JUDGMENT OF THE COURT (First Chamber)

1 October 2009 *

In Case C-103/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Unabhängiger Verwaltungssenat des Landes Vorarlberg (Austria), made by decision of 29 February 2008, received at the Court on 6 March 2008, in the proceedings

Arthur Gottwald

v

Bezirkshauptmannschaft Bregenz,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano (Rapporteur), A. Borg Barthet and E. Levits, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2009,

after considering the observations submitted on behalf of:

— Mr Gottwald, by H. Frick and T. Dietrich, Rechtsanwälte,

— the Austrian Government, by E. Riedl and G. Eberhard, acting as Agents,

— the Commission of the European Communities, by N. Yerrell, G. Braun and D. Maidani, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2009,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 12 EC.

2 This reference has been made in relation to proceedings between Mr Gottwald and the Bezirkshauptmannschaft Bregenz (Bregenz administrative authority at first instance) regarding a fine imposed by the latter for failure to pay a motorway toll.

Legal context

National legislation

3 Paragraph 10(1) of the Law of 2002 on tolls on federal roads (Bundesstraßen-Mautgesetz 2002, BGBl. I, 109/2002), in the version applicable to the facts in the main proceedings ('the BStMG 2002'), provides:

'The use of stretches of toll road by single track motor vehicles and by multi-track motor vehicles with a maximum permissible total weight not exceeding 3.5 tonnes is subject to a time-dependent toll.'

4 Paragraph 11(1) of the BStMG 2002 provides:

'The time-dependent toll is to be paid prior to use of stretches of toll road by affixing a toll disc to the vehicle.'

5 Paragraph 13(2) of the BStMG 2002, which governs the procedure for granting, free of charge, an annual toll disc for nationals who hold a disabled persons card, reads as follows:

'The Bundesamt für Soziales und Behindertenwesen (Federal Office for Social Affairs and the Disabled) must, upon application, make available to disabled persons resident or ordinarily resident in national territory having at least one registered multi-track motor vehicle with a maximum permissible total weight not exceeding 3.5 tonnes an annual disc for a motor vehicle of the specified category free of charge in so far as such persons possess a disabled persons' card pursuant to Paragraph 40 of the Bundesbehindertengesetz (Federal Law on Disabled Persons) on which is stated that they suffer from a permanent and serious lack of ability to walk, that they cannot reasonably use public means of transport because of permanent damage to health or that they are blind.'

6 Paragraph 20(1) of the BStMG 2002 provides:

'Drivers of motor vehicles who use stretches of toll road without having duly paid the time-dependent toll due under Paragraph 10 commit an administrative offence and are to be punished by a fine of between EUR 400 and EUR 4 000.'

The dispute in the main proceedings and the question referred for a preliminary ruling

7 Mr Gottwald is a German national resident in Hamburg (Germany) who suffers from complete paraplegia with the loss of all functions below the fourth vertebra. A severe-disability identification card was issued to him in Germany.

8 On 26 August 2006, Mr Gottwald was driving his vehicle on the Austrian toll motorway network, on his way to his holiday location in Austria. He was subject to a roadside check and it was ascertained that he had not paid the time-dependent toll by purchase of a toll disc to be affixed to his vehicle.

9 The Bezirkshauptmannschaft Bregenz therefore imposed a fine of EUR 200 on him, by decision of 4 December 2006, against which Mr Gottwald appealed before the Unabhängiger Verwaltungssenat des Landes Vorarlberg (Independent Administrative Tribunal of the Province of Vorarlberg).

10 In that appeal, Mr Gottwald submitted, in particular, that, since he suffers from paraplegia in respect of which he has been issued with a German disabled person's card, he is entitled to be issued with a toll disc free of charge in Austria, pursuant to Paragraph 13(2) of the BStMG 2002, on the same basis as disabled persons resident or ordinarily resident in Austria.

11 In those circumstances, since it was uncertain as to the lawfulness of the conditions for issue of that toll disc in the light of Community law, the Unabhängiger

Verwaltungssenat des Landes Vorarlberg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 12 EC to be interpreted as precluding the application of a provision of national law which provides that an annual disc in respect of a motor vehicle for the use of federal toll roads is made available free of charge only to those persons with a defined disability who are resident or ordinarily resident in national territory?'

The question referred

12 By its question, the national court essentially asks whether Article 12 EC must be interpreted as precluding national legislation, such as that in question in the main proceedings, which restricts the issue of an annual toll disc free of charge to disabled persons who are resident or ordinarily resident in the territory of the Member State concerned.

Admissibility

13 The Austrian Government argues that the reference for a preliminary ruling is inadmissible on the ground that it is of a purely hypothetical nature and is irrelevant to the outcome of the dispute in the main proceedings, since Mr Gottwald has never made an application in Austria for the free toll disc in question.

14 More specifically, in the view of the Austrian authorities, the question referred bears no relation to the facts of the case in the main proceedings, since those proceedings do not concern a decision refusing issue of the free toll disc, within the meaning of Paragraph 13(2) of the BStMG 2002, but concern solely Mr Gottwald's appeal against the fine which was imposed on him on the basis of Paragraph 20(1) of the BStMG 2002, read in conjunction with Paragraphs 10(1) and 11(1) of that Law, for non-payment of the time-dependent toll charge.

15 Nevertheless, that argument cannot be accepted.

16 In that regard, it should be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30).

17 It follows that the presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of the provisions of Community law referred to in the questions bears no relation to the actual facts of the main action or to its purpose (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 29).

18 In the present case, although Mr Gottwald did not apply for a free toll disc under Paragraph 13(2) of the BStMG 2002, the fact remains that the Court's answer may have a useful effect on the result of the action in the main proceedings.

19 It is apparent from the information supplied by the Austrian Government at the hearing that the national court had the power to reduce the amount of the fine if it found that the applicant in the main proceedings would have been entitled to receive that free toll disc by virtue of the right, set out in Article 12 EC, not to suffer discrimination on the ground of his nationality.

20 Thus, any decision of the Court that that provision of the EC Treaty precludes a national rule such as that at issue in the main proceedings could, in particular, constitute mitigation allowing the national court to reduce the penalty imposed on Mr Gottwald.

21 Clearly, therefore, it does not appear obvious that the interpretation sought is irrelevant as regards the decision which the national court is called upon to give.

22 Consequently, the reference for a preliminary ruling must be declared admissible.

Substance

23 As a preliminary point, it must be borne in mind that, in accordance with settled case-law, citizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 31, and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 15 and the case-law cited).

24 In particular, as the Court has already held, any citizen of the Union may rely on Article 12 EC in all situations falling within the material scope of Community law (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 62, and *Schempp*, paragraph 17).

25 Those situations include those involving the exercise of the right to move and reside within the territory of the Member States conferred by Article 18 EC (Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 24; *Bidar*, paragraph 33; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 37).

26 In those circumstances, a Member State national such as Mr Gottwald, when exercising his freedom to move and reside within the territory of the Member States in order to take holidays in another Member State, has the right, set out in Article 12 EC, not to suffer discrimination by reason of his nationality.

27 In that regard, it is also apparent from case-law that the rules regarding equality of treatment between nationals and non-nationals prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the

application of other distinguishing criteria, lead to the same result (see, inter alia, Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285, paragraph 16; Case C-224/00 *Commission* v *Italy* [2002] ECR I-2965, paragraph 15; and Case C-28/04 *Tod's and Tod's France* [2005] ECR I-5781, paragraph 19).

28 That is true, in particular, of a measure under which a distinction is drawn on the basis of residence or ordinary residence, in that that requirement is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, inter alia, Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 14, and Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 14).

29 In the present case, the legislation at issue in the main proceedings is based on precisely that kind of criterion, having regard to the fact that it restricts availability of the free annual toll disc only to those disabled persons who are resident or ordinarily resident in Austria.

30 Such a difference in treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 36; *Garcia Avello*, paragraph 31; and *Bidar*, paragraph 54).

31 With regard to the condition requiring there to be objective considerations in the public interest, the Austrian Government submits that the measure at issue in the main proceedings is intended to promote the mobility and social integration of disabled persons who, because of their disability, cannot use public transport and who, as a consequence, depend on a private vehicle. Thus, that measure applies, as shown by the validity of the toll disc of one year, to persons who have to use the road network

relatively frequently. The requirement relating to residence or ordinary residence is therefore the manifestation of a certain degree of integration of the recipients of the free toll disc in Austrian society.

32 In that regard, it must be noted that both the promotion of mobility and integration of disabled persons and the wish to ensure that there is a connection between the society of the Member State concerned and the recipient of a benefit such as that at issue in the main proceedings can indeed constitute objective considerations of public interest which are capable of justifying the fact that the conditions for the grant of the benefit may affect the freedom of movement of the citizens of the Union (see, by analogy, *D'Hoop*, paragraph 38; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 35; and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 37).

33 Nevertheless, the fact remains that it is necessary for the condition of proportionality outlined in paragraph 30 of the present judgment to be met. It follows from the case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain it (see, inter alia, *Tas-Hagen and Tas*, paragraph 35 and the case-law cited).

34 More specifically, with regard to the degree of connection of the recipient of a benefit with the society of the Member State concerned, the Court has already held that, with regard to benefits that are not covered by Community law, such as that at issue in the main proceedings, Member States enjoy a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society (see, to that effect, *Tas-Hagen and Tas*, paragraph 36).

35 Thus, the Court has accepted on certain conditions that national rules may require, in order to establish the existence of a certain degree of integration, that the recipient of the benefit in question has been resident or ordinarily resident in the Member State concerned for a certain period of time (see, to that effect, *Bidar*, paragraph 59, and *Förster*, paragraph 50).

36 With regard to a measure such as that at issue in the main proceedings, intended to facilitate regular journeys in Austria by disabled persons with a view to their integration in national society, the place of residence or of ordinary residence then appears to be a criterion suitable to establish the existence of a connection between those persons and the society of the Member State concerned such as, in particular, to distinguish them, as the Advocate General observed in point 71 of his Opinion, from other categories of users likely to use the road network of that Member State only occasionally or temporarily.

37 Furthermore, it must be noted that, in the present case, the national rule at issue in the main proceedings does not make grant of the free annual toll disc subject to any additional condition relating to a minimum period during which the person concerned must have been resident or ordinarily resident in Austria.

38 The considerations set out in the preceding paragraphs regarding the proportionality of the conditions of residence and ordinary residence to the objectives pursued by the national rule at issue in the main proceedings are all the more valid, as the Austrian Government explained at the hearing, without being contradicted on that point by the other interested parties which submitted observations to the Court, since those conditions are interpreted widely, so that other connecting factors allow a sufficiently close connection to Austrian society to be established for the purposes of grant of the free toll disc.

39 In particular, as that Government stated at the hearing, a disabled person who, while not having his residence or ordinary residence in Austria, regularly travels in that country for professional or personal reasons would also have the right to receive the road toll disc free of charge.

40 In those circumstances, it must be held that the national rule at issue in the main proceedings does not go beyond what is necessary to achieve the objectives which it pursues.

41 Consequently, the answer to the question referred is that Article 12 EC must be interpreted as meaning that it does not preclude a national rule, such as that at issue in the main proceedings, which restricts the issue of an annual toll disc free of charge to those disabled persons who are resident or ordinarily resident in the territory of the Member State concerned, including also those persons who regularly travel to that State for professional or personal reasons.

Costs

42 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 (First Chamber) hereby rules:

Article 12 EC must be interpreted as meaning that it does not preclude a national rule, such as that at issue in the main proceedings, which restricts the issue of an annual toll disc free of charge to those disabled persons who are resident or ordinarily resident in the territory of the Member State concerned, including also those persons who regularly travel to that State for professional or personal reasons.

[Signatures]