factual assessment, it is a question to be determined by the referring court. It must make its decision on all of the objective evidence before it, established on the basis of current medical and scientific knowledge and data. The court may find a limitation is long-term (i) if, at the time of the allegedly discriminatory act, it is not clear how long the person is likely to be incapacitated for or (ii) if the person is likely to be incapacitated for a long time.

## Ruling

The fact that a person is temporarily incapacitated for work, as defined in national law, for an indeterminate length of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as 'long-term', within the meaning of the definition of 'disability' laid down by the Directive, read in light of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009.

It is possible to find such a limitation 'long-term' either if, at the time of the allegedly discriminatory act, there is no clearly-defined prognosis of short-term progress or if the incapacity is likely to be significantly prolonged before the person recovers.

The referring court must base its decision on all relevant evidence in its possession relating to that person's condition, in particular documents and certificates based on current medical and scientific knowledge and data.

# ECJ 15 December 2016, joined cases C-401/15 to C-403/15 (Depesme), Free movement, social insurance

Noémie Depesme (C-401/15), Saïd Kerrou (C-401/15), Adrien Kauffmann (C-402/15) and Maxime Lefort (C-403/15) – v – Ministre de l'Enseignement supérieur et de la Recherche, Luxembourgian case

## Summary

These cases concern the refusal by Luxembourg to grant financial aid to students studying in Luxembourg whilst living in France or Belgium, when they would be entitled to such aid under Regulation 492/2011 on free movement (pursuant to Article 45 TFEU), based on their family circumstances, were it not that the person employed in Luxembourg was not their father but their stepfather. The ECJ found in favour of the students.

## Ruling

Article 45 TFEU and Article 7(2) of Regulation (EU) No 492/2011 […] must be interpreted as meaning that a child of a frontier worker who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker supports that child. The latter requirement is the result of a factual situation, which it is for the national authorities and, if appropriate, the national courts, to assess, and it is not necessary for them to determine the reasons for that contribution or make a precise estimation of its amount.

# ECJ (Grand Chamber) 21 December 2016, case C-201/15 (AGET Iraklis), Collective redundancies

Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) – v – Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis; intervener: Enosi Ergazomenon Tsimenton Chalkidas, Greek case

## Summary

Where no agreement is reached with employee representatives on a planned collective redundancy, the employer must try to obtain permission from the Minister for Labour – who rarely gives it. The employer in this case argued successfully that this was a serious obstacle to its to freedom to establish and conduct business in Greece.

## Facts

AGET Iraklis, a subsidiary of the French Lafarge group, is a producer of cement. It has three plants, one of which is in Chalkida, where it employed 236 workers.



doi: 10.5553/EELC/187791072017002001012

In March 2015, due to falling demand for cement, it decided to close the Chalkida plant and to relocate production to the two remaining plants. Immediately afterwards, it invited the relevant trade union for talks on the restructuring plan, in accordance with Greek law. The law provides that in the event of an impending collective dismissal, the employer must consult with employee representatives in order to consider ways of avoiding or reducing the redundancies and their adverse consequences. If the parties agree, the collective redundancy may go ahead as agreed. If no agreement is reached – as was the case here – the employer may only go ahead with the redundancies following authorisation by the Minister for Labour. AGET requested authorisation but it was denied.

## National proceedings

AGET applied to the Council of State to annul the minister's decision. It took the position that Greek law on collective redundancies contravenes Directive 98/59 on collective redundancies as well as Articles 49 (on freedom of establishment) and 63 (on the free movement of capital) of the TFEU, read in conjunction with Article 16 of the Charter (on the freedom to conduct a business). In particular, AGET pointed out that the Greek authorities have systematically opposed planned collective redundancies in the past, which has had the consequence that employee representatives generally refrain from taking part in consultations. The Council of State was unsure whether Greek law complied with EU law and for that reason, referred the following questions to the ECJ.



## Questions referred to the ECJ

1. Is a national provision, such as Article 5(3) of Law No 1387/1983, which lays down as a condition in order for collective redundancies to be effected in a specific undertaking that the administrative authorities must authorise the redundancies in question on the basis of criteria as to (a) the conditions in the labour market, (b) the situation of the undertaking and (c) the interests of the national economy, compatible with Directive 98/59 in particular and, more generally, Articles 49 and 63 TFEU?
2. If the answer to the first question is in the negative, is a national provision with the aforementioned content compatible with Directive 98/59 in particular and, more generally, Articles 49 and 63 TFEU if there are serious social reasons, such as an acute economic crisis and very high unemployment?

## ECJ's findings

The Directive does not impinge upon employers' freedom to effect collective redundancies. It merely aims to provide a minimum level of protection to workers. Member States may adopt domestic law that is more favourable for workers than the Directive, and may, in principle, confer upon a public authority the power to prevent collective redundancies. However, such domestic measures may not deprive the Directive of its practical effect. The Directive is based on the premise that collective redundancies must be possible, provided the correct procedure has been followed. It is for the referring Greek court to determine whether Greek practice in effect rules out any real possibility for employers to effect collective redundancies. If so, that practice does not comply with the Directive.

The ECJ noted that it is settled case law that the concept of a 'restriction' within the meaning of Article 49 TFEU covers measures which, even though they apply without discrimination on grounds of nationality, are liable to impede the exercise of freedom of establishment or render it less attractive. This includes the freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, including the number of workers required, and also the freedom to scale down the activity later on. The decision to effect collective redundancies is a fundamental decision in the life of an undertaking.

The ECJ found that national legislation such as that at issue reduces or even eliminates, the ability of economic operators from other Member States who have chosen to set up in a new market, to adjust their activity in that market . It therefore found that such national legislation is liable to constitute a serious obstacle to the exercise of freedom of establishment in Greece.

The Greek legislation restricting freedom of establishment was capable of being justified, but only if it complied with fundamental rights. One of those is enshrined in Article 16 of the Charter. Under that provision, an undertaking must be able to assert its interests effectively in a contractual process to which it is party and to negotiate changes to the working conditions of its employees, based on its planned future economic activity (see the ECJ's judgment in *Alemo-Heron*, C-426/11). The ECJ therefore found that a framework for collective redundancies such as that imposed by Greece, constitutes an interference in the exercise of the freedom to conduct a business and, in particular, freedom of contract in relation to a business' workforce.

The public interest objectives pursued by the legislation in this instance relate both to protecting workers and combating unemployment and to safeguarding the interests of the national economy. The ECJ noted that it is settled case law that purely economic reasons, such as the promotion of the national economy or its proper


doi: 10.5553/EELC/187791072017002001012

functioning, cannot serve as justification for obstacles prohibited by the TFEU. Nevertheless, the maintenance of employment may, under certain circumstances, justify national legislation that has the effect of impeding freedom of establishment.

Since the EU has not only an economic but also a social purpose, rights under the TFEU on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include the promotion of employment, the improvement of living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

The mere fact that a Member State requires planned collective redundancies to be notified to a national authority with the power to review and, in certain circumstances, oppose them as a means of protecting workers, is not contrary to the freedom of establishment guaranteed by Article 49 TFEU or the freedom to conduct a business enshrined in Article 16 of the Charter. However, the ECJ found that on the facts, the Greek legislation at issue was disproportionate.

## Ruling

1. Council Directive 98/59 […] must be interpreted as not precluding, in principle, national legislation […] under which, if there is no agreement with the workers' representatives on projected collective redundancies, an employer can effect such redundancies only if the competent national public authority […] does not adopt […] a reasoned decision not to authorise some or all of the projected redundancies. The position is different, however, if – a matter which is, as the case may be, for the referring court to ascertain – […] that legislation proves to have the consequence of depriving the provisions of that directive of their practical effect. Article 49 TFEU must be interpreted as precluding, in a situation such as that at issue in the main proceedings, national legislation such as [that at issue].
2. The fact that the context in a Member State may be one of acute economic crisis and very high unemployment does not affect the answer set out in point 1 above.

# ECJ 21 December 2016, joined cases C-508/15 (Ucar) and C-509/15 (Kilic), Free movement, residence

Sidika Ucar and Recep Kilic – v – Land Berlin, German case

## Summary

These cases relate to Decision 1/80 of the 'Association Council', a body established pursuant to the 1963 Association Agreement between Turkey and the EU. In both cases, the German immigration authorities had rejected an application to extend the residence permit of a Turkish national but the ECJ found they had a right of residence.

## Ruling

Article 7, first paragraph, first indent, of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association must be interpreted as meaning that that provision confers a right of residence in the host Member State on a family member of a Turkish worker, who has been authorised to enter that Member State for the purposes of family reunification and who, from his entry into the territory of that Member State, has lived with that Turkish worker, even if the period of at least three years during which the latter is duly registered as belonging to the labour force does not immediately follow the arrival of the family member concerned in the host Member State, but is subsequent to it.



doi: 10.5553/EELC/187791072017002001012