JUDGMENT OF THE COURT
31 May 1989 *

In Case 344/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State, Afdeling Rechtspraak (Council of State, Judicial Division) for a preliminary ruling in the proceedings pending before that court between

I. Bettray

and

Staatssecretaris van Justitie (Secretary of State for Justice)

on the interpretation of Article 48 of the EEC Treaty and Article 1(1) of Regulation No 1612/68 of the Council of 15 October 1968 (Official Journal, English Special Edition 1968 (II), p. 475),

THE COURT

composed of: O. Due, President, T. Koopmans, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Diez de Velasco, Judges,

Advocate General: F. G. Jacobs
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

the plaintiff in the main proceedings, Ingo Bettray, by L. F. Portier, lawyer,

* Language of the case: Dutch

the Netherlands Government by E. F. Jacobs, Secretary-General at the Ministry of Foreign Affairs,

the Commission of the European Communities by Pieter Jan Kuyper, a member of its Legal Department, acting as Agent

having regard to the Report for the Hearing and further to the hearing on 18 January 1989,

after hearing the opinion of the Advocate General delivered at the sitting on 8 March 1989,

gives the following

Judgment

1 By order of 20 October 1987 which was received at the Court on 6 November 1987 the Raad van State of the Netherlands referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 48 of the EEC Treaty and Article 1(1) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

2 That question arose in proceedings between Mr Bettray and the Netherlands State concerning the refusal of the Netherlands authorities to grant him a residence permit.

3 Mr Bettray, a German national, entered the Netherlands on 15 July 1980. He applied twice for a residence permit in the Netherlands, giving as the reason for his stay 'a period of residence with his fiancée and later marriage' and adding on the second occasion 'a stay in a rehabilitation centre for drug addicts'. Those applications were rejected by the Netherlands authorities.

4 Because of his drug addiction, Mr Bettray was employed for an indefinite period with effect from 18 April 1983 by Ergon, Eindhoven, under the system set up by the Wet Sociale Werkvoorziening (Social Employment Law).

5 It is apparent from the order for reference that the Social Employment Law constitutes a body of rules intended to provide work for the purpose of maintaining, restoring or improving the capacity for work of persons who, for an indefinite period, are unable, by reason of circumstances related to their situation ('ten gevolge van bij hen gelegen factoren'), to work under normal conditions. For that purpose, Netherlands local authorities are to set up, with financial support from the State, undertakings or work associations the sole purpose of which is to provide the persons involved with an opportunity to engage in paid work under conditions which correspond as far as possible to the legal rules and practices applicable to paid employment under normal conditions in so far as the physical and mental capacities of the workers do not justify a derogation in that regard.

6 On 4 November 1983 Mr Bettray submitted a further application for a residence permit giving as the reason for his stay 'work as an employed person'. The residence permit was refused by the head of the local police. Mr Bettray applied to the Staatssecretaris van Justitie for review of that decision, but that application was also rejected. He then brought an action before the Raad van State, claiming that he was a worker within the meaning of the Treaty.

7 The Raad van State considered that in order to give judgment, it was necessary to refer the following question to the Court for a preliminary ruling:

'Is Article 1(1) of Regulation (EEC) No 1612/68 of 15 October 1968 — concerning the right of a national of a Member State, irrespective of his place of residence, to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State — to be construed as meaning that that right is also enjoyed by a national of another Member State who is working in the territory of the Netherlands under the Social Employment Law in a case where:

(a) he cannot be regarded as having previously been a worker within the meaning of Article 48(1) of the Treaty establishing the European Economic Community, other than in the context of such a social employment scheme; and

(b) he is not one of the persons referred to in Title III of Regulation (EEC) No 1612/68 of 15 October 1968?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 The question raised by the national court seeks essentially to ascertain whether Article 48(1) of the EEC Treaty must be interpreted as meaning that a national of a Member State employed in another Member State in the framework of a scheme such as that provided for in the Social Employment Law may be regarded on that ground alone as a worker for the purposes of Community law.

10 The Commission and the plaintiff in the main proceedings consider that the reply to the national court's question must be in the affirmative, having regard to the Court's case-law on the concept of worker, while the Netherlands Government argues that having regard to the special characteristics of the scheme set up by the Social Employment Law persons working under that scheme should not be regarded as workers for the purposes of Community law. It points in particular to the *sui generis* nature of the employment relationship under the Social Employment Law, the very low productivity of the persons employed, whose remuneration is financed largely by subsidies from public funds, and the pre-eminently social and non-economic nature of the scheme.

11 It should be pointed out first of all that according to now established case-law the term 'worker' in Article 48 of the Treaty has a Community meaning and, inasmuch as it defines the scope of one of the fundamental freedoms of the Community, must be interpreted broadly (see, in particular, the judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121).

12 According to the same judgment, that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned, and the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.

13 It is clear both from the terms in which the principle of freedom of movement for workers is expressed and the place occupied by the provisions concerning that principle in the structure of the Treaty that those provisions guarantee freedom of movement only for persons pursuing or wishing to pursue an economic activity and that, consequently, they cover only the pursuit of an effective and genuine activity (see the judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035).

14 It appears from the order for reference that persons employed under the scheme set up by the Social Employment Law perform services under the direction of another person in return for which they receive remuneration. The essential feature of an employment relationship is therefore present.

15 That conclusion is not altered by the fact that the productivity of persons employed in the scheme is low and that, consequently, their remuneration is largely provided by subsidies from public funds. Neither the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker.

16 Nor can the person cease to be regarded as a worker merely by virtue of the fact that the employment relationship under the Social Employment Law is of a *sui generis* nature in national law. As the Court has held (see, primarily, the judgment of 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsches Bundespost* [1974] ECR 153), the nature of the legal relationship between the employee and the employer is of no consequence in regard to the application of Article 48 of the Treaty.

17 However, work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.

18 It appears from the order for reference that the jobs in question are reserved for persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal conditions and that the social employment ends once the local authority is informed by the employment office that the person concerned will be able within a short period to take up employment under normal conditions.

19 It also appears from the order for reference that persons employed under the Social Employment Law are not selected on the basis of their capacity to perform a certain activity; on the contrary, it is the activities which are chosen in the light of the capabilities of the persons who are going to perform them in order to maintain, re-establish or develop their capacity for work. Finally, the activities involved are pursued in the framework of undertakings or work associations created solely for that purpose by local authorities.

20 The reply to the national court's question must therefore be that Article 48(1) of the EEC Treaty is to be interpreted as meaning that a national of a Member State employed in another Member State under a scheme such as that established under the Social Employment Law, in which the activities carried out are merely a means of rehabilitation or reintegration, cannot on that basis alone be regarded as a worker for the purposes of Community law.

Costs

21 The costs incurred by the Netherlands Government and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main

proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Raad van State, by order of 20 October 1987, hereby rules:

Article 48(1) of the EEC Treaty must be interpreted as meaning that a national of a Member State employed in another Member State under a scheme such as that established under the Social Employment Law, in which the activities carried out are merely a means of rehabilitation or reintegration, cannot on that basis alone be regarded as a worker for the purposes of Community law.

Due Koopmans Joliet Grévisse

Slynn Kakouris Moitinho de Almeida Rodríguez Iglesias Diez de Velasco

Delivered in open court in Luxembourg in 31 May 1989.

J.-G. Giraud
Registrar

O. Due
President