In Case 77/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht [Social Court] Stuttgart for a preliminary ruling in the action pending before that court between

ANASTASIA PESKELOGLOU

and

BUNDESANSTALT FÜR ARBEIT, Nürnberg [Federal Employment Office, Nuremberg], represented by the Director of the Arbeitsamt [Employment Office]

on the interpretation of the second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (Official Journal 1979, L 291, p. 17),

THE COURT (Fourth Chamber)

composed of: A. O'Keeffe, President of Chamber, P. Pescatore, G. Bosco, F. Koopmans and K. Bahlmann, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The plaintiff in the main action, Mrs Peskeloglou, is a Greek national born in

1961 who immigrated into the Federal Republic of Germany on 29 November 1980 in order to join her husband there.

On 31 May 1981, the plaintiff applied for a work permit to enable her to work as a kitchen assistant in a Stuttgart undertaking. The competent employment office refused that application on the ground that the plaintiff "had not completed the waiting period of four or three years applicable in the case of persons joining their spouses".

The plaintiff in the main action was adversely affected by an amendment to the national legislation applicable which was made after she had submitted her application for the grant of a work permit.

According to the court making the reference, until 13 August 1981, Article 19 of the Arbeitsförderungsgesetz [Law on the promotion of employment] as amended by the Law of 19 June 1969 (Bundesgesetzblatt I, p. 582) provided that the applicant was legally entitled to the grant of a work permit if, regard being had to the situation and labour market developments, the position referred to by her could not be filled by German workers or foreign workers having a prior claim to employment.

That provision was amended by the sixth Law amending the Arbeitsförderungsgesetz, the Wartezeitgesetz [Law on waiting periods], which entered into force on 14 August 1981. The sixth order amending the Arbeitserlaubnisverordnung [Work Permits Order] was adopted on 24 September 1981 in order to implement the third sentence of the first paragraph of Article 19 of the Arbeitsförderungsgesetz. That order entered into force on 1 October 1981.

Under the second paragraph of Article 1 of the sixth order, a work permit for a fist employment may be granted to spouses of foreign workers "if they have completed a period of lawful residence of four years in the territory to which this order applies; in respect of employment in those sectors of the economy in which the number of vacancies notified to the Employment Office considerably exceeds the number of registered unemployed, a work permit may be issued to spouses after a period of lawful residence of two years".

The Sozialgericht concludes that under the law in force in the Federal Republic of Germany on 1 October 1981, the main action is unfounded. However, in view of the fact that in its opinion those rules might conflict with the second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (hereinafter referred to as "the Act of Accession"), the national court considers that it is important to determine whether that provision "permits the national laws to be made more stringent", as they were in this case.

The second subparagraph of Article 45 (1) of the Act of Accession provides:

"The present Member States and the Hellenic Republic may maintain in force until 1 January 1988, with regard to Hellenic nationals and to nationals of the present Member States respectively, national provisions submitting to prior authorization immigration undertaken with a view to pursuing an activity as an employed person and/or the taking up and pursuit of paid employment."

According to the order making the reference it is questionable "whether this rule of Community law permits the law to be made more stringent . . . in the case of the grant for the first time of a work permit to Greek nationals", as has been described.

However, in view of the doubt over the interpretation of the second subparagraph of Article 45 (1) of the Act of

Accession, it appears to the national court necessary to refer the matter to the European Court of Justice and to submit to it the following question:

"May the second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties, which constitute one of the Documents concerning the accession of the Hellenic Republic to the European Economic Community, to the European Atomic Energy Community and to the European Coal and Steel Community (Bundesgesetzblatt, Part II, p. 230 et seq.), be interpreted as permitting the existing national rules contained in Article 19 of the Arbeitsförderungsgesetz [Law on the promotion of employment], which cover the first grant of a work permit to a Greek national, according to which the work permit is to be issued according to the situation and evolution of the employment market in the light of the circumstances of the individual case, to be made more stringent by virtue of the fact that by the sixth Law amending the Arbeitsförderungsgesetz, namely the Wartezeitgesetz [Law on waiting periods] of 3 August 1981 (Bundesgesetzblatt, Part I, p. 802), in conjunction with the sixth order, dated 24 September 1981, amending the Arbeitserlaubnisverordnung [Work Permits Order] (Bundesgesetzblatt Part I, p. 1042), the first grant of a work permit is made subject also in the case of a Greek national to the additional requirement of completion of a waiting period of at least two years?"

The order making the reference was received at the Court Registry on 23 February 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff in the main action, represented by Messrs Gutmann and Wohlfarth, Rechtsanwälte, the Greek Government, represented by Mr Kranidiotis, Advocate, and the Commission of the European Communities, represented by Mr Beschel, a member of its Legal Department, acting as Agent.

By order of 15 December 1982, the Court, after establishing that no Member State or institution, being a party to the proceedings, had requested that the case be decided in plenary session, assigned it to the Fourth Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. However, it requested the Bundesanstalt für Arbeit or the Federal Republic of Germany to present oral argument at the sitting.

II — Written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *plaintiff in the main action* considers that "the answer should be that the Wartezeitgesetz of 30 August 1981 conflicts with Article 45 of the Act of Accession". She argues that transitional rules which are intended to permit the progressive harmonization of different situations may not have the effect of increasing the differences which exist between the two social orders concerned. A Member State which adopts such rules commits a breach of the principle of fairness and mutual confidence and injures the other Contracting Party.

The *Greek Government* considers that it follows from the second subparagraph of Article 45 (1) of the Act of Accession that the Member States and the Hellenic Republic are entitled but not required to

maintain their national legislation until 1 January 1988 and that it is possible to amend that national legislation to make it more favourable but not to make it less favourable. Such an amendment would indeed be contrary to the purpose of the transitional period which was introduced to facilitate the application of Community law, not to hinder it.

According to the Greek Government, the result of the expiry of the transitional period will be European unity, the prime objective of the Treaty of the European Communities. A transitional period "in the opposite sense" would constitute an anti-Community concept.

The Greek Government also contends that the introduction by a Member State during the transitional period of less favourable legislation conflicts with the principle of the precedence of Community law, amounts to an alteration of the *acquis communautaire* and therefore constitutes a breach of an acquired right.

Since this case relates to a breach of a fundamental right of the plaintiff, that is to say the right to work, the Greek Government considers that it is appropriate to apply the European Convention for the Protection of Human Rights.

Next it seeks to show that the second subparagraph of Article 45 (1) of the Act of Accession "is directly applicable" and that it "creates rights and obligations for nationals of the Member States". It concludes from that that the possibility of a Member State's amending its national legislation so as to make it less favourable would also constitute a breach of the principle of legal certainty, since it would "impair" the position of a national of another Member State.

Finally, such an amendment of national legislation "would not be permissible because of the stand-still principle".

Consequently "the Greek Government has the honour to propose to the Court of Justice that the answer to the question submitted to it should be that the second subparagraph of Article 45 (1) of the Act of Accession may not be interpreted as permitting a Member State to make its national legislation more stringent than it was at the time when the Act of Accession was signed".

The *Commission* states first that the legal problems raised by the question put to the Court by the Sozialgericht Stuttgart concern "the content and scope of the principle of free movement under Community law". That principle, which constitutes one of the foundations of the Community, is included among the objectives pursued by the Treaty and thus embodies the special character of the Community in an essential area.

The accession of a new Member State cannot result in an amendment of that principle in the framework of "conditions of admission" and the "adjustments ... necessitated thereby" referred to in Article 237 of the Treaty.

During a transitional period the right to free movement may of course be subject to limitation so far as the relations of the original Member States with the new Member State are concerned; however, "any such rules may be only transitional and limited in content to what is strictly necessary".

It was in that spirit, that is to say as an exceptional measure, limited in time and having a precisely-defined content, that

the transitional provisions contained in Article 44 et seq. of the Act of Accession were drafted; it is also in that spirit that they must be interpreted. Thus Article 44 of the Act of Accession clearly defines the relationship between the rule and the exception by establishing that Article 48 of the EEC Treaty is applicable in principle and by modifying that rule only within the limits expressly provided for in Article 45 et seq.

Under those circumstances the fact that Article 45 of the Act of Accession permits the Member State to "maintain in force" their national provisions was intended to permit the 10 Member States "to make arrangements progressively to adapt themselves to the new situation". On the other hand, if that provision were interpreted "as authorizing the Member States to avoid putting into application the principle of free movement beyond the limits laid down" it "would wholly contradict the objective of the transitional rules".

In addition, the expression "maintain in force" shows in all the linguistic versions that the maintenance of the existing national provisions constitutes the limit beyond which no restriction on the principle of free movement may be accepted.

That interpretation is further confirmed by the Joint Declaration on the Free Movement of Workers made by the Member States on the accession of the Hellenic Republic and reproduced in the Final Act.

The Commission further considers that national rules such as those in issue in this case infringe Article 48 of the EEC Treaty in conjunction with the first subparagraph of Article 45 (1) of the Act of Accession and are therefore void.

According to the Commission that assessment is not affected by the second subparagraph of Article 45 (2) of the Act of Accession. That provision in fact means that where a member of the family of a migrant worker has been resident for at least three years in the territory of the Member State in which the worker has settled, he must be free to take up an activity as an employed person without any formality and irrespective of any national provisions, as follows from Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

Even if a member of a migrant worker's family has failed to fulfil the pre-condition of the residence period of three years, the general national provisions on the access of foreign workers to employment would nevertheless apply to him during the transitional period. Since those national provisions must comply with the "stand-still" obligation laid down in the second subparagraph of Article 45 (1) of the Act of Accession, it would be improper to interpret the second subparagraph of Article 45 (2) as authorizing the national legislature, contrary to that obligation, to "reduce" especially for a member of the migrant worker's family the existing more favourable national rules to the less favourable level of the conditions provided for by Community law.

From that it would follow that members of the families of Greek nationals who according to the spirit and purpose of the transitional rules constitute a class of privileged persons, would be in a less favourable position than other Greek nationals, who would be authorized to rely upon the "stand-still" obligation contained in the second subparagraph

of Article 45 (1) without any other formality.

Consequently, the Commission proposes the following answer to the question put to the Court by the Sozialgericht Stuttgart:

"The second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties must be interpreted as prohibiting national legislatures from amending national provisions existing at the time of accession, which make immigration undertaken with a view to pursuing an activity as an employed person or the taking up and pursuit of paid employment or both subject to prior authorization so as to subject to additional restrictions the rights conferred on Greek migrant workers and the members of their families by virtue of such national provisions."

II — Oral procedure

At the sitting on 26 January 1983 oral argument was presented and questions put by the Court were answered by the following: Mr Gutmann, for the plaintiff in the main action; Evagelos Tsekouras, acting as Agent, for the Greek Government; and Mr Beschel, a member of the Commission's Legal Department, for the Commission of the European Communities.

The Advocate General deliverd his opinion at the sitting on 23 February 1983.

Decision

1 By an order dated 15 February 1982 which was received at the Court Registry on 23 February 1982, the Sozialgericht [Social Court] Stuttgart referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (Official Journal 1979, L 291, p. 17), hereinafter referred to as "the Act of Accession".

2 That question arose in the course of an action pending before the Sozialgericht Stuttgart between Mrs Anastasia Peskeloglou, a Greek national residing in the Federal Republic of Germany, and the Bundesanstalt für Arbeit Nürnberg [Federal Employment Office, Nuremberg] in relation to Mrs Peskeloglou's entitlement to a work permit.

3 Mrs Peskeloglou immigrated into the Federal Republic of Germany on 29 November 1980 in order to join her husband there. On 31 May 1981 she

applied for a work permit to enable her to work in a Stuttgart undertaking; that application was refused by the competent employment office on the ground that the plaintiff "had not completed the waiting period of four or three years applicable in the case of persons joining their spouses".

4 According to the Sozialgericht, the national provisions applicable until 13 August 1981, namely Article 19 of the Arbeitsförderungsgesetz [Law on the promotion of employment] as amended by the Law of 19 June 1969 (Bundesgesetzblatt I, p. 582), conferred upon the spouse of a foreign worker the right to the grant of a work permit where, regard being had to the situation and labour market developments, the position sought by him cannot be filled by German workers of by foreign workers having a prior claim to employment.

5 On the other hand, as a result of an amendment of those provisions a work permit for a first employment may, according to the law in force on 1 October 1981, be granted to spouses of foreign workers if they have completed a period of lawful residence of four years in the Federal Republic of Germany; however, "in respect of employment in those sectors of the economy in which the number of vacancies notified to the Employment Office considerably exceeds the number of registered unemployed, a work permit may be issued to spouses after a period of lawful residence of two years".

6 The Sozialgericht, considering that it was necessary to determine the dispute on the basis of the amended legislation, took the view that the main action was unfounded under the law in force on 1 October 1981. However, since in its view the amendments thus made might be incompatible with Article 45 (1) of the Act of Accession, it decided to stay the proceedings and to refer to the Court of Justice the following question:

"May the second subparagraph of Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties, which constitute one of the Documents concerning the accession of the Hellenic Republic to the European Economic Community, to the European Atomic Energy Community and to the European Coal and Steel Community (Bundesgesetzblatt, Part II, p. 280 et seq.), be interpreted as permitting the existing national rules contained in Article 19 of the Arbeitsförderungsgesetz [Law on the promotion of employment], which cover the first grant of a work permit to a Greek national, according to which the work permit is to be issued according to the situation and evolution of the employment market in the light of the circumstances of the individual case,

to be made more stringent by virtue of the fact that by the sixth Law amending the Arbeitsförderungsgesetz, namely the Wartezeitgesetz [Law on waiting periods] of 3 August 1981 (Bundesgesetzblatt, Part I, p. 802), in conjunction with the sixth order, dated 24 September 1981, amending the Arbeitserlaubnisverordnung [Work Permits Order] (Bundesgesetzblatt Part I, p. 1042), the first grant of a work permit is made subject also in the case of a Greek national to the additional requirement of completion of a waiting period of at least two years?"

7 By that question, the Sozialgericht Stuttgart is asking whether the second subparagraph of Article 45 (1) of the Act of Accession permits national rules in force before 14 August 1981 to be made more stringent as regards Greek nationals by the introduction of an additional residence requirement as one of the conditions for the grant of a work permit.

8 The first subparagraph of Article 45 (1) of the Act of Accession states that Articles 1 to 6 and 13 to 23 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Communty (Official Journal, English Special Edition 1968 (II), p. 475) are to apply in the present Member States with regard to Greek nationals only as from 1 January 1988. The second subparagraph provides that during the transitional period the present Member States may maintain in force, with regard to Greek nationals, national provisions submitting to prior authorization immigration undertaken with a view to pursuing an acticity as an employed person or the taking up and pursuit of paid employment, or both.

9 That provision is therefore applicable to all Greek workers, whereas the position of spouses and dependent children is expressly provided for in Article 45 (2) of the Act of Accession. The first subparagraph of Article 45 (2) provides that Article 11 of Regulation No 1612/68, which in particular confers on spouses the right to take up employment, is to apply in the present Member States with regard to Greek nationals only as from 1 January 1986. As a transitional measure, the second subparagraph of Article 45 (2) provides that the members of the family of a worker who is a national of a Member State are to have the right to be employed in the territory of the Member State where they have settled with the worker, if they are resident for at least three years in that territory; that period of residence is to

be reduced to 18 months as from 1 January 1984. However, the third subparagraph of Article 45 (2) expressly provides that the rules of paragraph (2) "shall not prejudice more favourable national provisions".

10 In this case, the plaintiff in the main action is a Greek national, married to a worker of the same nationality; she is therefore covered both by Article 45 (1) and by Article 45 (2). As the question submitted by the national court expressly refers to Article 45 (1), that provision should be considered in the first place.

11 The transitional provision contained in the second subparagraph of Article 45 (1) of the Act of Accession authorizes the existing Member States to maintain in force until 1 January 1988 with regard to Greek nationals national provisions submitting to prior authorization immigration undertaken with a view to pursuing an activity as an employed person or the taking up and pursuit of paid employment. It should be noted that the same right was conferred upon Greece in its relations with the other Member States.

12 That provision, which is intended to prevent disturbance of the labour market both in Greece and in the other Member States as a result of immediate and substantial movements of workers following accession, constitutes a derogation from the principle of the free movement of workers laid down in Article 48 of the EEC Treaty. As such it must be interpreted restrictively, as is apparent from Article 44 of the Act of Accession which lays down the principle that Article 48 of the Treaty is immediately applicable, subject to the transitional provisions contained *inter alia* in Article 45.

13 From that it follows that the Federal Republic of Germany is authorized to maintain existing restrictions but may not in any circumstances during the transitional period make more stringent the conditions on the taking up and pursuit of employment by Greek nationals through the introduction of fresh restrictive measures.

14 Article 45 (2) does not affect that conclusion. Indeed, it would be unreasonable to interpret Article 45 (2) as meaning that the national

legislature was entitled to make more stringent the conditions for the entitlement of spouses and members of the family alone to take up employment, since that would have the unacceptable consequence that the latter would be in a more unfavourable position than Greek nationals in general.

15 The answer to the question submitted should therefore be that Article 45 (1) of the Act of Accession must be interpreted as not permitting national provisions concerning the first grant of a work permit to a Greek national to be made more restrictive after the entry into force of the Act of Accession.

Costs

16 The costs incurred by the Greek Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question submitted to it by the Sozialgericht Stuttgart by order of 15 February 1982, hereby rules:

Article 45 (1) of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (Official Journal 1979, L 291, p. 17) must be interpreted as not permitting national

provisions concerning the first grant of a work permit to a Greek national to be made more restrictive after the entry into force of that Act.

O'Keeffe Pescatore Bosco

Koopmans Bahlmann

Delivered in open court in Luxembourg on 23 March 1983.

P. Heim
Registrar

A. O'Keeffe
President of the Fourth Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 23 FEBRUARY 1983

My Lords,

Mrs Peskeloglou is a Greek national. On 28 November 1980 she went to the Federal Republic of Germany to join her husband, apparently also a Greek national working in Germany. On 31 May 1981 she applied for a work permit in order to take up employment as a kitchen assistant in Stuttgart. That was refused. It seems that the initial decision was taken on 30 June 1981 and a complaint against it dismissed on 28 August 1981.

She brought proceedings in the Sozialgericht, Stuttgart against the Federal Employment Office (Bundesanstalt für Arbeit) for the annulment of the refusal of a work permit. Before the Court it was pointed out that:

(a) Article 19 of the Law on the Promotion of Employment (Arbeitsförderungsgesetz as amended by the Law of 19 June 1969 Bundesgesetzblatt I, p. 582) provided that non-German nationals required a work permit, the issue of which was to depend on the state of the labour market and individual circumstances; but that