JUDGMENT OF THE COURT (Grand Chamber)

18 July 2007 *

In Case C-212/05,

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

Gertraud Hartmann

v

Freistaat Bayern,

THE COURT (Grand Chamber),

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

* Language of the case: German.

Advocate General: L.A. Geelhoed,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2006,

after considering the observations submitted on behalf of:

— Ms Hartmann, by M. Eppelein, Assessor,

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

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Netherlands Government, by M. de Mol, acting as Agent,

— the United Kingdom Government, initially by C. Jackson, acting as Agent, and E. Sharpston QC, and subsequently by C. Gibbs, acting as Agent, and T. Ward, Barrister,

— the Commission of the European Communities, by V. Kreuschitz and D. Martin, acting as Agents,

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 Hartmann and Freistaat Bayern (Free State of Bavaria) concerning the latter's refusal to grant her child-raising allowance for her children.

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 1(7) of the BErzGG, in the amended version of 12 October 2000, the spouse resident in another Member State of a person working in the civil service or a public-law employment in Germany may receive child-raising allowance. However, under Paragraph 24(1) of the BErzGG, in the amended version of 12 October 2000, that provision does not apply for children born before 1 January 2001.

The main proceedings and the order for reference

7 Ms Hartmann is an Austrian national married since 1990 to a German national who previously lived in Germany. Since 1990 they have lived in Austria with their three children, who were born in March 1991, May 1993 and September 1997. The applicant's husband works in Germany as a civil servant (for Deutsche Bundespost from 1986, and for Deutsche Telekom AG since 1995).

8 By decisions of 25 September 1991, in the version of the decision of 7 January 1992 on her objection, and 20 September 1993, in the version of the decision of 26 January 1994 on her objection, the Free State of Bavaria refused to grant Ms Hartmann the child-raising allowance provided for by the BErzGG, in the version applicable at the material time, for her first two children.

9 By decisions of 10 and 23 June 1998, in the version of the decision of 7 September 1998 on her objection, Ms Hartmann's applications for review were rejected, as was her application for child-raising allowance for the first year of the life of her younger son. The grounds for the refusal to grant that child-raising allowance were that Ms Hartmann was not resident in Germany and did not work there.

10 After the Sozialgericht München (Social Court, Munich) had, by decision of 14 February 2001, dismissed the action brought by Ms Hartmann, she appealed against that decision to the Bayerisches Landessozialgericht (Bavarian Higher Social Court), which likewise dismissed her appeal by judgment of 1 July 2003. That court considered that under German law Ms Hartmann was not entitled to child-raising allowance, since she did not live in Germany. Nor could the allowance be granted her under Community law.

11 In that court's view, Council Regulation (EEC) No 1408/71 of 14 June 1971 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 1249/92 of 30 April 1992 (OJ 1992 L 136, p. 28) ('Regulation No 1408/71'), was not applicable in this case because neither Ms Hartmann nor her husband fell within the scope of that regulation: Ms Hartmann was not employed, and her husband, as a civil servant, was not an 'employed person' within the meaning of point 1(C) ('Germany') of Annex I to Regulation No 1408/71.

12 The Bayerisches Landessozialgericht added that a right to child-raising allowance could not be based on Article 7(2) of Regulation No 1612/68 either, since Regulation No 1408/71 took precedence over that regulation.

13 Ms Hartmann thereupon appealed on a point of law to the Bundessozialgericht (Federal Social Court).

14 In those circumstances, the Bundessozialgericht decided to stay the proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(1) Is a German national who, while continuing his service as a post office official in Germany, moved his permanent residence from Germany to Austria in 1990 and has since then carried on his occupation as a frontier worker to be regarded as a migrant worker within the meaning of Regulation (EEC) No 1612/68 ... for periods between January 1994 and September 1998?

(2) If so:

Does it constitute indirect discrimination within the meaning of Article 7(2) of Regulation No 1612/68 if the non-working spouse of the person mentioned in Question 1, who lives in Austria and is an Austrian national, was excluded from receiving German child-raising allowance in the period in question because she did not have either her permanent or ordinary residence in Germany?'

The questions referred for a preliminary ruling

Question 1

15 By its first question, the national court essentially asks whether a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of migrant worker for the purposes of Regulation No 1612/68.

16 The German Government, the United Kingdom Government and the Commission of the European Communities, in their written observations, and the Netherlands Government, at the hearing, submitted that only the movement of a person to another Member State for the purpose of carrying on an occupation should be regarded as an exercise of the right of freedom of movement for workers. A person such as Mr Hartmann, who never left his employment in the Member State of which he is a national and merely transferred his residence to the Member State of his spouse, could not therefore benefit from the Community provisions on freedom of movement for workers.

17 That argument must be considered in the light of the judgment in Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711. In that case the Court, examining the position of the appellants in the main proceedings in the light of the principle of freedom of movement for workers set out in Article 48 of the EC Treaty (now, after amendment, Article 39 EC), observed in paragraphs 31 and 32 of the judgment that any national of a Member State, irrespective of his place of residence and his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of that provision. It followed that the appellants in the main proceedings, who worked in a Member State other than that of their actual place of residence, fell within the scope of Article 48 of the Treaty.

18 In the present case, the situation which gave rise to the main proceedings is that of a person who, since the transfer of his residence, resides in one Member State and works in another Member State. That Mr Hartmann settled in Austria for reasons not connected with his employment does not justify refusing him the status of migrant worker which he acquired as from the time when, following the transfer of his residence to Austria, he made full use of his right to freedom of movement for workers by going to Germany to carry on an occupation there.

19 It follows that for the period from January 1994 to September 1998 the situation of a frontier worker such as Mr Hartmann falls within the scope of the provisions of the EC Treaty on freedom of movement for workers, and hence of Regulation No 1612/68.

20 Having regard to the above considerations, the answer to Question 1 must be that a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of migrant worker for the purposes of Regulation No 1612/68.

Question 2

21 By its second question, the national court essentially asks whether, in circumstances such as those at issue in the main proceedings, Article 7(2) of Regulation No 1612/68 precludes a migrant worker's non-working spouse, who lives in Austria and has the nationality of that Member State, from being refused child-raising allowance on the ground that she did not have his permanent or ordinary residence in Germany.

22 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 Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 26).

23 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.

24 It should be noted that Mr Hartmann's status of frontier worker does not in any way prevent him 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 freedom of 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' (Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 50).

25 In the case at issue in the main proceedings, child-raising allowance is claimed by Ms Hartmann, who, as the spouse of a worker who falls within the scope of Regulation No 1612/68, is only an indirect beneficiary of the equal treatment granted to migrant workers by Article 7(2) of that regulation. Consequently, the benefit of German child-raising allowance can be extended to Ms Hartmann only if that allowance constitutes for her husband a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 (see, by analogy, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 26).

26 That is the case here. A benefit such as German child-raising allowance, which enables one of the parents to devote himself or herself to the raising of a young child, by meeting family expenses (see, to that effect, Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraphs 23 to 25), benefits the family as a whole, whichever parent it is who claims the allowance. The grant of such an allowance to a worker's spouse is capable of reducing that worker's obligation to contribute to family expenses, and therefore constitutes for him or her a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 (see, by analogy, *Bernini*, paragraph 25).

27 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. Since child-raising allowance is a 'social advantage' within the meaning of that provision, a migrant worker in a situation such as that of Mr Hartmann, and consequently his spouse, must, for the reasons stated in paragraphs 25 and 26 above, be able to enjoy it on the same basis as a national worker.

28 According to the documents before the Court, the German legislation makes the grant of child-raising allowance conditional principally on the recipients being resident on national territory. Since such a rule can lead to indirect discrimination against workers who do not live in Germany, the national court wonders whether the rule can be justified and whether it satisfies the criterion of proportionality.

29 It should be recalled that the equal treatment rule which appears both in 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).

30 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).

31 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 German workers or their spouses, who usually live in Germany, than by workers from other Member States or their spouses, who more often reside in another Member State (see, by analogy, Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraphs 23 and 24).

32 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.

33 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.

34 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.

35 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.

36 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.

37 In those circumstances, the allowance at issue in the main proceedings could not be refused to a couple such as Mr and Ms Hartmann who do not live in Germany, but one of whom works full-time in that State.

38 Having regard to the above considerations, the answer to Question 2 must be that, in circumstances such as those at issue in the main proceedings, Article 7(2) of Regulation No 1612/68 precludes the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, from being refused a social advantage with the characteristics of German child-raising allowance on the ground that he did not have his permanent or ordinary residence in the former State.

Costs

39 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:

1. **A national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of migrant worker for the purposes of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.**

2. **In circumstances such as those at issue in the main proceedings, Article 7(2) of Regulation No 1612/68 precludes the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, from being refused a social advantage with the characteristics of German child-raising allowance on the ground that he did not have his permanent or ordinary residence in the former State.**

[Signatures]