Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 September 2019*

(Reference for a preliminary ruling — Article 49 TFEU — Freedom of establishment — Self-employment — National of a Member State who ceases to be self-employed because of the physical constraints in the late stages of pregnancy and the aftermath of childbirth — Retention of self-employed status)

In Case C-544/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom), made by decision of 7 August 2018, received at the Court on 20 August 2018, in the proceedings

Her Majesty's Revenue and Customs

v

Henrika Dakneviciute,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarra, Judges,

Advocate General: G. Pitruzzella,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2019,

after considering the observations submitted on behalf of:

– Ms Dakneviciute, by T. Holdcroft, Advocate, D. Rutledge and A. Berry, Barristers,

– the United Kingdom Government, by S. Brandon and Z. Lavery, acting as Agents, and by G. Ward, Barrister,

– the European Commission, by E. Montaguti, L. Armati and J. Tomkin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: English.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request was made in the context of a dispute between Her Majesty's Revenue and Customs (United Kingdom) and Ms Henrika Dakneviciute concerning the former's refusal to grant Ms Dakneviciute a weekly allowance for dependent children known as 'child benefit'.

Legal context

EU law

Directive 2004/38/EC

3 According to Article 1(a) 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, and OJ 2005 L 197, p. 34):

'This Directive lays down:

(a) the conditions governing the exercise of free movement and residence within the territory of the Member States by Union citizens and their family members.'

4 Article 7 of that directive, entitled 'Right of residence for more than three months', provides in paragraphs 1 and 3:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State …

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first 12 months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

…'

5 Article 16(1) and (3) of the directive provides:

‘1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. …

…

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.’

Directive 2010/41/EU

6 According to recital 18 of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1):

‘The economic and physical vulnerability of pregnant self-employed workers … makes it necessary for them to be granted the right to maternity benefits …’

7 Article 8(1) of that directive provides:

‘The Member States shall take the necessary measures to ensure that female self-employed workers … may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks.’

United Kingdom law

The Immigration (European Economic Area) Regulations 2006

8 Regulation 14(1) of the Immigration (European Economic Area) Regulations 2006, in force at the time of the facts in the main proceedings, granted a right of residence in the United Kingdom of more than three months to any ‘qualified person’.

9 In accordance with regulation 6(1)(b) and (c) of those regulations, the concept of ‘qualified person’ covered both workers and self-employed persons.

10 Regulation 6(2) of the regulations provided that a person will continue to be treated as a ‘worker’ if he is temporarily unable to work as a result of an illness or accident, or (under certain conditions) if he is involuntarily unemployed or if he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

11 Regulation 6(3) of the regulations provided that a person will continue to be treated as a ‘self-employed person’ if he is temporarily unable to pursue his activity as a result of an illness or accident.

The Social Security Contributions and Benefits Act 1992

12 Under section 146(2) and (3) of the Social Security Contributions and Benefits Act 1992:

'(2) No person shall be entitled to child benefit for a week unless he is in Great Britain in that week.

(3) Circumstances may be prescribed in which any person is to be treated for the purposes of subsection … (2) above as being, or as not being, in Great Britain.'

The Child Benefit (General) Regulations 2006

13 Regulation 23(4) of the Child Benefit (General) Regulations 2006 provides:

'A person shall be treated as not being in Great Britain for the purposes of section 146(2) of the [Social Security Contributions and Benefits Act 1992] if he makes a claim for child benefit on or after 1st May 2004 and

(a) does not have a right to reside in the United Kingdom; …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Ms Dakneviciute is a Lithuanian national who had been employed in the United Kingdom since 2011, working at night. After learning that she was pregnant in December 2013 she decided to work as a self-employed beauty therapist as of 25 December 2013.

15 From 11 May 2014, she became in receipt of maternity allowance. Her child was born on 8 August 2014.

16 After a period of inactivity between 22 July 2014 and the end of October 2014, Ms Dakneviciute continued to work as a self-employed beauty therapist on a marginal basis before ceasing that activity because her income had become insufficient. She then claimed jobseeker's allowance on 10 February 2015 before taking up employment in April 2015.

17 In the meantime, on 27 August 2014, Ms Dakneviciute applied for child benefit. By decision of 1 February 2015, her claim was rejected on the ground that, under the applicable national legislation, she lacked a sufficient right to reside to meet the qualifying conditions for that benefit.

18 That decision was annulled on 29 September 2015 by the First-tier Tribunal (United Kingdom). Her Majesty's Revenue and Customs, which administers child benefit, appealed against that judgment to the referring court, the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom).

19 By an interim decision of 12 January 2017, the referring court set aside the judgment of the First-tier Tribunal as having erred in law. The referring court found that, from 22 July 2014 to 9 February 2015, Ms Dakneviciute's economic activity was marginal, such that she had ceased to be economically active during that period. According to that court, it is common ground both that the reason why Ms Dakneviciute ceased all genuine and effective economic activity was because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, and that her return to economic activity, first by way of job seeking and then by way of employment, occurred within a reasonable period after the birth of her child.

20 Having stated that, in the judgment of 19 June 2014, *Saint Prix* (C-507/12, EU:C:2014:2007), the Court held that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of Article 45 TFEU, provided she returns to work or finds another job within a reasonable period after the birth of her child, the referring court asks whether the same principle can be applied to persons who have exercised their freedom of establishment pursuant to Article 49 TFEU.

21 In that regard, the referring court states that, following the judgment of 20 December 2017, *Gusa* (C-442/16, EU:C:2017:1004), the parties to the main proceedings made further submissions to it in which they supported divergent positions as to the application of the principle adopted in that judgment. According to Her Majesty's Revenue and Customs, that principle cannot be applied to the facts of the case in the main proceedings, in so far as, in particular, a self-employed person is not required to carry out her work personally and it is open to her to continue her business by other means, including being replaced by another person. According to Ms Dakneviciute, the considerations set out in paragraphs 36 and 40 to 44 of the judgment of 20 December 2017, *Gusa* (C-442/16, EU:C:2017:1004) do in fact support the view that the interpretation of EU law resulting from the judgment of 19 June 2014, *Saint Prix* (C-507/12, EU:C:2014:2007) may be applied to self-employed persons.

22 In those circumstances, the Upper Tribunal (Administrative Appeals Chamber) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In circumstances where an EU citizen who is a national of one Member State

(i) is present in another Member State (the host Member State),

(ii) has been active as a self-employed person within the meaning of Article 49 TFEU in the host Member State,

(iii) was paid a maternity allowance from May 2014 (a point at which she considered herself less able to work on account of pregnancy),

(iv) has been found to have ceased to be in genuine and effective self-employed activity from July 2014,

(v) gave birth in August 2014, and

(vi) did not return to genuine and effective self-employed activity in the period following the birth and prior to claiming jobseekers' allowance as a jobseeker in February 2015:

Must Article 49 TFEU be interpreted as meaning that such a person, who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth, retains the status of being self-employed, within the meaning of that Article, provided she returns to economic activity or seeking work within a reasonable period after the birth of her child?'

Consideration of the question referred

23 By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as meaning that a woman who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth retains the status of being self-employed, provided that she returns to the same or another self-employed activity or employment within a reasonable period after the birth of her child.

24 As a preliminary matter, it should be made clear that, in order to establish whether, in the present case, Ms Dakneviciute is entitled to child benefit as provided for in the Child Benefit (General) Regulations 2006, it is important for the referring court to know whether, during the period from 22 July 2014 to 9 February 2015, during which, according to the facts found by the referring court, Ms Dakneviciute ceased and then resumed a self-employed marginal activity due to the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, she had, under EU law, the right to reside in the United Kingdom.

25 In that regard, it should be noted that Directive 2004/38 is a single legislative act codifying and revising earlier instruments of EU law in order to facilitate the exercise of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States (see, to that effect, judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 25 and the case-law cited).

26 It is thus clear from Article 1(a) of Directive 2004/38 that that directive is intended to set out the conditions governing the exercise of that right, which includes, for stays of more than three months, in particular, the condition laid down in Article 7(1)(a) of that directive. According to that condition, Union citizens must be workers or self-employed persons in the host Member State (judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 26).

27 The Court held that Article 7(3) of Directive 2004/38 which lays down the cases in which a Union citizen who is no longer a worker or self-employed person nevertheless retains that status, and the correlate right of residency, does not cover the case of a woman who temporarily gives up work because of the late stages of her pregnancy and the aftermath of childbirth (see, to that effect, judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 30).

28 Nevertheless, the Court held that Article 7(3) of Directive 2004/38 does not list exhaustively the circumstances in which a Union citizen who is no longer a worker or self-employed person in the host Member State will nevertheless retain the status of 'worker' for the purposes of Article 7(1)(a) thereof and, consequently, the right of residence derived from that status (judgment of 11 April 2019, *Tarola*, C-483/17, EU:C:2019:309, paragraph 26 and the case-law cited).

29 In particular, the Court held that the fact that the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth require a woman to give up work during the period needed for recovery does not, in principle, deprive her of the status of 'worker' within the meaning Article 45 TFEU. The fact that she was not actually available to the employment market of the host Member State for a few months does not mean that she has ceased to belong to that market during that period, provided she returns to work or finds another job within a reasonable period after confinement (judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraphs 40 and 41).

30 In the present case, the referring court asks whether the interpretation set out in the previous paragraph, adopted in the context of a situation falling within the scope of Article 45 TFEU, can be applied to the case of a self-employed person under Article 49 TFEU.

31 In that regard, it should be noted that the Court held that Articles 45 and 49 TFEU afford the same legal protection, the classification of the economic activity thus being without significance (see, to that effect, judgment of 5 February 1991, *Roux*, C-363/89, EU:C:1991:41, paragraph 23).

32 According to the settled case-law of the Court, all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the European Union, and preclude measures that might place Union nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin (judgment of 20 December 2017, *Simma Federspiel*, C-419/16, EU:C:2017:997, paragraph 35 and the case-law cited).

33 A Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host Member State and gave up self-employed activity as a result, if only for a short period, she risked losing her status as self-employed in that State (see, by analogy, judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 44).

34 It follows that a woman in the situation described in paragraph 29 above must, under the same conditions, be able to retain her status as self-employed within the meaning of Article 49 TFEU.

35 Furthermore, the Court held that employees and the self-employed are in a comparable vulnerable position if obliged to stop working, and therefore cannot be treated differently as regards retention of their right of residence in the host Member State (see, to that effect, judgment of 20 December 2017, *Gusa*, C-442/16, EU:C:2017:1004, paragraphs 42 and 43).

36 Pregnant women are in a comparable vulnerable situation, regardless of whether they are employed or self-employed.

37 In that regard, the EU legislature expressly recognised, in recital 18 of Directive 2010/41, the state of economic and physical vulnerability of pregnant self-employed workers. It is for that reason that Article 8(1) of that directive requires the Member States to take the necessary measures to ensure that self-employed women may be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood under conditions similar to those laid down for female employees.

38 The argument cannot be accepted which Her Majesty's Revenue and Customs put forward before the referring court, repeated by the United Kingdom Government at the hearing before the Court, that, in substance, a woman who cannot pursue an activity as a self-employed person personally because of the constraints of the last stages of pregnancy and childbirth, could be temporarily replaced in the exercise of that activity by another person. Indeed, it cannot be assumed that such a replacement will always be possible, particularly when the activity in question involves a personal relationship or a relationship of trust with a customer.

39 It follows that a woman who ceases to be self-employed because of the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth cannot be treated differently, as regards the retention of her right of residence in the host Member State, to a woman in employment in a comparable situation.

40 Moreover, the foregoing considerations are supported by Article 16(3) of Directive 2004/38. Inasmuch as an absence for an important event such as pregnancy or childbirth does not affect the continuity of the five years of residence in the host Member State required for the granting of a right of permanent residence, the physical constraints of the late stages of pregnancy and the immediate aftermath of childbirth, which require a woman to give up work temporarily, cannot, a fortiori, result in that woman losing her status as self-employed (see, by analogy, judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraphs 45 and 46).

41 In the light of all of the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as meaning that a woman who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth retains the status of being self-employed, provided that she returns to the same or another self-employed activity or employment within a reasonable period after the birth of her child.

Costs

42 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 (Fourth Chamber) hereby rules:

Article 49 TFEU must be interpreted as meaning that a woman who ceases self-employed activity in circumstances where there are physical constraints in the late stages of pregnancy and the aftermath of childbirth retains the status of being self-employed, provided that she returns to the same or another self-employed activity or employment within a reasonable period after the birth of her child.

Vilaras Jürimäe Šváby

Rodin Piçarra

Delivered in open court in Luxembourg on 19 September 2019.

A. Calot Escobar
Registrar

M. Vilaras
President of the Fourth Chamber