OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 28 September 2006 [1]

I — Introduction

1. Under the German Bundeserziehungsgeldgesetz (Federal Law on child-raising allowance, hereinafter: 'the BErzGG') the grant of child-raising allowance is dependent, inter alia, on the beneficiary being resident in Germany. However, this social benefit is also granted to frontier workers, provided they are engaged in more than minor employment in Germany. The main question raised by the present case, which was referred by the Bundessozialgericht, is whether this requirement of minor employment, as further defined in national law, is compatible with Article 7(2) of Regulation No 1612/68, [2] which guarantees equal treatment of migrant workers with national workers as regards entitlement to social advantages in the Member State of employment. [3]

2. In parallel with this case, the Bundessozialgericht referred questions to the Court regarding the same residence requirement in relation to the Austrian spouse of a German civil servant who, after having transferred his residence to Austria, continued to work with his employer in Germany: Case C-212/05 *Hartmann*. To the extent that the discussion in my Opinion in that case [4] covers the issues raised by the present case, I will confine myself to referring to the relevant sections in that Opinion in order to avoid pointless repetition.

1 — Original language: English.

2 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (hereinafter: 'Regulation No 1612/68'), OJ English Special Edition 1968(II) p. 475.

3 — The Commission has also instigated infringement proceedings under Article 226 EC against the Federal Republic of Germany in respect of the same provisions of national law. See Case C-307/06 *Commission* v *Germany*.

4 — Also presented today.

II — Relevant provisions

A — *Community law*

3. Article 7(1) and (2) of Regulation No 1612/68 provide as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

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

B — *National law*

4. Under Paragraph 1(1) of the BErzGG, in the version of 31 January 1994, [5] any person who is (1) permanently or ordinarily resident in Germany, (2) has a dependent child in his household, (3) looks after and brings up that child, and (4) has no, or no full-time, employment, is entitled to child-raising allowance.

5. Paragraph 1(4) of the BErzGG provides for an entitlement for EC citizens and frontier workers from Germany's immediate neighbouring countries provided they are engaged in more than minor employment in Germany.

6. According to Paragraph 8(1)(1) of Book IV of the Sozialgesetzbuch (the Social Law; hereinafter: 'SGB') in the version of 13 June 1994 [6] then in force, employment is minor if it is regularly exercised for less than 15 hours a week and the monthly remuneration regularly does not exceed one seventh of the monthly amount within the meaning of Paragraph 18 of the SGB IV. This amount was DEM 610 in 1997 and DEM 620 in 1998.

7. Pursuant to Paragraph 27(2) of Book III of the SGB, persons in minor employment are

5 — BGBl. I, p. 180.

6 — BGBl. I, 1229.

not compulsorily insured against unemployment.

III — Facts and procedure

8. Mrs Geven is a Netherlands national. When her son was born on 18 December 1997, she was living in the Netherlands with her German husband who also worked in that country. Until the beginning of the maternity protection period before the birth of her son Mrs Geven worked in several subordinate jobs in the Netherlands and Germany. Following the maternity protection period she was employed exclusively in Germany. Her weekly working time in the first year of the child's life varied between 3 and 14 hours and her weekly earnings between DEM 40.00 and 168.87.

9. The Land Nordrhein Westfalen refused the claimant's application for child-raising allowance for the first year of her son's life since she did not have her residence or habitual place of stay in the Federal Republic of Germany and also was not in an employment relationship of at least 15 hours. As a person in minor employment she was also not an employed person within the meaning of Regulation No 1408/71. [7]

10. Mrs Geven unsuccessfully challenged this decision, first before the Sozialgericht Münster (Social Court, Münster) and later, on appeal, before the Landessozialgericht Nordrhein-Westfalen (Higher Social Court of North Rhine-Westphalia). She thereupon appealed to the Bundessozialgericht which decided to stay the proceedings and refer a preliminary question to the Court for a ruling under Article 234 EC.

11. In its order for reference, the Bundessozialgericht established, first, that Mrs Geven could not claim entitlement to child-raising allowance under Regulation No 1408/71. As a person in minor employment she was not compulsorily insured against unemployment and, therefore, did not qualify as an 'employed person' within the meaning of Article 1(a)(ii) of that regulation in combination with Point I.C [8] of Annex I to the regulation. The national court went on to

7 — Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 OJ L 28 p. 1, (hereinafter: 'Regulation No 1408/71'),

8 — This provision restricts the scope of the concept 'employed person' for the purposes of the application of Title III of Regulation No 1408/71 on family benefits to persons who are compulsorily insured against unemployment and to persons who, as a result of such insurance, receive cash benefits under sickness insurance or comparable benefits.

consider whether she could base her claim on Article 7(2) of Regulation No 1612/68. As to her status as a worker, it found that Mrs Geven was in a genuine employment relationship at the material time in view of the long-term nature of her employment. However it queries whether as a frontier worker, pursuing her gainful employment in Germany from her Netherlands residence, she can rely unrestrictedly on Article 7(2) of Regulation No 1612/68 in relation to German child-raising allowance. On the assumption that she indeed could invoke the protection of this provision, it next expressed its doubts as to whether the unequal treatment of frontier workers resulting from the requirement of having to fulfil more than minor employment could be objectively justified. In the light of these considerations the Bundessozialgericht decided to refer the following question to the Court:

'Does it follow from Community law (in particular from Article 7(2) of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community) that the Federal Republic of Germany is precluded from excluding a national of another State who lives in that Member State and is in minor employment (between 3 and 14 hours a week) in Germany from receiving German child-raising allowance because she does not have a residence or habitual place of stay in Germany?'

12. Written observations were submitted by Mrs Geven, the German and United Kingdom Governments and the Commission.

IV — Summary of submissions

13. First, it should be noted that all parties which submitted written observations agree with the Bundessozialgericht's finding that Mrs Geven cannot rely on Regulation No 1408/71 in order to claim entitlement to child-raising allowance in Germany. It follows from the combined effect of Point I.C of Annex I to that regulation and the fact that under Paragraph 27(2) of Book III of the SGB persons in minor employment are not insured against the risks of unemployment that she falls outside the scope ratione personae of Regulation No 1408/71.

14. Mrs Geven, therefore, relies on Article 7(2) of Regulation No 1612/68 and Article 39 EC to assert that she is entitled to equal treatment in respect of the granting of a social advantage such as child-raising allowance. She maintains that, as the work she performed in the context of her employment relationship could not be considered to be marginal and ancillary, she must be regarded as a worker for the purposes of the application of these provisions of Community law. The residence requirement laid down in Paragraph 1(1)(1) of the BErzGG indirectly discriminates against frontier workers. In

addition, where as persons in minor employment living in Germany receive the benefit, frontier workers must demonstrate, on the contrary, that their activities are above the threshold of minor employment. To require beneficiaries to have a close link with the German employment market contradicts the purpose for which child-raising allowance is provided, i.e. to make it possible to leave employment for a certain time.

15. The German Government states that it is not obliged under Article 7(2) of Regulation No 1612/68, read together with Article 39 EC, to provide child-raising allowance to persons who only perform activities in minor employment in Germany and are resident in another Member State. It points out that where Regulation No 1408/71 regulates conclusively the cases in which child-raising allowance can be exported and does not provide for exportation for persons in minor employment, Article 7(2) of Regulation No 1612/68 should not be interpreted in such a way that this result is negated. It refers in this regard to Article 42(2) of Regulation No 1612/68. [9]

9 — 'This Regulation shall not affect measures taken in accordance with Article [42] of the Treaty.'

16. The German Government doubts whether Regulation No 1612/68 applies to Mrs Geven in view of the marginal and ancillary character of her professional activities. In the absence of a specification of when an activity must be regarded as marginal and ancillary, it submits that the views expressed by the referring court on this matter cannot be considered to be conclusive. It recognises that the residence requirement in the BErzGG may constitute indirect discrimination, but considers that it is justified in order to ensure that there is an effective link between the beneficiary and German society. In contrast with benefits connected with professional activities, benefits linked to residence are based on the notion of community solidarity. If a frontier worker in Mrs Geven's situation were given access to child-raising allowance in Germany, she would be able to benefit unjustly — despite the provisions of Regulation No 1408/1 — from the residence based social advantages in both countries and combine them.

17. The United Kingdom Government submits that the Court should be slow to allow Regulation No 1612/68 to be used to override Regulation No 1408/71 so as to export a social advantage, intended to benefit domestic and migrant workers alike who are living in the territory of the host Member State, to a frontier worker based in another Member State. Mrs Geven is seeking to rely upon Article 7(2) of Regulation No 1612/68

precisely because persons in her situation were expressly excluded by the Community legislator from accessing that benefit under Regulation No 1408/71.

18. The United Kingdom Government observes that Article 7 of Regulation No 1612/68 does not normally envisage the export of social advantages. Rather, it is intended primarily to assist a migrant worker and his family to settle in the worker's country of employment. It maintains that it is evident that the child-raising allowance has no connection with Mrs Geven's activity as a worker and that it is not based upon the employment relationship itself. The primary intention of Article 7(2) of Regulation No 1612/68 is to give national and migrant workers access to the same social advantages within the territory of the host Member State. It is not to force Member States to provide objective justification for not making those social advantages available to persons resident in the territory of other Member States. It agrees with the referring court that the absence of coordinating rules in Regulation No 1612/68 may well point to a limited application of Article 7(2) of that regulation as regards the export of social advantages, particularly in the case of frontier workers who as a rule also have access to equivalent social advantages in their Member State of residence.

19. The Commission submits that if a person does not come within the scope ratione personae of Regulation No 1408/71, this does not mean that Regulation No 1612/68 is inapplicable. It maintains that it cannot be inferred from Article 42(2) of Regulation No 1612/68 that this regulation does not apply to benefits covered by Regulation No 1408/1. It points out, next, that the concept of worker has a Community meaning and that if a person complies with the criteria laid down in the Court's case-law (i.e. (1) performance of services for and under the direction of another person; (2) for a certain period of time; (3) in return for remuneration), [10] the only circumstance which can deprive him of that status is that the activities concerned are purely marginal or ancillary. The German Government has not explained why minor employment must be regarded as marginal and ancillary.

20. The Commission recalls that the Court has already determined that the Member States may not make the grant of a social advantage within the meaning of Article 7(2) dependent on the condition that the beneficiaries be resident within its territory. [11] It considers that social advantages are not only those which are linked to a contract of employment, but also which the Member States grant to their citizens either because

10 — See, e.g., Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13, and C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 24.

11 — *Meeusen*, cited in the previous footnote, at paragraph 21 of the judgment.

of their objective status as a worker or because they reside in their territory. Frontier workers may invoke Article 7(2) of Regulation No 1612/68 in the same way as migrant workers who have moved to the Member State where they are employed.

V — Assessment

A — *Introductory remarks*

21. As a preliminary point it should be remarked that, for the reasons given by the Bundessozialgericht and agreed upon by all parties having submitted written observations, [12] Mrs Geven cannot rely on Regulation No 1408/71 in order to gain access to child-raising allowance in Germany. It is not disputed that she falls outside the scope ratione personae of this regulation for the purposes of entitlement to family benefits in that Member State. There is, therefore, no reason to discuss the case from the angle of the potential applicability of Regulation No 1408/71.

22. Next, it should be observed that Mrs Geven must be considered to be a worker for the purposes of the application of Article 39 EC and Regulation No 1612/68. It is generally accepted that to come within the definition of a worker a person must pursue an activity which is effective and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential characteristic of the employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration. [13] Applying those criteria, the Bundessozialgericht established that Mrs Geven was indeed in a genuine employment relationship at the material time and that this followed in particular from the long-term nature of her employment.

23. It should be noted that this fact distinguishes Mrs Geven's case in one essential respect from that of Mrs Hartmann. [14] Unlike Mrs Hartmann, who is seeking a right to German child-raising allowance indirectly through her spouse's status as a frontier worker, Mrs Geven's claim is based directly on her personal status as a Community worker.

24. Mrs Geven's application for child-raising allowance was refused by the Land Nordrhein-Westfalen on the grounds that she was neither resident in Germany, nor engaged in

12 — See points 11 and 13 above.

13 — See the case-law cited in footnote 10.

14 — See points 2 above.

more than minor employment in that Member State. Although the question referred by the Bundessozialgericht is drafted in such a way that it focuses on whether the Federal Republic of Germany is precluded from applying the residence requirement in respect of persons in minor employment in Germany, it appears from the national court's considerations in its order for reference that it also entertains doubts as to the justifiability of the criterion of minor employment itself. Indeed, where frontier workers by definition cannot comply with a requirement of residence in the Member State of employment, the basic question is whether the criterion applied by the national legislature for lifting this requirement in respect of certain frontier workers to the exclusion of other frontier workers is compatible with Community law.

25. Besides providing an answer to the question regarding the compatibility of the residence requirement in Paragraph 1(1) of the BErzGG with Article 7(2) of Regulation No 1612/68, it should therefore also be examined whether or not it is compatible with Community law that Paragraph 1(4) of the BErzGG makes entitlement to German child-raising allowance for frontier workers dependent on the condition that they are engaged in more than minor employment in Germany which according to national law implies that entitlement depends on them working for more than 15 hours a week and earning more than a minimum wage of DEM 610 (1997) or DEM 620 (1998).

B — *The residence requirement*

26. In my Opinion in *Hartmann*, which will be presented together with this Opinion, I discussed the question as to the compatibility with Article 7(2) of Regulation No 1612/68 of the residence requirement laid down in Paragraph 1(1) of the BErzGG in the context of the claim to child-raising allowance by the Austrian spouse of a German national who had moved to live in Austria, but continued to work in Germany. I only discussed this question as a subsidiary point after having found:

— that frontier workers are entitled to equal treatment under Article 7(2) of Regulation No 1612/68 in their Member State of employment as regards entitlement to social advantages in the Member State of employment only to the extent that such advantages are directly and exclusively linked to employment [15]

and

— that child-raising allowance in Germany is not sufficiently linked to employment

15 — At point 55 of the Opinion.

or the objective status as a worker that it can be considered to be a social advantage in respect of which frontier workers may claim equal treatment under Article 7(2) of Regulation No 1612/68. [16]

27. On the basis of these two conclusions in my Opinion in *Hartmann*, it would appear that Mrs Geven cannot invoke Article 7(2) of Regulation No 1612/68 to claim entitlement to child-raising allowance in Germany, as this social advantage does not come within the scope of protection of this provision as far as frontier workers are concerned.

28. However, assuming that the substantive scope of Article 7(2) of Regulation No 1612/68 might be considered to be broader and that this provision does apply to frontier workers in Mr Hartmann's and Mrs Geven's situation, in my Opinion in *Hartmann* I also examined whether the residence requirement governing entitlement to child-raising allowance in Germany could be objectively justified in view of the fact that it is not contested that this requirement discriminates indirectly against workers who are not resident in Germany.

29. Following the characterisation of the child-raising allowance by the Bundessozialgericht as an instrument of family policy aimed at stimulating the birth rate in Germany, I considered that this, as such, is a legitimate policy objective and that, by its very nature, such a policy must ensure that the measures involved are aimed at the persons resident on their national territories. It would be absurd to assume that Member States should in any way contribute to demographic development in other Member States by extending their family policy instruments to persons who do not reside in their territory. I concluded, therefore, that a residence requirement is appropriate to ensure that the child-raising allowance is provided to persons who belong to the Member State's national population, which, of course, includes not only German nationals but all persons lawfully resident in Germany irrespective of their nationality. [17]

30. I would add that, although the Court has held that Article 7(2) of Regulation No 1612/68 may apply to social advantages which, at the same time, fall specifically within the scope of Regulation No 1408/71, [18] this does not mean that the former provision may be interpreted in such a way as to permit results which the latter regulation seeks to prevent. This would appear to be the precise purpose of Article 42(2) of Regulation No 1612/68, according to which this regulation shall not affect measures taken in accordance with Article 42 EC,

16 — At point 60 of the Opinion.

17 — At point 69 of the Opinion.

18 — See Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 21.

i.e. Regulation No 1408/71. This provision therefore establishes a relative hierarchy between both regulations, in that Regulation No 1408/71 as the more specific regulation should take precedence over Article 7(2) of Regulation No 1612/68 in cases in which the application of both regulations lead to conflicting results.

31. Article 7(2) of Regulation No 1612/68 does not, therefore, preclude the Federal Republic of Germany from making entitlement to child-raising allowance dependent on the beneficiary being permanently or ordinarily resident in that Member State. The refusal to grant Mrs Geven child-raising allowance on that ground was therefore justified.

32. None the less, the German legislature has made child-raising allowance available to frontier workers, even though they are not resident in Germany, provided they are engaged in more than minor employment in Germany as defined by national law. As the condition of minor employment excludes frontier workers who do not perform activities above this threshold from entitlement to this benefit, it should next be examined — and this is a question which is particular to this case — whether this condition is compatible with Community law.

C — *The minor employment requirement*

33. As the German Government observed in its written observations where even the total exclusion of non-residents from entitlement to child-raising benefit would have been justified under Community law, the extension of such entitlement to frontier workers under certain conditions was based on the goodwill of the German legislature. It infers from this that it was therefore entitled to impose a condition relating to the degree of employment activity in Germany to ensure a link with the national employment market.

34. It is questionable whether this inference is correct. Whenever a Member State, exercising its discretion, grants certain rights or makes benefits available to its citizens coming within the scope ratione materiae of the EC Treaty, it must observe the most basic prohibition of discrimination on grounds of nationality as laid down in Article 12 EC and given expression in relation to workers in Article 39 EC.

35. In this context I see a parallel with the Court's judgment in *Trojani*.[19] In that case it found that if it appears that a Community citizen who could not derive a right of residence from the applicable Community

19 — Case C-456/02 [2004] ECR I-7573.

provisions because of lack of sufficient resources, was nonetheless lawfully resident in that Member State under national law, he could rely on Article 12 EC in order to be granted social assistance on an equal footing with nationals of that Member State. [20] In other words, once a person's legal position has been equated as a matter of national law to that of nationals resident in a Member State this entitles that person to equality of treatment in respect of matters coming within the scope of the Treaty.

36. In this case, it has been established, as was seen in point 22 above, that Mrs Geven has the status of a Community worker. Despite the fact that her activities in employment were considered to be minor for the purposes of the application of the German legislation at issue, they were not, in the referring court's view, sufficiently marginal or ancillary to exclude her from the definition of a Community worker. It must also be pointed out in this context that the concept of 'worker' may not be defined or delimited by reference to national law, as this would imply that the scope of the rights guaranteed to Community workers could be modified unilaterally by the Member States without any control by the Community institutions. [21] More specifically, the Member States are precluded from excluding from the scope of this concept persons who only receive remuneration which is below the minimum level of subsistence, particularly where he or she can supplement that income by other means including income generated by another member of the family. [22] The criterion of minor employment, as defined by Paragraph 8(1)(1) of the SGB IV, cannot deprive Mrs Geven of the rights she enjoys as a Community worker.

37. The minor employment requirement applies solely to frontier workers and was introduced in order to extend the benefit of entitlement to child-raising allowance to persons who were not resident in Germany, but who were economically active there at a significant enough level.

38. Despite this generous objective of the German legislature, it is apparent that the requirement of minor employment operates a distinction between different groups of workers as regards eligibility for child-raising allowance. It distinguishes between two categories of frontier workers working in Germany (those below and those above the threshold of minor employment), even though having regard to the purpose of child-raising benefit to stimulate child-birth in Germany those frontier workers are all in the same position, i.e. they do not contribute to that objective. The requirement also distinguishes between frontier workers in minor employment and persons resident in

20 — See paragraphs 37 to 46 of the judgment.

21 — Case 53/81 *Levin* [1982] ECR 1035, paragraph 11, and Case 139/85 *Kempf* [1986] ECR 1741, paragraph 15.

22 — *Kempf*, cited in the previous footnote, at paragraph 14 of the judgment.

Germany who are also in minor employment, as the latter are entitled to this benefit. Finally, it distinguishes between frontier workers in minor employment in Germany and German frontier workers working in neighbouring Member States, who despite the fact that they do not have an employment relationship in Germany and regardless of the nature of their employment, are eligible for child raising allowance on the basis of their residence in Germany.

39. As frontier workers working in Germany, as a rule, will be nationals of the Member States in which they live, this difference in treatment of workers active on the same German labour markets as a result of the minor employment requirement constitutes indirect discrimination on grounds of nationality. If the requirement cannot be objectively justified and cannot be regarded as proportionate to the objective for which it is imposed, it is contrary to Article 39 EC.

40. In point 29 above, which also refers to the relevant sections of my Opinion in *Hartmann* on this matter, I have already indicated that the child-raising allowance serves longer term demographic objectives by rewarding persons taking time off work or by not engaging in employment in order to be able to tend their children in the earliest stages of infancy. It thereby seeks to stimulate child-birth in Germany. In view of this objective it is wholly explicable that the conditions laid down in Paragraph 1(1) of the BErzGG are unrelated to employment. I agree with the Bundessozialgericht where it observes that the requirement of more than minor employment in Germany is inherently rather illogical for child-raising allowance, in particular since that benefit is intended not least to allow the possibility of not having to engage in paid employment, and that there is an evident discrepancy in the co-existence of the exclusion of persons in full employment and the requirement that frontier workers must exceed the minor employment threshold.

41. It thus appears that the minor employment requirement has no bearing on the objectives for which child-raising allowance is granted and is inappropriate as a condition. As it cannot be considered to be justified it infringes the prohibition of unequal treatment of workers as laid down in Article 39 EC.

VI — Conclusion

42. In the light of the foregoing observations I would suggest that the Court give the following answers to the preliminary question submitted by the Bundessozialgericht:

— 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 does not preclude the Federal Republic of Germany from excluding a national of another State who lives in that Member State from receiving German child-raising allowance because she does not have a residence or habitual place of stay in Germany.

— Article 39 EC precludes the Federal Republic of Germany from excluding a national of another State who lives in that Member State and who works in Germany for between 3 and 14 hours a week, from receiving German child-raising allowance for the reason that she is only engaged in minor employment, which is defined by domestic legislation as employment exercised regularly for less than 15 hours a week.