OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 24 June 1992 *

Mr President,
Members of the Court,

1. These proceedings relate to a request for a preliminary ruling from the Belgian Cour de Cassation (Court of Cassation) on the scope of the principle of equal treatment of migrant and national workers enshrined in 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. [1]

The national court's question was raised in proceedings between the Belgian State (the appellant in the main proceedings) and Noushin Taghavi (the respondent in the main proceedings) concerning an application by the respondent for a Belgian allowance for handicapped persons.

Background

2. Noushin Taghavi is an Iranian national. She has been resident in Belgium since 29 November 1971. On 5 October 1977 she married Filippo Iannino, an Italian national, who has been resident in Belgium since the age of twelve and works there.

Since January 1983, Noushin Taghavi has been dependent on her husband, who, since that date at least, has been subject to the Belgian social security system.

3. On 14 November 1985, Noushin Taghavi applied for an allowance for handicapped persons under a Belgium law of 27 June 1969. [2] Under Article 4 of that law, an allowance may be claimed by handicapped persons who

'1. are Belgians and genuinely reside in Belgium. Under such conditions as He shall determine the King may derogate from this provision;

2. are at least fourteen years of age;

3. are no more than 65 or 60 years of age, depending whether the person concerned is a man or a woman;

4. belong to one of the classes of handicapped persons ... and are affected by permanent incapacity for work of at least 30%;

* Original language: Dutch.

1 — As annexed to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983, L 230, p. 6).

2 — Law of 27 June 1969 on the grant of allowances to handicapped persons (*Belgisch Staatsblad* of 15 July 1969, p. 6935).

5. do not have resources the amount of which exceeds the limits laid down by the King ...'.

Noushin Taghavi's application was rejected by administrative decision of 21 April 1986 on the ground that she did not fulfil all the conditions for the receipt of pecuniary benefits, in particular the nationality requirement.

4. On appeal, the Cour de Travail (Labour Court), Brussels, decided on 8 January 1990 that Noushin Taghavi was nevertheless entitled to the allowance in question on the basis of Article 3 of Regulation No 1408/71, which I shall be considering later. The Belgian State appealed against that judgment to the Cour de Cassation, which, on 9 September 1991, decided to refer the following question to the Court of Justice for a preliminary ruling:

'Are Articles 2 and 3 of Regulation (EEC) No 1408/71 to be interpreted as meaning that the benefit of the national legislation of a Member State conferring a personal right, guaranteed by statute, to a handicapped person's allowance may be enjoyed by a handicapped person who, although neither possessing the nationality of a Member State nor claiming the status of an employed person, is resident in the territory of the Member State providing for that personal right and is the spouse of an employed person who is subject to the legislation of that Member State but is a national of one of the other Member States?'

Application of Regulation (EEC) No 1408/71

5. Article 2(1) of Regulation No 1408/71 provides as follows with regard to the persons covered by the regulation:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

Under Article 3, persons resident in the territory of one of the Member States to whom the regulation applies are entitled in principle to equal treatment. In principle, they are to be 'subject to the same obligations and to enjoy the same benefits under the legislation of any Member State as the nationals of that State'.

6. Since Noushin Taghavi is married to an employed person who is an Italian national to whom the legislation of a Member State (Belgian legislation) applies, she falls prima facie within the scope *ratione personae* of Regulation No 1408/71. Since, in addition, she resides in Belgium, she also appears to satisfy the conditions for the application of Article 3 of that regulation. Nevertheless,

that article does not automatically entitle her to obtain benefits on the same terms as Belgian nationals.

This is because a distinction has to be drawn in this sphere between personal rights or own rights and so-called 'derived' rights, obtained in the capacity of a member of a worker's family.

7. In the judgment in *Kermaschek*, [3] the Court ruled that, under Regulation No 1408/71, a member of an employed person's family was entitled to claim only derived rights:

'Therefore the question arises whether and to what extent the members of the family of a national of a Member State are, in applying Regulation No 1408/71, ... to be assimilated to those nationals themselves.

Article 2(1) of the regulation provides that it: "shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States [4] and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors."

It is evident from the juxtaposition indicated by the use of the words "as also" that this provision refers to two clearly distinct categories: workers on the one hand, and the members of their family and their survivors.

Whereas the persons belonging to the first category can claim the rights to benefits covered by the regulation as rights of their own, the persons belonging to the second category can only claim derived rights, acquired through their status as a member of the family or a survivor of a worker, that is to say of a person belonging to the first category.' [5]

On those grounds, the Court held that a member of a migrant worker's family — whether or not he is a national of a Member State — can derive a right from Regulation No 1408/71 in his capacity of member of the family of an unemployed person (derived right) but not in the capacity of unemployed member of the family (personal right):

'The members of the family of [unemployed migrant] workers are entitled only to the benefits provided by such legislation for the members of the family of unemployed workers, and it is to be understood that the nationality of those members of the family does not matter for this purpose'.

The fact that personal rights and derived rights have to be distinguished in that way for the purposes of delimiting the scope *ratione personae* of Regulation

3 — Judgment in Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669.

4 — Part of this paragraph does not appear in the Dutch version printed in the European Court Reports, although it does in the French and German [and English] versions. German was the language of the case.

5 — Judgment in *Kermaschek*, paragraphs 5, 6 and 7.

No 1408/71 was subsequently confirmed by the Court in the judgments in *Frascogna* [6] (special old-age allowance), *Deak* [7] (unemployment benefits for young workers unable to find employment after completing their studies or finishing their apprenticeships) and *Zaoui* [8] (supplementary allowance paid to pensioners). [9]

8. According to the national court's question, entitlement to the pecuniary benefit which handicapped persons may obtain from the Belgian public authorities is a 'personal right, guaranteed by statute'. I infer from this that that right is not conferred on handicapped persons in their capacity of members of a worker's family and is therefore a personal right in the meaning given to that expression in Community law. [10] Consequently, according to the case-law cited above, Noushin Taghavi cannot rely on Regulation No 1408/71 in order to avail herself of that right vis-à-vis the Belgian State.

Application of Regulation (EEC) No 1612/68

9. It should first be observed that the national court's question is confined to the interpretation of Regulation No 1408/71 and does not extend to Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [11] However, in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question. [12] On several occasions in the past, the Court has, in judgments giving a preliminary ruling, considered the applicability of Regulation No 1612/68, even though the national court referred only to Regulation No 1408/71. [13]

10. In this case, too, it is appropriate to consider whether Noushin Taghavi can rely on Regulation No 1612/68. Indeed, the parties have submitted observations thereon to the Court. Article 7(2) of Regulation No 1612/68 provides that a worker who is a national of a Member State must enjoy the same social and tax advantages as national workers in the territory of other Member States. In the judgment in *Lebon*, the Court expressly stated that that principle of the equal treatment of migrant and national workers also applies to the advantages conferred on members of workers' families, and that those family members may therefore rely on that principle indirectly. [14]

11. There can be no doubt that allowances for handicapped persons fall within the scope *ratione personae* of Regulation No 1612/68 in so far as they may constitute a social advantage which may accrue to a

6 — Case 157/84 *Frascogna* [1985] ECR 1739, paragraph 15.

7 — Case 94/84 *Deak* [1985] ECR 1873, paragraphs 10 to 16.

8 — Case 147/87 *Zaoui* [1987] ECR 5511.

9 — See also my Opinion in Case C-18/90 *Kziber* [1991] ECR I-208.

10 — While Article 4 of the 1969 Law imposes nationality and residence conditions, it does not impose conditions relating to family relationship.

11 — OJ, English Special Edition 1968(II), p. 475. The amendments made to Regulation No 1612/68 by Regulation (EEC) No 312/76 of 9 February 1976 (OJ 1976 L 39, p. 2) are not relevant to this case.

12 — Judgment in Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9. See also the judgment in Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and the following footnote.

13 — In particular in the judgments in Case 249/83 *Hoeckx* [1985] ECR 973, and in *Frascogna* and *Deak*.

14 — Judgment in Case 316/85 *Lebon* [1987] ECR 2811, paragraphs 11 and 12.

worker who is a national of a Member State. As the Court has consistently held, 'social advantages' within the meaning of Article 7(2) are 'all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their 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'. [15] In addition, in the judgment in *Inzirillo*, the Court stated that

'the matters covered by Article 7(2) [of Regulation No 1612/68] must be defined in such a way as to include every social and tax advantage, whether or not linked to a contract of employment, such as an allowance for handicapped adults which is awarded by a Member State to its own nationals under legislation which gives a legally protected right thereto'. [16]

12. However, the Belgian State refers to the judgment in *Zaoui* [17] in order to contest that Noushin Taghavi also falls within the scope *ratione personae* of Regulation No 1612/68, on the ground that her husband has lived in Belgium since the age of twelve and has therefore never exercised his right of free movement within the Community. As I understand this reasoning, in his case the allowance for handicapped persons could not facilitate the mobility of the worker in question. I disagree.

Admittedly, the Court has held that the provisions of the Treaty in regard to freedom of movement for workers may not be applied to situations in which there is no factor connecting them to any of the situations envisaged by Community law. [18] On that basis, in the judgments in *Morson and Jhanjan*, [19] *Zaoui* [20] and *Dzodzi* [21] the Court refused to apply Regulation No 1612/68 to disputes relating to members of families of workers who had always worked and/or resided in the Member State of which they were nationals. [22] The Court based those judgments, not only on the wording, but also on the aims of the Community law. The advantages denied could not in fact make for the 'abolition of all differences in treatment between national workers and workers who are *nationals of the other Member States*'(my emphasis). [23]

By contrast, Noushin Taghavi's husband neither works nor resides in the territory of the Member State of which he is a national. He is an Italian national resident in Belgium,

15 — Judgments in Case 207/78 *Ministère Public* v *Even* [1979] ECR 2019, paragraph 22, in Case 65/81 *Reina* [1982] ECR 33, paragraph 12, in Case 261/83 *Castelli* [1984] ECR 3199, paragraph 11, in *Hoeckx*, cited above, paragraph 20, in Case 122/84 *Scrivner and Cole* [1985] ECR 1027, paragraph 24, in *Frascogna*, cited above, paragraph 20, in *Deak*, cited above, paragraph 20, in Case 59/85 *Reed* [1986] ECR 1283, paragraph 26, and in Case 39/86 *Lair* [1988] ECR 3161, paragraph 21.

16 — Judgment in Case 63/76 *Inzirillo* [1976] ECR 2057, paragraph 21.

17 — Paragraphs 15 and 16.

18 — Judgments in Case 175/78 *Regina* v *Saunders* [1979] ECR 1129, paragraph 11, in Case 180/83 *Moser* v *Land Baden-Württemburg* [1984] ECR 2539, paragraph 15, and in Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, paragraph 14. See also the next three footnotes.

19 — Judgment in Joined Cases 35 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraphs 15, 16 and 17.

20 — Paragraphs 15 and 16.

21 — Judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR I-3763, paragraphs 23 to 28.

22 — See also my Opinion of 6 May 1992 in Case C-78/91 *Rose Hughes*, still pending.

23 — Judgment in *Ministère Public* v *Even*, cited above, paragraph 21.

where he works. Accordingly, unlike in the cases at issue in the judgments cited above, his situation does in fact exhibit factors connecting it to the situations envisaged by Community law. Consequently, the application of Regulation No 1612/68 is completely consonant with the objectives of Community law. There is nothing in the regulation to suggest that, as the Belgian State argues, it is applicable only to workers who have worked in more than one Member State and not to workers who have always worked only in a Member State other than the one of which they are nationals.

13. I therefore consider, in common with the Commission, that Regulation No 1612/68 applies both *ratione materiae* and *ratione personae* to the case at issue. [24]

However, it is important to delimit precisely the scope and effects of the prohibition of discrimination against migrant workers. According to Article 7 of Regulation No 1612/68, that principle means that a worker who is a national of a Member State must enjoy the same social and tax advantages as national workers in the territory of other Member States. By the same token, a member of the family of a migrant worker who is a national of a Member State must be able to enjoy, in the territory of other Member States, the same advantages as members of the families of national workers, as the Court held in the judgments in *Cristini*, [25] *Frascogna* [26] and *Bernini*. [27]

In this connection, the Court put the following supplementary question to the Belgian Government:

'Can a person fulfilling all the conditions laid down by Article 4 of the 1969 Law, except for the fact that that person is not a national of a Member State of the EEC, claim the allowance merely because that person's spouse is a Belgian national?'

The Belgian Government answered that question in the negative on 26 May 1992.

14. Since it appears that the Belgian Law of 27 June 1969 does not grant allowances for handicapped persons to the non-EEC spouses of national workers, the question arises as to whether that is sufficient reason for refusing to grant the allowance to Noushin Taghavi, who is the non-EEC wife of a migrant worker from another Member State. In more abstract terms, that question may be put as follows: does the prohibition

24 — Its applicability *ratione loci* is — correctly — not contested.

25 — Judgment in Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085, paragraphs 14 and 15. The Court held that "If the widow and infant children of a national of the Member State in question are entitled to such cards [cards for reduced rail fares] provided that the request had been made by the father before his death, the same must apply where the deceased father was a migrant worker and a national of another Member State" (paragraph 15).

26 — The Court held in paragraph 24 that "a requirement that relatives in the ascending line of workers who are nationals of other Member States must have resided in the territory of a Member State for a specified number of years constitutes discrimination contrary to Article 7(2) of Regulation No 1612/68, if that requirement is not also imposed on relatives in the ascending line of workers who are nationals of that Member State".

27 — Judgment in Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 29. In that case, the Court held that a child of a migrant worker from a Member State was entitled to obtain funding for education on the same conditions as those applying to children of national workers, at least where the migrant worker was still responsible for the maintenance of his child.

of discrimination set out in Article 7(2) of Regulation No 1612/68 mean that social advantages which, on grounds of nationality, are refused to members of the family of national workers may also be refused for the same reason to members of the family of migrant workers from other Member States?

15. In the 1985 judgment in *Deak*, cited above, the Court answered that question in the negative.

Deak was concerned with the Belgian authorities' refusal to grant special unemployment benefits for young persons unable to find employment after completing their studies or finishing their apprenticeships to Deak, a Hungarian national who was living in Belgium with his mother, a migrant worker of Italian nationality. The refusal to grant Deak the special unemployment benefits was based on his Hungarian nationality, since the applicable Belgian legislation provided that those benefits should be granted to foreign workers and stateless persons only 'in so far as is provided in an international convention'. Since there was no convention between Hungary and Belgium on the matter, Hungarian children of Belgian nationals also could not claim entitlement to the special benefits. However, the Court held that

'[para. 24] ... under Article 7 of Regulation No 1612/68 a Member State cannot refuse to grant the dependent children of a worker who is a national of another Member State the benefits provided under its legislation for young persons seeking work, on the grounds that those children are nationals of another Member State.

[para. 25] That conclusion is not altered by the fact that the child in question is a national not of a Member State but of a non-member country, as in the case before the national court.

[para. 26] As the Commission has correctly pointed out, the principle of equal treatment laid down in Article 7 of Regulation No 1612/68 for workers who are nationals of a Member State and, indirectly, for members of their families applies without regard to the nationality of those family members. That is expressly confirmed by the wording of Article 11 of that regulation, which provides that the spouse of a national of a Member State who is pursuing an activity as an employed or self-employed person in the territory of another Member State and those of his children who are under the age of 21 years or who are dependent on him have the right to take up any activity as an employed person throughout the territory of that same State, "even if they are not nationals of any Member State".'

Particular attention should be given to the Court's reason for its view that the grant of the special unemployment benefits to migrant workers' children could not be linked to any nationality condition:

'[para. 23] A worker anxious to ensure for his children the enjoyment of the social benefits provided for by the legislation of the Member States for the support of young persons seeking employment would be induced not to remain in the Member State where he had established himself and found employment if that State could refuse to pay the benefits in question to his children because of their foreign nationality. As was pointed

out in the judgment of 16 December 1968 [in Case 63/76 *Inzirillo*] ... that result would run counter to the objective of the principle of freedom of movement for workers within the Community.'

16. In my opinion, the point of view set out in the judgment in *Deak*, which is based on the principle of free movement, goes further than that which is required by the prohibition of discrimination alone, as I formulated it above (in section 13). Nevertheless, it prompts me to adhere to the view taken by the Commission and to decide that, as the case-law stands at present, Noushin Taghavi is entitled to rely on Regulation No 1612/68 in order to obtain from the Belgian State the handicapped person's allowance. [28] Indeed, if the Belgian State were authorized to refuse to grant the handicapped person's allowance to Noushin Taghavi because of her nationality, her husband, to use the wording of the judgment in *Deak*, might be 'induced not to remain in the Member State where he had established himself and found employment'.

17. In conclusion, I propose that the Court should give the following reply to the national court's question:

'(1) A member of the family of a migrant worker who is a national of a Member State cannot rely on Regulation (EEC) No 1408/71 in order to obtain an allowance for handicapped persons in another Member State if, in that Member State, handicapped persons are entitled only to a personal right to that allowance.

(2) It is contrary to Article 7(2) of Regulation (EEC) No 1612/68 for a Member State to refuse to grant an allowance for handicapped persons to the non-EEC spouse of a migrant worker from another Member State because of the spouse's foreign nationality.'

28 — See the judgment in Case 131/85 *Gül* [1986] ECR 1573, in which the Court appears to reiterate the views which it expressed in *Deak* in relation to Article 11 of Regulation No 1612/68.