

JUDGMENT OF THE COURT (Fifth Chamber)
23 May 1996 *

In Case C-237/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before him between

John O'Flynn

and

Adjudication Officer

on the interpretation of Article 7 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),

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward, President of the Chamber, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón and M. Wathelet, Judges,

* Language of the case: English.

Advocate General: C. O. Lenz,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr O’Flynn, by R. Drabble, Barrister, instructed by C. Dabezies, Solicitor,
- the United Kingdom, by S. Braviner, of the Treasury Solicitor’s Department, acting as Agent, and S. Richards, Barrister,
- the Commission of the European Communities, by C. Docksey, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr O’Flynn, represented by R. Drabble, the United Kingdom, represented by S. Braviner and P. Watson, Barrister, and the Commission, represented by C. Docksey, at the hearing on 29 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1996,

gives the following

Judgment

- 1 By order of 28 June 1994, received at the Court Registry on 22 August 1994, the Social Security Commissioner referred to the Court for a preliminary ruling under

Article 177 of the EC Treaty three questions on the interpretation of Article 7 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 Those questions arose in proceedings between Mr O'Flynn and the Adjudication Officer concerning the refusal of a funeral payment under the Social Fund (Maternity and Funeral Expenses) Regulations 1987 (hereinafter 'the 1987 Regulations').

3 The funeral payment is a means-tested social benefit. It is intended to cover the costs incurred, by the claimant or a member of his family, described in the 1987 Regulations as 'the responsible member', on the occasion of a death in the family.

4 Under Regulation 7(1)(c) of the 1987 Regulations, a funeral payment is made only if 'the funeral takes place within the United Kingdom'. According to Regulation 3(1), "funeral" means a burial or a cremation'.

5 Under Regulation 7(2) of the 1987 Regulations, the funeral payment is to be an amount sufficient to meet the essential expenses met by the responsible member. So it covers all the costs normally associated with burial or cremation at a place near the deceased's home, and if necessary the costs of transporting the body within the United Kingdom to that home. On the other hand, it does not cover the cost of transporting the coffin to a place of burial or cremation which is distant from the deceased's home. In that case the additional cost of transporting the coffin has to be met by the responsible member.

Mr O'Flynn is an Irish national resident in the United Kingdom as a former migrant worker. His son died in the United Kingdom on 25 August 1988. A religious ceremony was held in the United Kingdom but the burial took place in Ireland.

- 7 Mr O'Flynn applied for a funeral payment, which was refused on the ground that the burial had not taken place in the United Kingdom as required by Regulation 7(1)(c) of the 1987 Regulations.

- 8 Mr O'Flynn appealed against the refusal. His contention before the national tribunal was, *inter alia*, that Regulation 7(1)(c) of the 1987 Regulations indirectly discriminated against migrant workers and was in breach of Article 7(2) of Regulation No 1612/68, under which a worker from one Member State is to enjoy in the territory of the other Member States the same social and tax advantages as national workers. The parties disagreed on the criteria to be applied to determine whether a provision such as Article 7(1)(c) of the 1987 Regulations constitutes discrimination against migrant workers.

- 9 Mr O'Flynn submitted that the condition at issue, being a territorial condition, was by its nature indirectly discriminatory against migrant workers. He submitted, in the alternative, that the discriminatory character of the provision should in any event be taken to be established if it was shown that migrant workers were normally less likely to fulfil the condition at issue.

- 10 The respondent authorities submitted for their part that the condition was to be regarded as discriminatory only if it was shown that it was substantially more difficult for migrant workers than for national workers to satisfy it, having regard *inter alia* to their customs. For that it was necessary to show that the condition at issue was satisfied only by a substantially lower proportion of workers from all the other Member States than of national workers. In any event, a migrant worker

could not rely on the discriminatory character of the condition at issue if the condition was not satisfied for reasons unconnected with that worker's nationality.

11 In those circumstances the Social Security Commissioner stayed proceedings and referred the following questions to the Court for a preliminary ruling:

1. Is it compatible with the Community principle of non-discrimination on grounds of nationality for the purposes of Article 7 of Regulation No 1612/68 for the United Kingdom to make the payment of Social Fund funeral expenses subject to a territorial condition, namely that the funeral takes place in the United Kingdom?

2. Does the answer to Question 1 depend upon any of the following considerations:

(a) Is the test to be applied for determining the existence of indirect discrimination on grounds of nationality:

(i) whether nationals of other Member States acting reasonably and in the normal course of events are, by reason of the territorial condition, less likely to receive payments than are United Kingdom nationals (and, if so, must it be shown that, by reason of the condition, a substantially lower proportion of nationals of other Member States than of United Kingdom nationals is likely to receive payments); or

(ii) whether it is substantially more difficult in practice for nationals of other Member States to satisfy the condition; or

(iii) some other and, if so, what test?

(b) In each case is it sufficient to make a comparison between United Kingdom nationals and nationals of the specific Member State of which the claimant is a national, or is it necessary to make a comparison between United Kingdom nationals and nationals of all other Member States?

3. Is such a condition capable of amounting to unlawful discrimination on grounds of nationality, and/or is it open to a claimant to rely on such discrimination, in circumstances in which the claimant's failure to satisfy the condition was for reasons unrelated to nationality, i. e. on grounds of cost?

12 The order for reference shows that the Social Security Commissioner wishes to know whether Article 7(2) of Regulation No 1612/68 precludes a provision, such as that in Regulation 7(1)(c) of the 1987 Regulations, which makes grant of a payment to cover funeral expenses incurred by a migrant worker subject to the condition that the funeral take place within the territory of the Member State whose legislation provides for that payment. Having regard to the arguments advanced before him, the Commissioner wishes to know in particular whether he should take account of the following factors: the proportion and nationality of the migrant workers who actually satisfy the condition at issue; how difficult it is in practice for migrant workers to satisfy that condition; and the reasons why a migrant worker fails to satisfy the condition at issue in a particular situation.

13 Those questions are closely linked and can be considered together.

- 14 The first point to note is that an allowance such as the funeral payment constitutes a 'social advantage' within the meaning of Article 7(2) of Regulation No 1612/68 and, in accordance with that provision, migrant workers must enjoy that advantage under the same conditions as national workers.
- 15 The United Kingdom says that the purpose of a funeral payment is to ensure, in the light of its civic responsibilities and in the interests of public health, the decent burial or cremation in the United Kingdom of all deceased persons. The allowance is granted in a non-discriminatory manner, being paid to migrant workers and national workers alike if the burial or cremation takes place within the United Kingdom, and refused to migrant workers and national workers alike if the burial or cremation takes place outside the United Kingdom.
- 16 It is, however, to be noted that an allowance such as the funeral payment covers not only the necessary costs of the burial or cremation of the body but also all the costs incurred by the responsible member in order to ensure that the deceased receives a modest but decent funeral at a place near his home. The costs of transporting the coffin to a place of burial or cremation distant from that home are not covered by the payment.
- 17 The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result (see *inter alia* Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR

153, paragraph 11; Case C-27/91 *URSSAF v Le Manoir* [1991] ECR I-5531, paragraph 10; Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraph 9; and Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, paragraph 7).

- 18 Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (see Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 24; Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591, paragraph 12; and *Le Manoir*, paragraph 11) or the great majority of those affected are migrant workers (see Case C-279/89 *Commission v United Kingdom* [1992] ECR I-5785, paragraph 42, and Case C-272/92 *Spotti v Freistaat Bayern* [1993] ECR I-5185, paragraph 18), where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (see *Commission v Luxembourg*, paragraph 10, and Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, paragraph 23) or where there is a risk that they may operate to the particular detriment of migrant workers (see Case C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-1779, paragraph 14, and Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249, paragraph 9).
- 19 It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law (see, to that effect, *Bachmann*, paragraph 27; *Commission v Luxembourg*, paragraph 12; and Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others v Università degli Studi di Venezia* [1993] ECR I-4309, paragraph 15).
- 20 It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, 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.

- 21 It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.
- 22 A migrant worker will, in his capacity as responsible member, incur costs of the same type as, and of comparable amount to, those incurred by a national worker. On the other hand, it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin.
- 23 To make payment of any expenses incurred by a migrant worker in his capacity as responsible member subject to the condition that burial or cremation take place within the United Kingdom therefore constitutes indirect discrimination, unless it be objectively justified and proportionate to the aim pursued.
- 24 Although, as the United Kingdom submits, the Social Security Commissioner has not expressly raised the question of justification for the national provision at issue,

his first question is, as the Advocate General observes at point 33 of his Opinion, a general one on the point as to whether such a provision is directly or indirectly discriminatory.

- 25 The Court therefore considers that, in order to give as complete and as useful a reply as possible to the national tribunal, it is necessary to examine that aspect of the problem.
- 26 As regards protection of public health, it suffices to note that that objective is also safeguarded if the body is transported outside the United Kingdom for burial or cremation in another Member State.
- 27 The United Kingdom has further put forward a justification based on the prohibitive cost and practical difficulties of paying the allowance if the burial or cremation takes place outside the United Kingdom.
- 28 However, in such a case, leaving aside the cost of transporting the coffin outside the United Kingdom, the expenses incurred within the United Kingdom by a migrant worker will be no different from those that would be incurred if burial or cremation were to take place within the United Kingdom. Checking those expenses would be no more difficult than if burial or cremation took place within the United Kingdom. The cost of transporting the coffin to a place distant from the deceased's home is not covered in any event.
- 29 With respect to the costs of burial or cremation in another Member State, there is nothing to prevent the United Kingdom from limiting the allowance to a lump sum or reasonable amount fixed by reference to the normal cost of a burial or cremation within the United Kingdom.

30 Consequently, the answer to the Social Security Commissioner's questions must be that Article 7(2) of Regulation No 1612/68 precludes a provision such as that in Regulation 7(1)(c) of the 1987 Regulations which makes grant of a payment to cover funeral expenses incurred by a migrant worker subject to the condition that burial or cremation take place within the territory of the Member State whose legislation provides for that payment.

Costs

31 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Social Security Commissioner by order of 28 June 1994, 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 precludes a provision such as that in Regulation 7(1)(c) of the Social Fund (Maternity and Funeral Expenses) Regulations 1987 which makes grant of a payment to cover

funeral expenses incurred by a migrant worker subject to the condition that burial or cremation take place within the territory of the Member State whose legislation provides for that payment.

Edward

Puissochet

Jann

Sevón

Wathelet

Delivered in open court in Luxembourg on 23 May 1996.

R. Grass

D. A. O. Edward

Registrar

President of the Fifth Chamber