JUDGMENT OF THE COURT
3 June 1986 *

In Case 139/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State [State Council], The Hague, for a preliminary ruling in the action pending before that court between

R. H. Kempf

and

Staatssecretaris van Justitie [Secretary of State for Justice]

on the interpretation of certain provisions of Community law relating to freedom of movement for workers,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann, R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. Kakouris, T. F. O'Higgins, F. Schockweiler, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

R. H. Kempf by Th. H. A. Teeuwen,

the Netherlands Government by I. Verkade, H. Siblesz and C. Lindeman,

the Danish Government by L. Mikaelsen,

* Language of the Case: Dutch.

the Commission of the European Communities by J. Griesmar and F. Herbert,

after hearing the Opinion of the Advocate General delivered at the sitting on 17 April 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an interlocutory judgment of 23 April 1985, which was received at the Court on 9 May 1985, the Raad van State of the Netherlands referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the provisions of Community law relating to freedom of movement for workers within the Community.

2 The plaintiff in the main action, Mr R. H. Kempf, a German national, entered the Netherlands on 1 September 1981 and worked there as a part-time music teacher giving 12 lessons a week from 26 October 1981 to 14 July 1982; at the end of that period the gross wages he was receiving for that work amounted to HFL 984 per month. In the same period he applied for and received supplementary benefit under the Wet Werkloosheidsvoorziening [Law on Unemployment Benefit]. Benefits under that Law, which come out of public funds, are payable to persons having the status of workers.

3 Mr Kempf subsequently became unable to work as a result of sickness and obtained social security benefits under the Ziektewet [Law on Sickness Insurance]. He also received supplementary benefits under both the above-mentioned Law on Unemployment Benefit and the Algemene Bijstandswet [Law on Social Assistance]. The last-mentioned law provides for general social assistance to the needy which is wholly financed out of public funds.

4 On 30 November 1981 Mr Kempf applied for a residence permit in the Netherlands in order 'to pursue an activity as an employed person' in that country. It was refused by a decision of the local chief of police dated 17 August 1982. The plaintiff then made an application for review to the Staatssecretaris van Justitie, which was rejected by a decision of 9 December 1982 on the ground, *inter alia*, that he did not qualify as a favoured EEC citizen within the meaning of the Netherlands legislation on immigration matters because he had had recourse to public funds in the Netherlands and was therefore manifestly unable to meet his needs out of the income received from his employment.

5 By an application dated 10 January 1983 Mr Kempf appealed against the decision of the Staatssecretaris van Justitie before the Judicial Division of the Raad van State. That is the background to the action before the Raad van State, which stayed the proceedings and referred the following question to this Court for a preliminary ruling:

'Where a national of a Member State pursues within the territory of another Member State an activity which may in itself be regarded as effective and genuine work within the meaning of the Court's judgment in *Levin* v *Staatssecretaris van Justitie*, does the fact that he claims financial assistance payable out of the public funds of the latter Member State in order to supplement the income he receives from that activity exclude him from the provisions of Community law relating to freedom of movement for workers?'

6 Mr Kempf and the Commission submit that that question calls for a negative answer. They state that the scope *ratione personae* of the provisions relating to freedom of movement for workers, which are to be interpreted broadly, is determined solely by the nature of the work and does not depend on the income produced by it. Consequently, work which in itself constitutes effective and genuine work does not cease to do so merely because the person who does it has recourse to benefits drawn from public funds in order to supplement his wages up to the level of the minimum means of subsistence. In their view that conclusion is confirmed by recent judgments of the Court (judgments of 27 March 1985 in Case 249/83 *Hoeckx* v *Kalmthout* and Case 122/84 *Scrivner* v *Chastre* [1985] ECR 973 and 1027) in which it was held that a social benefit guaranteeing a minimum means of subsistence in a general manner constituted a social advantage within the meaning of Regulation No 1612/68 of the Council of 15 October 1968 and must therefore be extended without discrimination to workers having the nationality of other Member States.

7 The Netherlands and Danish Governments, however, take the view that work providing an income below the minimum means of subsistence as defined by the host Member State cannot be regarded as effective and genuine work if the person who does it is claiming social assistance drawn from public funds. In such a case the work does not provide the immediate means for improving his living conditions but is merely one of the means by which he obtains the guaranteed minimum means of subsistence in the host Member State. It therefore does not constitute an economic activity as defined by the Treaty. Nevertheless, the Danish Government adds, whether a person has the status of a worker falls to be determined solely in regard to the date of the request for a residence permit, so that a person having the status of a worker on that date keeps that status even if he subsequently finds himself out of work and as a result becomes dependent on financial assistance drawn from public funds.

8 It is clear from the terms of the question submitted to the Court and the grounds of the judgment making the reference that the Raad van State seeks in essence a clarification of the criteria laid down by the Court in *Levin* (judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035) with regard to the case where a national of one Member State who pursues an effective and genuine activity as an employed person in another Member State seeks to supplement his income from that activity, which is lower than the minimum means of subsistence, so as to make it up to that level by obtaining financial assistance payable out of the public funds of the host State.

9 Accordingly it is necessary to consider the terms of that judgment, in which the Court ruled:

'The provisions of Community law relating to freedom of movement for workers also cover a national of a Member State who pursues, within the territory of another Member State, an activity as an employed person which yields an income lower than that which, in the latter State, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine.'

10 In the main body of the judgment, the Court further stated that 'whilst part-time employment is not excluded from the field of application of the rules on freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'.

11 As regards, first, the criterion of effective and genuine work as opposed to marginal and ancillary activities not covered by the relevant Community rules, the Netherlands Government expressed doubts at the hearing as to whether the work of a teacher who gives 12 lessons a week may be regarded as constituting in itself effective and genuine work within the terms of the judgment in *Levin*.

12 There is, however, no need to consider that question since the Raad van State, in the grounds of the judgment making the reference, expressly found that Mr Kempf's work was not on such a small scale as to be purely a marginal and ancillary activity. According to the division of jurisdiction between national courts and the Court of Justice in connection with references for a preliminary ruling, it is for national courts to establish and to evaluate the facts of the case. The question submitted for a preliminary ruling must therefore be examined in the light of the assessment made by the Raad van State.

13 The Court has consistently held that freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms 'worker' and 'activity as an employed person' defining the sphere of application of those freedoms must be given a broad interpretation in that regard, whereas exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly.

14 It follows that the rules on this topic must be interpreted as meaning that a person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard it is irrelevant whether those

supplementary means of subsistence are derived from property or from the employment of a member of his family, as was the case in *Levin*, or whether, as in this instance, they are obtained from financial assistance drawn from the public funds of the Member State in which he resides, provided that the effective and genuine nature of his work is established.

15 That conclusion is, indeed, corroborated by the fact that, as the Court held most recently in *Levin*, the terms 'worker' and 'activity as an employed person' for the purposes of Community law may not be defined by reference to the national laws of the Member States but have a meaning specific to Community law. Their effect would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers could be precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host State.

16 For those reasons, it must be stated in answer to the question submitted for a preliminary ruling that where a national of a Member State pursues within the territory of another Member State by way of employment activities which may in themselves be regarded as effective and genuine work, the fact that he claims financial assistance payable out of the public funds of the latter Member State in order to supplement the income he receives from those activities does not exclude him from the provisions of Community law relating to freedom of movement for workers.

Costs

17 The costs incurred by the Netherlands and Danish Governments and by 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, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Raad van State of the Netherlands by interlocutory judgment of 23 April 1985, hereby rules:

Where a national of a Member State pursues within the territory of another Member State by way of employment activities which may in themselves be regarded as effective and genuine work, the fact that he claims financial assistance payable out of the public funds of the latter Member State in order to supplement the income he receives from those activities does not exclude him from the provisions of Community law relating to freedom of movement for workers.

Mackenzie Stuart Koopmans Everling Bahlmann

Joliet Bosco Due Galmot Kakouris

O'Higgins Schockweiler Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 3 June 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President