt of an orphan's allowance, which constitutes his only source of financial support.

In 1989 Mr Gaal applied to the competent authority (the Landesamt für Ausbildungsförderung; hereinafter 'the Landesamt') for an allowance in order to undertake, in connection with his course, an eight months' period of study at a university in the United Kingdom. The Landesamt rejected the application on the ground that, since the candidate had already reached 21 years of age and was not dependent on his parents, he fell outside the category of those who are entitled to the allowance in accordance with the aforesaid German legislation.

4. In the ensuing proceedings, initiated by Mr Gaal against the rejection of his application, the German court hearing the appeal on a point of law referred to the Court of Justice for a preliminary ruling the above question, by which in effect it seeks to ascertain whether Article 12 of the Regulation must be interpreted in such a way as to render the twofold limitation laid down by the German legislation inoperative, thereby requiring the Landesamt to grant Mr Gaal the allowance requested.

5. At the commencement of the hearing, the German Government questioned the composition of the Chamber hearing the case. At the Court's request, that point was subsequently made in writing. To be precise, the

German Government considers that the second sentence of the second paragraph of Article 165 of the Treaty has been infringed in so far as insufficient information has been made available regarding the criteria for assignment to the Chamber hearing the case of five out of the six judges listed in the *Official Journal*² at the beginning of the judicial year as belonging to the Chamber.

Although the German Government's plea has had the effect of delaying the proceedings, it is manifestly unfounded. The Chamber hearing the present case is composed of five judges, precisely as envisaged by Article 165 of the Treaty. The designation of those five judges from among the six belonging to the Chamber clearly falls within the scope of the Court's autonomy in matters of internal organization.

6. Let us now turn to the substance. As a preliminary point it should be noted that, even though the Court has frequently had occasion to rule on the scope both *ratione materiae* and *ratione personae* of Article 12 of the Regulation,³ no interpretation of that article has been given with respect to the specific question whether there is an 'implied' limit to its application in the form

2 — OJ 1994 C 304, p. 1.

3 — Among the more recent judgments, see Case C-308/89 *Di Leo* [1990] ECR I-4185 and Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723. But see the earlier judgment in Case 9/74 *Casagrande* [1974] ECR 773.

of requirements regarding the age or status of those to whom it is addressed. By contrast with Articles 10 and 11 (laying down that the children are entitled to install themselves with their parents and to take up any activity as employed persons), Article 12 does not expressly set any such limit, which could thus be inferred only by way of interpretation.

Regulation reveals nothing to suggest that the concept of child should be limited by reference to the age or status of the person concerned, likewise an analysis of the rationale underlying that article precludes a different interpretation.

Our task is therefore to assess whether and, if so, to what extent it is appropriate or even necessary to go beyond a literal interpretation of Article 12 to the point of asserting that the application of the rule contained therein is limited to cases in which the beneficiaries are under 21 years old or are still dependent on their parents. That would be the result of a systematic interpretation of the Regulation — or rather of the last three articles of the first part (Articles 10, 11 and 12) — requiring those three provisions to be aligned with one another as regards their content.

In the first place, if the legislature had wished to make the concept of child for the purposes of Article 12 subject to the two limiting conditions in dispute, it would have added an express provision to that effect, of the kind contained in Articles 10 and 11 of the Regulation. The argument that the concept of child in Article 10 should automatically be extended to the other relevant articles of the Regulation is equally untenable, as demonstrated by the next article — Article 11 — which, in indicating which persons are to enjoy the benefits provided for therein, expressly specifies children who are under the age of 21 or still dependent. The fact is that not one article and still less the preamble contains a definition of child which must be applied to each of the provisions which follow.

If Article 12 of the Regulation were interpreted in that way, as the Landesamt and the German Government have suggested, it would not preclude the relevant provisions of the BAföG from being applied. If, on the other hand, the Court were to consider it necessary to accord Article 12 a different interpretation, the German legislation would be incompatible with that article and would have to be disapplied.

7. On that point, let me say at once that just as, in my view, the text of Article 12 of the

8. As regards the rationale underlying the article in question, the purpose of which is to ensure the fullest possible integration of the migrant worker's family into the society of the host country, it is worth briefly considering the Court's most important rulings on the subject, in order to observe the wide

interpretation which that provision has hitherto been given, in relation also to the general aims pursued by the Regulation.

Since its earliest judgments, the Court has taken the view that Article 12 cannot be interpreted independently of the objectives set out by the Regulation and has emphasized the importance of eliminating all obstacles to the mobility of workers, particularly as regards the conditions for the family's integration into the society of the host country.⁴

9. Starting from that premiss, the Court has confirmed in clear and unconditional terms the principle of equal treatment in matters of education as between the children of migrant workers and the nationals of the host State. The Court has also made it clear that the principle refers 'not only to rules relating to admission, but also to general measures intended to facilitate educational attendance',⁵ and to all the benefits provided by the laws of that State, with a view to the rehabilitation of the handicapped, for example.⁶

In its more recent judgments, the Court has further explored that aspect, confirming that the equal treatment guaranteed by Article 12 extends to all forms of education, whether vocational or general, including university courses and advanced vocational training,⁷ and that the status of child within the meaning of Article 12 also entails the right to obtain such study assistance from the host State as it provides for its own citizens.⁸ Again, on the subject of the provision's scope *ratione materiae*, the judgment in *Di Leo* made it clear that, notwithstanding the residence requirement, the provision also covers education allowances granted in respect of courses of instruction which are offered not just in the host State, but also abroad.⁹

10. On the question of the article's application *ratione personae*, the Court made it clear at the outset that the children of a deceased migrant worker are also entitled to rely on the principle of equal treatment.¹⁰ Furthermore, while affirming that it is indispensable in order to achieve the integration pursued by the Regulation for the child of a Community worker to be able to undertake and successfully complete studies at every level in the host country, the Court has laid down that even a child who has returned to his State of origin with his family does not lose

⁴ — See Case 76/72 *Michel S.* [1973] ECR 457, paragraph 13, Case 9/74, cited above, paragraph 3, and Case 68/74 *Alaimo* [1975] ECR 109, paragraph 4, which repeat almost word for word the fifth recital in the preamble to the Regulation.

⁵ — See Case 9/74, cited above, paragraph 9.

⁶ — See Case 76/72, cited above, paragraph 14.

⁷ — See Joined Cases 389/87 and 390/87, cited above, paragraphs 29 and 30.

⁸ — *Ibid.*, paragraphs 34 and 35.

⁹ — See Case C-308/89, cited above, paragraph 15.

¹⁰ — See Case 42/87 *Commission v Belgium* [1988] ECR 5445, paragraph 10. However, the Court had already stated that Article 12 cannot confer rights on a worker's child who is born after the worker no longer works and resides in the host State, since in such a case the child has never possessed the status of a member of the worker's family (see Case 197/86 *Brown* [1988] ECR 3205, paragraphs 29 and 30).

entitlement to benefits under Article 12 and consequently has the right to such benefits upon returning to the host State in order to continue or complete his studies.¹¹

In the first place, Article 12 expressly refers not only to general educational courses, but also to apprenticeship and vocational training courses. Those courses are usually — if not mostly — attended by young people who have already completed their compulsory school education, sometimes even by students who have finished a course of study at university. It would seem to me somewhat peculiar if benefits relating to attendance of such courses were limited to persons under 21 years of age.¹³

11. That rapid survey of the relevant case-law confirms that a restrictive interpretation of Article 12, seeking to make its application conditional upon further requirements which are not expressly laid down, would not be consistent with the aims of the measure itself, as identified and explained by the Court on several occasions. What is more, an interpretation of that nature — which would result in an unjustifiable difference of treatment for children of migrant workers as compared with children of nationals of the host State — seems to me clearly at odds not only with the spirit of the measure but also with the fundamental principles of Community law in this field.¹²

13. I would also point out — and it is a fact which seems to me to be significant — that in *Echternach and Moritz* the Court gave a preliminary ruling on the interpretation of Article 12 affirming its applicability in the circumstances of that case which concerned a student who, at the material time, was already 24 years old.

12. That conclusion would appear moreover to be substantiated by a number of further considerations.

Lastly, I should like to point out that in the same judgment, while examining the Netherlands legislation providing for grants for Netherlands students (to which the Court itself established that the children of migrant workers were entitled), the Court found that the financing in question was intended to cover widely differing costs, possibly including the maintenance costs of the student's

11 — See Joined Cases 389/87 and 390/87, cited above, paragraphs 21, 22 and 23.

12 — I am of course referring to Article 7 of the Treaty (now Article 6) on the basis of which the Court — in the absence of a specific provision (which exists, however, in the present case) — confirmed the unacceptability of the special enrolment fee required from foreign students by Belgian educational establishments (see Case 152/82 *Forcheri* [1983] ECR 2323, Case 293/83 *Gravier* [1985] ECR 593 and Case 24/86 *Blaziot* [1988] ECR 379).

13 — See, to the same effect, the Opinion of Advocate General Sir Gordon Slynn in Case 235/87 *Matteucci* [1988] ECR 5589, particularly pp. 5601 and 5602.

dependants.¹⁴ While the possibility cannot be ruled out that even persons under 21 years of age may have dependants, it is equally true that the idea of a person being dependent on someone who is, in turn, dependent on another makes no sense at all. That confirms, if confirmation were needed, that the interpretation given by the Court to Article 12, extending the application of the Netherlands legislation to the children of migrant workers, did not seek to subject the application thereof to requirements regarding their age or status.

host State may in some cases be based not on Article 10 of the Regulation, but on other provisions of Community law such as, for example, Article 3(2) of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.¹⁵ In such cases, it is still necessary to institute adequate safeguards so that there is no unfair discrimination between nationals of the host State and the children of migrant workers who, even though they may reside in the host State by virtue of provisions other than those of the Regulation, are nevertheless — in their capacity as children — entitled to rely on Article 12 thereof.

14. The German Government has contended that, if a literal interpretation of Article 12 were to be accepted, it might lead to a paradoxical situation in which the child of a migrant worker, despite having no right under Article 10 to install himself with his parent (being over 21 years of age or independent), might nevertheless be able to obtain the benefits available under Article 12, or even claim the right to install himself in the host country on the basis of a right to benefit under Article 12.

15. One final observation concerns Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students,¹⁶ to which the German Government has referred in its observations in support of the view that migrant students have no right to maintenance grants from the host State. Although it is true that under Article 3 of that directive students possessing a right of residence have no right to maintenance grants, it does not follow that the directive in question precludes a right to similar allowances where, as in this case, that right derives from other provisions of Community law.

On that point, I feel it is enough to note that, as the Commission has correctly submitted, the child's right to reside within the

14 — See Joined Cases 389/87 and 390/87, cited above, paragraph 32.

15 — OJ, English Special Edition 1970 (II), p. 402.

16 — OJ 1990 L 180, p. 30.

16. In the light of the foregoing considerations I therefore propose that the Court give the following answer to the question submitted by the Bundesverwaltungsgericht:

‘Article 12 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as precluding the application of a provision of national law which makes the concept of child contained therein subject to age-limits or to possessing the status of a dependant.’