

JUDGMENT OF THE COURT (Third Chamber)

6 September 2012 (*)

(Regulation (EEC) No 1612/68 – Directive 2004/38/EC – Right of permanent residence – Social assistance benefits – Care of a child – Period of residence completed before the State of origin acceded to the European Union)

In Joined Cases C-147/11 and C-148/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Administrative Appeals Chamber) (United Kingdom), made by decisions of 14 March 2011, received at the Court on 25 March 2011, in the proceedings

Secretary of State for Work and Pensions

v

Lucja Czop (C-147/11),

Margita Punakova (C-148/11),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 May 2012,

after considering the observations submitted on behalf of:

- Ms Czop, by G. King, Solicitor Advocate,
- Ms Punakova, by H. Mountfield, Barrister,
- the United Kingdom Government, by H. Walker, acting as Agent, and by C. Lewis, Barrister,
- the Polish Government, by M. Szpunar, and by D. Lutostańska and A. Siwek, acting as Agents,
- the European Commission, by C. Tufvesson and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 These references for a preliminary ruling concern the interpretation of Article 12 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), and Article 16(1) 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 were submitted in the course of proceedings between, on the one hand, Ms Czop and Ms Punakova, respectively, and, on the other, the Secretary of State for Work and Pensions, regarding the refusal of the latter to grant either Ms Czop or Ms Punakova income support.

Legal context

European Union legislation

- 3 Article 12 of Regulation No 1612/68 provided:

‘The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.’

- 4 In 2011, Regulation No 1612/68 was replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1). Article 10 of Regulation No 492/2011 reproduced the wording of Article 12 of Regulation No 1612/68.
- 5 Recital 3 in the preamble to Directive 2004/38 states that ‘[u]nion citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens’.
- 6 Article 7 of Directive 2004/38, which is entitled ‘Right of residence for more than three months’, 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; or
 - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State ...

...'

- 7 Article 16 of that directive, which is entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

...'

The United Kingdom legislation

- 8 The legislation which governs income support is the Social Security Contributions and Benefits Act 1992 and the Income Support (General) Regulations 1987.

- 9 Income support is a benefit granted, depending on resources, to various groups of persons. One of the conditions to which entitlement to that benefit is subject is that the income must not exceed the specified 'applicable amount', which may be set at nil. This means that, in practice, no benefit is granted in such a case. The applicable amount set for a 'person from abroad' is nil.

- 10 The words 'person from abroad' are defined in Regulation 21AA of the Income Support (General) Regulations 1987. According to the referring court, those provisions apply as follows:

'Claimants who come within regulation 21AA(4) [of the Income Support (General) Regulations 1987] are not persons from abroad. They will all have the right to reside and do not have to be habitually resident [in the United Kingdom, the Channel Islands, the Isle of Man or Ireland].

In order to be entitled to income support, anyone else must be habitually resident [in the United Kingdom, the Channel Islands, the Isle of Man or Ireland] (regulation 21AA(1) [of the Income Support (General) Regulations 1987]). If they are not, they are persons from abroad and not entitled to income support.

In order to be habitually resident [in the United Kingdom, the Channel Islands, the Isle of Man or Ireland], they must have a right to reside [depending on the case, in the United Kingdom, the Channel Islands, the Isle of Man or Ireland] (regulation 21AA(2) [of the Income Support (General) Regulations 1987]). If they do not, they are persons from abroad and not entitled to income support.

But persons who come within regulation 21AA(3) [of the Income Support (General) Regulations 1987] cannot have a right to reside and cannot, therefore, be habitually resident [in the United Kingdom, the Channel Islands, the Isle of Man or Ireland]. As a result, they are persons from abroad and not entitled to income support.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-147/11

- 11 Ms Czop, a Polish national, arrived in the United Kingdom in 2002 on a student visa and, on 8 December 2002, was granted leave to remain without recourse to public funds. According

to the referring court, that leave was renewed on 28 April 2004, but this is disputed by the United Kingdom Government. Ms Czop was self-employed from 2003 to November 2005. Her four children – Lukasz Czop, born in Poland on 25 October 1994, Simon Michal Krzyzowski, born on 20 September 2003, Kacper Krzyzowski, born on 9 January 2005, and Wiktor Mieczyslaw Krzyzowski, born on 25 March 2006 – live with her in the United Kingdom. Her three youngest children, of whom Mr Krzyzowski is the father, were born in the United Kingdom. Lukasz Czop joined his mother in the United Kingdom and entered the education system in 2006. None of Ms Czop’s children was in education in the United Kingdom while she was in self-employment, between 2003 and 2005.

- 12 Ms Czop’s partner, Mr Krzyzowski (who is not the father of Ms Czop’s eldest child), is also a Polish national and was self-employed between 2002 and 2007. In 2008, he was forced to leave the United Kingdom. In 2010, he joined Ms Czop and has since then been living with her and her children in the United Kingdom.
- 13 Ms Czop made a claim for income support on 29 May 2008, which was refused on 20 June 2008. As she returned to self-employment in September 2008, that claim concerns only the period from May to September 2008.
- 14 The Secretary of State for Work and Pensions refused the claim on the ground that Ms Czop was a ‘person from abroad’ because she did not have a residence permit for the purposes of Regulation 21AA(4) of the Income Support (General) Regulations 1987.
- 15 The First-tier Tribunal allowed Ms Czop’s appeal, holding that she had a right to reside for the purposes of that provision and should not therefore be deemed to be a ‘person from abroad’. In consequence, Ms Czop was entitled to income support.
- 16 The Secretary of State for Work and Pensions lodged an appeal against the decision of the First-tier Tribunal before the referring court.
- 17 It was against that background that the Upper Tribunal (Administrative Appeals Chamber) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In circumstances where a claimant:

- is a citizen of Poland;
- came to the United Kingdom before her country acceded to the European Union;
- established herself in self-employment within the meaning of Article 49 TFEU ...;
- remained [in the United Kingdom] and continued in self-employment, following accession [of her country to the European Union];
- is no longer in self-employment; and
- is the primary carer of a child who came to the United Kingdom and entered general education after accession [of the Republic of Poland to the European Union] and after [the claimant] ceased to be established in self-employment,

does the claimant have a right to reside in the United Kingdom on the basis that (individually or cumulatively):

- Regulation No 1612/68 applies, together with the reasoning of the European Court of Justice in *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99) [2002] ECR I-7091; *Ibrahim and Secretary of State for the Home Department* (Case C-310/08) [[2010] ECR I-1065]; and *Teixeira* (Case C-480/08) [[2010] ECR I-1107];
- there is a general principle of EU law that equates the position of workers and the self-employed;
- it would impede or deter the freedom of establishment if the claimant did not have a right to reside?’

Case C-148/11

- 18 Ms Punakova, a Czech national, arrived in the United Kingdom on 3 March 2001 and was self-employed as a cleaner from 16 November 2007 to 8 September 2008. Her three children were born in the United Kingdom: Nicholas Buklierius, on 1 March 2003, Andreos Buklierius, on 7 July 2004, and Lukas Buklierius, on 21 April 2007. The eldest of those children entered general education a week before Ms Punakova ceased to be self-employed.
- 19 On 15 September 2008, Ms Punakova made a claim for income support. As in the Ms Czop’s case, that claim was refused on the ground that she was a ‘person from abroad’. The First-tier Tribunal allowed Ms Punakova’s appeal.
- 20 The Secretary of State for Work and Pensions lodged an appeal against the decision of the First-tier Tribunal before the referring court.
- 21 It was against that background that the Upper Tribunal (Administrative Appeals Chamber) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘In circumstances where a claimant:

- is a citizen of the Czech Republic;
- came to the United Kingdom before her country acceded to the European Union;
- remained [in the United Kingdom] following accession [of her country to the European Union];
- thereafter established herself in self-employment under Article 49 TFEU ...;
- is no longer in self-employment; and
- is the primary carer of a child who entered general education while she was established in self-employment,

does the claimant have a right to reside in the United Kingdom on the basis that:

- Regulation No 1612/68 applies, together with the reasoning of the European Court of Justice in [*Baumbast and R*; *Ibrahim and Secretary of State for the Home Department*; and *Teixeira*];

- there is a general principle of EU law that equates the position of workers and the self-employed;
- it would impede or deter the freedom of establishment if the claimant did not have a right to reside; or
- some other basis?’

22 By order of the President of the Court of 31 May 2011, Cases C-147/11 and C-148/11 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

23 By its questions, the referring court is essentially asking whether, under European Union law, persons in the situation of Ms Czop and Ms Punakova have a right of residence.

24 In order to answer those questions, by which the referring court seeks to establish whether such persons are entitled to the income support at issue in the main proceedings, it should be observed that Article 12 of Regulation No 1612/68 confers on the children of a national of a Member State who is or has been employed in the territory of another Member State the right to be admitted to the general educational, apprenticeship and vocational training courses of the latter State under the same conditions as the nationals of that State, if those children are residing in its territory (*Teixeira*, paragraph 35).

25 According to case-law, that right of access to education implies that the child of a migrant worker or former migrant worker has a right of residence in order to attend educational courses in the host Member State, and that the parent who is the child’s primary carer has a corresponding right of residence (see *Teixeira*, paragraph 36).

26 It is also apparent from the case-law that it is sufficient that the child attending educational courses in the host Member State moved there when one of his parents was exercising rights of residence there as a migrant worker. The child’s right of residence in that State in order to attend educational courses there, in accordance with Article 12 of Regulation No 1612/68, and consequently the right of residence of the parent who is the child’s primary carer cannot therefore be subject to the condition that one of the child’s parents was working as a migrant worker in the host Member State on the date on which the child started in education (*Teixeira*, paragraph 74).

27 So far as Ms Punakova is concerned, it is apparent from the file placed before the national court that she is the primary carer of her son Nikholas Buklierius, in education since September 2008 and the son of Mr Buklierius, a Lithuanian national who was employed in the United Kingdom during the years 2004, 2005 and 2008.

28 As the Government of the United Kingdom conceded at the hearing, as mother of a migrant worker’s child of whom she is the primary carer and who is attending educational courses, Ms Punakova therefore has a right of residence under Article 12 of Regulation No 1612/68.

29 On the other hand, Ms Czop cannot derive a right of residence from the sole fact that she is the primary carer of her son Lukasz Czop, who entered the educational system in the United Kingdom in 2006.

30 Neither the father of Lukasz Czop nor Ms Czop herself has been employed in the United Kingdom. It is apparent from the clear and precise wording of Article 12 of Regulation No

1612/68, which refers to 'the children of a national of a Member State who is or has been employed', that that provision applies only to the children of employed persons.

- 31 Moreover, the literal interpretation of that provision, according to which it applies only to employed persons, is supported both by the general scheme of Regulation No 1612/68, the legal basis for which is Article 49 of the EEC Treaty (subsequently, after amendment, Article 49 of the EC Treaty, which became, after amendment, Article 40 EC), and by the fact that Article 12 of Regulation No 1612/68 was reproduced not in Directive 2004/38, but in Regulation No 492/11 also governing freedom of movement for workers and based on Article 46 TFEU, which corresponds to Article 40 EC.
- 32 Furthermore, it is settled case-law that an interpretation of a provision of European Union law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness (see, to that effect, *Case C-220/03 ECB v Germany* [2005] ECR I-10595, paragraph 31, and *Case C-199/05 European Community* [2006] ECR I-10485, paragraph 42).
- 33 It follows that Article 12 of Regulation No 1612/68, which concerns only employed persons, cannot be interpreted as applying also to the self-employed.
- 34 However, it should be observed that, according to the information provided by the United Kingdom Government at the hearing, Ms Czop has a right of permanent residence under Article 16(1) of Directive 2004/38.
- 35 It is settled case-law that periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided that those periods were completed in compliance with the conditions laid down in Article 7(1) of that directive (*Joined Cases C-424/10 and C-425/10 Ziolkowski and Szeja* [2011] ECR I-0000, paragraph 63).
- 36 In that regard, it is common ground that, by 29 May 2008 – the date on which she applied for income support – Ms Czop had resided in the United Kingdom for a continuous period of more than five years.
- 37 Secondly, according to the information provided by the United Kingdom Government at the hearing, it seems that Ms Czop had resided 'legally', for the purposes of Article 16(1) of Directive 2004/38, in the United Kingdom.
- 38 Although Ms Czop had not pursued an activity as a self-employed worker for five years in the United Kingdom and, consequently, did not meet the conditions laid down in Article 7(1)(a) of Directive 2004/38, she nevertheless – as the United Kingdom Government stated at the hearing – met the conditions laid down in Article 7(1)(b) of that directive.
- 39 In those circumstances, there is no need to consider whether Ms Czop also has a right of residence on another basis under European Union law.
- 40 In the light of the foregoing, the answer to the questions referred is:
- Article 12 of Regulation No 1612/68 must be interpreted as conferring on the person who is the primary carer of a migrant worker's or former migrant worker's child who is attending educational courses in the host Member State a right of residence in that

State, although that provision cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed;

- Article 16(1) of Directive 2004/38 must be interpreted as meaning that a European Union citizen who is a national of a Member State which recently acceded to the European Union may, pursuant to that provision, rely on a right of permanent residence where he or she has resided in the host Member State for a continuous period of more than five years, part of which was completed before the accession of the former State to the European Union, provided that the residence was in accordance with the conditions laid down in Article 7(1) of Directive 2004/38.

Costs

- 41 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:

Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as conferring on the person who is the primary carer of a migrant worker's or former migrant worker's child who is attending educational courses in the host Member State a right of residence in that State, although that provision cannot be interpreted as conferring such a right on the person who is the primary carer of the child of a person who is self-employed.

Article 16(1) 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 must be interpreted as meaning that a European Union citizen who is a national of a Member State which recently acceded to the European Union may, pursuant to that provision, rely on a right of permanent residence where he or she has resided in the host Member State for a continuous period of more than five years, part of which was completed before the accession of the former State to the European Union, provided that the residence was in accordance with the conditions laid down in Article 7(1) of Directive 2004/38.

[Signatures]

* Language of the case: English.