Comments on Ritter-Coulais (Case C-152/03 of 21 February 2006) and Ioannidis (Case C-258/04 of 15 September 2005)

D. MARTIN*

1. A Silent Reversal of Werner?

Case C-152/03, Ritter-Coulais, 21 February 2006; EC law provision interpreted: Article 39 EC

Facts: Mr Ritter-Coulais is a German national who has always worked in Germany. His wife is a dual French-German national who has also always worked in Germany. At the relevant time, they were living in France. They were assessed in Germany for the tax year 1987 as natural persons liable to income tax on their total income in accordance with German law. They requested that “negative income” (loss of income) deriving from their own use of their house as a dwelling be taken into account for the purposes of determining the rate for their tax liability. “Negative income” is income derived from the use of immovable property which is taxable only in the State in which that property is situated, namely in France, under the agreement between France and Germany for the avoidance of double taxation. German legislation provides, however, that in the absence of positive income from the letting of real property in another state, no account should be taken of income losses of the same kind incurred in the same state for the purposes of determining the basis of assessment or the rate of taxation.

Question: Is such a refusal contrary to EC law?

Judgment: “Article 48 of the EEC Treaty (subsequently Article 48 of the EC Treaty and now, after amendment, Article 39 EC) must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not permit natural persons in receipt of income from employment in one Member State, and assessable to tax on their total income there, to have income losses relating to their own use of a private dwelling in another Member State taken into account for the purposes of determining the rate of taxation applicable to their income in the former state, whereas positive rental income relating to such a dwelling is taken into account”.

Comments: When analysing the judgment given by the Court in this case, a crucial element to keep in mind is that it relates to facts which occurred in 1987, i.e. before

* European Commission, Legal Service. Views expressed here are purely personal to the author.
the entry into force of the Maastricht Treaty which inserted the concept of “free movement of citizens” in the EC Treaty (Article 18 EC).

On its face, the question raised by the national judge seemed, therefore, quite simple to answer, given that the facts of the case were quite similar to those which gave rise to the famous Werner judgment in 1993. Mr Werner, a German national, worked in Germany but lived with his wife in the Netherlands since 1961. When assessing the tax payable for 1982, the relevant authority took the view that he should be subject to limited taxation as regards income tax and assets tax since he did not reside in Germany. For the purposes of unlimited taxation, a preferential scale, known as the “splitting tariff”, was applied to married couples. Furthermore, taxpayers were entitled to deduct certain expenses from their taxable income, inter alia their contributions to sickness, accident and liability insurance schemes and a proportion of savings set aside for building purposes. Those advantages were unavailable to persons who were subject only to limited taxation. Those persons were, moreover, subject to different rates of tax. In its judgment, also given before the entry into force of the Maastricht Treaty, the Court of Justice ruled that the only factor which took Mr Werner’s case out of a purely national context was the fact that he lived in a Member State other than that in which he practised his profession. The Court ruled however that such a factual circumstance was not enough to bring his case within the personal scope of the Treaty.

The facts of, and the question raised by, the Ritter-Coulais case were strikingly similar to those of Werner’s, so it seemed unavoidable that the same reply would be made.

However, one crucial factual circumstance could have distinguished both cases, the French nationality held by Ms Ritter-Coulais. Because of her dual nationality, she was, according to a consistent case-law, to be regarded as a “worker”, within the meaning of Article 39 EC, in Germany, even if she was born in that Member State. When applied to her, it could have been quite easy to argue that the German legislation at stake created an indirect discrimination contrary to Article 39 EC.

The Court does indeed arrive at the conclusion of a violation of Article 39 EC, but without mentioning, even implicitly, either her dual nationality or its previous case-law on dual nationals. The Court chooses a different, and arguably flawed, path to conclude that the German legislation breaches Article 39 EC.

In this respect, it is also striking that the Court’s judgment is not related to facts posterior to the entry into force of the Maastricht Treaty. In fact, immediately after that date, the question was raised whether Werner was still “valid”. The legal debate surrounding this question is still vivid and the question is at the heart of a pending case, Hartmann (C-212/05) in which the Court will have the opportunity to clarify

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3 Quite strangely, AG Léger does not see in that circumstance an element sufficient to “communitise” their situation and consider that taking it into consideration would lead to an “artificial exercise in the light of the fact that they were jointly assessed” (para. 36).
4 May a German national rely upon Regulation 1612/68 when he moves his residence into Austria but still works in Germany where he always worked?