Press and Information

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Advocate General's Opinion in Joined Cases C-401/15, C-402/15 and C-403/15
Depesme and Kerrou, Kaufmann, Lefort v Ministre de l'Enseignement supérieur et de la Recherche

Advocate General Wathelet considers that a child in a reconstituted family may be regarded as the child of the stepparent for the purposes of a cross-frontier social advantage

In this field the parent-child relationship is defined not in legal but in economic terms, in that the child of a stepparent with the status of migrant worker can claim a social advantage where his stepparent in fact contributes to his maintenance

Luxembourg law provides that children of frontier workers employed or pursuing an activity in Luxembourg may apply for financial aid for higher education ('study grant') on condition in particular that the frontier worker has worked in Luxembourg for a continuous period of five years at the time when the application is made.[1]

Ms Noémie Depesme, Mr Adrien Kaufmann and Mr Maxine Lefort each live in a reconstituted family unit consisting of their biological mother and their stepfather[2] (the biological father being separated from the mother or deceased). Each of them applied for a study grant in Luxembourg on the basis that the stepfather had worked there continuously for more than five years (none of the mothers, on the other hand, work in Luxembourg). The Luxembourg authorities refused the applications, on the ground that Ms Depesme, Mr Kaufmann and Mr Lefort were not legally the 'children' of a frontier worker but merely 'stepchildren'.

The three students challenged the decisions of the Luxembourg authorities, and the Cour administrative (Higher Administrative Court) of Luxembourg, which is hearing the cases, asks the Court of Justice essentially whether, in connection with a social advantage, the concept of 'child' must also include stepchildren. In other words, it must be determined whether the parent-child relationship may be considered not from a legal but from an economic point of view.

In today's Opinion, Advocate General Melchior Wathelet starts by recalling that, in accordance with an EU regulation,[3] a worker from one Member State must, in any other Member State in which he works, enjoy the same social and tax advantages as national workers. Furthermore, for the

[1] Whether or not that condition of a minimum continuous period of work of five years, introduced following the Court's judgment of 20 June 2013 in the Giersch case (C-20/12, see press release 74/13), is discriminatory from the point of view of EU law is the subject of the Bragança Linares Verruga and Others case (C-238/15), in which Advocate General Wathelet gave his Opinion on 2 June last. In his view, that condition constitutes unjustified discrimination on grounds of nationality, in so far as it does not appear to be appropriate or necessary for meeting the legitimate objective pursued by Luxembourg (namely encouraging an increase in the proportion of residents who hold a higher education qualification). It may be noted that, since the disputes arose, the Luxembourg law has been amended on this point: following the Law of 24 July 2014, it suffices that the frontier worker has worked in Luxembourg for five years during the seven years preceding the application for the grant. According to Advocate General Wathelet, that amendment still does not, however, comply with the requirement of proportionality (Opinion in Case C-238/15, point 81, note 50).
[2] 'Stepfather' is to be understood here as the man, distinct from the biological father, whom the mother has subsequently married or with whom she has concluded a registered partnership equivalent to marriage. Similarly, the term 'stepchild' must be understood here as a child whose biological mother has married again or concluded a registered partnership equivalent to marriage, with a man other than the biological father.
[3] 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 EU (OJ 2011 L 141, p. 1).

purposes of an EU citizenship, children are defined by Directive 2004/38[4] as 'the direct descendants who are under the age of 21 or are dependants *and those of the spouse or partner*'. **The Advocate General sees no reason why this definition should not be applied in connection with social advantages under the regulation.** In his view, the family of an EU citizen must be the same as that of EU citizens seen in their capacity of 'workers'. He notes that the Court of Justice has previously held, in connection with children's schooling (which is also within the scope of that regulation), that both the descendants of the migrant worker and those of his spouse are entitled to be admitted to the school system of the host Member State.[5] In addition, the EU legislature has itself confirmed, in a recent directive[6] whose scope is identical to the regulation at issue, the uniformity of the concept of 'family members', in so far as the children of a frontier worker's spouse must be regarded as 'family members' of that worker. Finally, the Advocate General considers that that interpretation is consistent with the interpretation of 'family life' as protected by the Charter of Fundamental Rights of the EU and the European Convention on Human Rights, and the European Court of Human Rights has indeed itself progressively departed from the criterion of 'parent-child relationship' and recognised the possibility of 'de facto family ties'.[7]

As an illustration, the Advocate General takes the example of a reconstituted family with three children, the first of whom is the child of the mother, the second the child of the mother's spouse, and the third the child of the mother and her spouse. In that case, on the assumption that only the mother has the status of frontier worker in Luxembourg, the Advocate General notes that if the concept of 'child' were to be applied in its strict legal sense, the mother could obtain a Luxembourg study grant for her own child and the child of the couple but not for the child of her spouse, even if that child had, for example, lived in the reconstituted family since the age of two. The Advocate General concludes that **a child who has no legal connection to the migrant worker but corresponds to the definition of 'family member' within the meaning of Directive 2004/38 must be regarded as the child of that worker, and can thus enjoy the social advantages provided for by the regulation**.

As regards, finally, the degree of the necessary contribution to the maintenance of a student to whom the frontier worker has no legal connection, the Advocate General observes that **the status of dependent family member derives from a factual situation**,[8] and that case-law must also apply to a spouse's contribution to his stepchildren. The **contribution to the child's maintenance may be shown by objective elements** such as marriage, a registered partnership or even a joint household **without it being necessary to determine the reasons for providing the support or make a precise estimation of its amount**.[9]

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the

[4] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

[5] Case: C-413/99 Baumbast and R.

[6] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (OJ 2014 L 128, p. 8).

[7] Judgment of the European Court of Human Rights of 22 April 1997 in *X, Y and Z v. the United Kingdom*, no. 21830/93, §§ 36 and 37.

[8] Case: C-316/85 Lebon.

[9] It may be noted that as from 24 July 2014 Luxembourg has amended the law in question by providing expressly that children of frontier workers may receive study grants, provided that the worker continues to contribute to the student's maintenance. The Luxembourg law does not, however, define expressly what is to be understood by 'child'.

dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The full text of the Opinion is published on the CURIA website on the day of delivery.

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