OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 September 1987

My Lords,

Mrs Lair, the plaintiff in the national proceedings, is a French national. She has lived in Germany since at least 1979. She was employed there by the Deutsche Bank for two-and-a-half years from 1 January 1979 to 30 June 1981. She then received State unemployment benefit from 1 July 1981 to 31 October 1982 (following a retraining course between 1 September 1981 to 31 August 1982), was employed for the month of November 1982, unemployed and receiving State benefit from 1 December 1982 to 20 April 1983, employed for three months and then again unemployed and in receipt of benefit from 2 August 1983 to 30 September 1984.

She then began a degree course in Romance and Germanic languages and literature at the University of Hanover. She had applied for an education grant which was refused by a decision of 18 September 1984. Her objection to that refusal was dismissed by the University on 19 October 1984 on the grounds that foreigners could only be given education grants if they had been engaged in full-time employment in the Federal Republic for at least five years and had therefore paid tax and social security contributions. Periods of unemployment could not be taken into account.

The requirement of five years regular employment for foreigners resident in Germany is imposed by Article 8 (2) of the Federal Law on Training Grants. Article 8 (1) of the same law authorizes such grants for, *inter alios*, children who, as children of nationals of Member States, are entitled to freedom of movement or to reside in the Federal Republic. Those children's parents have to have worked for only three years including periods of unemployment.

Mrs Lair challenged the University's refusal in the Verwaltungsgericht (administrative court) at Hanover, claiming that periods of retraining and unemployment during which she was entitled to unemployment benefit must be regarded as the equivalent of periods of employment in calculating the relevant five years. She says further that since persons whose parents have worked in the Federal Republic for three years, including periods of unemployment, are entitled to grants, it is discriminatory (it seems between *non*-nationals) contrary to Article 7 of the EEC Treaty to refuse her a grant unless she has been employed for five years. She also claims that education grants

are a social advantage within the meaning of Article 7 (2) of Regulation No 1612/68 (Official Journal English Special Edition 1968-69, p. 45).

The Hanover court, from which this reference under Article 177 comes, considered that the German legislation must be interpreted as requiring five years actual paid employment, since it was clearly the legislator's intention to make education grants available only to foreigners who had contributed by their own work to the gross national product and thus to the social fund out of which the grants are financed. It also considered that the distinction drawn in German law between students relying on their own work experience in Germany and those who relied on their parents' employment does not constitute unequal treatment prohibited by the German Grundgesetz (Basic Law). It had doubts, however, as to whether it was necessary for a person claiming benefits under Article 7 (2) of Regulation No 1612/68 to continue in the status of a worker and whether the rule of five years' employment was contrary to Article 7 of the EEC Treaty. It found 'open to objection' the argument advanced by the University that 'the taxpayer principle' required that only a person who had contributed to the gross national product should be entitled to grants. It stressed the nexus between worker status and entitlement to social advantages under Regulation No 1612/68 and the relationship between paragraphs (2) and (3) of Article 7 of that Regulation. Accordingly it felt that it required the guidance of the Court in deciding whether Articles 48 and 49 of the Treaty and Article 7 of Regulation No 1612/68 entitled the plaintiff to a grant or, if not, whether the failure to award her a grant constituted discrimination contrary to Article 7 of the Treaty.

The following questions are therefore now before the Court:

'(1) Does Community law entitle nationals of Member States of the European Community who go to take up employment in other Member States then, after giving up their employment, commence a higher education course leading to a job qualification (in this case, a course in Romance and Germanic languages) to claim an education grant on the same criteria of aptitude and need as that social advantage is accorded to nationals of the Host Member State?

(2) Does the fact that a Member State accords grants for higher education courses leading to job qualifications to its own nationals on the basis of aptitude and need but accords the same grant to nationals of other Member States only if they can also show that they have been employed in the Host Member State for at least five years before the start of the course concerned constitute discrimination contrary to Article 7 of the EEC Treaty?'

Article 7 of Regulation No 1612/68 reads as follows (as far as is relevant):

'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 in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he be become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.'

It appears that no fees are payable in respect of Mrs Lair's course. The 'education grant' which she seeks is intended solely for her maintenance and takes the form of a loan repayable within a certain number of years after the end of the course.

As to the first question, it is to be noted that Regulation No 1612/68 is concerned with 'freedom of movement of workers' within the Community. To claim the rights conferred by Article 7 she must thus show that she does so as 'a worker'. The Court has recently underlined this in Case 316/85 *Centre public* v *Lebon* ([1987] ECR 2811), in holding that a person seeking work and the children of a worker do not have rights under Article 7.

It is clear law, however, that 'worker' must be interpreted as a matter of Community law: the concept does not vary from Member State to Member State and cannot be restricted by national measures (Case 75/63 *Hoekstra* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* ([1964] ECR 177). Even though the rules on freedom of movement of workers 'cover only the pursuit of effective and genuine activities to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary' and 'guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity' the concept of 'worker' must be broadly construed (Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, at p. 1050). In Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* ([1986] ECR 2121) the Court specified that the essential characteristic as to whether a person is a worker is that during a certain period of time he performs services for and under the direction of another in return for remuneration.

All the indicia in this case are that the applicant exercised her right to move to Germany under Article 48 of the Treaty as a worker; during the periods of her employment and for the purposes of Regulation No 1612/68 during her periods of unemployment, which as far as is known were involuntary, and retraining when she received unemployment benefit, she was 'a

worker'. She thus at this period was entitled to excercise the rights given by that regulation unless it is justified to impose a limit of five years' employment before she can qualify as a worker.

Whether five years can be justified as an absolute yardstick in deciding whether a person really is a worker for the purposes of the regulation is discussed in the reference and has been much debated in these proceedings. It is convenient to deal with this argument first before turning specifically to the terms of Article 7 (2) and Article 7 (3).

For the purpose of the rights given by Article 48, clearly no qualifying period can be prescribed. The right to move to another Member State to work postulates that the individual is not there in the first place. Leaving aside the issue whether a person has a right to move to look for work, the question under Article 48 (3) (a) and (b) is whether he has accepted an offer of employment. If he has, the right vests immediately, subject of course to the prescribed limitations as to such matters as public security. He does not have to serve a period in order to qualify as a worker.

Under the regulation the position is different. It is not enough to show that a person has accepted an offer of employment. He must be a worker in the Member State in question.

That seems to me to involve that he must have exercised his right to move to take up employment and be in the host State in the capacity of a worker as well as doing a genuine and effective job (*Levin*) which satisfies the necessary characteristics of an employment relationship (*Lawrie-Blum*). If he is there as such a worker the collateral intentions behind his going (e. g that he wants his wife and children to be in a particularly agreeable area or near to a particular educational institution) are irrelevant. But if he goes there not genuinely in the capacity of a worker but, e.g., in order to become a student or to gain a short, useful experience before his studies begin, then it does not seem to me that he is to be regarded as a worker for the purposes of Article 7 (2) and (3) of the regulation, even if during that period he is doing genuine and effective work which satisfies the test in *Lawrie-Blum*. Rights under those provisions are given only to persons in a Member State genuinely in the capacity of a worker.

Once it is clear that he is a genuine worker no period of employment can be prescribed to limit his rights under the regulation. In its judgments in Cases 249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn* [1985] ECR 973 and 122/84 *Scrivner* v *Centre public d'aide sociale de Chastre* [1985] ECR 1027, the Court held that it was not possible to prescribe a minimum period of residence before a person can be entitled to the particular social advantages in issue. However, in both those cases it is clear that the persons concerned were migrant workers and they

are described as such. If the issue, however, is whether a person is a worker, different questions arise. In my view it can be relevant to have regard to the length of the period a person has been in a Member State as well as to what he has been doing in order to decide whether he is there in the capacity of a genuine worker.

If, as a matter of the practical application of the regulation, it is right to take a specified test period as a guideline (as I think it is) to see whether a person is a worker, then it seems to me that it cannot reasonably exceed one year. On any view a period of five years to prove that a person is there genuinely in the capacity of a worker cannot be justified. If, however, it is clear that even before that period (and this may well be the exceptional case) a person moved to work and became a genuine worker, and then decided to undertake vocational training, he has the rights conferred by Article 7 (3). If it is not clear, then a period of a year seems to me to be a reasonable prerequisite in order to decide the question whether he is a worker for the purposes of Article 7.

It is obvious that even a year is not necessarily a watertight test since the potential student may not be deterred by a year's activity. On the other hand, some limit has to be imposed which does not unduly protract the undertaking of vocational training at the right stage. As a working rule a year is acceptable unless as already indicated it is clear even before that period that a person is there as a genuine worker.

It is also obvious that this approach will produce difficult cases; that is no novelty either for national administrations or courts. Until in relation to maintenance grants there is either a system of reciprocity between Member States or agreement that each Member State maintains its own students when working in another Member State, difficulties seem to be inevitable.

I do not find it possible to accept that working for however short a period is necessarily sufficient to give rights to a maintenance grant under Article 7. It is unacceptable that the person who honestly says, 'I am going as a student' should get no maintenance grant under the regulation, whereas the person who gets a job for a day, or a week or a month, in order essentially to be in the Member State to study should be able to say on day 1 or day 7 or day 31: 'I am now a worker; pay me a grant under Article 7'.

On the facts of the case it seems clear, and as I read the reference the national court was satisfied, that the applicant went to and was in the Federal Republic in the capacity

of a genuine worker economically integrated into the host State. To require her to prove work for five years when, as far as is known, she was involuntarily unemployed during a large part of the eight years during which she has resided in Germany seems to me to be a restriction of her rights to claim to be a worker and to claim the benefits of Article 7 which cannot be justified.

It is said, however, by the German Government, supported by the Danish Government, which have both submitted observations, that when she became a student the applicant ceased to be a worker so that at any rate during her period as a student she no longer had any rights under the regulation. In reply to the argument that the Court's case-law extends the benefit of Article 7 of the regulation to former workers and to the families of former or deceased workers (e. g. Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085) it is said that such indirect benefits are granted by reference to the former worker's status as a worker.

Although it may well be that certain rights conferred by the regulation are not available to someone who is a student, whilst a student, it does not follow that a person who as a worker opts to become a full-time student has no rights under the regulation. It depends on the nature of the right conferred.

Although the question does not specifically reflect the wording of Article 7 (3) of the Regulation, it is convenient to begin with that paragraph because it is discussed in the order for reference in relation to Article 7 (2) and also because if Article 7 (3), the more specific provision, applies the applicant does not need or may not be able to rely on Article 7 (2).

The right under Article 7 (3) in the English text is the right under the same conditions as national workers to 'access to training in vocational training schools and retraining centres'. It is, however, to be noted that, in the other language texts, this reference to access apparently does not appear. Thus, the French text reads: 'Il bénéficie également au même titre et dans les mêmes conditions que les travailleurs nationaux, de l'enseignement des écoles professionelles et des centres de réadaptation ou de rééducation'. The German text similarly reads 'Er kann mit gleichem Recht und unter den gleichen Bedingungen wie die inländischen Arbeitnehmer Berufsschulen und Umschulungszentren in Anspruch nehmen'.

It seems to me plain that such right, whether of access or training, is given to the worker. He can exercise it, and he is entitled to the full benefit of it, even if it means that during the period of training he ceases to work. To say that he can exercise the right by going to a vocational training school but that, the moment he does so, he loses all the benefits conferred on national workers deprives the provision of all content, indeed of all sense. It follows that if the worker goes to a vocational training

school he is entitled to the same treatment as a national worker who, it seems, for the purposes of the provision does not cease to be a worker when he becomes a student and who does receive the educational grant in issue in this case.

I cannot for my part see that Article 7 (3) is limited to workers who do a part-time course as students and who, it is accepted, will be entitled to claim as workers. If their work is full-time they may not need a maintenance grant. It is essentially the student who undertakes a full-time course who needs a grant.

It is, however, sought to qualify any right given on the basis that it only applies where the course undertaken is connected with the work previously done. I do not find this limitation in Article 7 (3) either expressly or impliedly in relation to training in vocational schools. Such a limitation as is suggested in my view conflicts with the aim of the regulation which is directed to the mobility of labour on equal terms and which recognizes the 'close links' which exist between freedom of movement for workers, employment and vocational training.

Although the reasoning said to lie behind the refusal (that only those who contribute to the gross national product and pay taxes for five years should benefit) is understandable, it seems to me, as appears to have been the opinion of the administrative court, that it is not a factor which can be brought into the equation. Rights are given to workers as such and not by reference to their contribution to the gross national product. Moreover, to adopt five years as a condition because most university courses last five years seems to me to be an unjustified restriction on the right conferred by Article 7 (3). It seems very unlikely that most workers would in any event pay the amount of the grant by way of social contributions during that time. On the other side, taken to its logical conclusion, this argument is capable of leading to a suggestion that what students should receive by way of a grant should be related to what they have contributed to the social fund from which the grants are made. I would not accept this argument.

Nor do I think that the provisions of Article 7 (3) are limited merely to the right to attend a course shorn of any rights to a grant. If one of the conditions under which a national worker can attend such a course is that he obtains a grant, then a grant is one of the conditions available to the worker from another Member State. This approach seems to me to be entirely consistent with the Court's decisions under Article 12 of the regulation, which gives a right to children of a national of one Member State employed, or who has been employed, in another Member State to be 'admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State . . . '. In Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 773 the Court held

that this applied 'not only to rules relating to admission but also to general measures intended to facilitate educational attendance' which in that case covered means-tested educational grants in respect of children of national workers. Case 68/74 *Alaimo* v *Préfet du Rhône* [1975] ECR 109 is to the same effect: Article 12 covers 'all the rights arising from admission to educational courses' given to a national's children. 'Under the same conditions' appears in both Article 12 and Article 7 (3) and in my view should cover grants equally in both places.

The question is thus whether the training sought here is in a vocational training school. I have come to the conclusion that 'vocational training' can take place in a university (my Opinions in Cases *293/85 Commission* v *Belgium*, [1988] ECR 305, 328; and 24/86 *Blaizot* v *University of Liège and Others* [1988] ECR 379, 395). In *Brown* both Germany and Denmark appear to accept this. If that is right a university in my view is *pro tanto* a vocational training school and I see no valid reason to apply Article 7 (3) to only some institutions of education where vocational training is given. There is no magic in the word 'school': within a university the word is not uncommonly found as being a part of the university as in 'law school' or 'medical school'.

Whether the training is vocational training depends on the Court's test in *Gravier* as subsequently to be considered in Case 293/85 *Belgium*. The questions referred speak of a 'higher education course leading to a job qualification', in this case a course in Romance and Germanic languages. I read that as meaning that the national court was satisfied that the course was vocational training, not least since otherwise the references to Article 7 (3) of the regulation and to Articles 7 and 128 of the Treaty and to *Gravier* are difficult to understand. If that is right then it seems to me on the facts stated in the order for reference that a worker who takes up such a course of vocational training is entitled to the benefit of Article 7 (3), i. e. to a grant under the same terms as national workers. If the referring court has not already decided that matter, it will need to decide whether this was vocational training in the light of *Gravier* and *Belgium*.

Article 7 (2) confers the right to enjoy the same social advantages as national workers. The Court has in a number of cases construed such advantages as being those available to national workers by reason of their objective status as workers or by the mere fact that they are residents in their national State and whether or not such advantages are directly related to the contract of employment (e. g. Case 261/83 *Castelli* v *Office national des pensions pour travailleurs salariés* [1984] ECR 3199). The question is therefore whether if a national worker of one Member State goes to take up employment in another Member State and then begins a higher education course leading to a job qualification he can claim an educational grant as a social advantage

on the same terms as the nationals of that State.

Is Article 7 (2) cut down by Article 7 (3)?

The United Kingdom contends not, since *lex specialis derogat legi generali.* Article 7 (3) covers the relevant ground and excludes the application of Article 7 (2). If it were not so, it is said, there would be duplication. The United Kingdom also stresses the word 'also' in Article 7 (3) which, it is said, shows that training in a vocational school (and therefore presumably education in general) is quite separate from the social advantages referred to in Article 7 (2).

Article 7 (3) is limited to training in vocational schools. There remain other kinds of education, in particular general education. If Article 7 (3) is to be treated as dealing exclusively with training in vocational schools then other educational grants fall within Article 7 (2). Equally, if the proper construction of Article 7 (3) is that, contrary to my view, it applies only to fees or the right to attend, then it seems to me that educational grants for workers at vocational training schools fall within Article 7 (2) as do general education grants.

I do not accept this argument although I recognize its force. In the first place the Court has given a broad meaning to 'social advantage' as I have no doubt the regulation intended. Thus in Case 65/81 *Reina* v *Landeskreditbank Baden-Württemberg* [1982] ECR 33, which covered childbirth loans to national workers on demographic grounds, the Court accepted that 'the concept of social advantage referred to in Article 7 (2) of the regulation encompasses not only the benefits accorded by virtue of a right but also those granted on a discretionary basis'. Those benefits are obviously not limited to cash payments but they include them. Similarly, as already shown, Article 12 has been given a wide construction (*Casagrande*). It seems to me that educational grants generally are perfectly capable of falling within 'social advantages' for workers without giving a particularly wide meaning to that term.

The word 'also' in Article 7 (3) ('également' in the French text) does not seem to me to exclude this result. It might well have been thought that it was arguable that, although general education is a 'social' advantage, vocational training is an 'employment' advantage, so that it was necessary to protect against the latter being by interpretation excluded from Article 7 (2) by providing specifically for it in Article 7 (3).

In this context it is not relevant that the national legislation in question covers a class of nationals as a whole and is not confined to national workers or their children (Case 76/72 *Michel S.* v *Fonds national de reclassement social des handicapés* [1973] ECR 457, at p. 464).

Accordingly, under either Article 7 (3) if her course is training in a vocational school or under Article 7 (2) if it is general education, the applicant is entitled to be treated in the same way as national workers in so far as education grants are concerned.

It is argued that this conclusion cannot be right because educational and social policy remain within the sole control of Member States and the Community cannot interfere.

It is true that Member States are left to pursue such policies. The Court, however, has made it abundantly clear that they must be pursued in such a way as not to conflict with Community provisions. Thus in *Casagrande* the Court said: 'Although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature to affect the measures taken in the execution of such a policy as that of education and training' (paragraph 6). Again in *Reina*, where demographic policy was relied on and a Member State's freedom to deal with it accepted, the Court said: 'This does not mean, however, that the Community exceeds the limits of its jurisdiction solely because the exercise of its jurisdiction affects measures adopted in pursuance of that policy' (paragraph 15). Accordingly childbirth loans were not to be treated as excluded from the ambit of Article 7 (2) 'solely because they are granted for reasons of demographic policy'.

Reliance was placed by the German Government on Regulation (EEC) No 1251/70 of 29 June 1970 (Official Journal 1970, L 142, p. 24). It is said that such a regulation does not confer upon students a right to remain in the territory of a Member State after having been employed in that State. Accordingly they cannot claim any rights as workers to stay and undertake studies. I do not find that regulation helpful. It seems to me to be dealing with specific situations where, for example, a worker has reached retirement age or has become incapacitated and is permanently giving up work or where he works in another Member State whilst keeping his residence in the State in which he previously worked and to which he returns once a month. The absence of students from such a regulation does not seem to me to bear upon the questions in this case.

Does the applicant have an additional right under Article 7 of the Treaty to this kind of grant? Such a right can only exist if the principle stated in *Gravier* applies to maintenance grants for vocational training. In my view it does not, for the reasons given in my Opinion in *Brown*. Though having in other cases taken the opposite view, in *Brown* the Commission, it seems to me, was accepting this position. *A fortiori* Article 7 does not apply to grants for non-vocational education.

Accordingly, in my view the questions referred fall to be answered on the following lines:

'A national of one Member State who moves to another Member State and takes up employment in the capacity of a worker is entitled to an award of an educational grant for maintenance subject to the same criteria and on the same terms as national workers: (a) in respect of general education as a social advantage under Article 7 (2) of Regulation No 1612/68; (b) in respect of training in vocational schools under Article 7 (3) of that regulation.'

The plaintiff's costs fall to be dealt with by the national court. The costs of the Member States which have submitted observations and of the Commission are not recoverable.