Joined Cases C-22/08 and C-23/08

Athanasios Vatsouras

and

Josif Koupatantze

v

Arbeitsgemeinschaft (ARGE) Nürnberg 900

(Reference for a preliminary ruling from the Sozialgericht Nürnberg)

(European citizenship – Free movement of persons – Articles 12 EC and 39 EC – Directive 2004/38/EC – Article 24(2) – Assessment of validity – Nationals of a Member State – Professional activity in another Member State – Level of remuneration and duration of the activity – Retention of the status of 'worker' – Right to receive benefits in favour of job-seekers)

Summary of the Judgment

1. *Freedom of movement for persons – Workers – Concept – Existence of an employment relationship – Real and genuine activity*

(Art. 39 EC)

2. *Citizens of the European Union – Right of free movement and residence in the territory of the Member States – Directive 2004/38 – Derogation from the principle of equal treatment of Union citizens*

(Art. 39(2) EC; European Parliament and Council Directive 2004/38, Art. 24(2))

3. *Community law – Principles – Equal treatment – Discrimination on grounds of nationality – Prohibition – Scope*

(Art. 12 EC)

1. Notwithstanding the limited amount of the remuneration and the short duration of a professional activity, such as brief minor professional activity which is insufficient to ensure its holder a livelihood and which has lasted barely more than one month, the possibility cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC.

In that regard, 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 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 paras 25-26, 30)

2. With respect to the rights of nationals of Member States seeking employment in another Member State, the derogation to the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families who reside within the territory of the host Member State provided for in Article 24(2) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96, according to which the host Member State is not obliged to confer entitlement to social assistance, in particular on job-seekers during the longest period during which they have the right to reside there must be

interpreted in accordance with Article 39(2) EC.

In that regard, nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market. It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted. The objective of the benefit must be analysed according to its results and not according to its formal structure. Thus, benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

(see paras 34-35, 40-42, 44-46, operative part 1)

3. Article 12 EC does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries.

The first paragraph of Article 12 EC prohibits, within the scope of application of the EC Treaty and without prejudice to any provisions contained therein, any discrimination on grounds of nationality. That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and those of third countries.

(see paras 51-53, operative part 2)

JUDGMENT OF THE COURT (Third Chamber)

4 June 2009 (*)

(European citizenship – Free movement of persons – Articles 12 EC and 39 EC – Directive 2004/38/EC – Article 24(2) – Assessment of validity – Nationals of a Member State – Professional activity in another Member State – Level of remuneration and duration of the activity – Retention of the status of 'worker' – Right to receive benefits in favour of job-seekers)

In Joined Cases C-22/08 and C-23/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Sozialgericht Nürnberg (Germany), made by decisions of 18 December 2007, received at the Court on 22 January 2008, in the proceedings

Athanasios Vatsouras (C-22/08),

Josif Koupatantze (C-23/08)

v

Arbeitsgemeinschaft (ARGE) Nürnberg 900,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2009,

after considering the observations submitted on behalf of:

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,

– the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

– the United Kingdom Government, by I. Rao and J. Coppel, acting as Agents,

– the European Parliament, by E. Perillo, A. Auersperger Matić and U. Rösslein, acting as Agents,

– the Council of the European Union, by M. Veiga and M. Simm, acting as Agents,

– the Commission of the European Communities, by D. Maidani and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2009,

gives the following

Judgment

1 The references for a preliminary ruling in the present cases concern the interpretation of Articles 12 EC and 39 EC and the validity of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda (OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28)).

2 The references have been made in the course of proceedings between Mr Vatsouras and Mr Koupatantze, on the one hand, and the Arbeitsgemeinschaft (ARGE) Nürnberg 900 (Job Centre, Nuremberg 900) (‘the ARGE’), on the other, concerning the withdrawal of basic benefits in favour of job-seekers which Mr Vatsouras and Mr Koupatantze had been receiving.

Legal framework

Community legislation

3 Recitals 1 and 9 in the preamble to Directive 2004/38 are worded as follows:

‘(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

…

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice.’

4 Article 6 of Directive 2004/38 states:

‘1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

5 Article 7 of Directive 2004/38 provides:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; … .

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

… '

6 Article 14 of that directive provides in particular:

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

…

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

…

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

7 Article 24 of Directive 2004/38 provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

National legislation

8 Paragraph 7(1) of Book II of the German Code of Social Law – Benefits in favour of job-seekers (Sozialgesetzbuch II) ('the SGB II') provides:

'Under this Book benefits shall be received by people who:

1. have attained the age of 15 and have not yet attained the age of 65,

2. are capable of earning a living,

3. are in need of assistance and

4. whose ordinary place of residence is in the Federal Republic of Germany … .

The following are excluded …

(2) foreign nationals whose right of residence arises solely out of the search for employment, their family members and those entitled to benefits under Paragraph 1 of the Asylbewerberleistungsgesetz (Law on the benefits to be granted to asylum-seekers). Provisions relating to the right of residence are unaffected.'

9 Under Paragraph 23(3) of Book XII of the German Code of Social Law – Social assistance for foreign nationals (Sozialgesetzbuch XII), foreign nationals who have entered the country in order to obtain social assistance or whose right of residence arises solely out of the search for employment have no right to social assistance benefits.

10 Paragraph 1 of the Asylbewerberleistungsgesetz provides:

'1 Those entitled to benefits under this Law are foreign nationals who actually reside in the Federal Republic of Germany and who

(1) possess a temporary residence permit for asylum-seekers under the Asylverfahrengesetz (Law on asylum proceedings).

…'

The actions in the main proceedings and the questions referred for preliminary ruling

Case C-22/08

11 Mr Vatsouras, who was born on 10 December 1973 and is a Greek national, arrived in Germany in March 2006.

12 On 10 July 2006, he applied to the ARGE for entitlement to benefits under the SGB II. By decision of the ARGE of 27 July 2006, those benefits were granted to him until 30 November 2006. The income received by Mr Vatsouras in respect of his professional activity was deducted from the amount of the benefits at issue, with the result that those benefits amounted to EUR 169 per month. By decision of the ARGE of 29 January 2007, entitlement to those benefits was extended up to 31 May 2007.

13 Mr Vatsouras' professional activity concluded at the end of January 2007.

14 By decision of 18 April 2007, the ARGE brought those benefits to an end, with effect from 30 April 2007. The objection filed by Mr Vatsouras against that decision was dismissed by decision of the ARGE of 4 July 2007 on the ground that Mr Vatsouras did not have a right to the benefits under point 2 of the second sentence of Paragraph 7(1) of the SGB II. Mr Vatsouras appealed against that decision to the Sozialgericht Nürnberg (Social Court, Nuremberg).

15 In the intervening period, on 4 June 2007, Mr Vatsouras recommenced professional activity which allowed him to be no longer dependent on social assistance.

Case C-23/08

16 Mr Koupatantze, who was born on 15 May 1952, is a Greek national.

17 He entered Germany in October 2006 and accepted employment on 1 November 2006. His

employment contract ended on 21 December 2006, the employer invoking a shortage of orders.

18 On 22 December 2006, Mr Koupatantze applied to the ARGE for basic benefits in favour of job-seekers under the SGB II. By decision of the ARGE of 15 January 2007, benefits in the amount of EUR 670 per month were granted to him up to 31 May 2007. However, by decision of 18 April 2007, the ARGE ended payment of those benefits with effect from 28 April 2007.

19 The objection filed by Mr Koupatantze against that decision was dismissed by decision of the ARGE of 11 May 2007, on the ground that he was not entitled to benefits under point 2 of the second sentence of Paragraph 7(1) of the SGB II. Mr Koupatantze appealed against that decision to the referring court.

20 As of 1 June 2007, Mr Koupatantze again took up a professional activity which allowed him to be no longer dependent on social assistance.

The questions referred for preliminary ruling

21 On 18 December 2007, the Sozialgericht Nürnberg decided to stay the respective proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Is Article 24(2) of Directive 2004/38 … compatible with Article 12 EC, read in conjunction with Article 39 EC?

2. If the answer to Question 1 is in the negative, does Article 12 EC, read in conjunction with Article 39 EC, preclude national rules which exclude Union citizens from receipt of social assistance if the maximum period of residence permitted under Article 6 of Directive 2004/38 … has been exceeded and there is no right of residence under other provisions?

3. If the answer to Question 1 is in the affirmative, does Article 12 EC preclude national rules which exclude nationals of Member States of the European Union even from receipt of the social assistance benefits which are granted to illegal immigrants?’

22 By order of the President of the Court of 7 April 2008, Case C-22/08 and Case C-23/08 were joined for the purposes of the written and oral procedure and of the judgment.

The questions referred for preliminary ruling

Preliminary observations

23 Although, as regards the division of jurisdiction between the Community judicature and national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a Community rule are fulfilled in the case pending before it, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 58).

24 As is apparent from the orders for reference, the questions referred are based on the premiss that, at the time material to the main proceedings, Mr Vatsouras and Mr Koupatantze did not have the status of ‘worker’ within the meaning of Article 39 EC.

25 The referring court found that the ‘brief minor’ professional activity engaged in by Mr Vatsouras ‘did not ensure him a livelihood’ and that the activity pursued by Mr Koupatantze ‘lasted barely more than one month’.

26 It must be pointed out in that regard that, according to settled case-law, 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, inter alia, Case 66/85 *Lawrie-*

Blum [1986] ECR 2121, paragraphs 16 and 17, and Case C-228/07 *Petersen* [2008] ECR I-0000, paragraph 45).

27 Neither the origin of the funds from which the remuneration is paid nor the limited amount of that remuneration can have any consequence in regard to whether or not the person is a 'worker' for the purposes of Community law (see Case 344/87 *Bettray* [1989] ECR 1621, paragraph 15, and Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145, paragraph 22).

28 The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a 'worker' within the meaning of Article 39 EC (see Case 53/81 *Levin* [1982] ECR 1035, paragraphs 15 and 16, and Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 19), even if the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he resides (see Case 139/85 *Kempf* [1986] ECR 1741, paragraph 14).

29 Furthermore, with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 39 EC (see Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 16, and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 25).

30 It follows that, independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of 'worker' within the meaning of Article 39 EC.

31 Were the referring court to reach such a conclusion in regard to the activities pursued by Mr Vatsouras and Mr Koupatantze, the latter would have been able to retain the status of workers for at least six months, subject to compliance with the conditions laid down in Article 7(3)(c) of Directive 2004/38. The national court alone is responsible for factual assessments of this kind.

32 If Mr Vatsouras and Mr Koupatantze had retained the status of workers, they would have had the right to benefits such as those provided for by the SGB II, in accordance with Article 24(1) of Directive 2004/38, during that period of at least six months.

The first question

33 By this question, the referring court asks whether Article 24(2) of Directive 2004/38 is compatible with Article 12 EC, read in conjunction with Article 39 EC.

34 Article 24(2) of Directive 2004/38 establishes a derogation from the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families, who reside within the territory of the host Member State.

35 Under that provision, the host Member State is not obliged to confer entitlement to social assistance on, among others, job-seekers for the longer period during which they have the right to reside there.

36 Nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC and therefore enjoy the right to equal treatment laid down in paragraph 2 of that provision (Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 21).

37 Furthermore, in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State (Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 63, and *Ioannidis*, paragraph 22).

38 It is, however, legitimate for a Member State to grant such an allowance only after it has been

possible to establish a real link between the job-seeker and the labour market of that State (Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 38, and *Ioannidis*, paragraph 30).

39 The existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question (*Collins*, paragraph 70).

40 It follows that nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article 39(2) EC in order to receive a benefit of a financial nature intended to facilitate access to the labour market.

41 It is for the competent national authorities and, where appropriate, the national courts not only to establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted.

42 As the Advocate General has noted in point 57 of his Opinion, the objective of the benefit must be analysed according to its results and not according to its formal structure.

43 A condition such as that in Paragraph 7(1) of the SGB II, under which the person concerned must be capable of earning a living, could constitute an indication that the benefit is intended to facilitate access to employment.

44 In any event, the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with Article 39(2) EC.

45 Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of Directive 2004/38.

46 In the light of the foregoing, the answer must be that, with respect to the rights of nationals of Member States seeking employment in another Member State, examination of the first question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38.

The second question

47 In the light of the answer given to the first question, it is not necessary to answer the second question.

The third question

48 By this question, the referring court asks whether Article 12 EC precludes national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to illegal immigrants.

49 In relation to that question, the referring court cites provisions of the Asylbewerberleistungsgesetz, point (1) of Paragraph 1(1) of which provides that foreign nationals actually residing within the territory of the Federal Republic of Germany are entitled to those benefits where they possess a temporary residence permit for asylum-seekers.

50 That question should, therefore, be construed as meaning that the referring court is essentially asking whether Article 12 EC precludes national rules which exclude nationals of Member States from receipt of social assistance benefits in cases where those benefits are granted to nationals of non-member countries.

51 The first paragraph of Article 12 EC prohibits, within the scope of application of the EC Treaty, and without prejudice to any provisions contained therein, any discrimination on grounds of nationality.

52 That provision concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a

possible difference in treatment between nationals of Member States and nationals of non-member countries.

53 The answer to the third question, therefore, must be that Article 12 EC does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries.

Costs

54 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 (Third Chamber) hereby rules:

1. **With respect to the rights of nationals of Member States seeking employment in another Member State, examination of the first question has not disclosed any factor capable of affecting the validity of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.**

2. **Article 12 EC does not preclude national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to nationals of non-member countries.**

[Signatures