# JUDGMENT OF THE COURT (Fifth Chamber)
29 October 1998 *

In Case C-185/96,

**Commission of the European Communities**, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Hellenic Republic**, represented by Ioanna Galani-Maragkoudaki, Special Deputy Legal Adviser to the Special Department for Community Legal Matters of the Ministry of Foreign Affairs, and Stamatina Vodina, Special Assistant in the same Department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by precluding by regulation or administrative practice on the grounds of their nationality employed or self-employed workers from other Member States and the members of their families from being attributed large-family status for the purpose of the award of special benefits for such families and from being awarded family allowances, the Hellenic Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty, Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

* Language of the case: Greek.

Article 7 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402), Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10) and Article 3 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (consolidated version, OJ 1992 C 325, p. 1),

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann (Rapporteur), J. C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 March 1998,

after hearing the Opinion of the Advocate General at the sitting on 30 April 1998,

gives the following

## Judgment

1 By application lodged at the Court Registry on 31 May 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty

for a declaration that, by precluding by regulation or administrative practice on the grounds of their nationality employed or self-employed workers from other Member States and the members of their families from being attributed large-family status for the purpose of the award of special benefits for such families and from being awarded family allowances, the Hellenic Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty, Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), Article 7 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402), Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10) and Article 3 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (consolidated version, OJ 1992 C 325, p. 1).

## The legal background

### *The Community legislation*

2 Article 7(1) and (2) of Regulation No 1612/68 provides:

'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.'

3 Article 7 of Regulation No 1251/70 provides:

'The right to equality of treatment, established by Council Regulation (EEC) No 1612/68, shall apply also to persons coming under the provisions of this Regulation.'

4 Article 7 of Directive 75/34 provides:

'Member States shall apply to persons having the right to remain in their territory the right of equality of treatment recognised by the Council directives on the abolition of restrictions on freedom of establishment pursuant to Title III of the general programme which provides for such abolition.'

5 Article 3(1) of Regulation No 1408/71 provides:

'1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

*The Greek legislation*

6 Articles 1 and 2 of Law No 1910/1944, consolidating the legislation on the protection of large families, lay down the requirements which families must meet in order to be accorded large-family status. Articles 3 to 12 of that Law set out the various advantages to which such status affords entitlement. These may consist in the reduction or waiving of charges, or the grant of assistance, or preferential treatment in such areas as education, health, housing, legal matters, access to employment in the public service, and transport.

7 Decree-Law No 1153/1972 on the protection of large families provides for the grant of cash benefits to large families whose habitual residence is in Greece. The grant of those benefits is subject to certain conditions concerning in particular the Greek nationality or Greek origins of family members.

8 Pursuant to Article 63(1) and (2) of Law No 1892/1990 of 31 July 1990 concerning measures to combat population problems, a mother receives a monthly cash benefit, payable for three years, on the birth of her third child. Article 63(3) provides that, in the case of large families, a monthly cash benefit for each child under 25 years of age is to be granted to the mother who, pursuant to Law No 1910/1944, is deemed to be head of the household in such cases. Under Article 63(4), a mother who is no longer entitled to the last-mentioned benefit receives a pension for life. Pursuant to the implementing decree of 7 and 21 February 1991, the grant of those benefits is subject to certain conditions concerning the Greek nationality or Greek origins of family members.

## The pre-litigation procedure

9 On learning through complaints submitted by Community nationals working in Greece that only Greek nationals were granted large-family status and the related advantages, the Commission wrote to the Greek authorities on 2 March and 11 June 1992 asking for an explanation. By letter of 23 June 1992, the Greek authorities replied essentially that the legislation at issue was composed of various sets of provisions essentially of a social character, all of which were intended to assist large families resident in Greece, whether or not the persons concerned were workers. As regards, more specifically, Law No 1892/1990, the Greek authorities emphasised that, given its demographic policy aims, the benefits for which it made provision fell outside the scope of the principle of non-discrimination laid down by the Treaty.

10 The Commission took the view that the provisions at issue and the related administrative practice entailed discrimination contrary to Community law and decided to initiate the infringement procedure laid down by Article 169 of the Treaty. It therefore sent the Hellenic Republic a letter of formal notice on 20 July 1993 asking it to submit its observations within two months.

11 Since the Hellenic Republic did not reply to that letter, the Commission delivered a reasoned opinion by letter of 18 May 1995, calling upon it to take the necessary measures to comply with the opinion within two months of its notification.

12 In response to the reasoned opinion, the Greek Government, after stating in a letter of 3 August 1995 that the provisions at issue were to be amended, sent the Commission a copy of the relevant draft legislation under cover of a letter of 19 December 1995.

13 By letter of 24 April 1996 addressed to the Greek Government, the Commission pointed out that the draft legislation was only in the first stage of the adoption process, that no indication had been given as to the possible date of its adoption and that, moreover, the draft legislation did not appear to meet all the objections set out in the reasoned opinion. The Commission therefore brought the present proceedings.

14 After the present proceedings had been brought, the Hellenic Republic informed the Court of the adoption of Law No 2459/1997, published in the *Official Journal of the Hellenic Republic* of 18 February 1997, Article 39 of which lays down that Community nationals are also to be eligible for the benefits provided for by Law No 1910/1944 and by Article 63(1) to (3) of Law No 1892/1990.

## Substance

15 In the Commission's submission, all the advantages provided for by the Greek legislation at issue, with the exception of exemption from military service under Article 5 of Law No 1910/1944 which concerns only Greek nationals, constitute social advantages within the meaning of Article 7(2) of Regulation No 1612/68. The health-care benefits provided for by Law No 1910/1944 and the cash benefits provided for by Decree-Law No 1153/1972 and by Article 63(1) to (3) of Law No 1892/1990 also constitute social security benefits within the meaning of Article 4(1) of Regulation No 1408/71.

16 The Commission concludes that the legislation at issue, in so far as it gives rise to discrimination directly based on grounds of nationality, or in so far as the manner of its implementation leads to the same result, is contrary to the principle of the free movement of persons laid down in Articles 48 and 52 of the Treaty and, more specifically, to the principle of equal treatment for workers, implemented by Article 7(2) of Regulation No 1612/68 and by Article 3(1) of Regulation No 1408/71.

17 The Hellenic Republic contends that, even though it was made clear in the course of the pre-litigation procedure that it intended to amend the legislation at issue — an intention which, after the proceedings had been initiated, was carried out through the adoption of Law No 2459/1997 — the Commission failed to take this into account.

18 On that point, it must be borne in mind that the Court has consistently held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-361/95 *Commission* v *Spain* [1997] ECR I-7351, paragraph 13).

19 Since the present action calls for consideration of the application of the principle of equal treatment in relation to both social advantages and social security benefits (as to the joint application of Regulations Nos 1612/68 and 1408/71, see Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 27), the meaning of those concepts must be re-examined.

20 First, as regards social advantages, it is settled law that this concept embraces all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community (*Martínez Sala*, paragraph 25).

21 As the Commission has argued, it follows from that definition that all the advantages for which the Greek legislation at issue provides in relation to large families constitute social advantages within the meaning of Article 7(2) of Regulation No 1612/68. Pursuant to that provision, therefore, workers who are nationals of other

Member States must be eligible for those advantages on the same terms as national workers. Equal treatment in that sense must also extend to dependent members of their families (Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 28).

22 The Commission has submitted that, although Law No 1910/1944 is silent as to nationality, administrative practice has nevertheless established Greek nationality as one of the criteria for attribution of large-family status and, in consequence, the related advantages are granted solely to Greek nationals. The Hellenic Republic has not challenged that assertion, which is moreover substantiated by the fact that Article 39 of Law No 2459/1997 extended the scope of Law No 1910/1944 to cover Community nationals.

23 Furthermore, both Decree-Law No 1153/1972 and the combined provisions of Law No 1892/1990 and the implementing decree of 7 and 21 February 1991 expressly make the award of the benefits for which they provide subject to conditions concerning the Greek nationality or Greek origins of family members.

24 In imposing a discriminatory nationality requirement, that administrative practice, like those legislative provisions, infringes Article 48(2) of the Treaty, Article 7(2) of Regulation No 1612/68 and Article 7 of Regulation No 1251/70. For the same reason, they also constitute an infringement of Article 52 of the Treaty and Article 7 of Directive 75/34 (Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 17).

25 Secondly, as regards social security benefits, the Court has ruled on numerous occasions that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position, and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (*Commission* v *Luxembourg*, paragraph 29, and the case-law cited).

26 It is apparent from that definition that, among the benefits provided for by Law No 1910/1944, those relating to health-care also constitute social security benefits, since they fall within the category of sickness benefits referred to in Article 4(1)(a) of Regulation No 1408/71.

27 The same is true of the cash benefits provided for by Decree-Law No 1153/1972 and by Article 63(1) to (4) of Law No 1892/1990, which must be regarded as family benefits within the meaning of Article 4(1)(h) of Regulation No 1408/71.

28 Accordingly, the administrative practice and legislative provisions making the award of those benefits subject to discriminatory nationality requirements are also contrary to the rule laid down in Article 3(1) of Regulation No 1408/71 concerning equal treatment of workers which, it should be recalled, may also be relied upon by members of their families (Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097).

29 In that connection, the Hellenic Republic contends that most of the advantages provided for by Law No 1910/1944 are now redundant.

30 It must be observed that the maintenance in force, even if only in a formal way, of legislation which, if it had not become obsolete, would infringe Community law, is likely to engender doubt incompatible with the principle of legal certainty, in so far as such a situation exacerbates the difficulties for potential beneficiaries in ascertaining the extent of their rights.

31 The Greek Government also contends that, notwithstanding the express provisions of Decree-Law No 1153/1972, the benefits provided for therein are not reserved

for Greek nationals but, in accordance with the directly applicable provisions of Regulation No 1408/71, are also paid to Community nationals.

32 On that point, suffice it to recall that, according to established case-law, the maintenance of national legislation which is in itself incompatible with Community law, even if the Member State concerned acts in accordance with Community law, gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities for them of relying on Community law (Case C-307/89 *Commission* v *France* [1991] ECR I-2903, paragraph 13, and the case-law cited).

33 The Greek Government contends, lastly, that the Greek nationality requirement to which the grant of the benefits provided for by Article 63(1) to (4) of Law No 1892/1990 is subject is justified because those benefits help to further demographic policy aims. So far as concerns the life pension for mothers of large families provided for by Article 63(4), the Greek Government maintains, in particular, that the nationality requirement is justified by the fact that the pension in question is awarded as an honour in recognition of a contribution made to society which, in view of the declining birthrate in Greece, may be regarded as a service to the country.

34 On that point, it should be recalled that the Court has consistently held that social measures cannot be regarded as exempt from the application of the rules of Community law solely because they have been adopted for reasons of demographic policy (Case 65/81 *Reina* [1982] ECR 33, paragraph 15).

35 Consequently, it must be held that, by precluding by regulation or administrative practice on the grounds of their nationality employed or self-employed workers from other Member States and the members of their families from being attributed large-family status for the purpose of the award of special benefits for such families

and from being awarded family allowances, the Hellenic Republic has failed to fulfil its obligations under Articles 48 and 52 of the EC Treaty, Article 7 of Regulation No 1612/68, Article 7 of Regulation No 1251/70, Article 7 of Directive 75/34 and Article 3 of Regulation No 1408/71.

## Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has been unsuccessful and the Commission has applied for costs, the Hellenic Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1) **Declares that, by precluding by regulation or administrative practice on the grounds of their nationality employed or self-employed workers from other Member States and the members of their families from being attributed**

**large-family status for the purpose of the award of special benefits for such families and from being awarded family allowances, the Hellenic Republic has failed to fulfil its obligations under:**

**— Articles 48 and 52 of the EC Treaty;**

**— Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community;**

**— Article 7 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State;**

**— Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity; and**

**— Article 3 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community;**

**2) Orders the Hellenic Republic to pay the costs.**

Puissochet Jann Moitinho de Almeida

Gulmann Wathelet

Delivered in open court in Luxembourg on 29 October 1998.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber