JUDGMENT OF THE COURT (Grand Chamber)

7 September 2004 *

In Case C-456/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Tribunal du travail de Brussels (Belgium), made by decision of 21 November 2002, received on 18 December 2002, in the proceedings:

Michel Trojani

v

Centre public d'aide sociale de Bruxelles (CPAS),

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Presidents of Chambers, R. Schintgen, F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,

* Language of the case: French.

Advocate General: L.A. Geelhoed,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and following the hearing on 6 January 2004,

after considering the observations submitted on behalf of:

— Mr Trojani, by P. Leclerc, avocat,

— the Centre public d'aide sociale de Bruxelles (CPAS), by M. Legein, avocat,

— the Belgian Government, by A. Snoecx, acting as Agent, assisted by C. Doutrelepont, avocat,

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

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

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Netherlands Government, by H.G. Sevenster and N. Bel, acting as Agents,

— the United Kingdom Government, by R. Caudwell, acting as Agent, assisted by E. Sharpston QC,

— the Commission of the European Communities, by D. Martin, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 19 February 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18 EC, 39 EC, 43 EC and 49 EC; Article 7(1) 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');

and Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

2 The reference was made in the course of proceedings between Mr Trojani and the Centre public d'aide sociale de Bruxelles ('the CPAS') concerning its refusal to grant him the minimum subsistence allowance ('the minimex').

Legal background

Community legislation

3 Under Article 18 EC:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

...'

4 Article 39(1) EC reads as follows:

'Freedom of movement for workers shall be secured within the Community.'

5 Under Article 39(3) EC, freedom of movement for workers 'shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

...

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

...'

6 Article 1(1) of Directive 90/364 provides:

'Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.'

National legislation

7 Article 1 of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance (*Moniteur belge*, 18 September 1974, p. 11363) provides:

'1. Any Belgian having reached the age of majority, who is actually resident in Belgium and who does not have adequate resources and is not able to obtain them either by his own efforts or by other means, is entitled to a minimum subsistence allowance.

...'

8 Under Article 1 of the Royal Decree of 27 March 1987 (*Moniteur belge*, 7 April 1987, p. 5086) extending the scope of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance to persons not possessing Belgian nationality:

'The scope of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance is extended to the following persons:

1. those to whom Regulation (EEC) No 1612/68 of the Council of the European Communities of 15 October 1968 on freedom of movement for workers within the Community applies;

...'

The main proceedings and the reference for a preliminary ruling

9 Mr Trojani is a French national who after a short stay in Belgium in 1972, during which he is said to have worked as a self-employed person in the sales sector, returned there in 2000. He resided, without being registered, first at a campsite in Blankenberge and then from December 2001 in Brussels. After a stay at the Jacques Brel youth hostel, he was given accommodation in a Salvation Army hostel from 8 January 2002, where in return for board and lodging and some pocket money he does various jobs for about 30 hours a week as part of a personal socio-occupational reintegration programme.

10 As he had no resources, he approached the CPAS with a view to obtaining the minimex, on the grounds that he had to pay EUR 400 a month to the hostel and should also be able to leave the hostel and live independently.

11 The CPAS's refusal, on the grounds that, first, Mr Trojani did not have Belgian nationality and, second, he could not benefit from the application of Regulation No 1612/68, was the subject of proceedings in the Tribunal du travail de Bruxelles (Labour Court, Brussels).

12 That court granted Mr Trojani the right to receive provisional financial assistance of EUR 300 from the CPAS. It also decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Can a citizen of the Union in the factual circumstances described in this judgment

— who has temporary leave to reside,

— does not have sufficient resources,

— carries out work for the hostel to the extent of approximately 30 hours a week in the context of a personal reintegration programme,

— and receives in return benefits in kind which cover his basic needs at the hostel itself

claim a right of residence

— as a worker within the meaning of Article 39 EC or Article 7(1) of Regulation No 1612/68,

— or as a worker pursuing an activity as a self-employed person within the meaning of Article 43 EC,

— or as a person providing a service, in view of the tasks he performs at the hostel, or as a person for whom services are intended, in view of the benefits in kind granted to him by that hostel, within the meaning of Article 49 EC,

— or merely because he is taking part in a programme for his socio-occupational reintegration?

2. If not, can he rely directly on Article 18 EC, which guarantees the right to move and reside freely in the territory of another Member State of the Union, merely in his capacity as a European citizen?

What then becomes of the conditions laid down by Directive 90/364 ... and/or the "limitations and conditions" laid down in the EC Treaty, in particular the condition as to minimum resources which, if it were applied on entry to the host country, would deprive him of the very substance of the right of residence?

If, on the other hand, the right of residence arises automatically on the basis of citizenship of the Union, could the host State subsequently refuse an application for the minimex or for social assistance (non-contributory benefits), curtailing his right of residence on the ground that he does not have sufficient resources, when those benefits are granted to nationals of the host country subject to conditions which Belgians too must satisfy (proof of their availability for work, proof that they are in need)?

Must the host country comply with any other rules in order to avoid rendering meaningless the right of residence, such as a duty to assess the situation in the light of the fact that the application for the minimex or for social assistance is temporary, or to take into account the principle of proportionality (would the burden on the State in question be unreasonable)?'

The questions referred for a preliminary ruling

The first question

13 By its first question, the national court essentially asks whether a person in a situation such as that of the claimant in the main proceedings can claim a right of

residence as a worker, a self-employed person or a provider or recipient of services, within the meaning of Articles 39 EC, 43 EC and 49 EC respectively.

14 In the context of freedom of movement for workers, it should be recalled that Article 39(3)(c) EC grants nationals of the Member States the right of residence in the territory of a Member State for the purpose of employment.

15 As the Court has held, the concept of 'worker' within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, 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, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26).

16 Moreover, neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law (see Case 53/81 *Levin* [1982] ECR 1035, paragraph 16; Case 344/87 *Bettray* [1989] ECR 1621, paragraphs 15 and 16; and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32).

17 With respect more particularly to establishing whether the condition of the pursuit of real and genuine activity for remuneration is satisfied, the national court must base its examination on objective criteria and make an overall assessment of all the circumstances of the case relating to the nature both of the activities concerned and of the employment relationship at issue (see Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 27).

18 In this respect, the Court has held that activities cannot be regarded as a real and genuine economic activity if they constitute merely a means of rehabilitation or reintegration for the persons concerned (*Bettray*, paragraph 17).

19 However, that conclusion can be explained only by the particular characteristics of the case in question, which concerned the situation of a person who, by reason of his addiction to drugs, had been recruited on the basis of a national law intended to provide work for persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions (see, to that effect, Case C-1/97 *Birden* [1998] ECR I-7747, paragraphs 30 and 31).

20 In the present case, as is apparent from the decision making the reference, Mr Trojani performs, for the Salvation Army and under its direction, various jobs for approximately 30 hours a week, as part of a personal reintegration programme, in return for which he receives benefits in kind and some pocket money.

21 Under the relevant provisions of the decree of the Commission communautaire française of 27 May 1999 on the grant of authorisation and subsidies to hostels (*Moniteur belge*, 18 June 1999, p. 23101), the Salvation Army has the task of receiving, accommodating and providing psycho-social assistance appropriate to the

recipients in order to promote their autonomy, physical well-being and reintegration in society. For that purpose it must agree with each person concerned a personal reintegration programme setting out the objectives to be attained and the means to be employed to attain them.

22 Having established that the benefits in kind and money provided by the Salvation Army to Mr Trojani constitute the consideration for the services performed by him for and under the direction of the hostel, the national court has thereby established the existence of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.

23 For the claimant in the main proceedings to have the status of worker, however, the national court, in the assessment of the facts which is within its exclusive jurisdiction, would have to establish that the paid activity in question is real and genuine.

24 The national court must in particular ascertain whether the services actually performed by Mr Trojani are capable of being regarded as forming part of the normal labour market. For that purpose, account may be taken of the status and practices of the hostel, the content of the social reintegration programme, and the nature and details of performance of the services.

25 On the question of the applicability of Articles 43 EC and 49 EC, it must be stated that, in the case at issue in the main proceedings, neither of those provisions of the EC Treaty may be relied on as a legal basis for a right of residence.

26 As may be seen from paragraph 20 above, Mr Trojani performs services on a continuing basis for and under the direction of the Salvation Army, in return for which he receives a remuneration.

27 Now, first, the freedom of establishment provided for in Articles 43 EC to 48 EC, includes only the right to take up and pursue all types of self-employed activity, to set up and manage undertakings, and to set up agencies, branches or subsidiaries (see, in particular, Case C-255/97 *Pfeiffer* [1999] ECR I-2835, paragraph 18, and Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 24). Paid activities are therefore excluded.

28 Second, according to the settled case-law of the Court, an activity carried out on a permanent basis, or at least without a foreseeable limit to its duration, does not fall within the Community provisions concerning the provision of services (see Case 196/87 *Steymann* [1988] ECR 6159, paragraph 16, and Case C-215/01 *Schnitzer* [2003] I-14847, paragraphs 27 to 29).

29 In those circumstances, the answer to the first question must be that a person in a situation such as that of the claimant in the main proceedings, first, does not come under Articles 43 EC and 49 EC and, second, can claim a right of residence as a worker within the meaning of Article 39 EC only if the paid activity he carries out is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.

The second question

30 By its second question, the national court essentially asks whether, if the first question is answered in the negative, a person in the situation of the claimant in the

main proceedings may, simply by virtue of being a citizen of the European Union, enjoy a right of residence in the host Member State by the direct application of Article 18 EC.

31 It must be recalled that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC (see Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84). Mr Trojani therefore has the right to rely on that provision of the Treaty simply as a citizen of the Union.

32 That right is not unconditional, however. It is conferred subject to the limitations and conditions laid down by the Treaty and by the measures adopted to give it effect.

33 Among those limitations and conditions, it follows from Article 1 of Directive 90/364 that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence.

34 As the Court has previously held, those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality (*Baumbast and R*, paragraph 91).

35 It follows from the judgment making the reference that a lack of resources was precisely the reason why Mr Trojani sought to receive a benefit such as the minimex.

36 In those circumstances, a citizen of the Union in a situation such as that of the claimant in the main proceedings does not derive from Article 18 EC the right to reside in the territory of a Member State of which he is not a national, for want of sufficient resources within the meaning of Directive 90/364. Contrary to the circumstances of the case of *Baumbast and R* (paragraph 92), there is no indication that, in a situation such as that at issue in the main proceedings, the failure to recognise that right would go beyond what is necessary to achieve the objective pursued by that directive.

37 However, it must be observed that, according to information put before the Court, Mr Trojani is lawfully resident in Belgium, as is attested by the residence permit which has in the meantime been issued to him by the municipal authorities of Brussels.

38 It should be recalled here that it is for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see inter alia, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, paragraph 7; and Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16).

39 In the context of the present case, it should be examined more particularly whether, despite the conclusion in paragraph 36 above, a citizen of the Union in a situation such as that of the claimant in the main proceedings may rely on Article 12 EC,

under which, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, all discrimination on grounds of nationality is prohibited.

40 In the present case, it must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC.

41 In that connection three points should be made.

42 First, as the Court has held, a social assistance benefit such as the minimex falls within the scope of the Treaty (see Case C-184/99 *Grzelczyk* [2001] ECR I-6193, in particular paragraph 46).

43 Second, with regard to such benefits, a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.

44 Third, national legislation such as that at issue in the main proceedings, in so far as it does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy

the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality prohibited by Article 12 EC.

45 It should be added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure (see, to that effect, *Grzelczyk*, paragraphs 42 and 43).

46 Consequently, the answer to the second question must be that a citizen of the Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that

court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **A person in a situation such as that of the claimant in the main proceedings, first, does not come under Articles 43 EC and 49 EC and, second, can claim a right of residence as a worker within the meaning of Article 39 EC only if the paid activity he carries out is real and genuine. It is for the national court to carry out the examinations of fact necessary to determine whether that is so in the case pending before it.**

2. **A citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings is in possession of a residence permit, he may rely on Article 12 EC in order to be granted a social assistance benefit such as the minimex.**

Signatures.