Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 9 June 2016 [1]

Joined Cases C-401/15 to C-403/15

Noémie Depesme (C-401/15),
Saïd Kerrou (C-401/15),
Adrien Kauffmann (C-402/15),
Maxime Lefort (C-403/15)
v
Ministre de l'Enseignement supérieur et de la Recherche

(Requests for a preliminary ruling from the Cour administrative (Luxembourg))

(References for a preliminary ruling — Freedom of movement for persons — Equal treatment — Social advantages — Regulation (EU) No 492/2011 — Article 7(2) — Financial aid for higher education — Condition — Discrimination — Parent-child relationship — Concept of 'child' — Step-parent')

I – Introduction

1. These requests for a preliminary ruling concern the interpretation of Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union. [2]

2. The references were made in the context of three disputes between Ms Noémie Depesme and Mr Saïd Kerrou, Mr Adrien Kauffmann and Mr Maxime Lefort and the Minister for Higher Education and Research ('the Minister') relating to the refusal to award State financial assistance for higher education for the academic year 2013/2014.

3. They are to be viewed in the context of the amendments made to the Luxembourg legislation following the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411).

1 — Original language: French.
2 — OJ 2011 L 141, p. 1.

4. By the question referred, the Court is being asked to determine whether the concept of 'child' of a migrant worker in the new Article 2a of the Law of 22 June 2000 on State financial aid for higher education (Loi du 22 juin 2000 concernant l'aide financière de l'État pour études supérieures), as amended by the Law of 19 July 2013 (*Mémorial* A 2013, p. 3214), which was adopted following the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411), also includes the worker's stepchildren. [3]

5. In the context of this Opinion, the terms 'stepson', 'stepdaughter' and 'stepchildren' must be taken to refer to the relationship between a child and the person to whom his or her mother or father is married or with whom the mother or father has entered into a registered partnership equivalent to marriage.

II – Legal framework

A – *EU law*

1. Regulation No 492/2011

6. Article 7 of the regulation states 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.

…'

2. Directive 2004/38/EC

7. The concept of a 'family member' of a citizen of the Union is defined in Article 2(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [4] According to that provision, a 'family member' is:

'(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

3 — I would point out that this legislation is the subject of another request for a preliminary ruling in *Bragança Linares Verruga and Others*, currently pending before the Court, in which I delivered my Opinion on 2 June 2016 (C-238/15, EU:C:2016:389). That case relates more fundamentally and directly to the consistency with Union law of the provisions by which the Luxembourg legislature has chosen to make the award of State financial aid for higher education subject to a minimum period of employment in Luxembourg. At the end of my analysis, I proposed that the Court rule that Article 7(2) of Regulation No 492/2011 precluded a Member State from adopting a rule such as the Luxembourg law.

4 — OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).'

B – *Luxembourg law*

8. Article 2 of the loi du 22 juin 2000 concernant l'aide financière de l'État pour études supérieures (Law of 22 June 2000 on State financial aid for higher education), as amended by the Law of 26 July 2010 (*Mémorial* A 2010, p. 2040), ('the Law of 22 June 2000') provided as follows:

'Persons entitled to financial aid A student admitted to higher education studies shall be entitled to receive financial aid from the State for higher-education studies where he or she satisfies one of the following conditions:

(a) he or she is a Luxembourg national or a member of the family of a Luxembourg national and is domiciled in the Grand Duchy of Luxembourg, or

(b) he or she is a national of another Member State of the European Union or of one of the other States which is a party to the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)] or of the Swiss Confederation and resides, in accordance with Chapter 2 of the amended Law of 29 August 2008 on the free movement of persons and on immigration, in the Grand Duchy of Luxembourg as an employed person, a self-employed person, a person who retains that status, or a family member of one of the categories of persons above, or as a person who has acquired the right of permanent residence … …'

9. Following the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411), Article 1(1) of the Law of 19 July 2013 (*Mémorial* A 2013, p. 3214) inserted into the Law of 22 June 2000 Article 2a, worded as follows:

'A student not residing in the Grand Duchy of Luxembourg may also receive financial aid for higher education studies where that student is the child of an employed or self-employed person who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation, is employed or pursuing an activity in Luxembourg, and has been employed or has pursued an activity in Luxembourg for a continuous period of at least five years at the time the student makes the application for financial aid for higher education studies. Employment in Luxembourg must be for at least half the normal working hours applicable within the undertaking, under statute or by virtue of any collective labour agreement that may be in force. A self-employed worker must have been compulsorily and continuously affiliated to the social security system in the Grand Duchy of Luxembourg under Article 1(4) of the Social Security Code during the five years prior to the application for financial aid for higher education studies.'

10. The Law of 22 June 2000, as amended by the Law of 19 June 2013, ('the amended Law of 22 June 2000') was, however, soon repealed by the Law of 24 July 2014 on State financial assistance for higher education (*Mémorial* A 2014, p. 2188).

11. Article 3 of the latter law now provides as follows:

'A student or pupil, as defined in Article 2, hereinafter referred to as a 'student', who fulfils one of the following conditions may benefit from State financial aid for higher education:

…

(5) a student not resident in the Grand Duchy of Luxembourg who:

(a) is a worker and a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation, employed or pursuing an activity in the Grand Duchy of Luxembourg at the time when the application for financial aid for higher education is made; or

(b) is the child of a worker who is a Luxembourg national or a national of the European Union or of another State party to the Agreement on the European Economic Area or of the Swiss Confederation employed or pursuing an activity in the Grand Duchy of Luxembourg at the time when the student's application for financial aid for higher education is made, provided that the worker is continuing to contribute to the maintenance of the student and the worker has been employed or has pursued an activity in the Grand Duchy of Luxembourg for at least five years at the time of the student's application for financial aid for higher education, within a reference period of seven years counting back from the date of the application for financial aid for higher education or, by way of derogation, the person retaining worker status met the aforementioned criterion of five years out of seven when he or she finished work.'

III – Facts of the dispute in the main proceedings

12. Ms Depesme is the stepdaughter of Mr Kerrou, a frontier worker in Luxembourg. They live in Mont-Saint-Martin in Lorraine (France), near the border with the Grand Duchy. Ms Depesme applied for Luxembourg State financial aid for higher education, with a view to registering for the first year of medicine at the University of Lorraine in Nancy (France).

13. Mr Kauffmann is the stepson of Mr Patrick Kiefer, who is also a frontier worker in Luxembourg. They live in Marly Freskaty (France), in the border area of Lorraine. Mr Kauffmann requested Luxembourg State financial aid for higher education for his course in law and economics at the University of Lorraine in Nancy.

14. Mr Lefort is the stepson of Mr Terwoigne, who is also a frontier worker in Luxembourg. Mr Terwoigne married Mr Lefort's mother after her husband died. They live in Vance (Belgium), in the part of the province of Luxembourg which borders on the Grand Duchy of Luxembourg. Mr Lefort requested Luxembourg State financial aid for higher education for his studies in sociology and anthropology at the Catholic University of Louvain in Louvain-la-Neuve (Belgium).

15. In the version of the amended Law of 22 June 2000 applicable to the facts in the main proceedings, the financial aid sought is to be awarded to students who are not resident in Luxembourg on condition, first, that the recipient of the assistance is the child of a worker, whether employed or self-employed, who is a Luxembourg national or Union national and, secondly, that that worker has been employed or pursuing an activity in Luxembourg for an uninterrupted period of at least five years at the time of the application.

16. By letters dated 26 September, 17 October and 12 November 2013 respectively, the Minister refused the applications of Ms Depesme, Mr Kauffmann and Mr Lefort on the ground that they did not fulfil the conditions laid down by the amended Law of 22 June 2000. According to the orders for reference, the Minister took the view that Ms Depesme, Mr Kauffman and Mr Lefort could not be classified as 'children' of frontier workers as only their stepfathers worked in Luxembourg.

17. On 20 December 2013 Ms Depesme brought an action before the Tribunal administratif (Administrative Court) of Luxembourg seeking annulment of the decision refusing her application. Her stepfather, Mr Kerrou, declared that he was intervening voluntarily in the case. On 20 January and 25 April 2014, Mr Lefort and Mr Kauffmann each brought similar actions against the decisions refusing their applications.

18. By judgments of 15 January 2015, the Tribunal administratif declared the applications of Ms Depesme, Mr Kauffmann and Mr Lefort admissible but unfounded. Ms Depesme, Mr Kerrou, Mr Kauffmann and Mr Lefort contested those judgments before the Cour administrative (Higher Administrative Court, Luxembourg).

19. Before that court, Ms Depesme and Mr Kerrou point out inter alia that Mr Kerrou, who has been a frontier worker in Luxembourg for 14 years, married Ms Depesme's mother on 24 May 2006. Since then, all three of them have lived in the same home and Mr Kerrou contributes to the maintenance of his wife's child, including in relation to higher education. He was also in receipt of Luxembourg family benefits for that child before she entered higher education.

20. Mr Kauffmann states that his parents separated in 2003 and have been divorced since 20 June 2005. His mother was awarded sole custody of the children. She married Mr Kiefer on 10 March 2007. Since then, all three of them have lived under the same roof. Mr Kiefer has provided for his maintenance and education. He has also received Luxembourg family benefits in respect of Mr Kauffmann.

21. Finally, Mr Lefort states that his father is dead. His mother remarried Mr Terwoigne, a frontier worker in Luxembourg for over five years. Since then he has lived with his mother and stepfather, Mr Terwoigne, who bears the full financial cost of running the household. He also contributes to Mr Lefort's higher education costs.

22. In reply to these factual arguments, the Luxembourg State argues that Ms Depesme, Mr Kauffmann and Mr Lefort are not 'legally' the children of their stepfathers.

23. In its order for reference, the Cour administrative (Higher Administrative Court) emphasises that Article 2a of the amended Law of 22 June 2000 is consequential upon the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411). According to the referring court, the disputed issue in the cases brought before it relates not to the conditions for making an award under the new law, but to the very concept of 'child' as used in the law, to which the aforementioned judgment of the Court referred. The parent-child relationship may be regarded not just from a legal point of view but also from an economic point of view.

24. In those circumstances, the Cour administrative (Higher Administrative Court) decided to stay the proceedings and refer a question to the Court for a preliminary ruling.

IV – Questions referred for a preliminary ruling and procedure before the Court

25. By three decisions of 22 July 2015, received at the Court on 24 July 2015, the Cour administrative (Higher Administrative Court) referred to the Court under Article 267 TFEU three questions for a preliminary ruling in identical terms, subject to one difference.

26. In Case C-403/15 the referring court added to the provisions of EU law referred to in the other two cases Article 33(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), in combination if appropriate with Article 7 of the Charter.

27. The question referred in its more complete formulation is worded as follows:

'In order properly to meet the requirements of non-discrimination under Article 7(2) of Regulation … No 492/2011 …, together with Article 45(2) TFEU, against the background of Article 33(1), together if appropriate with Article 7, of the Charter …, when taking into account the actual degree of attachment of a non-resident student, who has applied for financial aid for higher education studies, with the society and with the labour market of Luxembourg, being the Member State in which a frontier worker has been employed or has carried out his activity in the conditions referred to in Article 2a of the Law of 22 June 2000 … amended in direct consequence of the judgment of the Court of Justice of 20 June 2013 [*Giersch and Others* (C-20/12, EU:C:2013:411)],

— should the requirement that the student be the "child" of that frontier worker be taken to mean that he must be the frontier worker's "direct descendant in the first degree whose relationship with his parent is legally established", with the emphasis being placed on the child-parent relationship established between the student and the frontier worker, which is supposed to underlie the abovementioned attachment, or

— should the emphasis be placed on the fact that the frontier worker "continues to provide for the student's maintenance" without necessarily being connected to the student through a legal child-parent relationship, in particular where a sufficient link of communal life can be identified, of such a kind as to establish a connection between the frontier worker and the student's parent with whom the child-parent relationship is legally established?

From the latter perspective, where the contribution, by definition non-compulsory, of the frontier worker is not exclusive but made in parallel with that of the parent or parents connected with the student through a legal child-parent relationship, and therefore in principle under a legal duty to maintain the student, must that contribution satisfy certain criteria as regards its substance?'

28. Written observations were submitted by Ms Depesme, Mr Kerrou, Mr Kauffmann and Mr Lefort, the Luxembourg Government and the European Commission. On conclusion of the written stage of the procedure, the Court considered that it had sufficient information to rule without holding a hearing, in accordance with Article 76(2) of the Rules of Procedure of the Court.

V – Analysis

A – *Preliminary observations on the judgment in Giersch and Others and the applicable regulation*

1. The judgment in Giersch and Others

29. The referring court points repeatedly to the connection between the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411) and the amendment to the Law on State financial aid for higher education. That connection was expressly confirmed by the grounds set out in draft Law No 6585, which is the basis of the Law of 19 July 2013. [5]

30. With regard to the problem at the heart of the cases in the main proceedings, it is true that the Court itself, in paragraph 39 of its judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411), pointed to settled case-law according to which 'study finance granted by a Member State to the *children* of workers constitutes, for the migrant worker, a social advantage within the meaning of 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, [6] as amended by Directive 2004/38 [7]]'. [8]

31. It also confirmed that the members of migrant worker's family are indirect recipients of the equal treatment granted to the worker under Article 7(2) and that, 'since the grant of funding for studies to a *child* of a migrant worker constitutes a social advantage for the migrant worker, the child may himself rely on that provision in order to obtain that funding if, under national law, such funding is granted directly to the student'. [9]

2. Applicable regulation

32. In its request for a preliminary ruling, the referring court refers to the interpretation of Article 7(2) of Regulation No 492/2011. Yet in the judgment of 20 June 2013 *Giersch and Others* (C-20/12, EU:C:2013:411), the Court referred to Regulation No 1612/68.

33. However, that difference has no effect on the relevance of the judgment for the cases in the main proceedings. Although Regulation No 1612/68 was repealed and replaced with effect from 15 June 2011 by Regulation No 492/2011, Article 7 is in every particular identical in the two regulations. [10]

B – *The question referred*

34. In order to give a useful reply to the referring court, it is necessary first of all to interpret the term 'child' of a migrant worker.

5 — According to the actual wording of the statement of reasons, the purpose of amending the system of financial aid from the Luxembourg State for higher education was to 'draw the appropriate conclusions' from the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411). See draft Law No 6585 amending the Law of 22 June 2000 on State financial aid for higher education (Document 6585 of 5 July 2013, p. 2, available on the website of the Chamber of Deputies of the Grand Duchy of Luxembourg at the following address: http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id= 6585#).

6 — OJ, English Special Edition 1968(II), p. 475.

7 — Cited in footnote 3.

8 — My emphasis.

9 — Judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 40). My emphasis.

10 — Furthermore under the second indent of Article 41 of Regulation No 492/2011, the references to Regulation No 1612/68 are to be understood as references to Regulation No 492/2011.

35. Does that concept as it appears in the case-law of the Court on Article 7(2) of Regulation No 1612/68 (now Article 7(2) of Regulation No 492/2011) refer exclusively to the legal parent-child relationship, or does it also include the worker's 'stepchildren', that is to say, his partner's children, where there is not necessarily a legal connection between them?

36. It is only if the second interpretation is to be adopted — as I think it should be — that it will then have to be asked whether there should be a requirement that a certain contribution is made by the frontier worker to the maintenance of the child.

1. Concept of 'child' of the migrant worker

37. Two facts may inform the interpretation of the Court.

38. First, it is clear from settled case-law that study finance awarded by a Member State to children of workers constitutes for a migrant worker a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 where the worker continues to support the child.[11] In addition, members of his family have been recognised as indirect beneficiaries of the equality of treatment provided for in that article.[12]

39. Second, under Article 10(1) of Regulation No 1612/68, the spouse of a worker from another Member State 'and their descendants who are under the age of 21 years or are dependants' had the right to install themselves with that worker in another Member State whatever their nationality.

40. The Court has interpreted 'the right of "his spouse and their descendants who are under the age of 21 years or are dependants" to install themselves with the migrant worker … as meaning that it is granted both to the descendants of that worker and *to those of his spouse*. To give a restrictive interpretation to that provision to the effect that only the children common to the migrant worker and his spouse have the right to install themselves with them would run counter to the aim of Regulation No 1612/68' of the integration of family members of migrant workers.[13]

41. It is of course true that Article 10 of Regulation No 1612/68 was repealed with the amendment to Regulation No 1612/68 by Directive 2004/38.[14] However, it must be noted, first, that that provision was restated in favour of all citizens of the Union in Article 2 of the directive, and, second, that the Union legislature clarified the formal definition of 'descendant', applying the wide interpretation conferred on it by the Court.

42. Indeed, according to Article 2(2)(c) of Directive 2004/38, 'the direct descendants who are under the age of 21 or are dependants *and those of the spouse or partner*' are considered to be family members of the Union citizen.[15]

43. Since the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411) relates to Regulation No 1612/68 and postdates the adoption of Directive 2004/38, that judgment and the concept of 'child' it uses are unquestionably part of that development in the case-law and legislation.

11 — See, to that effect, judgments of 26 February 1992 in *Bernini* (C-3/90, EU:C:1992:89, paragraph 29); 8 June 1999 in *Meeusen* (C-337/97, EU:C:1999:284, paragraph 19); and 14 June 2012 in *Commission* v *Netherlands* (C-542/09, EU:C:2012:346, paragraph 35).

12 — See, to that effect, judgments of 26 February 1992 in *Bernini* (C-3/90, EU:C:1992:89, paragraph 26 and 29) and 14 June 2012 in *Commission* v *Netherlands* (C-542/09, EU:C:2012:346, paragraph 48). See also, but in relation to a guarantee ensuring the minimum wage, judgment of 18 June 1985 in *Lebon* (316/85, EU:C:1987:302, paragraph 12).

13 — Judgment in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 57). My emphasis.

14 — See Article 38 of Directive 2004/38.

15 — My emphasis. I note that a similar definition of 'family' is also used in Article 4 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

44. The Luxembourg Government nonetheless, arguing against such a contextual and historical interpretation, proposes a strict separation between the scope of Regulation No 492/2011 and that of Directive 2004/38. It maintains that the directive relates only to the right of Union citizens and members of their family freely to move about and reside in Member States, and not to the right of frontier workers to benefit from the same social advantages as national workers provided for in Article 7(2) of Regulation No 492/2011.[16]

45. In the view of that government, the reference to the definition of 'family member' in Directive 2004/38 is therefore not relevant to the analysis of the principle of non-discrimination against workers in the context of Regulation No 492/2011.[17]

46. I do not share this view which makes a watertight distinction between the scopes of the two rules and claims that the family of a citizen of the Union is not necessarily the same as the family of a citizen of the Union when he is considered in his capacity as a 'worker'.

47. It not only leaves out of account the development of the EU legislation, which I have already described, but furthermore leads to situations which cannot be justified.

48. Indeed, it must be noted that the broad definition of 'descendants who are under the age of 21 or are dependants' was applied by the Court in a case which involved the right of the 'children of a national of a Member State who is or has been employed in the territory of another Member State [to be educated] under the same conditions as the nationals of that State, if such children are residing in its territory'.[18]

49. That right, which was enshrined in Article 12 of Regulation No 1612/68, still appears in identical terms in Regulation No 492/2011.[19] The fact that that provision has not been interpreted differently by the Court since the judgment of 17 September 2002 in *Baumbast and R* (C-413/99, EU:C:2002:493) means in concrete terms that both the descendants of the migrant worker and those of his spouse have the right to be admitted to the educational system of the host Member State under Article 10 of Regulation No 492/2011.

50. Therefore, if the Court were to follow the argument of the Luxembourg Government, that would imply that the concept of 'child' was interpreted widely in the context of the right to be educated (Article 10 of Regulation No 492/2011), but restrictively in relation to the award of the same social and tax benefits as national workers (Article 7 of Regulation No 492/2011), including advantages relating to the financing of studies.

51. Such a different interpretation of the concept of 'child' in the application of one and the same regulation would certainly not be justified.

52. Furthermore, the Union legislature itself very recently confirmed the consistency of the concept of 'members of the family' whether it is considered from the perspective of the worker, or, more broadly, from the perspective of citizenship of the Union.

53. According to recital 1 of Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers,[20] 'the free movement of workers is a fundamental freedom of Union citizens and one of the pillars of the internal market in the Union enshrined in Article 45

16 — See written observations of the Luxembourg Government (point 23).

17 — See written observations of the Luxembourg Government (point 22).

18 — Article 12 of Regulation No 1612/68. See judgment of 17 September 2002 in *Baumbast and R* (C-413/99, EU:C:2002:493).

19 — Article 10 of Regulation No 492/2011.

20 — OJ 2014 L 128, p. 8.

[TFEU]. Its implementation is further developed by Union law aiming to guarantee the full exercise of rights conferred on Union citizens and the members of their family. "*Members of their family" should be understood as having the same meaning as the term defined in point (2) of Article 2 of [Directive 2004/38], which applies also to family members of frontier workers*'. [21]

54. Under Article 2(2) of that directive, its scope is *identical* to that of Regulation No 492/2011. Furthermore, Article 1 of Directive 2014/54 states that its purpose is to 'facilitate the uniform application and enforcement in practice of the rights conferred by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) No 492/2011'.

55. Directive 2014/54, which came into force on 20 May 2014, seems to me therefore fully applicable to the cases in the main proceedings, in that Article 3(1) requires the Member States to ensure that judicial procedures for the enforcement of obligations under Article 45 TFEU and under Articles 1 to 10 of Regulation No 492/2011 are available to workers and members of their families who 'consider themselves wronged by a failure to apply the principle of equal treatment to them'.

56. Is it still necessary to repeat that the Member States' obligation, arising under a directive, to achieve the result envisaged by the directive, and their duty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts? [22] Specifically, that means that 'in applying national law, whether the provisions in question were adopted *before* or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article [288 TFEU]'. [23]

57. In those circumstances, Directive 2014/54 confirms that the concept of a 'child' able to benefit indirectly from the principle of equality enshrined in Article 7(2) of Regulation No 492/2011 must indeed be interpreted in the light of the concept of 'family members' as defined by the case-law of the Court in relation to Regulation No 1612/68, and restated in Article 2 of Directive 2004/38. [24]

58. That interpretation is furthermore consistent with the interpretation of the 'family life' as protected by Article 7 of the Charter and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. The European Court of Human Rights has progressively departed inter alia from the criterion of the 'parental relationship', recognising the possibility of 'de facto family ties'. [25] Under Article 52(3) of the Charter, the rights which it contains and which correspond to the rights guaranteed by the Convention must have the same meaning and scope.

59. An example will serve to show the inappropriateness of a strictly legal definition of the parent-child relationship in the context of Article 7 of Regulation No 492/2011 and the social and tax advantages.

21 — My emphasis.

22 — See, to that effect, for a recent reminder of the settled case-law, judgment of 19 April 2016 in *DI* (C-441/14, EU:C:2016:278, paragraph 30 and the case-law cited).

23 — See, to that effect, judgment of 13 November 1990 in *Marleasing* (C-106/89, EU:C:1990:395, paragraph 8). My emphasis.

24 — Analysing the case-law of the Court and the rules of secondary law which use the concept of 'family', T. Stein reaches the same conclusion. In his view, the concept of 'family' in EU law is based on a conception of the family arising from a marital relationship, including registered partnerships, but it goes beyond the traditional concept of the nuclear family by including dependents (Stein, T., 'The notion of the term of family on European level with a focus on the case law of the European Court of Human Rights and the European Court of Justice', in Verbeke, A., Scherpe, J.-M., Declerck, Ch., Helms, T., and Senaeve, P. (ed.), *Confronting the frontiers of family and succession law: liber amicorum Walter Pintens*, vol. 2, Cambridge/Antwerp, Portland/Intersentia, 2012, pp. 1375-1392, particularly. p. 1391).

25 — See, to that effect, ECHR, 22 April 1997, *X, Y and Z v. the United Kingdom*, ECLI:CE:ECHR:1997:0422JUD002183093.

60. Let us imagine a blended family with three children. The first was only a few months old when he lost his father following a car accident. When he was three his mother met a man, a divorced father of a two-year-old, of whom he had sole custody. A third child is born of their union. The family lives in Belgium, a few kilometres from Luxembourg, where the mother has been working for 10 years.

61. In this configuration, if the concept of 'child' used in Article 2a of the amended law of 22 June 2000 were used in its strict interpretation, that would mean that the mother could obtain financial aid from the Luxembourg State for the higher education of her own child and for the child common to the couple. But the partner's child, who has been living within this family from the age of two, would not be able to benefit from the same aid.

62. In light of the foregoing considerations, I therefore consider that a child who has no legal connection to the migrant worker but fulfils the definition of 'family member' in Article 2(2) of Directive 2004/38 must be regarded as the child of the worker and an indirect beneficiary of the social advantages referred to in Article 7(2) of Regulation No 492/2011.

2. The requirement that the parent without any legal connection to the child contribute to the child's maintenance

63. In the second part of the question referred for a preliminary ruling, the referring court is also asking what level of contribution the frontier worker has to make to the maintenance of a student to whom he has no legal connection in order for the student to benefit from financial assistance such as that at issue in the main proceedings.

64. It is correct that, according to the case-law of the Court set out at paragraph 39 of the judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411), 'study finance granted by a Member State to the children of workers constitutes, for the migrant worker, a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 [now Article 7(2) of Regulation No 492/2011], *where the worker continues to support the child*'.[26]

65. It is also true that Article 10 of Regulation No 1612/68 related to the worker's spouse 'and their descendants who are under the age of 21 years *or are dependants*',[27] and that the expression was repeated in Article 2(2)(c) of Directive 2004/38.

66. In that regard, it must be noted that the Court has held that 'the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance'.[28] 'If that were the case, the composition of the family would depend on national legislation, which varies from one State to another, and that would lead to the application of Community law in a manner that is not uniform.'[29]

67. The same reasoning must apply to a spouse's support of his or her stepchildren. It therefore always seems to be judicious to take the view that the status of 'dependent member of a worker's family is the result of a factual situation',[30] which it is for the authorities and, if appropriate, the courts to assess.

68. That interpretation is furthermore compatible with the case-law referred to above, which favours the wider formulation 'support the child'[31] rather than 'dependent [child]'.

26 — My emphasis.

27 — My emphasis.

28 — Judgment of 18 June 1985 in *Lebon* (316/85, EU:C:1987:302, paragraph 21).

29 — Judgment of 18 June 1985 in *Lebon* (316/85, EU:C:1987:302, paragraph 21).

30 — Judgment of 18 June 1985 in *Lebon* (316/85, EU:C:1987:302, paragraph 22).

31 — Judgment of 20 June 2013 in *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 39).

69. The condition of contributing to the maintenance of a child derives from a factual situation which may be evidenced by objective factors such as marriage (or registered partnership between the 'legal' parent and the step-parent) or a joint household, and it is not necessary to determine the reason why such support is given or to make a precise estimation of its extent.

70. In that regard, the Luxembourg Government's argument that it would be impossible for its authorities to find out in every individual case whether and to what extent the frontier worker who is the step-parent of a student does or does not contribute to the student's maintenance cannot be accepted. [32]

71. To begin with, a child is presumed to be dependent up to the age of 21 years, since Article 2(2)(c) of Directive 2004/38 envisages responsibility for the child as an alternative criterion to age after the age of 21.

72. Next, it is clear from the submissions of the applicants in the main proceedings that the fact that the household is responsible for the child constitutes a criterion for the payment of family benefit (which, in this case, is paid to at least two of the stepfathers concerned) and does not pose any particular difficulty, even though there is no requirement as to legal parentage. [33]

73. Finally, the Luxembourg legislature has itself made it a condition, in Article 3 of the law currently in force, that is to say the Law of 24 July 2014 on State financial aid for higher education, that 'the worker is continuing to contribute to the maintenance of the student'. Such a requirement cannot therefore be regarded as unverifiable by the authorities.

VI – Conclusion

74. In the light of the foregoing considerations, I propose that the Court give the following reply to the question referred for a preliminary ruling by the Cour administrative (Higher Administrative Court, Luxembourg) as follows:

Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, must be interpreted as meaning that a child who has no legal connection to a migrant worker but is a descendant of the spouse (or registered partner) of that worker must be regarded as the child of that worker. On this basis, he is an indirect beneficiary of the social advantages referred to in Article 7(2) of Regulation No 492/2011, provided that the worker provides for his maintenance.

The condition of contributing to the maintenance of the child derives from a factual situation, and it is not necessary to determine the reason why such support is given or to make a precise estimation of its extent.

32 — See written observations of the Luxembourg Government (point 46).

33 — See written submissions of Ms Depesme and Mr Kerrou (p. 21), and of Mr Kauffmann (point 90 et seq.).