JUDGMENT OF THE COURT (Sixth Chamber)

6 November 2003 *

In Case C-413/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Franca Ninni-Orasche

and

Bundesminister für Wissenschaft, Verkehr und Kunst,

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Austrian Government, by H. Dossi, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and C. Lewis, barrister,

— the Commission of the European Communities, by D. Martin and W. Bogensberger, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

1 By order of 13 September 2001, received at the Registry of the Court on 17 October 2001, the Verwaltungsgerichtshof (Administrative Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC).

2 Those questions were raised in proceedings between Mrs Ninni-Orasche and the Bundesminister für Wissenschaft, Verkehr und Kunst (Federal Minister for Science, Transport and the Arts) concerning the Minister's refusal to grant her application for study finance under the Studienförderungsgesetz (Law on promotion of education) (BGBl., 1992/305).

Legal background

Community legislation

3 Under Article 48 of the Treaty, freedom of movement for workers is to be secured within the Community and is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

4 Article 7(1) and (2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1), ('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.'

5 The sixth recital in the preamble to Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59) states that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State.

6 The seventh recital of Directive 93/96 states:

'..., in the present state of Community law, as established by the case-law of the Court of Justice, assistance granted to students does not fall within the scope of the Treaty within the meaning of Article 7 thereof'.

7 Article 3 of that directive provides:

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

National legislation

8 In Austrian law, the provisions on and conditions for conferment of entitlement to study finance are laid down in the Studienförderungsgesetz. Paragraph 2 of that Law states that the assistance for which it provides may be applied for by Austrian nationals (first sentence of Paragraph 2 and Paragraph 3) and by foreigners and stateless persons who are to be treated as Austrian nationals (second sentence of Paragraph 2 and Paragraph 4) and refers to Community law as regards the definition of the latter concepts.

The main proceedings and the questions referred for a preliminary ruling

9 It is apparent from the order for reference that the appellant in the main proceedings, Mrs Ninni-Orasche, is an Italian national who has been married to an Austrian since 18 January 1993. She has been resident in Austria since 25 November 1993 and held a residence permit for that Member State which was valid until 10 March 1999. That permit conferred on her the right to take up and pursue activities as an employed or a self-employed person in the territory of Austria under the same conditions as a national worker.

10 From 6 July to 25 September 1995, Mrs Ninni-Orasche was employed in Austria for a fixed term as a waitress authorised to act as cashier in an Austrian catering company. Aside from her duties as cashier, she was also responsible for stocks of goods and for the ordering and storage of goods offered for sale. On 16 October 1995, she successfully sat, in Italy, an examination completing a course of secondary school studies in the form of evening classes which required her attendance only at the examinations. She thereby obtained a technical diploma ('Maturità tecnica — Diploma di ragioniere e perito commerciale') which entitled her to enrol at an Austrian university.

11 Between October 1995 and March 1996, Mrs Ninni-Orasche sought employment in Austria corresponding to her education and professional experience by sending unsolicited applications to hotels and a bank without success. In March 1996, she therefore began studying romance languages and literature, specialising in Italian and French, at the University of Klagenfurt (Austria).

12 On 16 April 1996, Mrs Ninni-Orasche applied for study finance under the Studienförderungsgesetz. Since that application was refused by the local authorities, she appealed to the Bundesminister für Wissenschaft, Verkehr und Kunst,

who likewise refused her application. Mrs Ninni-Orasche therefore decided to lodge an appeal against the Minister's decision with the Verfassungsgerichtshof (Constitutional Court) (Austria). That court declined to hear Mrs Ninni-Orasche's appeal but, pursuant to a supplementary application, it referred the appeal to the Verwaltungsgerichtshof for determination.

13 The Verwaltungsgerichtshof takes the view that, in light of the case-law of the Court relating to Article 48 of the Treaty and Article 7(2) of Regulation No 1612/68, it should, first of all, be determined whether Mrs Ninni-Orasche has acquired the status of a worker. On that point the national court is uncertain whether, having regard to the relevant case-law of the Court (Case 53/81 *Levin* [1982] ECR 1035, paragraph 17, and Case C-357/89 *Raulin* [1992] ECR I-1027), the short-term employment taken up by Mrs Ninni-Orasche can be regarded as an effective and genuine activity conferring on her the status of a worker.

14 Next, the national court observes that, according to that case-law, in the field of higher-education assistance continuity is required between the previous occupational activity and the studies pursued, except where a migrant worker involuntarily becomes unemployed and, as a result, is obliged by conditions on the labour market to undertake occupational retraining.

15 In the light of that case-law, the national court is uncertain whether the end of an employment relationship which, from the outset, had been concluded for a fixed term must be regarded as voluntary or involuntary from the point of view of the worker and whether the efforts of the person concerned to find another job in the host Member State before taking up a course of studies there and obtaining the qualification required for university entrance are relevant in that connection.

16 Lastly, the national court observes that, having regard to Case 39/86 *Lair* [1988] ECR 3161, paragraph 43, it must also be examined whether, in the context of the main proceedings, Mrs Ninni-Orasche's application for study finance was abusive, which would mean that the Community provisions conferring entitlement to such finance and prohibiting discrimination would not apply.

17 It was against this legal and factual background that the Verwaltungsgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Does the fact that an EU citizen works for a short period (two and a half months) that is fixed from the outset in a Member State of which he is not a national confer on him the status of a worker under Article 48 of the EC Treaty...?

(b) When determining whether he is a worker in the above sense in such a case, are any of the following circumstances significant:

(i) the fact that he took up the job only some years after his entry into the host State;

(ii) the fact that shortly after the end of his short, fixed-term employment relationship he became eligible for entry to university in the host country by virtue of having completed his schooling in his country of origin;

(iii) the fact that he attempted to find a new job in the period between the end of the short, fixed-term employment relationship and the time when he took up his studies?

2. If he is a (migrant) worker under Question 1:

(a) Does the termination, by expiry of time, of an employment relationship which is limited from the outset to a fixed term constitute a voluntary termination?

(b) If so, in such a case, when assessing whether or not the termination of the employment relationship was voluntary or involuntary, are any of the following circumstances significant, either in themselves or in conjunction with the other factors referred to herein:

(i) the fact that shortly after the employment relationship ended he became eligible for entry to university in the host country by virtue of having completed his schooling in his country of origin and/or

(ii) immediately following termination of that employment relationship until beginning his studies, he was looking for another job?

Is it relevant to the answer to this question that the other job sought by the person in question constitutes a sort of continuation at a similar (low) level of the job which he was doing for a fixed period but which has come to an end, or a job which corresponds to the higher level of education achieved in the meantime?'

The first question

18 By its first question, the national court is essentially asking, first, whether the fact that a national of a Member State has worked for a temporary period of two and a half months in the territory of another Member State, of which he is not a national, can confer on him the status of a worker within the meaning of Article 48 of the Treaty and, second, whether circumstances preceding and subsequent to that period of employment, such as the fact that the person concerned:

— took up the job only some years after his entry into the host Member State,

— shortly after the end of his short, fixed-term employment relationship, became eligible for entry to university in the host Member State by virtue of having completed his schooling in his country of origin, or

— attempted to find a new job in the period between the end of the short, fixed-term employment relationship and the time when he took up his studies,

are relevant in that regard.

Observations submitted to the Court

19 All the Governments which have submitted observations before the Court and the Commission agree that an employment relationship of a short duration that was fixed from the outset does not, in itself, preclude conferment of the status of worker within the meaning of Article 48 of the Treaty. They refer to the case-law of the Court according to which, in order to be treated as a worker, a person must pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.

20 According to the German Government and the Commission, short-term employment, intended from the outset to be for a fixed term, of a Community national in a Member State of which he is not a national confers on that person the status of a worker within the meaning of Article 48 of the Treaty. They take the view that the fact that, in the main proceedings, the appellant on several occasions sought employment or rather a new job corresponding to the higher level of qualifications obtained after the expiry of her fixed-term contract of employment and that she successfully completed her schooling in her Member State of origin is irrelevant in that regard.

21 The Austrian, Danish and United Kingdom Governments submit that the national court must assess all the circumstances of the main proceedings on the basis of objective criteria in order to establish whether the person concerned, rather than genuinely seeking to exercise her right to freedom of movement with a view to working, in fact intended to study in a Member State other than her Member State of origin and has thus attempted to create a situation in which it appears that she is a worker with the sole aim of obtaining advantages such as study finance. They take the view that the circumstances referred to by the national court in its first question are of particular relevance in that regard.

22 The Danish Government adds that, in order to establish whether the employment in question was marginal and ancillary, the national court must also take account of the fact that the appellant in the main proceedings was employed for only two and a half months during a period of residence in the host Member State lasting two and a half years.

The reply of the Court

23 First of all, it is settled case-law that the concept of 'worker', within the meaning of Article 48 of the Treaty, has a specific Community meaning and must not be interpreted narrowly (see, to that effect, inter alia, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16, Case 197/86 *Brown* [1988] ECR 3205, paragraph 21, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14, and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13).

24 Moreover, that concept must be defined in accordance with objective criteria characterising the employment relationship in view of the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration (see *Lawrie-Blum*, cited above, paragraph 17, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 12, and *Meeusen*, cited above, paragraph 13).

25 In the light of that case-law, it must be held that the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 48 of the Treaty.

26 In order to be treated as a worker, a person must nevertheless pursue an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory (see, in particular, *Levin*, cited above, paragraph 17, and *Meeusen*, paragraph 13).

27 When establishing whether that condition is satisfied, the national court must base its examination on objective criteria and assess as a whole all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue.

28 It should be stated that, with respect to the assessment whether employment is capable of conferring the status of worker within the meaning of Article 48 of the Treaty, factors relating to the conduct of the person concerned before and after the period of employment are not relevant in establishing the status of worker within the meaning of that article. Such factors are not in any way related to the objective criteria referred to in the case-law cited in paragraphs 23 and 24 of this judgment.

29 In particular, the three factors referred to by the national court, namely the fact that the person concerned took up employment as a waitress only several years after her entry into the host Member State, that, shortly after the end of her short term of employment, she obtained a diploma entitling her to enrol at university in that State and that, after that employment had come to an end, she attempted to find a new job, are not linked either to the possibility that the activity pursued by the appellant in the main proceedings was ancillary or to the nature of that activity or of the employment relationship.

30 For the same reasons, nor can the Court accept the argument put forward by the Danish Government that, in order to assess whether activities pursued as an employed person are effective and genuine, it is necessary to take account of the short term of the employment in relation to the total duration of residence by the person concerned in the host Member State, which, in the main proceedings, was two and a half years.

31 Finally, as regards the argument that the national court is under an obligation to examine, on the basis of the circumstances of the case, whether the appellant in the main proceedings has sought abusively to create a situation enabling her to claim the status of a worker within the meaning of Article 48 of the Treaty with the aim of acquiring advantages linked to that status, it is sufficient to state that any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope *ratione personae* of that Treaty because he satisfies the conditions for classification as a 'worker' within the meaning of that article. It follows that the issue of abuse of rights can have no bearing on the answer to the first question.

32 Having regard to the preceding considerations, the answer to the first question must be that the fact that a national of a Member State has worked for a temporary period of two and a half months in the territory of another Member State, of which he is not a national, can confer on him the status of a worker within the meaning of Article 48 of the Treaty provided that the activity performed as an employed person is not purely marginal and ancillary.

It is for the national court to carry out the examinations of fact necessary in order to determine whether that is so in the case before it. Circumstances preceding and subsequent to the period of employment, such as the fact that the person concerned:

— took up the job only some years after his entry into the host Member State,

— shortly after the end of his short, fixed-term employment relationship, became eligible for entry to university in the host Member State by virtue of having completed his schooling in his country of origin, or

— attempted to find a new job in the period between the end of the short, fixed-term employment relationship and the time when he took up his studies,

are not relevant in this connection.

The second question

33 By its second question, the national court is essentially asking whether a Community national such as the appellant in the main proceedings, where he has the status of a migrant worker for the purposes of Article 48 of the Treaty, is voluntarily unemployed, within the meaning established by the relevant case-law of the Court, solely because his contract of employment, from the outset concluded for a fixed term, has expired.

34 According to the case-law referred to in the preceding paragraph, migrant workers are guaranteed certain rights linked to the status as a worker even when they are no longer in an employment relationship (*Lair*, cited above, paragraph 36, and Case C-35/97 *Commission* v *France* [1998] ECR I-5325, paragraph 41).

35 In the field of assistance for university education, a national of a Member State other than the host Member State who has engaged in occupational activity in that host State and then undertaken there university studies leading to a professional qualification must be regarded as having retained his status as a worker entitled as such to benefit from Article 7(2) of Regulation No 1612/68 provided that there is continuity between the previous occupational activity and

the studies pursued. However, this condition cannot be imposed on a migrant worker who has involuntarily become unemployed and is obliged by conditions on the labour market to undertake occupational retraining (see, to that effect, *Lair*, paragraph 39, and *Raulin*, cited above, paragraph 21).

36 However, that finding cannot give rise to a situation whereby a national of a Member State may enter another Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State. Such an abuse is not covered by the Community provisions in question (see, to that effect, *Lair*, paragraph 43).

Observations submitted to the Court

37 The Austrian, German and United Kingdom Governments take the view, first, that the fact that the term of a contract of employment is fixed and thus accepted in advance by the employee concerned precludes that employee from being regarded as involuntarily unemployed once that contract expires. The German Government adds that the concept of involuntary unemployment, within the meaning established by the Court's case-law, covers only cases of dismissal.

38 Second, it is in their view indisputable that there is no link between Mrs Ninni-Orasche's employment in the catering sector and her studies of romance languages and literature.

39 By contrast, the Commission, relying on the case-law of the Court relating to Decision No 1/80 of the Council of Association of 19 September 1980 on the

development of the Association between the European Economic Community and Turkey, in particular Case C-171/95 *Tetik* [1997] ECR I-329, paragraphs 38 and 39, submits that where an employment relationship which was intended from the outset to be temporary comes to an end because the contract expires, this is not, as a general rule, the result of the personal wishes of the worker. Accordingly, in the main proceedings Mrs Ninni-Orasche was, in the Commission's opinion, involuntarily unemployed.

40 However, the Commission submits that there is no evidence in the case-file indicating that the conditions on the labour market obliged the appellant in the main proceedings to undertake occupational retraining in a sector other than that in which she had previously been employed. She has therefore lost her status as a worker within the meaning of Article 48 of the Treaty.

The reply of the Court

41 First of all, it is for the national court to conduct the examinations of fact necessary to determine, in accordance with the case-law referred to in paragraphs 34 to 36 of this judgment, whether there is continuity between the activity as an employed person previously performed by the appellant in the main proceedings and the course of studies subsequently undertaken, whether the appellant became unemployed involuntarily and whether she was obliged by conditions on the labour market to undertake occupational retraining or whether she performed that activity with the sole aim of benefiting from the system of student assistance in the host Member State.

42 However, it should be noted that the mere fact that a contract of employment is from the outset concluded as a fixed-term contract cannot necessarily lead to the

conclusion that, once that contract expires, the employee concerned is automatically to be regarded as voluntarily unemployed.

43 While a contract of employment is generally the result of negotiations, it is none the less true that cases in which the worker has no influence over the term and type of contract of employment which he may conclude with an employer are not unusual. On the contrary, as the Advocate General pointed out in points 53 and 54 of his Opinion, in some occupations it is common practice to conclude fixed-term contracts of employment and there are various reasons for this such as the seasonal nature of the work, the fact that the relevant market is sensitive to economic fluctuations or the possible inflexibility of national employment law.

44 Thus, when examining whether the unemployment of the appellant in the main proceedings is voluntary or involuntary, the national court may, in particular, take account of circumstances such as practices in the relevant sector of economic activity, the chances of finding employment in that sector which is not fixed-term, whether there is an interest in entering into only a fixed-term employment relationship or whether there is a possibility of renewing the contract of employment.

45 By contrast, the factors referred to by the national court, namely that, as soon as her contract of employment had expired, the person concerned obtained a diploma entitling her to enrol at university in the host Member State, that the search for a new job began immediately after the employment relationship had come to an end and the nature and level of the new employment sought, are not necessarily relevant in that connection. Indeed such circumstances may be indicative of either involuntary or voluntary unemployment on the part of the appellant in the main proceedings.

46 However, those factors might prove to be relevant when examining the question whether, in the present case, the appellant in the main proceedings took up short-term employment with the sole aim of benefiting from the system of student assistance in the host Member State.

47 Moreover, when carrying out that examination, account should also be taken of the fact that the appellant in the main proceedings appears to have entered the host Member State not with the sole aim of benefiting from the system of student assistance in that State but in order to live there with her husband, who is a national of that State, and of the fact that she is lawfully resident there.

48 In light of all the preceding considerations, the answer to the second question must be that a Community national such as the appellant in the main proceedings, where he has the status of a migrant worker for the purposes of Article 48 of the Treaty, is not necessarily voluntarily unemployed, within the meaning established by the relevant case-law of the Court, solely because his contract of employment, from the outset concluded for a fixed term, has expired.

Costs

49 The costs incurred by the Austrian, Danish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 13 September 2001, hereby rules:

1. **The fact that a national of a Member State has worked for a temporary period of two and a half months in the territory of another Member State, of which he is not a national, can confer on him the status of a worker within the meaning of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) provided that the activity performed as an employed person is not purely marginal and ancillary.**

   It is for the national court to carry out the examinations of fact necessary in order to determine whether that is so in the case before it. Circumstances preceding and subsequent to the period of employment, such as the fact that the person concerned:

   — took up the job only some years after his entry into the host Member State,

— shortly after the end of his short, fixed-term employment relationship, became eligible for entry to university in the host Member State by virtue of having completed his schooling in his country of origin, or

— attempted to find a new job in the period between the end of the short, fixed-term employment relationship and the time when he took up his studies,

are not relevant in this connection.

2. A Community national such as the appellant in the main proceedings, where he has the status of a migrant worker for the purposes of Article 48 of the Treaty, is not necessarily voluntarily unemployed, within the meaning established by the relevant case-law of the Court, solely because his contract of employment, from the outset concluded for a fixed term, has expired.

Puissochet Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass V. Skouris

Registrar President