JUDGMENT OF THE COURT (Grand Chamber)

18 July 2007 *

In Case C-213/05,

REFERENCE for a preliminary ruling under Article 234 EC by the Bundessozialgericht (Germany), made by decision of 10 February 2005, received at the Court on 17 May 2005, in the proceedings

Wendy Geven

v

Land Nordrhein-Westfalen,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, P. Kūris and E. Juhász, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann (Rapporteur), J. Makarczyk, G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

* Language of the case: German.

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Ms Geven, by M. Eppelein, Assessor,

— the German Government, by M. Lumma, acting as Agent,

— the United Kingdom Government, by C. Jackson, acting as Agent, and E. Sharpston QC,

— the Commission of the European Communities, by V. Kreuschitz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The reference was made in the course of proceedings between Ms Geven and Land Nordrhein-Westfalen (*Land* of North Rhine-Westphalia) concerning the latter's refusal to grant her child-raising allowance for her child.

Legal context

Community legislation

3 Article 7(1) and (2) of Regulation No 1612/68 reads 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.'

National legislation

4 According to the order for reference, Paragraph 1(1) of the Bundeserziehungsgeldgesetz (Law on child-raising allowance and parental leave, 'the BErzGG'), in the

version applicable at the material time, provides that any person permanently or ordinarily resident in Germany who has a dependent child in his household, looks after and brings up that child, and has no, or no full-time, employment can claim child-raising allowance.

5 In addition, under Paragraph 1(4) of the BErzGG, in the version applicable at the material time, nationals of the Member States of the European Union and frontier workers from countries having a common frontier with Germany are entitled to child-raising allowance, provided that they are engaged in more than minor employment in Germany.

6 Under Paragraph 8(1)(1) of Book IV of the Sozialgesetzbuch (Social Code), in the version in force at the material time (BGBl. I, p. 1229), employment was regarded as minor if it was of less than 15 hours a week and the monthly remuneration regularly received did not exceed one seventh of the monthly reference amount within the meaning of Paragraph 18 of Book IV, namely DEM 610 in 1997 and DEM 620 in 1998.

The main proceedings and the order for reference

7 Ms Geven is a Netherlands national. When her son was born in December 1997, she was living in the Netherlands with her husband, who worked in that Member State. After the statutory maternity protection period, during the first year of her son's life, she worked in Germany with a weekly working time varying between 3 and 14 hours and weekly earnings of between DEM 40.00 and DEM 168.87.

8 Her application for child-raising allowance for the first year of her son's life was refused by the *Land* of North Rhine-Westphalia, by decision of 5 June 1998, in the version of the decision of 27 January 2000 on her objection. The grounds for the refusal were that Ms Geven did not have her permanent or ordinary residence in Germany and was not in a contractual employment relationship of at least 15 hours a week. Moreover, as a person in minor employment she was not an 'employed person' within the meaning of 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 and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1290/97 of 27 June 1997 (OJ 1997 L 176, p. 1) ('Regulation No 1408/71').

9 Ms Geven's action against that refusal was unsuccessful both at first instance and on appeal, following judgments of the Sozialgericht Münster (Social Court, Münster) of 6 May 2002 and the Landessozialgericht Nordrhein-Westfalen (Higher Social Court of North Rhine-Westphalia) of 24 October 2003. She thereupon appealed on a point of law to the Bundessozialgericht (Federal Social Court).

10 In those circumstances, the Bundessozialgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does it follow from Community law (in particular from Article 7(2) of Regulation (EEC) No 1612/68 ...) that the Federal Republic of Germany is precluded from excluding a national of another Member State who lives in that 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 her permanent or ordinary residence in Germany?'

The question referred for a preliminary ruling

11 Article 7(2) of Regulation No 1612/68 provides that a migrant worker is to enjoy the same social and tax advantages in the host Member State as national workers.

12 The reference to 'social advantages' in that provision cannot be interpreted restrictively (Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 39). According to settled case-law, 'social advantages' are to be understood as all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate their mobility within the European Community (see Case 65/81 *Reina* [1982] ECR 33, paragraph 12; *Meints*, paragraph 39; and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25).

13 The Court has already held that German child-raising allowance constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 (see *Martínez Sala*, paragraph 26).

14 The German and United Kingdom Governments observed that it would be unfair to allow a frontier worker whose residence and workplace are in different Member States to enjoy the same social advantages in both Member States and to combine them. To avoid that risk, and in view of the fact that Regulation No 1612/68 does not contain any coordinating rules to avoid cumulation of benefits, the possibility of 'exporting' child-raising allowance to the frontier worker's Member State of residence could be excluded.

15 It should be noted that Ms Geven's status of migrant worker does not in any way prevent her from being able to claim the equal treatment prescribed by Article 7(2) of Regulation No 1612/68 in relation to the grant of social advantages. The Court has already held that frontier workers can rely on the provisions of Article 7 of Regulation No 1612/68 on the same basis as any other worker to whom that article applies. The fourth recital in the preamble to that regulation expressly states that the right of free movement must be enjoyed 'without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services', and Article 7 of the regulation refers, without reservation, to a 'worker who is a national of a Member State' (*Meints*, paragraph 50).

16 It should also be noted that the scope of the rules on freedom of movement for workers (and hence of Regulation No 1612/68) extends to all workers carrying on effective and genuine activities, with the exception of those whose activities are on such a small scale as to be regarded as purely marginal and ancillary (see, in particular, Case 53/81 *Levin* [1982] ECR 1035, paragraph 17).

17 The national court has established that during the period in question Ms Geven was in a genuine employment relationship allowing her to claim the status of migrant worker for the purposes of Regulation No 1612/68.

18 It should be recalled that the equal treatment rule which appears both in Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (*Meints*, paragraph 44).

19 Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*Meints*, paragraph 45).

20 That is true of a residence condition such as that at issue in the main proceedings, which, as the national court points out, can naturally be more easily met by national workers than by workers from other Member States.

21 As explained by the national court, German child-raising allowance constitutes an instrument of national family policy intended to encourage the birth-rate in that country. The primary purpose of the allowance is to allow parents to care for their children themselves by giving up or reducing their employment in order to concentrate on bringing up their children in the first years of their life.

22 The German Government adds essentially that child-raising allowance is granted in order to benefit persons who, by their choice of residence, have established a real link with German society. It says that, in that context, a residence condition such as that at issue in the main proceedings is justified.

23 Regardless of whether the aims pursued by the German legislation could justify a national rule based exclusively on the criterion of residence, it must be observed that, according to the information provided by the national court, the German legislature did not confine itself to a strict application of the residence condition for the grant of child-raising allowance but allowed exceptions under which frontier workers could also claim it.

24 It appears from the order for reference that, under Paragraph 1(4) of the BErzGG, in the version applicable at the material time, frontier workers who carry on an occupation in Germany but reside in another Member State can claim German child-raising allowance if they carry on an occupation of a more than minor extent.

25 Consequently, it is apparent that, under the German legislation in force at the material time, residence was not regarded as the only connecting link with the Member State concerned, and a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that Member State.

26 In those circumstances, the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal to grant the social advantage at issue.

27 As the Court has already held in Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraphs 18 to 21 and 29, while a person in minor employment of the kind referred to in the national court's question has the status of worker within the meaning of Article 39 EC, social policy is, in the current state of Community law, a matter for the Member States, who have a wide discretion in exercising their powers in that respect. However, that wide discretion cannot have the effect of undermining the rights granted to individuals by the provisions of the EC Treaty in which their fundamental freedoms are enshrined (see, with reference to Article 39 EC, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 44, and Case C-208/05 *ITC* [2007] ECR I-181, paragraphs 39 and 40, and, by analogy, concerning equal treatment of men and women workers, *Megner and Scheffel*, and Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraphs 61 and 63).

28 As noted in paragraphs 21 to 25 above, the aim of the German legislature is, in a situation such as that at issue in the main proceedings, to grant a child-raising allowance to persons who have a sufficiently close connection with German society, without reserving that allowance exclusively to persons who reside in Germany.

29 In exercising its powers, that legislature could reasonably consider that the exclusion from the allowance in question of non-resident workers who carry on an occupation in the Member State concerned that does not exceed the threshold of minor employment as defined in national law constitutes a measure that is appropriate and proportionate, having regard to the objective mentioned in the preceding paragraph (see, by analogy, *Megner and Scheffel*, paragraph 30).

30 In the light of the above considerations, the answer to the national court's question must be that Article 7(2) of Regulation No 1612/68 does not preclude the exclusion, by the national legislation of a Member State, of a national of another Member State who resides in that State and is in minor employment (between 3 and 14 hours a week) in the former State from receiving a social advantage with the characteristics of German child-raising allowance on the ground that he does not have his permanent or ordinary residence in the former State.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 exclusion, by the national legislation of a Member State, of a national of another Member State who resides in that State and is in minor employment (between 3 and 14 hours a week) in the former State from receiving a social advantage with the characteristics of German child-raising allowance on the ground that he does not have his permanent or ordinary residence in the former State.

[Signatures]