

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 10 DECEMBER 1981

My Lords,

Mr and Mrs Reina are Italian nationals who have for many years been resident as workers in the Federal Republic of Germany. On 1 October 1979 they applied to the Landeskreditbank, Baden-Württemberg (where they resided) for a childbirth loan, following the birth of their twins. Provision is made for such loans in the "Guidelines on the Grant of Family Loans" issued by the Ministry for Labour, Health and Social Affairs of the *Land* of Baden-Württemberg. The loans are made by the bank, the cost being borne by the *Land*, on the conditions set out in "the Guidelines". The latter provide that loans shall be granted, free of interest, on account of the birth of a child to married couples ordinarily resident in Baden-Württemberg, whose average monthly income does not exceed a specified amount, but that in order to be eligible for a loan, at least one of the parents must be a German national. The bank refused the application solely on the basis that neither parent was a German national.

Mr and Mrs Reina instituted proceedings before the Verwaltungsgericht Stuttgart for an order compelling the bank to grant the loan to them. They relied primarily on Article 7 of Council Regulation No 1612/68 of 15 October 1968 "on freedom of movement for workers within the Community" (Official Journal, English Special Edition 1960 (II), p. 475) which reads as follows:

"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."

Mr and Mrs Reina contended that a childbirth loan was a "social advantage" and that in being refused a loan because of their nationality they were not enjoying the same social advantages as national workers. The bank argued that this loan was not a social advantage; that it was bound to observe the conditions set out in the guidelines which did not in any event confer a legal right to a loan, the grant of which remained discretionary.

The Verwaltungsgericht thereupon referred two questions to this Court, the first of which reads as follows:

"Must Article 7 (2) of Regulation (EEC) No 1612/68 be construed as meaning that it puts other nationals of the EEC on an equal footing with German nationals if, pursuant to internal

administrative rules and without there being any legal entitlement thereto, a loan institute incorporated under public law grants upon application in the event of the birth of a child interest-free loans to married couples whose income does not exceed a certain amount for the purpose of averting, alleviating or removing financial difficulties and in respect of which loans the *Land* of Baden-Württemberg provides the institute with assistance for the service of debts appropriated from time to time in the State budget, with the aim *inter alia* of countering by measures for family assistance the decline in the birth rate in the Federal Republic of Germany and reducing the number of abortions?"

Member State". It is not contested that the Verwaltungsgericht is a tribunal of a Member State so that question does not arise. Whether the tribunal is properly constituted for the purpose of making an order under its own rules of procedure is a different question. In Case 75/63 *Hoekstra v Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177 it was objected that the questions were formulated and transmitted by the President of the national tribunal rather than by the tribunal as a whole in its judgment; yet the Court answered the question. I am not satisfied on the material before the Court that there is a defect here (in the sense that the reference could not be made and signed by the three professional judges) which vitiates the reference, and in my opinion the reference should be regarded as being admissible.

The bank takes a preliminary objection to this Court's jurisdiction to answer that question, on the ground that the order was not made by a properly constituted tribunal. It observes that the order to stay proceedings and to refer a question to the Court was made only by three professional judges whereas Article 5 (3) of the Verwaltungsgerichtsordnung (the German law prescribing procedure before administrative tribunals) provides that an administrative tribunal deciding upon cases at first instance should consist of three professional and two lay judges.

According to the preamble to the Guidelines on the Grant of Family Loans, the system was established "in order to avoid the economic difficulties confronting families, single parents and pregnant women or to reduce or remove their impact". According to Article 6 of the same guidelines "a family loan is designed for the promotion of the family". In its order for reference, the Verwaltungsgericht referred this Court to passages from the records of debates in the *Landtag* of the Land of Baden-Württemberg, indicating that the promoters of the scheme were concerned at the low birth rate and the large number of terminations of pregnancies in the *Land*, and hoped to resist this trend by offering assistance for pregnant women with financial difficulties. The loans formed part of that assistance. Together with the factors mentioned by the Verwaltungsgericht in its first

It is, of course, for the Court to decide whether a body asking the Court to give a ruling under Article 177 of the EEC Treaty is "any court or tribunal of a

question, these considerations indicate that the loans are to be considered, *prima facie*, as a form of social assistance.

Nevertheless, it was contended on behalf of the bank that they do not amount to social advantages within the meaning of Article 7 of Regulation No 1612/68 since there is no connection whatever between the grant of the loan and the recipient's status as a "worker", nor do they do anything to affect the mobility of workers within the Community. It was said that the loans were issued for demographic purposes; and could not on any basis be described as "conditions of employment" in the sense of Article 48 (2) of the EEC Treaty.

It is obviously arguable that Article 7 (2) should be construed as covering only social advantages accorded to national workers *qua* workers. The Court has, however, already decided that the term "social advantages" in Article 7 (2) of Regulation No 1612/68 cannot be construed restrictively, and in particular it cannot be limited to benefits connected with the contract of employment itself. I refer to Case 32/75, *Anita Cristini v Société Nationale des Chemins de Fer Français* [1975] ECR 1085 at p. 1094 and to Case 207/78, *Ministère Public v Even* [1979] ECR 2019 at p. 2034. Moreover, Article 49 imposes on the Council the duty to make regulations setting out the measures required to bring about freedom of movement for workers, "in particular", the measures listed thereafter. The phrase "in particular" indicates that the ensuing list is not exhaustive. Rules governing eligibility for benefits of a social character, which discriminate between nationals of the different Member States, are, it seems to

me, capable of constituting obstacles to the freedom of movement of workers, even though they are not connected with the contract of employment. Such rules may therefore be eliminated by means of legislation adopted in accordance with Article 49 of the EEC Treaty.

Such an approach seems to me to be consistent with the Court's reasoning in Case 9/74 *Casagrande v Landeshauptstadt München* [1974] ECR 773 where it was decided that the prohibition of discrimination on grounds of nationality in Article 12 of Regulation No 1612/68 extends not only to rules relating to the admission of children to schools but also to general measures intended to facilitate educational attendance.

The fact that a social advantage may be conferred for reasons of demographic policy, among other considerations, does not seem to me to prevent it from falling within Article 7 (2). As Mr Advocate General Trabucchi observed in the *Cristini* case, at p. 1098:

"What is involved is undoubtedly a *social advantage* whose potential or actual connection with a policy of population growth could not change its chief characteristic which is that it be related to family responsibilities".

I do not, therefore, accept the bank's argument that, because the scheme for childbirth loans was not designed to impose a disability on foreigners but to compensate for the low birth rate among German nationals relative to that of the

alien population, that concludes the question against Mr and Mrs Reina. Even if the birth rate is relatively high among all migrant workers, as appears to be contended, the fact remains that these loans are granted on the basis of need to families with low incomes. A worker who is a national of another Member State is entitled to the same social advantages as national workers in this respect.

Nor can I accept the bank's argument that the loans in question fall outside the scope of "social advantages" by reason of the fact that each Member State retains the power to treat its own nationals and foreigners differently as far as civil rights and obligations are concerned. There are, of course, matters which fall within the sphere of civil rights and outside the field of application of Articles 48 to 51 of the EEC Treaty and the legislation adopted thereunder. I do not consider that childbirth loans, of the kind at issue in this case, are to be categorized as civil rights outside the scope of Articles 48 to 51 of the EEC Treaty. In my view, the bank's argument derives no support from the *Gilbert Even* case upon which the bank relies.

That case was concerned with a scheme providing for benefits for victims of war, the essential object of which was "to

offer to Belgian workers who fought in the allied forces between 10 May 1940 and 8 May 1945 and suffer incapacity for work attributable to an act of war a testimony of national recognition . . . and to grant them . . . a benefit by reason of the services thus rendered to their country" (page 2032 para. 12). Such a benefit, based on a scheme of national recognition, could not be considered as a "social advantage" within the meaning of Article 7. It is, indeed, to be noted that in that case the Court considered as falling within Regulation No 1612/68 advantages which "whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community" (para. 22). The particular benefit was not one "granted to a national worker by reason primarily of his status of worker or resident on the national territory and *for that reason* does not fulfil the essential characteristics of the 'social advantages' referred to in Article 7 (2)".

The bank further contended that there is an objective justification for the policy of discriminating between German nationals and aliens, since in the course of the period allowed for the repayment of a loan, which extends to seven years, many migrant workers return to their countries of origin. It is said that it is often difficult to find the new addresses of such workers and that the recovery of the loan in such cases entails additional

legal and administrative costs. It is possible that such considerations might warrant the imposition of conditions designed to protect the bank in the event of the departure from the jurisdiction of recipients of loans. They cannot, however, warrant the exclusion of nationals of other Member States from the entire scheme, even when such nationals are firmly settled in the *Land* of Baden-Württemberg, particularly when German nationals are eligible for the loans irrespective of any intention to change their domicile.

Finally the bank contended that the loans in question could not amount to social advantages within the meaning of Article 7 of Regulation No 1612/68 because, by contrast with the concessionary fares in the *Cristini* case, they were not granted as a matter of right, but only on a discretionary basis. The argument is not that Community law cannot give an entitlement to what would otherwise be a discretionary benefit but that a discretionary benefit is not a "social advantage" within the meaning of Article 7 (2). The consequences of accepting such a proposition would be extremely wide, since it is not uncommon to find social benefits accorded by national authorities on a discretionary basis to those in need; if all these benefits were to be excluded from the concept of "social advantages" one would expect to find it expressly stated in the article. It is not so stated: on the contrary the reference is to "social advantages" and not to "social rights". The exclusion of nationals of other Member States from the opportunity to be considered for such benefits would constitute an important obstacle to the free movement of labour. For these reasons I conclude that the term

"social advantages" in Article 7 includes benefits of a discretionary nature.

Accordingly, I am of the opinion that the first question should be answered in the affirmative. If that view is accepted it is unnecessary to reply to the Verwaltungsgericht's second question, which this Court is asked to answer only in the event of its giving a negative reply to the first question. By the second question this Court is asked whether Article 7 of the EEC Treaty precludes discrimination between German nationals and nationals of other Member States as regards the grant of childbirth loans. That article provides, in part, that

"Within the scope of application of this treaty, and without prejudice to any special conditions contained therein, any discrimination on grounds of nationality shall be prohibited."

For the reasons that I have already given, the terms and conditions governing the award of childbirth loans may amount to obstacles to the freedom of movement of labour, which are to be removed in accordance with Article 49. To that extent, such terms and conditions fall within the scope of application of the Treaty, and would be encompassed by the general rule contained in Article 7 if they were not covered by the specific application of that rule, contained in Article 7 of Council Regulation No 1612/68.

For these reasons I am of the opinion that the Court should answer the Verwaltungsgericht's first question as follows:

If in any Member State provision is made (pursuant to internal administrative guidelines and without there being any legal entitlement thereto) for the grant of interest-free loans, by a loan institute incorporated under public law, to married couples, on the birth of a child, on condition that the income of the couple does not exceed a certain amount, and with the object of averting, alleviating or removing financial difficulties, and in circumstances such that the responsible government provides the institute with assistance from public funds for the service of those debts on the basis of the funds appropriated from time to time in the State budget (and even if this is done with the aim *inter alia* of countering by measures for family assistance the decline in the birth rate in the Member State and reducing the number of abortions) such loans amount to "social advantages" within the meaning of paragraph 2 of Article 7 of Regulation No 1612/68, and accordingly all workers who are nationals of any Member State are eligible for such loans on the same basis as nationals of the State in which such loans are available.