OPINION OF ADVOCATE GENERAL LÉGER

delivered on 14 November 1995 *

1. Can a national of a Member State who is employed in the embassy of another Member State in a non-member country rely on the Community provisions relating to the principle of non-discrimination on ground of nationality? This, in essence, is the question referred to the Court by the Bundesarbeitsgericht in connection with a dispute the factual and legal context of which is as follows.

2. The German Gesetz über den Auswärtigen Dienst (Law on the Diplomatic Service, 'GAD') provides that the staff of German foreign representations consists of employees posted from the Ministry and non-posted employees. The latter are called 'local employees'.

3. A distinction is made between local employees of German nationality and local employees who are not German nationals. Under Paragraph 32 of the GAD, the legal position of the former is determined by (German) collective agreements and the other provisions (of German law) applying to them. On the other hand, the conditions of employment of the latter are, pursuant to Paragraph 33 of the GAD, 'determined by reference to ... the law of the host country and local practice. Employment and social security conditions shall be guaranteed to them taking account of the local situation.'

4. The rules referred to by the latter provision apply to Ms Boukhalfa, the plaintiff in the main proceedings.

5. Ms Boukhalfa, a Belgian national, has been employed as a passport office assistant at the German Embassy in Algiers since 1 April 1982. Her contract of employment was concluded in Algiers, where she was already permanently resident. She pays contributions to the German statutory pension insurance fund [1] and the income she receives from national public funds is subject to limited income tax under German law. [2]

* Original language: French.

1 — Although, as the representative of the Federal Republic of Germany pointed out at the hearing, there was no legal basis for these contributions: they were originally made by mistake, then as a result of acquiescence (see also note 7 of the Commission's observations).

2 — Commission's observations, point 6.

6. By letter of 19 November 1991 she protested against the application to her of the rules applying to local employees of non-German nationality and claimed that she should be treated by her employer, the Federal Republic of Germany ('the defendant in the main proceedings'), in the same way as local employees of German nationality covered, under Paragraph 32 of the GAD, by the more favourable rules of the Collective Agreement of 28 September 1973 governing the conditions of employment of German non-posted employees employed in foreign representations of the Federal Republic of Germany ('the Collective Agreement').

7. As the Federal Republic of Germany refused to grant her claim, she referred the matter to the Arbeitsgericht (Labour Court). In support of her action, she contended that it was contrary to the prohibition of discrimination based on nationality laid down by Article 48(2) of the EC Treaty and to Article 7(1) and (4) of the Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [3] to apply to her the less favourable treatment given to local employees of non-German nationality.

8. The defendant in the main proceedings submitted that the action should be dismissed on the ground that the plaintiff could not rely on the abovementioned Community provisions because the present case was outside their territorial ambit, which was limited by Article 227 of the EC Treaty to the Member States of the European Union.

9. The first instance court allowed Ms Boukhalfa's claim, but it was dismissed by the Landesarbeitsgericht (Higher Labour Court) on appeal by the defendant. An appeal on a point of law was then lodged with the Bundesarbeitsgericht (Federal Labour Court), which took the view that the distinction between German local employees and those of foreign nationality might be justified in German law, but was uncertain as to the possibility of discrimination based on nationality contrary to Community law. [4] It has therefore referred the following question to the Court:

'Must Article 48(2) of the EC Treaty and Article 7(1) and (4) of Regulation No 1612/68 be interpreted as meaning that there must be no difference in treatment based on nationality in respect of conditions of employment of a Belgian national permanently resident in Algiers, employed in the passport section of the German Embassy in Algiers, if the employment relationship was entered into there and the work is exclusively and permanently performed there?'

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

4 — See point 1 of the order for reference.

Analysis

10. The question before the Court today is an important one. Beyond the limited context of the question from the national court, the reply to be given by the Court of Justice may be of concern to all Community personnel employed in a non-member country in the foreign representation of a Member State of which they are not nationals. [5] This is why the question could be reworded in more general terms: are the Community rules concerning freedom of movement for workers, particularly the rules prohibiting discrimination based on nationality as regards conditions of work and employment, applicable to the situation of workers who are Community nationals and are employed in a non-member State in the foreign representation of a Member State of which they are not nationals?

11. As may be anticipated, the national court's reasoning in this case breaks down into two parts, the second of which does not really give rise to any difficulty. First of all, it is necessary to ascertain whether the Community provisions are applicable *ratione territorii* to a situation of that kind. If so, it will be necessary to determine, in relation to each situation, whether the worker in question has any grounds for complaining of discrimination based on nationality.

5 — See point 12 et seq., of the Commission's observations.

Existence of discrimination

12. It will be convenient at this stage to examine briefly the second point, which is not in formal terms part of the question before the Court, as the examination of it by the national court will be relevant only if the pertinent Community provisions are *actually* applicable.

13. Article 48(2) of the Treaty reads as follows:

'[Freedom of movement for workers] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

14. Article 7(1) and (4) of Regulation No 1612/68 is worded as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality

'n respect of any conditions of employment nd work, in particular as regards remunera- ion, dismissal, and should he become unem- ployed, reinstatement or re-employment.

[...]

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of other Member States.'

15. These two provisions give effect to the 'fundamental right' [6] of Community workers to freedom of movement. Article 48(2) of the Treaty is a more specific form of the general principle of the prohibition of discrimination on grounds of nationality laid down by Article 6 of the EC Treaty in that it grants migrant workers equality of treatment with nationals of the host country 'as regards employment, remuneration and other conditions of work and employment'. Article 7 of Regulation No 1612/68 for its part refers to the general principle (paragraph 1) and adds in paragraph 4 that any clause of a collective agreement is null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of other Member States.

16. Under these provisions, therefore, any national of a Member State working in another Member State must be treated in the same way as nationals of the host State. Consequently any legal measures or administrative practices of a State which restrict employment and eligibility for employment with regard to foreigners who are nationals of another Member State, or which subject them to conditions not applying to nationals of the host State, are inapplicable.

17. The plaintiff in the main proceedings is undoubtedly a 'worker who is a national of a Member State' within the meaning of those provisions, a term which, as the Court has consistently held, has a Community meaning and is not to be defined under national law. [7] As a passport office assistant employed in an embassy, she pursues an activity which is effective and genuine, for and under the direction of another person, in return for which she receives remuneration. [8] Furthermore, the nature of the employment relationship (whether private or public-law) is

6 — See the preamble to Regulation No 1612/68.

7 — Case 41/74 *Van Duyn* [1974] ECR 1337.

8 — For the term 'worker', which the Court has construed widely, see Case 197/86 *Brown* v *Secretary of State for Education* [1988] ECR 3205, paragraph 21, and Case C-357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, paragraph 10.

immaterial. [9] As a worker who is a national of a Member State, therefore, she is undoubtedly within the personal scope of those provisions.

18. It therefore remains to be considered whether she actually suffers discrimination by reason of her nationality, contrary to Community law. In this connection it appears that, under German law, the conditions of employment of local employees working in a German foreign representation, like the plaintiff in the main proceedings, are subject to different rules according to whether or not they are German nationals. [10] Therefore the criterion giving rise to this difference in treatment of workers of the same status is clearly nationality. If the difference in treatment were shown to exist only as between German local employees and Algerian local employees (or those who are nationals of a country which is not a member of the Community), the Community provisions prohibiting discrimination based on nationality would clearly not be applicable. On the other hand, where such difference is shown to exist by reason of nationality alone, between two workers who are Community nationals in the same situation, it undoubtedly constitutes direct discrimination based on nationality, contrary to Community law.

19. It should be noted that the existence of discrimination in the present case is not called into question by Article 48(4) of the Treaty, which states that:

'The provisions of this Article shall not apply to employment in the public service.'

Even if it might be thought that the plaintiff in the main proceedings has a post in the public service, the Court has construed this provision as meaning that it 'cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers from other Member States once they have been admitted to the public service'. [11]

20. It follows that, if Ms Boukhalfa's situation is within the ambit of Community law, she would in principle be able to complain, in relation to her conditions of work and employment, of direct discrimination by reason of nationality, contrary to Community law.

9 — See Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121.

10 — See the provisions of the GAD referred to in point 2 of this Opinion.

11 — See Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 11.

21. Having established this, it is now necessary to ascertain whether the Community provisions are applicable to her situation, as otherwise discrimination could not be shown to exist.

Applicability of Community law

22. This is the real problem raised by the case. The whole difficulty arises, of course, from the foreign element: the fact that the employment relationship exists in a country which is not a member of the European Union. Clearly the problem would not arise if the same relationship existed in one of the Member States. There would be no question that the Community rules would apply to the situation of a Belgian employee in the German Embassy in France, for example.

Application of Community law not excluded by extraterritoriality

23. The first point to be considered, therefore, is whether the fact that the employment relationship exists outside the territory of the European Union is sufficient to exclude the application of Community law.

24. In this connection it is necessary to see whether there is a criterion of territoriality, in the strict geographical sense, for the application of Community law. In support of this argument, before the national court the defendant in the main proceedings cited Article 227 of the Treaty, paragraph 1 of which is worded as follows:

'This Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.'

25. Should this list of States which are parties to the Union and in relation to which Community law applies be regarded as a purely geographical demarcation of its ambit?

26. It must be observed immediately that, if this were so, primary and secondary law would apply only within the frontiers of each of the Member States, with the result that their foreign representations, which are by definition outside such territory, would always be, so to speak, a 'non-Community-

law area'. It is common ground [12] that the buildings of a foreign representation cannot be regarded as forming part of the national territory of the State represented. At most such premises are inviolable and have immunity pursuant to Article 22(1) and (3) of the Vienna Convention of 18 April 1961 on Diplomatic Relations. [13] In any case a foreign representation is always situated on the territory of the host State, as emphasized by Article 21 of the Vienna Convention:

'1. The receiving State shall either facilitate the acquisition *on its territory*, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.' [14]

27. However, I do not consider that it should be concluded from Article 227 of the Treaty that primary (and, by extension, secondary) Community law has a purely geographical scope.

28. Article 227 merely states, giving a very concise list, that the EC Treaty applies to the Member States. Although territory is one of the elements of the standard definition of the state in public international law (and Regulation No 1612/68 refers to it almost systematically in each article, which applies 'in the territory of another Member State' [15] or 'within the Community' [16] it is only one of a number of elements of the definition. [17]

29. It should also be observed that the body of the Treaty itself contains provisions which are applicable outside Community territory in the strictly geographical sense. Thus Part Four of the EC Treaty, concerning association of the overseas countries and territories, provides for the same treatment as that laid down by the Treaty, for example, in trade with those non-member countries (Article 132) or in relation to the abolition of customs duties applying to trade with them (Article 133).

A further example of extraterritorial application occurs in Article 8c of the EC Treaty,

12 — See point 2, paragraph 2, of the plaintiff's observations, point 3 of the defendant's observations, point 18 of the Commission's observations, and page 7 of the order for reference. See also the prevailing academic opinion and, for example, Nguyen Quoc Dinh, P. Dallier and A. Pellet, *Droit International Public*, 3rd edition, LGDJ, 1987, paragraph 468: 'a permanent diplomatic mission, generally termed an embassy and sometimes a legation, is a public service of the accrediting State and is *permanently established on the territory of the receiving State*' (emphasis added); H. Thierry, J. Combacau, S. Sur and Ch. Vallée, *Droit International Public*, Précis Domat, Editions Montchrestien, 1975, p. 427: 'by definition an embassy is situated on foreign territory'.

13 — *United Nations Treaty Series*, Volume 500, No 7310, p. 95.

14 — Emphasis added.

15 — See, for example, Article 7(1).

16 — See, for example, the first recital in the preamble.

17 — In public international law academic writers traditionally consider that at least three elements are necessary to constitute a State; a population, a territory and a government (or political authority), but that in addition another distinctive criterion must be sought, which is generally sovereignty (see, e. g., Ch. Rousseau, *Droit International Public*, Volume II, Editions Sirey, 1974, point 7; Nguyen Quoc Dinh, P. Dallier and A. Pellet, op. cit., paragraph 270; H. Thierry, J. Combacau, S. Sur and Ch. Vallée, op. cit., p. 226).

which implements the principle of Union citizenship outside Community frontiers:

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.'

30. It may also be noted that, unlike Article 227 of the Treaty, Articles 198, paragraph 1, of the Euratom Treaty and Article 79 of the ECSC Treaty expressly limit the application of each of these treaties strictly to the 'territory' of the Member States. In my opinion, [18] the absence of any reference to this term in Article 227 should not be regarded as a mere oversight on the part of the draftsmen, who after all took care to refer to it in the other treaties.

31. Finally it should be observed that, if we look only to the provisions of the Treaty relating to freedom of movement for individuals, which are of particular concern to us here, they all set out a fundamental obligation to treat the nationals of all the Member States in the same way as those of the State concerned. Thus they meet the more general aim of promoting a feeling of belonging to a common entity enshrined in the frequently used phrase 'people's Europe', and in the 'citizenship of the Union' added to the EC Treaty by the European Union Treaty. [19] What would be the effects of such a feeling of belonging or such citizenship if they disappeared once the geographical borders of the Union were crossed?

32. Therefore it must be concluded that, 'in providing that the EEC Treaty applies to the States party to it, Article 227 defines the sphere of application of the rules laid down by or pursuant to the Treaty, without reference to the basis of State territorial sovereignty. Therefore the geographical dimension of the Community legal system is more than the sum of the territories of the Member States, which it undoubtedly includes'. [20]

33. This has in any case been the position adopted by the Court since 1976, in the *Kramer* case, [21] which concerned the application of Community law to fishing on the high seas. Although the geographical area in question (the high seas) is outside the

18 — See V. Coussirat-Coustère, 'Article 227, Commentaire', in *Traité instituant la CEE, Commentaire article par article*, Edition Economica, 1992, p. 1419, point 2; Y. Van Der Mensbrugghe, 'La CEE et le plateau continental des États Membres', in *Mélanges Fernand Dehousse*, Volume 2, 1979, p. 311, point 1; J.-L. Dewost, 'L'application territoriale du droit communautaire: disparition et résurgence de la notion de frontière', in *La Frontière* (Colloque de Poitiers de la Société Française pour le Droit International), Editions Pedone, pp. 253, 254.

19 — Part Two of the EC Treaty, Articles 8 to 8e.

20 — V. Coussirat-Coustère, op. cit., point 1. See also J.-L. Dewost, op. cit., p. 261.

21 — Cases 3/76, 4/76 and 6/76 [1976] ECR 1279.

territorial frontiers of the Member States, the Court nevertheless stated that:

'Although Article 5 of Regulation No 2141/70 is applicable only to a geographically limited fishing area, it none the less follows from Article 102 of the Act of Accession, from Article 1 of the said regulation and moreover from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends — in so far as the Member States have similar authority under public international law — to fishing on the high seas.' [22]

34. This same position is the starting-point of the Court's settled case-law relating to the particular subject-matter of the present case — freedom of movement for workers outside the borders of the Union. The Court has held that:

'the mere fact that a worker's activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers'. [23]

Case-law criteria for extraterritorial application

35. The Court's case-law should be briefly summarized so as to elicit the principles which will shed light on the present problem.

36. One of the first cases setting out these principles raised the question of the extent to which the principle of non-discrimination on grounds of nationality (Articles 48, 59 and, alternatively, 7 [24] of the EEC Treaty) may be applied to legal relationships in the context of the activities of a world sports federation (the Union Cycliste Internationale).

The Court's reply in the judgment of 12 December 1974 in Case 36/74 [25] amounts to a statement of principle:

'By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the

22 — Paragraph 31.

23 — See Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 14.

24 — The present Article 6 of the EC Treaty.

25 — *Walrave and Koch* [1974] ECR 1405.

place where they take effect, can be *located within the territory of the Community.*

It is for the national judge to decide whether they can be so located, having regard to the facts of each particular case, and, as regards the legal effect of these relationships, to draw the consequences of any infringement of the rule on non-discrimination.' [26]

37. The judgment of 12 July 1984 in the *Prodest* case [27] provided an opportunity to confirm and also to clarify this case-law. The question there was whether a Belgian national residing in France and employed by a French temporary employment firm could claim, pursuant to Regulation No 1612/68, that he continued to be covered by the French general social security scheme for the duration of his assignment in Nigeria. The Court noted first that:

'In principle such a case comes within the scope of the Community provisions on the free movement of workers within the Community.' [28]

It added, on the basis of the *Walrave and Koch* judgment, that:

'Activities temporarily carried on outside the territory of the Community are not sufficient to exclude the application of that principle, as long as the employment relationship retains *a sufficiently close link with that territory.*' [29]

Finally the Court set out, for the benefit of the court making the reference, the first circumstantial factors likely to show the existence of a 'sufficiently close link':

'In a case such as this, a link of that kind can be found in the fact that the Community worker was engaged by an undertaking established in another Member State and, for that reason, was insured under the social security scheme of that State, and in the fact that he continued to work on behalf of the Community undertaking even during his posting to a non-member country.' [30]

38. The next step in this case-law was the *Lopes da Veiga* judgment of 27 September

26 — Paragraphs 28 and 29, emphasis added.
27 — Case 237/83 [1984] ECR 3153.
28 — Paragraph 5.
29 — Paragraph 6, emphasis added.
30 — Paragraph 7.

1989. [31] The Court was asked, in particular, whether a seaman who was a Portuguese national working permanently for a Dutch company on board vessels flying the Dutch flag could rely on Article 7 et seq. of Regulation No 1612/68.

Whereas previous judgments had formulated the criterion of a 'sufficiently close link with the Community' only in order to apply it to legal relationships of employment on a *partial* or *temporary* basis, in the *Lopes da Veiga* judgment the Court held that:

'[the] connection criterion must also apply in the case of a worker/national of a Member State who is *permanently* employed ...'. [32]

In the now classic manner, the Court referred the assessment of this criterion to the national court, suggesting that for this purpose it should take account, *'in particular'*, of a number of circumstances that were apparent from the main action:

'The applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Dutch law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands.' [33]

39. Finally, replies to similar questions were given in the *Aldewereld* judgment cited above. The Court was asked whether a Dutch national who was living in the Netherlands when he was recruited by a German firm which immediately posted him to Thailand could be covered by the Community rules on freedom of movement for workers, particularly Regulation No 1408/71. [34]

The Court's reasoning was the same as in previous cases:

'It follows from the case-law of the Court (see, to that effect, in particular the judgment in Case 237/83 *Prodest* [1984] ECR 3153, paragraph 6), that the mere fact that the activities are carried out [exclusively] outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers as long as the employment relationship retains a sufficiently close link with the Community. In a

31 — Case 9/88 [1989] ECR 2989.

32 — Paragraph 16, emphasis added.

33 — Paragraph 17.

34 — Council Regulation of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ, English Special Edition 1971 (II), p. 416.

case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.' [35]

40. For the sake of completeness I should like to mention a recent judgment of 6 June 1995 in Case C-434/93 *Bozkurt*, [36] in which the Court adhered to its existing position to such a point that it transposed it to the converse situation of a worker who is a national of a non-member country and works for a Community undertaking:

'To ascertain whether a Turkish worker employed as an international lorry-driver belongs to the legitimate labour force of a Member State, for the purposes of Article 6(1) of Decision No 1/80, it is for the national court to determine whether the applicant's employment relationship retains a sufficiently close link with the territory of the Member State, and, in so doing, to take account in particular of the place where he was hired, the territory on which the paid employment was based and the applicable national legislation in the field of employment and social security law.' [37]

41. This review of the case-law produces the following pointers.

42. In an employment relationship between a 'Community' undertaking and a national of another Member State the rules on freedom of movement for workers (particularly those prohibiting discrimination on grounds of nationality) are, of course, in principle applicable.

43. Their application in principle is not affected by the fact that the work is carried out abroad, whether temporarily and occasionally (*Walrave and Koch* judgment, *Prodest* judgment, cited above), or permanently and exclusively (*Lopes da Veiga* and *Aldewereld* judgments, cited above).

44. The criterion for applying these rules to an employment relationship existing abroad is the existence of a 'a sufficiently close link with the Community'.

45. Whether such a link actually exists is a matter for the national court, which is best placed to decide on this in the light of the particular circumstances of the case before it.

35 — Paragraph 14.
36 — [1995] ECR I-1475.
37 — Paragraph 24.

46. In that context, the Court recommends that the national court refer to what could be called a 'bundle of factors'. Thus the Court has already identified a number of factual matters which could assist the national court in its task:

— employment relationship entered into *by a Community worker and an undertaking of another Member State*;

— *recruitment* of the Community worker in a Member State;

— Community worker *established in a Member State* at the time of recruitment;

— *establishment of the employer in the Member State* of which he is a national;

— employer subject to the *legal system of a Member State*;

— *employment relationship governed by the law of the Member State* of which the employer is a national;

— Community worker working *for the undertaking which employs him*, even if it be in a non-member country;

— Community worker belongs to the *social security scheme* of the Member State of which his employer is a national;

— Community worker liable for *income tax* in the Member State of which his employer is a national.

47. Let me stress that this list is merely an indication of the factors to which the national court may *'in particular'* [38] refer. It should be noted that this list is by no means exhaustive. Furthermore, it does not seem to me that the existence of one or another of these factors is decisive. At most the situation always involves an employment relationship between a *Community national* and an undertaking which is a *national of another Member State*, the work being done *in a non-member country for that undertaking*. Finally it should be observed, in the light of the most recent developments in the case-law, particularly the *Aldewereld* judgment, that the number of elements is not decisive. It is not a matter of drawing up two

38 — These words appear in the *Lopes da Veiga* and the *Bozkurt* judgments in paragraphs 17 and 24 respectively.

lists, one containing the elements in favour of a link, the other those militating against it, and weighing one against the other. Rather it is necessary in each particular case to ascertain whether the factors in favour of a link exist.

Transposition of case-law criteria to the present case: whether a 'sufficiently close link' exists

48. When transposing this case-law to the present case, it must be borne in mind that application of the Community rules on the prohibition of discrimination on grounds of nationality, in relation to the conditions of work and employment of the plaintiff in the main proceedings, is not precluded merely because she works abroad.

49. Having said this, in principle it is for the national court to refer to a 'bundle of factors' capable of showing that the employment relationship retains 'a sufficiently close link with the Community'.

50. On this point, bearing in mind the factors formulated in the Court's case-law, the present case discloses various factors militating against there being a close link: [39]

— the plaintiff's contract of employment was concluded in a non-member country;

— her conditions of employment are determined by the 'law of the host country and local practice', according to Paragraph 33 of the GAD; [40]

— she resides permanently in the non-member country where she works, and has done so since before the contract was concluded.

On the other hand, the fact that Ms Boukhalfa works in Algeria permanently, and not on a temporary or part-time basis, is not, according to the Court's case-law — as we have seen — inconsistent with a link, contrary to what the Bundesarbeitsgericht appears to think. [41]

39 — See the views of the national court, p. 8 of the order for reference.

40 — See point 3 of this opinion.

41 — Page 8 of the order for reference.

51. However, it seems to me that there are other factors in the case which suggest that 'a sufficiently close link with the Community' exists.

52. Some of them have already been formulated in the Court's case-law.

53. The employment relationship in question was entered into by a worker who is a national of a Member State with an employer which is by definition a Community national as it is a Member State. The plaintiff in the main proceedings continues to work for that employer even though that work is carried out abroad. Moreover she is affiliated to the German social security scheme, at least so far as pension insurance is concerned. Similarly she is liable to German income tax, although to a limited extent. [42] Above all, however, her contract of employment was concluded in accordance with German law, in particular the GAD. The plaintiff's conditions of work and employment are determined by reference to Algerian law, which is less favourable, solely by virtue of the provisions of the GAD. In sum, this means that she is *subject to the legal system of a Member State.*

54. It seems to me that this last point is decisive. It is also confirmed by other factual findings relating to the characteristics of the employment relationship which may therefore be found in most employment relationships of Community nationals employed in a non-member country in the foreign representation of a Member State of which they are not a national. Therefore the following factual elements seem to me likely to be new factors to which the national court may refer.

55. First of all, the contract between the two parties contains a jurisdiction clause conferring jurisdiction upon the courts of Bonn, and subsequently Berlin. [43] This factor once again emphasizes the close connection of the contractual situation with the German legal system.

56. Furthermore, unlike the cases previously before the Court, the employer here is not merely a private individual, but a public entity, and the most important there can be: a State. That fact alone is sufficient for it to

42 — The Commission rightly notes in its observations (point 28) that, although liability under the German tax rules would cease to exist if the Belgo-German double taxation convention were applied, liability under the Belgian tax rules would nevertheless constitute a link with the Community.

43 — Point 28 of the Commission's observations.

be held that all the factors which the Court has formulated in relation to the employer — his place of establishment, the legal system applying to him — are present when the employer is the State itself. In a situation of this kind a 'climate' of connection with the legal system of that State is inevitably indicated.

57. Secondly, the nature of the work of the staff of foreign representations is rather special. Without going so far as to agree that they perform sovereign functions on behalf of their employer State, the view may be taken that they *participate* in the performance of sovereign functions by the Member State which employs them. Their actions in the fulfilment of their functions are attributed to the State on whose behalf they act. Their duties entail the exercise of powers of the State. In my opinion, this applies particularly to a person employed, like the plaintiff in the main proceedings, in a department responsible for issuing passports. This service undoubtedly stems from the exercise of the sovereign functions of a State.

58. Finally, the place where the employment relationship takes effect is relevant. As already mentioned, foreign representations are situated in the territory of the host State. However, it must not be overlooked that the function of such missions consists, according to Article 3 of the Vienna Convention, in:

'(a) representing the sending State in the receiving State;

(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) negotiating with the Government of the receiving State;

(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.'

The discharge of these functions, which emphasize the fact that a State does in fact maintain, through its staff and on an equal

footing, diplomatic relations with other sovereign States and is represented *vis-à-vis* those other States, is certainly one of the surest criteria of the sovereignty of a State.

59. The various factors listed above show that a Member State, in its capacity of employer, exercises its *sovereignty* and its *jurisdiction* over the contracts of employment which it concludes with Community nationals working for it in its foreign representations situated in non-member countries.

60. It seems to me that an employment relationship which is subject to the sovereignty and the jurisdiction of a Member State is a strong indication of a 'link with the Community' within the meaning of the Court's case-law, quite apart from the other circumstances of the present case which I have mentioned.

61. This concurs with the opinion of certain academic writers, who consider that 'the Treaty is applicable to the Member States wherever they exercise their sovereignty or their jurisdiction, even in international spheres, in relation to a subject-matter within the substantive scope of Community law', [44] and that 'the Treaty and secondary law apply not only in the *territory* of the Member States [...] but also in any place where, in accordance with international law, they exercise certain "sovereign rights", even if limited ones'. [45]

62. My conclusion does not conflict with the Court's case-law either. I have already pointed out that the legal system of a Member State — both that to which the employer is subject and that governing the contract of employment — is one of the criteria to which the Court suggests that national courts should refer when seeking a 'sufficiently close link'.

63. I should like to make one final remark. The Court has not yet had an opportunity to give a ruling on the 'new' concept of European citizenship introduced by the European Union Treaty. The recognition of European citizenship, enshrined in Articles 8 to 8e of the EC Treaty, is of considerable symbolic value and is probably one of the advances in the construction of Europe which has received most public attention. Admittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in that concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations. Taken to its ultimate conclusion, the

44 — V. Coussirat-Coustère, op. cit., point 12.

45 — J.-L. Dewost, op. cit., p. 255.

concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality. Such equal treatment should be manifested in the same way as among nationals of one and the same State. Consequently, in a situation such as the present, it is impossible to imagine some local German employees being treated differently from other local German employees in the same situation. So why should it be possible in the case of a local employee with Belgian nationality?

64. Therefore I propose that the Court give the following reply to the question from the national court:

Article 48(2) of the EC Treaty and Article 7(1) and (4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community must be interpreted as meaning that the principle of non-discrimination on grounds of nationality applies to the conditions of employment of citizens of the European Union employed by a Member State in one of its foreign representations in a non-member country in so far as such conditions of employment, which are subject to the jurisdiction and the sovereignty of the Member State represented, retain a sufficiently close link with the Community.