Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Case C-542/09
European Commission v The Netherlands

Advocate General Sharpston deems a Netherlands rule limiting funding for studying abroad to students who have resided in the Netherlands for three out of the last six years contrary to EU law on the freedom of movement of workers

Although this rule could, in principle, be justified on the basis of its social objective, the Netherlands has failed to show that the residence requirement is an appropriate and proportionate means of attaining that objective

Netherlands legislation on the financing of higher education defines who can receive funding to study in the Netherlands and abroad. Migrant workers in the Netherlands and their family members qualify for funding to study in the Netherlands, regardless of their place of residence.

However, to obtain funding for higher education outside the Netherlands (known as MNSF), students must have lawfully resided in the Netherlands during at least three out of the last six years prior to commencing their studies abroad. That requirement applies irrespective of students' nationality.

In infringement proceedings against the Netherlands, the Commission has asked the Court to declare that by imposing this residence requirement, the Netherlands indirectly discriminates against migrant workers, particularly cross-border workers, and their dependent family members, and has therefore infringed EU law.

Advocate General Eleanor Sharpston argues that the Court's case-law confirms that the principle of equal treatment of migrant workers with regard to social advantages[1] applies to nationals of a Member State who work in another Member State and their dependent family members. Cross-border workers, who by definition reside outside the Member State in which they work, belong to this category and they and their families also benefit from this right to equal treatment.

The Advocate General disagrees with the Netherlands' contention that workers working in the Netherlands but residing outside the Netherlands are not in a comparable situation to Netherlands workers and migrant workers residing in the Netherlands and that therefore there is an objective difference between these two categories which would justify the residence requirement. The Netherlands grants funding to the children of migrant workers to study in the Netherlands. She therefore considers that it has implicitly accepted that at least some children of migrant workers may be inclined to study in the Netherlands and that they should receive funding for those studies. If that is so, it can no longer be legitimately argued that the place of residence automatically determines where a migrant worker or his child will study. She concludes therefore that the place of residence cannot be used as an objective criterion for different treatment.

According to the Advocate General, the residence requirement indirectly discriminates against migrant workers. A requirement of past, present or future residence (especially if it stipulates residence for a particular duration) is intrinsically likely to affect workers who are nationals of the Member State imposing the requirement less than migrant workers who are in a comparable situation. That is because such a condition *always* distinguishes between workers who do not need

[1] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, p. 2-12, Article 7(2).

to move to satisfy it and workers who do need to move. The former are usually, although possibly not invariably, more likely to be nationals of the host Member State. The Advocate General considers that Netherlands workers are more likely to be able to satisfy the three out of six years rule than migrant workers residing in the Netherlands, and therefore concludes that the residence requirement constitutes indirect discrimination.

The Netherlands sought to justify the discriminatory residence requirement based on an economic and a social objective.

Advocate General Sharpston considers that the Netherlands cannot invoke financial concerns to justify discriminatory treatment of migrant workers and their dependent family members. If Member States make a social advantage available to their own workers, they must grant it on equal terms to migrant workers. Any limitation imposed for financial reasons must apply equally to national workers and migrant workers. The Netherlands cannot therefore justify the three out of six years rule on economic grounds.

The Advocate General accepts however the legitimate social objective of aiming to increase student mobility from the Netherlands to other Member States and targeting students who are likely to use their experience abroad to enrich Netherlands society and (possibly) the Netherlands employment market.

Nevertheless, according to the Advocate General, the Netherlands has not made a persuasive case that the residence requirement is appropriate to achieve that social objective. She accepts that where students reside prior to pursuing higher education may have some influence on where they study, and that the residence requirement prevents students from using MNSF to study where they reside, since students residing outside the Netherlands are precluded from applying for MNSF.

However, she is not convinced that there is an obvious link between where students reside prior to pursuing higher education and the likelihood that they will return to the Netherlands after completing their studies abroad. Nor does she consider that the Netherlands has demonstrated that the residence requirement does not go beyond what is necessary to increase student mobility and identify the target group. Therefore she finds that the Netherlands has not established that the residence requirement is an appropriate and proportionate way to identify the group of students to whom it wishes to give MNSF.

Advocate General Sharpston therefore concludes that, whilst the residence requirement could, in principle, be justified on social grounds, the Netherlands has not shown that it is an appropriate and proportionate means of attaining that objective.

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: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.
Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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