OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 11 July 1991 *

Mr President,
Members of the Court,

1. The Netherlands College van Beroep Studiefinanciering (Study Finance Tribunal) has asked the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty on the interpretation of Articles 7 and 48 of the EEC Treaty as well as Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475). The questions were raised in an action brought by Ms V. J. M. Raulin, the plaintiff, against the Minister van Onderwijs en Wetenschappen (Minister for Education and Science), the defendant, concerning the entitlement of a student from another Member State to the award of Netherlands study finance.

The facts and procedure

2. The plaintiff, who is of French nationality, settled in the Netherlands at the end of 1985 without registering at the Aliens' Office and without a residence permit. On 1 August 1986 she began a full-time course of studies (visual arts) at the Gerrit Rietveld Academie in Amsterdam. Between her arrival in the Netherlands and commencing her studies, more specifically from 5 to 21 March 1986, the plaintiff worked as a waitress for 12 days, five hours per day, under what is known as an '*oproep-contract*' ('on-call contract'). She did not officially apply for a residence permit until 11 December 1987 and it was issued to her on 9 March 1988 on the basis of the fact that she was living with her Dutch husband whom she had married on 16 October 1987.

3. On 5 December 1986 the plaintiff submitted, pursuant to the Wet op de Studiefinanciering (Law on Study Finance — 'WSF') of 24 April 1986,[1] an application for study finance to the Minister van Onderwijs en Wetenschappen ('the Minister') in connection with her studies at the Gerrit Rietveld Academie.[2] On 11 May 1987 this application was rejected for the period from October 1986 to December 1987 on the grounds that the plaintiff was not of Netherlands nationality and did not belong to the group of people treated as Netherlands nationals under Article 7 of the WSF. On 3 July 1987 the plaintiff lodged a formal objection with the same Minister against the aforementioned rejection of her application, and on 25 September 1987 the Minister rejected her objection, again on the ground that the plaintiff could not be

* Original language: Dutch.

1 — *Nederlands Staatsblad* 1986, 252. This law came into force on 1 October 1986. For a brief summary see the Report for the Hearing, p. I-1030.

2 — The WSF makes a distinction between a non-recoverable basic grant, awarded regardless of the financial situation of the students' parents, and supplementary finance, which usually consists of an interest-bearing loan. The plaintiff applied for both a grant and supplementary finance.

included in the category of persons treated as Netherlands nationals. It was stressed in particular that the plaintiff did not have a residence permit for the period concerned (October 1986 to December 1987).[3]

4. The plaintiff appealed to the College van Beroep Studiefinanciering against the aforementioned ministerial decision. It is in the course of those proceedings that the College (hereinafter referred to as 'the national court') has submitted the following questions to the Court for a preliminary ruling:

'1. Does the nature of the activities of an "*oproepkracht*" ("on-call worker") prevent such a person from being considered to be a worker within the meaning of Article 48 of the EEC Treaty?

2. Is the fact that a person has exercised or sought to exercise an economic activity for only a short time, for example in the framework of an "*oproepcontract*" ("on-call contract"), relevant to the answer to the question whether the activities are on such a small scale as to be regarded as purely marginal and ancillary so that the provisions on freedom of movement for workers do not apply?

3. In assessing whether a person is a worker within the meaning of Article 48 of the EEC Treaty, must account be taken of all the activities which the worker has pursued within the European Communities or solely of the activities most recently pursued in the host Member State?

4. May a migrant worker who (voluntarily or involuntarily) has given up his previous occupation in order to study to obtain new skills to further his career retain his status as a worker within the meaning of Article 7(2) of Regulation (EEC) No 1612/68, in spite of the fact that there is no link between his previous activities and the chosen course of study, and may he on that basis claim the same social advantages as those available to a worker with the same status who is a national of the host State?

5. Does the requirement that a migrant student have a residence permit in order to qualify for a system of allowances for the cost of studies in a situation in which no such requirement is imposed on students of the host State constitute discrimination prohibited under Article 7 of the EEC Treaty?

6. Does a national of a Member State who is admitted to vocational training in another Member State derive from the relevant provisions of Community law a right of residence in that other Member State in order to be able to undertake vocational training there? If so, may that person exercise the right of residence whether or not a residence permit has been issued by that other Member State?

3 — Article 3(1) of the Royal Decree of 22 September 1986 (*Nederlands Staatsblad* 1986, 477) provides, pursuant to Article 7 of the WSF, *inter alia* that:
The following persons shall be treated as Netherlands nationals for the purposes of study finance pursuant to Chapters II and III of the law ...
c) persons ... over 21 who have been authorized to reside in the Netherlands pursuant to Article 9 of the Vreemdelingenwet (Aliens' Law) ....
Article 9 of the Vreemdelingenwet of 13 January 1965 (*Nederlands Staatsblad* 1965 40) states that:
Foreigners in possession of a residence permit shall be allowed to stay in the Netherlands until the said permit expires.

Is it possible for a residence permit to be granted by the national authorities of that other Member State subject to restrictive conditions as regards the purpose and duration of the stay and having sufficient resources to cover maintenance costs?

7. Does a system of study finance (such as the Netherlands WSF), in which no distinction is made between an allowance for the cost of access to the course and an allowance for maintenance costs, fall wholly or in part within the scope of the EEC Treaty (and in particular Articles 7 and 128 thereof)?

If it falls within the scope thereof only in part, does the fact that the system of study finance does not make the aforesaid distinction mean that a national of another Member State who, for example, goes to undertake vocational training in the Netherlands should be granted the entire amount of the allowance towards the education contribution (as for example referred to in Article 12(1)(c) of the Netherlands WSF) or only (a proportionate part of) the amount to which the person concerned would otherwise have been entitled if the provisions of the WSF concerning the amount of study finance to be granted were applied to him in their entirety?'

I shall examine the first four questions jointly under one heading since they all concern entitlement to the award of study finance as a migrant worker. After that I shall examine the last three questions jointly since they concern the right of residence and entitlement to the award of study finance as a student who is a Community national pursuant to Article 7 of the EEC Treaty.

Entitlement to the award of study finance on the basis of status as a migrant worker

5. Article 7(2) of Regulation (EEC) No 1612/68 states that a national of a Member State who is working in another Member State shall enjoy, in the territory of the latter Member State, the same social and tax advantages as national workers.[4] The Court has consistently held that study finance must be considered to be a social advantage within the meaning of that provision.[5] In the present case, however, the question is whether the plaintiff can in actual fact be regarded as a migrant worker within the meaning of Article 48 of the EEC Treaty and, in particular, within the meaning of Regulation (EEC) No 1612/68. Did she ever possess this status (the first and second questions) and, if so, did she subsequently retain that status during her studies at the Gerrit Rietveld Academie (the third and fourth questions)?

6. As already mentioned, between her arrival in the Netherlands at the end of 1985 and the start of her studies on 1 August 1986, more specifically from 5 to 21 March 1986 inclusive, the plaintiff worked as a waitress for 12 days, five hours

4 — OJ, English Special Edition 1968 (II), p. 475.

5 — See, for example, the judgments in Case 39/86 *Lair* [1988] ECR 3161, paragraphs 19 to 24, and in Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 11.

a day, that is to say a total of 60 hours. The work was performed under what is known as an 'on-call contract' (*'oproepcontract'*), which the plaintiff concluded with Parkhotel Exploitatie Maatschappij BV for the period from 5 March to 3 November 1986. By its *first question* the national court wishes to know whether the nature of the activities of an 'on-call worker' (*'oproepkracht'*) prevents such a person from being considered to be a worker within the meaning of Article 48 of the EEC Treaty.

As stated in the order for reference, an 'on-call' contract is a very widespread way of employing workers in certain sectors of activity in which the volume of work depends on the weather or is seasonal. By its very nature, work under an on-call contract is sometimes undertaken only on a very small number of days per week and/or during a few hours each day. The employer is obliged to pay wages and grant social advantages only in so far as the on-call worker, after having been called on to do so by his employer, has performed work.[6] However, if that work is performed, then, according to the national court, there may be said to be the supply of an economic service for and under the direction of another person for which remuneration is received.[7] According to the plaintiff, this activity conferred on her the status of a migrant worker within the meaning of Article 48 of the EEC Treaty and the aforementioned regulation.

7. The Court has held on many occasions that the concept of migrant worker has a specific Community meaning because otherwise national legislation would be able arbitrarily to exclude certain categories of persons from the scope of the EEC Treaty.[8] Furthermore, the Court has always stressed that the concept cannot be interpreted restrictively, because it defines the scope of one of the fundamental freedoms guaranteed by the EEC Treaty.[9] The Court has consistently held[10] that a migrant worker includes anybody pursuing (or wishing to pursue[11]) effective and genuine paid activity which is not on such a small scale as to be purely marginal and ancillary. Furthermore, the Court has held that the concept of worker must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. 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.[12] According to the

6 — The Netherlands government confirmed at the hearing that an on-call worker is not obliged to heed the employer's call for him to work.

7 — See the order for reference, p. 8.

8 — See, for example, the judgments in Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177, Case 53/81 *Levin* [1982] ECR 1035, paragraph 11, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16, and, more recently, in Case 344/87 *Bettray* [1989] 1621, paragraph 11.

9 — See the judgments in *Levin*, paragraph 13, *Lawrie-Blum*, paragraph 16, and *Bettray*, paragraph 11, cited in footnote 8.

10 — See judgments in *Levin*, paragraphs 16, 17 and 21, and *Bettray*, paragraph 13, cited in footnote 8, as well as the judgments in Case 139/85 *Kempf* [1986] ECR 1741, paragraph 14, Case 197/86 *Brown* [1988] ECR 3205, paragraph 21, and Case 196/87 *Steymann* [1988] ECR 6159, paragraph 13.

11 — Persons wishing to pursue an activity (who, in the judgments in *Levin* and *Bettray*, are mentioned alongside persons pursuing an activity) include those moving to another Member State to accept offers of employment actually made (see Article 48(3) of the EEC Treaty) or to seek employment there (see judgment in Case 48/75 *Royer* [1976] ECR 497, and, more recently, in Case C-292/89 *Antonissen* [1991] ECR I-745). In the present case the plaintiff is not claiming that she came to the Netherlands for that reason. Be that as it may, in its judgment in Case 316/85 *Lebon* [1987] ECR 2811, paragraph 26, the Court limited the right to equal treatment enjoyed by persons moving to another Member State in search of employment to the right of access to employment, with the result that it does not cover the social and tax advantages referred to in Article 7(2) of Regulation (EEC) No 1612/68.

12 — See the judgments in *Lawrie-Blum*, paragraph 17, and *Bettray*, paragraph 12, cited in footnote 8, and the judgment in *Brown*, paragraph 21, cited in footnote 10.

case-law of the Court, the nature of the legal relationship between the employee and the employer is of no consequence as regards the status of worker. [13]

8. In the light of the abovementioned case-law, I believe that the nature of a legal relationship created under an on-call contract does not preclude recognition of the status of worker if the activity performed by an on-call worker is carried out for another person, under that person's direction and in return for remuneration. The irregular and insecure nature of such employment is of no consequence in this respect, just as it is irrelevant that such work is often performed only part-time or involves remuneration below the guaranteed minimum wage in the sector concerned. [14]

It does not necessarily follow from the above that an on-call worker who, like the plaintiff, worked a total of only 60 hours, must be regarded as a migrant worker within the meaning of Article 48 of the EEC Treaty and Regulation (EEC) No 1612/68. [15] The case-law [16] cited above requires that the activities pursued be effective and genuine, 'to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary', and adds that 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. [17] Is that the case when a person works only 60 hours? That is the essence of the *second question.*

9. In the judgment in *Lair,* [18] the Court (referring to the judgment in *Frascogna* [19]) held that a Member State cannot unilaterally make the granting of the status of migrant worker conditional upon a certain period of occupational activity on its territory. In *Lair* the Court nevertheless added that abuses are not covered by Community provisions on the freedom of movement for workers and that abuse is involved if a person 'has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system'. [20]

From that it can already be deduced, in my view, that a relationship not really entered into for the purpose of pursuing occupational activity but for the sole purpose of obtaining an advantage, such as study finance, which does not stem from the employment relationship itself cannot confer the status of migrant worker; furthermore, whenever work is performed for a very

13 — Judgment in Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5, and the judgments in *Lawrie-Blum,* paragraph 20, and *Bettray,* paragraph 16, cited in footnote 8.

14 — In the judgments in *Levin,* paragraphs 16 and 17, and *Lawrie-Blum,* paragraph 21, cited in footnote 8, and in the judgment in *Kempf,* paragraph 14, cited in footnote 10, the Court held that people employed only on a part-time basis or who receive remuneration below the guaranteed wage in the sector concerned may nevertheless be migrant workers within the meaning of Article 48 of the EEC Treaty and Regulation (EEC) No 1612/68, provided that the activity pursued is effective and genuine.

15 — I am not referring here to the rights set out in Article 48(3)(a), (b) and (c), and Articles 1 to 6 of Regulation (EEC) No 1612/68. Those rights are in existence already prior to or on the conclusion of the contract. The present case concerns the social advantages referred to in Article 7(2) of Regulation (EEC) No 1612/68.

16 — See footnotes 8 and 10.

17 — The phrase 'for a certain period of time' is clearly not used in the sense of 'for a stipulated period fixed in advance' (as opposed to a 'non-stipulated period') but in the sense of 'for some period of time'.

18 — See paragraph 42 of the judgment cited in footnote 5.

19 — Judgment in Case 157/84 *Frascogna* [1985] ECR 1739, paragraph 25.

20 — See paragraph 43 of the judgment cited in footnote 5.

short period only, this may indicate the existence of such a non-real employment relationship.

The present case clearly does not involve such an 'abuse' of the employment relationship.

10. Even apart from cases of abuse, work can be so 'marginal and ancillary' that no employment relationship exists of such a nature as to confer the status of migrant worker. An employment relationship includes, in other words, an element of durability. This element of durability does not, however, necessarily have to be expressed by the duration of the work actually carried out, but can, in my view, also reside in the availability of the worker. It appears that one criterion of an employment relationship widely applied within the various Member States is that the time during which the worker is available to the employer, that is to say is obliged to perform work at the request of the latter, is decisive in defining what is to be considered as working time.[21] But in this context, the worker's availability must be genuine and obligatory.

The question of how extensive the work actually performed and/or the obligatory availability must be so as not to be deemed purely marginal and ancillary is not primarily a matter for this Court, but for the national courts, inasmuch as it depends on the specific circumstances. Generally speaking, I believe one can say here that an employment relationship which is so brief that the person performing the work cannot, or can hardly, familiarize himself with the work and/or that the activities performed have little or no 'economic value'[22] for the employer can be deemed to be purely marginal or ancillary. Thus, in the case of a specialized job presupposing a skill which in practice is developed only after a certain time (and which the worker concerned did not possess at the time of starting the work), the acquisition of the status of worker would require a period of occupational activity longer than that required in the case of non-specialized work. This is the case *a fortiori* of work performed as part of an apprenticeship or training period, that is to say work intended by definition to develop a certain occupational skill, always assuming that such a relationship actually has all the essential features of an employment relationship mentioned above.[23]

I doubt that in the present case such special circumstances exist which make acquisition of the status of worker conditional on a longer period of work, but it is up to the national court to decide this issue. Nevertheless, even in the absence of such circumstances, with the result that a shorter period is sufficient, I believe that work performed

21 — Blanpain R.: 'General Report' in Blanpain R. and Köhler E. (eds.): *Legal and Contractual Limitations to Working Time in the European Community Member States*, Office for Official Publications of the EC, Luxembourg, 1988, p. 25.

22 — With regard to this criterion, see paragraph 18 of the judgment in *Lawrie-Blum* cited in footnote 8. With regard to both criteria, also see point 12 of my Opinion in Case C-3/90 *Bernini* [1992] ECR I-1071

23 — On this last point also see my Opinion cited in the previous footnote, point 12.

for 60 hours is too brief to enable the person concerned to get to know the work sufficiently well and to constitute effective and genuine activities which are not purely marginal and ancillary.

11. The question remains of the importance to be attached to the fact that a person such as the plaintiff has concluded an on-call contract, such contracts constituting one of the more flexible types of employment relationships which have evolved over the past decade.[24] In some Member States, including Germany, they are covered by a special regulation.[25] To my mind, an important factor is whether or not a worker is required to heed the employer's call to work. If he is so required, he has limited his freedom of movement for the duration of the contract and is at the disposal of the employer. Unless such obligatory availability is in itself purely marginal, I am inclined to consider obligatory availability to be an element which, combined with the work actually performed under the on-call contract, can confer the status of worker. This presupposes, of course, that the relationship is not a purely sham one (see point 9 above), which might be apparent from the fact *inter alia* that an on-call worker is rarely or never called on to work.

In the present case the on-call contract was concluded for a period of eight months (from 5 March to 3 November 1986), but it was prematurely terminated, or so I assume, by the plaintiff on 1 August when she started her studies. Under the contract, the plaintiff worked only 60 hours, and what is more, all during the first two weeks of the contract. According to the information provided by the Netherlands Government at the hearing, an on-call worker is not obliged to heed his employer's call for him to work. I do not know whether there were any further calls of this nature after the first two weeks. Nor, as far as is known, did the plaintiff receive any remuneration for the period during which she was (voluntarily) available and did not work. In those circumstances, I believe that the fact that an on-call contract was concluded is not of such a nature as to change my impression that 60 hours of work constitute an insufficient period for conferring the status of worker on the person performing the work.

12. If the national court should nevertheless conclude that the plaintiff acquired, by the fact of her work as a waitress described above, the status of a migrant worker, the question arises whether she retained that status and still possesses it, given that she is pursuing a full-time course at the Gerrit Rietveld Academie. That problem is referred to in the *fourth question.*

In the judgment in *Lair*,[26] the Court stated that entitlement to the award of study finance 'does not depend on the continued existence of an employment relationship' (paragraph 35), and that it is also guaranteed to migrant workers who 'are no longer in an employment relationship'

24 — Köhler E.: Introduction in Blanpain R. and Köhler E. (eds.): *op. cit.*

25 — Blanpain R.: 'General Report', and Weiss M.: 'Germany' in Blanpain R. and Köhler E. (eds.): *op. cit.*, pp. 59 and 223 respectively.

26 — Cited in footnote 5.

(paragraph 36). But it further noted that there must be some 'continuity between the previous occupational activity and the course of study; there must be a relationship between the purpose of the studies and the previous occupational activity' (paragraph 37). However, it added that such continuity may not be required 'where a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in *another field of activity*' (paragraph 37; emphasis added).

13. It is apparent from its comments in its order for reference that the national court wonders whether there must in all cases be a demonstrable link between the nature of the previous occupational activity and the studies subsequently undertaken. It points out that an affirmative answer to that question would be extremely disadvantageous for workers who stop their unskilled work in order to improve their situation on the employment market by undertaking vocational training, which — as I understand the comment — makes it possible for them to obtain another job quite different in nature.

In this context, the national court refers to the *third question* it has submitted. If the existence of a link between occupational activity and training is demonstrated, must the link — and here I quote — 'always be between the *most recent* occupational activity and the studies subsequently undertaken, or may it be between an earlier occupational activity (whether or not in the host Member State) and the studies in question?' [27] This is how I understand the third question and, in contrast to what the parties have done in their observations before the Court, I link this with the fourth question concerning, as I have said, continuity between previous activity and subsequent studies. [28]

14. I would first point out that the continuity required under the case-law of the Court between previous activity and subsequent studies must be interpreted in a reasonable manner, that is to say, not too literally, but not so broadly that the requirement loses all meaning. Studies allowing a worker to improve his situation in the 'sector of activity' in which he works involve, in my opinion, a sufficient link with previous activity even if, on the basis of such studies, he is able to occupy a more senior or more specialized post within that same sector. Even on such a broad interpretation, it seems to me that, in the present case, the requirement of continuity is missing between the job of waitress and pursuing an arts course at an academy.

The rider added in the case-law of the Court that such a link need not exist when the migrant worker (always presuming that the person involved had acquired such status) is obliged to undertake occupational retraining for another sector, must also be interpreted in a reasonable manner. As I see it, a migrant worker who interrupts his activity to undertake vocational training which is to enable him, on the basis of the *foreseeable* developments in the sector of activity concerned, to secure his chances of

27 — Order for reference, p. 9, first paragraph, final sentence.

28 — However, see also footnote 30.

employment in the future, satisfies the condition in question. In other words, I am inclined to view the phrase 'involuntarily become unemployed' in the judgment in *Lair* as being used exemplificatory, and I would concentrate more on the subsequent wording: 'and is obliged by conditions on the job market to undertake occupational retraining in another field of activity'. In my view, this also includes the situation of a worker who decides to undertake supplementary training with a view to securing a job in the future.[29]

A broad interpretation, both of the requirement concerning continuity and the requirement of being obliged to undertake occupational retraining, accords with the third recital in the preamble to Regulation (EEC) No 1612/68, according to which the freedom of movement for workers (and thus the Community rules referring thereto) constitute one of the means 'by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement'.

15. The question remains whether, when there has to be a demonstrable link between the studies undertaken and the occupational activity previously performed, account may be taken only of the most recent occupational activity pursued in the host Member State.

Given the aim underlying Regulation (EEC) No 1612/68 of promoting freedom of movement for workers within the Community — and, to this end, promoting integration of migrant workers in the host country by conferring on them the same rights and advantages as national workers — I believe that only the occupational activity pursued in the host country must be taken into consideration. After all, it is only that occupational activity which confers on a worker the status of migrant worker in the host Member State and entitles him to integration in that country through equality of treatment. Furthermore, the requirement of continuity with 'the' previous occupational activity, in accordance with the judgment in *Lair*, appears to indicate that the most recent occupational activity pursued is meant.[30]

Right of residence and entitlement to the award of study finance pursuant to Article 7 of the EEC Treaty

16. The Court has consistently held that inequality of treatment of Community nationals on grounds of nationality constitutes discrimination prohibited by Article 7 *if* it falls within the scope of the EEC Treaty, and that the conditions governing access to vocational training do indeed fall within that scope.[31]

29 — Furthermore, it is generally acknowledged that there is a causal link between a low level of education and long-term unemployment.

30 — If the third question were nevertheless linked to the acquisition of the status of worker (see footnote 28), I would share with the Commission the view that, given the aim of 'integration' referred to, in that case, too, only the occupational activity pursued in the host Member State must be taken into account (but then 'all' the activities pursued in that Member State, not just the most 'recent activity' pursued there, given that it is not a matter here of determining the continuity between the activity previously pursued and the studies subsequently undertaken).

31 — See the judgments in Case 293/83 *Gravier* (1985) ECR 593, paragraph 25, and Case 24/86 *Blaizot* [1988] ECR 379, paragraph 24, as well as the judgments in *Lair*, paragraph 12, and *Brown*, paragraph 15, cited in footnotes 5 and 10 respectively.

In the light of that case-law, the national court wishes to know whether requiring that a migrant student have a residence permit in order to qualify for study finance, although national students are not subject to the same requirement, constitutes discrimination prohibited under Article 7 of the EEC Treaty (the fifth question). It also wishes to know whether, and if so under which (restrictive) conditions, a national of a Member State who has been admitted to vocational training in another Member State can derive from the provisions of Article 7 of the EEC Treaty a right of residence in that other Member State in order to undertake such vocational training there (the sixth question). Finally, the national court is asking whether a system of study finance (like the WSF in the Netherlands), which makes no distinction between an allowance for the cost of access to the course and an allowance for maintenance costs, falls wholly or in part within the scope of the EEC Treaty (in particular Articles 7 and 128 thereof), and, if so, what practical consequences that has (the seventh question).

17. Given, as I have already said, that, according to the case-law of the Court, the conditions of access to vocational training fall within the scope of the EEC Treaty and that study finance, in so far as it is intended to cover enrolment fees or other costs pertaining to access to vocational training, forms part of such conditions of access,[32] it is clear that any discrimination on grounds of nationality is prohibited in this context. The answer to the *fifth question* must therefore be that Article 7 of the EEC Treaty precludes entitlement to financing of enrolment fees or other costs relating to access to vocational training being made conditional on possession of a residence permit, because such a requirement applies only to students who are nationals of other Member States.

The grant of a residence permit is, as the Court held in its judgment in *Royer*, 'to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law'.[33] The requirement pertaining to a residence permit may therefore be imposed only if it does not conflict with the obligations deriving from Community law, in this case the prohibition under Article 7 of the EEC Treaty of discrimination in financing access to vocational training.

18. There is then the *sixth question*, the first part of which asks in essence whether the *right of residence* in the Member State in which the course of training is pursued (and for the duration thereof) also constitutes part of the 'conditions of access to vocational training'. In my estimation the answer is yes. The case-law cited above shows that discrimination is prohibited not only with regard to the actual or substantive conditions of access (for example, as

32 — See the judgments in *Lair*, paragraph 14, and *Brown*, paragraph 17, cited in footnotes 5 and 10 respectively.

33 — Judgment in Royer cited in footnote 11, paragraphs 32 and 33. See also the judgment in Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraphs 24, 25 and 26.

regards previous knowledge or certificates required for a specific course), but also as regards the financial conditions of access (in particular the enrolment or tuition fees charged: see the judgments in *Gravier*, paragraph 26, and *Blaizot*, paragraph 24) as well as the financial assistance granted to cover those financial conditions of access (see the judgments in *Lair*, paragraph 14, and *Brown*, paragraph 17). The underlying idea is therefore that, as regards application of the prohibition of discrimination, all measures affecting actual access to vocational training, because they permit or facilitate such access, fall within the scope of the prohibition. This is not the case, under the aforementioned case-law, for allowances covering maintenance costs (see also point 20 below) which, on my understanding of the case-law, do not have a sufficiently direct link with access to the course of study itself. [34]

Seen in this light, I believe that the grant of a right of residence has a sufficiently direct link with actual access to the course of study, given that refusal to grant that right makes it impossible to pursue the course in question. Thus, even if all the other access conditions have been fulfilled, and in particular if admission and enrolment for the course of study have been forthcoming from the establishment concerned, and the enrolment fee has been paid by or for the student, the student will nonetheless be denied access to vocational training if he does not obtain a right of residence in the Member State where the course is being held. In this respect there is a clear difference between not recognizing a right of residence on the one hand and not providing an allowance to cover maintenance costs (to which the prohibition of discrimination does not apply) on the other. Not granting an allowance to cover such costs does not deny the student's actual access to the course (he can, for example, cover his costs by working during his spare time or holidays); refusing a right of residence does deny him such access.

19. The answer to the first part of the sixth question should therefore be that, in principle, students from a Member State who wish to pursue vocational training in another Member State, and have fulfilled in that respect all the other access conditions (applying also to students who are nationals of that Member State), enjoy a right of residence for the duration of the course pursuant to Article 7 of the EEC Treaty which forbids any discrimination in any field falling within the scope of the EEC Treaty.

It also follows from the abovementioned case-law concerning the granting of a residence permit (see point 17) that, in answer to the *second part* of the national court's sixth question, the right of residence in question, which stems directly from Article 7 of the EEC Treaty, may not be made conditional on possession of a residence permit.

20. Finally, the *third part* of the sixth question concerns restrictive conditions which the authorities in the host Member State may attach to the right of residence (and to the corresponding residence permit).

It follows from the above that a person's right of residence — pursuant to Article 7 of

34 — As stated by Advocate General Sir Gordon Slynn in his Opinion in Case 197/86 *Brown* [1988] ECR 3205, at p. 3230.

the EEC Treaty — in a Member State where he is pursuing a course of study stems from the right of students who are Community nationals to have access to vocational training on a non-discriminatory basis. Consequently, that right of residence, without prejudice to application of any other provisions of Community law, applies only where that right to non-discriminatory access applies, and is therefore restricted, that is to say granted only in connection with the planned studies and limited in time to the duration thereof, and the residence permit, which confirms that right, may also be made subject to the same restrictive conditions.

Furthermore, Member States may subject the right of residence to specific conditions in certain cases which, in accordance with the case-law of the Court, do *not* fall within the scope of that right to non-discriminatory access, particularly as regards allowances for maintenance costs, again without prejudice to application of any other provisions of Community law. This view is confirmed in Council Directive 90/366/EEC of 28 June 1990[35] on the right of residence for students which, apart from the condition that the student be enrolled in a recognized educational establishment for the principal purpose of following a vocational training course there, also requires that the student demonstrate that he has sufficient resources at his disposal and is covered by sickness insurance in respect of all risks in the host Member State. This requirement comes under allowances for maintenance costs, for which the right to non-discriminatory treatment does not apply according to the current case-law of the Court.[36]

21. The Netherlands study finance system makes no distinction between an allowance for the cost of access to the course and an allowance for maintenance costs.[37] The *seventh* question from the national court relates to this.

It follows from the case-law of the Court cited above that a migrant student enjoys the same rights concerning the award of study finance as a national of the Member State in which he pursues his studies when such financial assistance is granted to cover enrolment fees or other costs, particularly tuition fees, charged for access to the course. Inasmuch as the assistance granted under the Netherlands system is intended to cover those costs, migrant students from another Member State must be guaranteed treatment identical to that accorded to students who are nationals of the host Member State, regardless of the method of calculating the assistance or the factors on which it is made conditional. On the other hand, as Community law now stands, migrant students cannot claim equal treatment with regard to the allowance for maintenance costs. It is, of course, for the national court to determine what proportion of the study finance covers enrolment fees or other costs of access to the course.

35 — OJ 1990 L 180, p. 30. The directive — in respect of which proceedings are pending before the Court regarding its juridical basis (Case C-295/90 *European Parliament* v *Council*) — must be transposed into national law by 30 June 1992 at the latest. The obligation to grant a right of residence is imposed on Member States in so far as a student who is a national of another Member State does not already enjoy that right under other provisions of Community law, and it also covers the members of the student's family (Article 1).

36 — Further thereto — see the sixth recital in the preamble to the directive — the host Member State is not obliged under the directive to pay maintenance grants to students benefiting from the right of residence (Article 3).

37 — In its judgment in *Echternach and Moritz*, cited in footnote 33, the Court noted that the Netherlands student funding system is intended to cover very different costs, not only the cost of access to education, but also maintenance costs and other costs incurred in connection with the course of studies (paragraph 32).

22. I therefore propose that the Court reply in the following manner to the questions submitted by the national court:

'1. The nature of the employment relationship known as an *"oproepcontract"* ("on-call contract") does not prevent the status of worker from being conferred on an *"oproepkracht"* ("on-call worker").

2. A national of a Member State can claim, on the basis of his status as a migrant worker in another Member State, the advantages referred to in Article 7(2) of Regulation (EEC) No 1612/68, only when the services he provides under the direction of an employer in return for remuneration are not on such a small scale that they do not allow him to become acquainted with the work and/or have little or no economic value for the employer. Obligatory availability, which is more than just fleeting, of the person providing the services under an on-call contract is a supplementary factor to be taken into consideration when determining whether that person enjoys the status of a worker.

3. and 4. A migrant worker retains the status of worker for the purposes of obtaining the advantages referred to in Article 7(2) of Regulation (EEC) No 1612/68 if he interrupts his work to undertake studies which are to enable him to improve his situation in the sector of activity in which he was most recently occupied in the host Member State or if he is obliged, given current or foreseeable developments in the sector of activity in question, to undergo retraining for a sector of activity other than that in which he was working in order to secure his chances of employment.

5. Article 7 of the EEC Treaty precludes a national of another Member State who has come to undertake vocational training in the host Member State from being required to possess a residence permit in order to qualify for a system of allowances for the cost of studies from which national students benefit in so far as it covers enrolment and tuition fees.

6. A national of a Member State who has been admitted and enrolled for the purposes of pursuing vocational training in another Member State has,

pursuant to Article 7 of the EEC Treaty, a right of residence and a right to be issued a residence permit confirming that right of residence in pursuance of his recognized entitlement to non-discriminatory access to vocational training. That right of residence (and the corresponding residence permit) may, without prejudice to application of any other provisions of Community law, be granted under restrictive conditions, that is to say accorded for and limited to the duration of the course of study and, as regards coverage of maintenance costs, made subject to related conditions.

7. If a study finance system does not make a distinction between assistance granted to cover the cost of access to vocational training (to which the right to non-discriminatory treatment applies) and assistance granted to cover other costs (to which that right does not apply), it is for the national court to determine what proportion of the finance covers the former type of assistance, regardless of the method of calculation or the factors on which it is made conditional.'