JUDGMENT OF THE COURT (Third Chamber)

25 January 2007 *

In Case C-370/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 5 October 2005, received at the Court on 10 October 2005, in the criminal proceedings against

Uwe Kay Festersen,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Tizzano, A. Borg Barthet, J. Malenovský (Rapporteur) and U. Lõhmus, Judges,

Advocate General: C. Stix-Hackl,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2006,

* Language of the case: Danish.

after considering the observations submitted on behalf of:

— Mr Festersen, by K. Berning, advokat,

— the Danish Government, by J. Molde, acting as Agent, and P. Biering, advokat,

— the Norwegian Government, by K. Moen and I. Holten, acting as Agents,

— the Commission of the European Communities, by H. Støvlbæk, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 56 EC.

2 The reference was made in the context of criminal proceedings brought against Mr Festersen for breach of the obligation to take up fixed residence on the agricultural property which he had acquired on the territory of the municipality of Bov in southern Jutland (Denmark).

National law

3 Under Paragraph 2 of the Danish Law on agriculture (landbrugsloven), in the version resulting from Codified Law No 598 (lovbekendtgørelse nr. 598) of 15 July 1999 ('the Law on agriculture'):

'1. Agricultural properties shall be subject to an agricultural-use obligation under the provisions of this Law.

2. "Agricultural property" shall mean property which is registered as such in the land register.

...'

4 Paragraph 4(6) of the Law on agriculture provides:

'When an agricultural property is divided up or otherwise reduced to a surface area of less than 2 hectares, the agricultural-use obligation shall no longer be applicable unless the owner wishes it still to apply. ...'

5 Under Paragraph 7 of that law:

'1. An agricultural property shall be maintained as an independent business and provided with an appropriate residential building from which the land shall be farmed by the residents, subject to Paragraph 8(4) and (6), Paragraph 9(1) and (2) and Paragraph 10.

2. The property shall be farmed properly having regard to the opportunities for commercial exploitation, the livestock health requirements, nature and the environment.

...'

6 Paragraph 16 of that law states:

'1. Title to an agricultural property which is situated in an agricultural zone and has an area exceeding 30 hectares may be acquired if:

...

(4) the acquirer takes up fixed residence on the property within six months after acquisition,

(5) the acquirer farms the property himself

...

2. Title to an agricultural property which has an area not exceeding 30 hectares may be acquired if the acquirer fulfils the requirements of subparagraph 1(1) to (4).

...'

7 Under Paragraph 18 of the Law on agriculture:

'1. Without prejudice to the cases covered by Paragraphs 16, 17 and 17a, title to an agricultural property in an agricultural zone may be acquired only with the authorisation of the Minister for Food, Agriculture and Fisheries.

...

4. The Minister may authorise the acquisition of an agricultural property, if:

(1) the acquisition is for the purposes of a use within the meaning of Paragraph 4(1)(1) and it is expected that the property will be used for the relevant purpose in the near future;

(2) the acquisition is for business purposes relating to a non-agricultural use which is otherwise to be regarded as desirable taking into account the general interests of society;

(3) the acquisition is for particular purposes, including use for scientific, training, general social, health or general recreational purposes;

(4) the acquisition is in connection with the creation of water meadows, the restoration of the environment or similar circumstances, or

(5) other special circumstances mitigate in its favour.

...'

8 Paragraph 27(2) of the Law on agriculture states:

'Where an application for authorisation to acquire or lease agricultural land is not submitted in due time, the competent minister may impose on the owner an order to dispose of the property within a period of a minimum of six months and a maximum of one year or impose on the tenant or lessee an order to cease use within a similar period. The same applies where authorisation is refused or lapses or the conditions placed on authorisation are not satisfied ...'

9 Paragraph 33 of that law provides:

'1. A fine shall be imposed on any person who:

...

(3) fails to comply with an order under Paragraph 8(5) and (7), Paragraph 9(5) or Paragraph 27.

...'

10 Under Paragraph 62 of Circular No 26 of 22 February 2000 relating to the Law on agriculture:

'Authorisation under Paragraph 18 of the Law [on agriculture] for the acquisition of agricultural property with an exemption from the residence requirement for an indefinite period may be granted only in exceptional cases (see Paragraph 16(1)(4) of the Law on agriculture). This applies for example in cases where due to the characteristics of the site it is physically impossible to fulfil the residence requirement for a large part of the year. The provision must be applied restrictively.'

11 According to Paragraph 4(1) of Decree No 627 of 26 July 1999 relating to training and residence requirements in connection with the Law on agriculture (bekendtgørelse nr. 627 af 26 juli 1999 om uddannelseskrav og bopælskrav m.v. i henhold til landbrugsloven), the requirement of fixed residence on an agricultural property presupposes that the person lives in a settled and continuous manner on that property and that he spends the night there, except in the event of special circumstances of fixed duration. That person must be listed in the local authority's population register as residing at the property in such a way that it constitutes his principal residence for tax purposes.

12 Paragraph 4(2) of that decree provides that the acquirer must fulfil the residence requirement for eight years from the acquisition of an agricultural property.

The main proceedings and the questions referred for a preliminary ruling

13 Mr Festersen, a German national, acquired, in 1998, a property in southern Jutland which, according to the land register, is designated an agricultural property. It consists of two plots: one of an area of 0.24 hectares situated in an urban zone with buildings on it and the other, a piece of meadow land, of an area of 3.29 hectares situated in an agricultural zone.

14 Since Mr Festersen did not satisfy the requirement that residence be taken up on that property, the Agricultural Committee for Southern Jutland gave him notice to put his situation in order by ordering him, on 8 September 2000, to dispose of the property within six months, unless he had placed the ownership on a legal footing beforehand by acquiring an exemption from the agricultural-use obligation or by fulfilling the residence requirement.

15 On 16 July 2001 that committee gave Mr Festersen a new period of six months within which to dispose of the property, unless he took the necessary measures before that period expired, either to reduce the area of the property to under 2 hectares and at the same time seek an exemption from the agricultural-use obligation or to take up residence on the property.

16 On 18 August 2003, Mr Festersen was ordered by the District Court of Gråsten to pay a fine of DKK 5 000 on account of infringement of Paragraphs 33(1)(3) and 27(2) of the Law on agriculture, in that he had failed to comply with the order of the Agricultural Committee for Southern Jutland. He was also ordered to pay a penalty payment of DKK 5 000 for each month of delay if he failed to comply with that order by 1 December 2003.

17 Mr Festersen, who took up residence at the property on 12 June 2003, has been listed in the population register of the municipality of Bov as resident at that address since 12 September 2003.

18 He brought an appeal against his conviction before the Vestre Landsret (Western Regional Court) and claimed that it should be set aside. The prosecuting authorities contended that the judgment at first instance should be upheld.

19 Mr Festersen and the prosecuting authorities disagreed as to whether the residence requirement under the Law on agriculture was compatible with the principles of the freedom of establishment and the free movement of capital as enshrined in Articles 43 EC and 56 EC.

20 Those were the circumstances in which the Vestre Landsret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Article 43 EC and Article 56 EC preclude a Member State from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property?

(2) Does it matter, as regards the answer to Question 1, that the property cannot constitute a self-sustaining unit and that the property's residential building is situated in an urban zone?'

The questions referred

The first question

21 By its first question the national court is effectively asking whether the provisions of the EC Treaty concerning the right of establishment (Article 43 EC) and the free movement of capital (Article 56 EC) preclude national legislation such as that at issue in the main proceedings from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up his fixed residence on that property.

22 It should be recalled at the outset that the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary

of freedom of establishment, as is apparent from Article 44(2)(e) EC (Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 22), generates capital movements when it is exercised (Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 29).

23 As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for the purposes of defining the notion of capital movements (see Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; Case C-464/98 *Stefan* [2001] ECR I-173, paragraph 5; *Reisch and Others*, paragraph 30; and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 22).

24 It must thus be examined whether national legislation such as that at issue in the main proceedings constitutes a restriction on capital movements. In that regard, it follows from settled case-law that the measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other States (see, to that effect, Case C-513/03 *Van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 44).

25 Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the free movement of capital.

26 Such a measure may nevertheless be permitted provided that it pursues an objective in the public interest, that it is applied in a non-discriminatory way and that it respects the principle of proportionality, that is to say that it is appropriate for ensuring that the aim pursued is achieved and does not go beyond what is necessary for that purpose (Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 40; *Reisch and Others*, paragraph 33; and Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 34).

27 As regards the condition relating to the pursuance of an objective in the public interest, the Danish Government submits that the national legislation seeks, first, to preserve the farming of agricultural land by means of owner-occupancy, which constitutes one of the traditional forms of farming in Denmark, and to ensure that agricultural property be occupied and farmed predominantly by the owners, second, as a town and country planning measure, to preserve a permanent agricultural community and, third, to encourage a reasonable use of the available land by resisting pressure on land.

28 Such objectives are themselves in the public interest and are capable of justifying restrictions to the free movement of capital (see, to that effect, *Konle*, paragraph 40; *Reisch and Others*, paragraph 34; and *Ospelt and Schlössle Weissenberg*, paragraphs 38 and 39). In addition, as the Danish Government and the Commission of the European Communities maintain, those objectives are consistent with those of the common agricultural policy which, under Article 33(1)(b) EC, aims 'to ensure a fair standard of living for the agricultural community' in the working-out of which, according to Article 33(2)(a), account must be taken 'of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions' (see, to that effect, *Ospelt and Schlössle Weissenberg*, paragraph 40).

29 As regards the condition of proportionality, it is necessary to check whether the requirement that the acquirer take up his fixed residence on the agricultural property acquired constitutes, as submitted by the Danish and Norwegian Governments, an appropriate and necessary measure for the attainment of the objectives mentioned in paragraph 27 above.

30 As regards whether the national measure at issue in the main proceedings is appropriate, it must be observed that it contains only a residence requirement and is not coupled, for an acquirer of an agricultural property of less than 30 hectares, with a requirement to farm the property personally. Such a measure thus does not appear, in itself, to ensure the attainment of the alleged objective seeking to preserve the traditional form of farming by owner-occupiers.

31 It is true that, as regards the second aim assigned to the Law on agriculture, the residence requirement is likely to contribute, by definition, to preserving an agricultural community and it can be met even further by farmers who, in accordance with one of the general objectives of the Law on agriculture seeking to encourage the owner-occupancy form of farming, personally farm their own land.

32 However, in the light of the phenomena of both reduction of the number of farms and regrouping of farms, as is apparent from the written observations lodged before the Court, and which were not challenged at the hearing, the objective of preserving an agricultural community cannot be met where the acquisition is made by a farmer

who is already resident on another farm. In such a situation, the residence requirement does not guarantee the attainment of that objective, and thus it does not appear that that requirement is, in actual fact, appropriate, in itself, for the purpose of attaining such an objective.

33 In relation to the third aim which the Law on agriculture seeks to attain, it must be found that the residence requirement can reduce the number of potential acquirers of agricultural property and, consequently, it is capable of reducing the pressure on that land. It can therefore be accepted that national legislation containing such a requirement, which seeks to avoid the acquisition of agricultural land for purely speculative reasons, and which is thus likely to facilitate the preferential appropriation of that land by persons wishing to farm it does pursue a public interest objective in a Member State in which agricultural land is, and this is not challenged, a limited natural resource.

34 It is thus necessary to ascertain whether the residence requirement constitutes a measure which does not go beyond what is necessary to attain such an objective.

35 In such an assessment account must be taken of the fact that that requirement restricts not only the free movement of capital but also the right of the acquirer to choose his place of residence freely, a right which he is, however, guaranteed by Article 2(1) of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

36 Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 36).

37 Given that the residence requirement thus adversely affects a fundamental right guaranteed by the ECHR, it therefore turns out to be particularly restrictive. The question thus arises whether other measures less restrictive than that requirement could have been adopted.

38 In that regard, the Danish Government submits that the requirement in question cannot be replaced by less restrictive measures which would be equally effective in preventing prices of agricultural land intended for production from being affected by an application motivated only by the desire to make investments to the detriment of professional farmers.

39 Although that government submits that the only solution remaining for maintaining prices at the desired level is State regulation of those prices, it does not state, however, in what way such a measure would be more restrictive than the residence requirement adopted. Nor did it justify in what way another measure, mentioned in the file, of incentives to lease residences acquired on agricultural property would prove to be more restrictive than that requirement. In the Danish Government's observations there was also no mention or evaluation of other measures capable, in some circumstances, of being less detrimental to the free movement of capital, such as provisions for higher tax on resale of land occurring shortly after acquisition, or even the requirement of a substantial minimum duration for leases of agricultural land.

40 Thus, none of the above enables the Court to find that the residence requirement is necessary to meet the objective sought.

41 Even supposing that that requirement is recognised as a measure necessary for meeting the objective sought on the ground that it would produce, by itself, positive effects on the property market (in the light of the constraints involved in any change of residence which in turn discourage property speculation), it must be pointed out that by coupling that requirement with a condition that residence be maintained for at least eight years, such an additional condition clearly goes beyond that which could be regarded as necessary, in particular as it implies a long-term suspension of the exercise of the fundamental freedom to choose one's place of residence.

42 It is true that, as submitted by the Danish Government, Paragraph 18 of the Law on agriculture enables the Minister for Food, Agriculture and Fisheries to authorise the acquisition of agricultural land with an indefinite exemption from the residence requirement. However, according to Circular No 26, the exercise of that power is strictly limited to 'exceptional cases' and must be 'applied restrictively'.

43 In addition, in providing only one example of such cases, that circular does not inform potential acquirers about the specific and objective situations in which a derogation from the residence requirement will be granted or refused. Such vagueness does not enable individuals to become familiar with the extent of their rights and obligations resulting from Article 56 EC, so that a system of that nature must be regarded as being contrary to the principle of legal certainty (see, to that effect, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 50, and Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraphs 74 and 75). In any event, it does not appear that that system has taken into account the situation of citizens of the Union who are not resident in Denmark in order to avoid discriminatory application.

44 Accordingly, the residence requirement, particularly since it is coupled in this case with a condition that residence be maintained for eight years, to which the acquisition of agricultural properties of less than 30 hectares is made subject by the national legislation at issue in the main proceedings does not appear to be a measure which is proportionate to the objective pursued and therefore constitutes a restriction to the free movement of capital which is incompatible with Article 56 EC.

45 The Danish Government must be considered still to be claiming that the residence requirement at issue in the main proceedings must also fall within the derogation laid down in Protocol No 16 annexed to the Treaty, according to which 'notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes'.

46 It must however be found, in that regard, that the requirement to take up residence on the agricultural property acquired applies irrespective of whether the residence at issue is a principal or second home. Protocol No 16 cannot, therefore, effectively be relied on to justify such a requirement.

47 In the light of all the foregoing, there is no need to examine the questions concerning the interpretation of Article 43 EC.

48 The answer to the first question must therefore be that Article 56 EC precludes national legislation such as that at issue in the main proceedings from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property.

The second question

49 By its second question the national court is effectively asking whether the interpretation of Article 56 EC required by the first question would be different where the agricultural property acquired did not constitute a viable farm and the residential building was situated in an urban zone.

50 It results from the answer to the first question that Article 56 EC precludes the residence requirement at issue, irrespective of particular circumstances relating to individual characteristics of the agricultural land concerned. Circumstances of that nature, such as those raised by the national court in its second question, are therefore irrelevant for the interpretation of that article.

51 Consequently, the answer to the second question must be that that interpretation of Article 56 EC would not be different where the agricultural property acquired did not constitute a viable farm and the residential building was situated in an urban zone.

Costs

52 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 (Third Chamber) hereby rules:

1. **Article 56 EC precludes national legislation such as that at issue in the main proceedings from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property.**

2. **That interpretation of Article 56 EC would not be different where the agricultural property acquired did not constitute a viable farm and the residential building was situated in an urban zone.**

[Signatures]