OPINION OF ADVOCATE GENERAL DARMON

delivered on 2 December 1992 *

Mr President,
Members of the Court,

1. The Bundesverwaltungsgericht is referring to the Court two questions for a preliminary ruling on the interpretation of provisions of Community law concerning the freedom of movement of workers. The Court is asked, in particular, whether in this sphere a Community national who, at the time of the accession of his country to the Community, was unemployed in another Member State enjoys the protection of Community law.

2. The facts may be summarized as follows.

3. Mr Tsiotras, the appellant in the main proceedings, who was born in 1936, arrived in the Federal Republic of Germany in 1960. The residence permit which he had initially been granted was regularly renewed from year to year, most recently on 4 December 1980 for a further period of one year.

4. Mr Tsiotras, who was originally employed, lost his employment in 1978 and has not worked since. [1] He received unemployment benefit and since 1981 social security benefits. From 7 June 1979 until 16 August 1981 he was unfit for work owing to sickness.

5. In December 1981 Mr Tsiotras applied for the extension of his residence permit. The reply to that application was deferred owing to the proceedings which he had brought for the purpose of obtaining an invalidity pension. That was definitively refused in 1983 on the ground that he was not incapable of work.

6. On 1 August 1986 the Landeshauptstadt Stuttgart refused to extend his residence permit and Mr Tsiotras lodged an appeal, which was rejected by the Verwaltungsgericht. He then appealed on a point of law to the Bundesverwaltungsgericht, which is now referring to the Court two questions which are set out in the Report for the Hearing [2] and which essentially seek to determine:

— first, whether a national of a Member State of the EEC who, at the time of the accession to the Community of his country of origin, finds it objectively impossible to find employment in another Member State where he had previously worked must be regarded as a worker within the meaning of Community law; and

— secondly, whether the same national also loses the right to remain in that State where, subsequently, and more specifically during the course of judicial proceedings concerning the grant of a

* Original language: French.

1 — Decision of the national court, p. 3 of the French translation.

2 — I.2, *in fine*.

residence permit, he becomes permanently incapable of work.

7. Let us examine each of these questions in turn.

8. Article 48(3) of the EEC Treaty provides that freedom of movement for workers is to entail the right

'(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action ...'.

9. Pursuant to Article 49 of the Treaty — which provides that freedom of movement is to be brought about by progressive stages — the Council adopted Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [3] (hereinafter 'the Regulation') and Directive 68/360/EEC, of the same date, on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [4] (hereinafter 'the Directive').

10. Article 7(1) of the Regulation provides that:

'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 become unemployed*, reinstatement or re-employment.' [5]

11. The Directive determines, *inter alia*, the conditions of the right to remain in a Member State of workers who are nationals of another Member State and the conditions for the issue and renewal of their residence permits.

12. To what extent may a Greek national who, at the time of the accession of his country to the Community, is unemployed in another Member State rely on the application of these provisions?

13. The accession of the Hellenic Republic to the Community became effective on 1 January 1981. [6]

14. Since that date any Greek national has been able to rely on Article 48, subject to the transitional provisions laid down in Articles 45 and 47 of the Act of Accession. [7] As regards the Regulation and the Directive,

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

4 — OJ, English Special Edition 1968 (II), p. 485.

5 — Emphasis added.

6 — Article 2(2) of the Treaty of 28 May 1979 between the Member States and the Hellenic Republic on the accession of that country to the EEC and Euratom (OJ 1979 L 291, p. 9).

7 — See Article 44 of the Act of Accession, which lays down the principle that of Article 48 of the Treaty is to apply immediately (OJ 1979 L 291, p. 17).

those provisions state that Articles 1 to 6 and 13 to 20 of the Regulation

'shall only apply in the present Member States with regard to Hellenic nationals ... as from 1 January 1988'. [8]

15. Concerning those transitional provisions, which apply in the same conditions to workers of the other Member States based in Greece, [9] the Court held in *Commission* v *Greece* [10] that

'Those provisions suspended ... the operation of Articles 1 to 6 and 13 to 23 of Regulation No 1612/68 of the Council, ... implementing the rights guaranteed by Articles 48 and 49 of the Treaty, but not the application of Articles 48 and 49, in particular, in regard to workers from other member States who were lawfully employed in the Hellenic Republic before 1 January 1981 and *continued to be employed there after that date* or those who were lawfully employed there for the first time after that date.' [11]

The Court concluded that

'Article 9(1) of Regulation No 1612/68 ... is applicable to such workers.' [12]

16. Furthermore, as I pointed out in my Opinion in the *Lopes da Veiga* case, [13] in its judgment in Peskeloglou, [14] which was also delivered in conction with the Act concerning the Conditions of Accession of the Hellenic Republic, the Court held that the provision suspending the application of certain articles of the Regulation derogated from the principle of freedom of movement for workers and therefore required a restrictive interpretation.

17. The transitional provisions, which suspend until 1 January 1988 the application of Title I of the first part of the Regulation, on *eligibility* for employment, are intended to avoid the disturbance in the labour markets of the former Member States which might result from an influx of Greek nationals in search of work. [15] No reason of that kind would justify refusing to Greek workers *already* employed in the territory of one of those States the immediate benefit of the provisions of Title II of the same part of the Regulation on the *exercise* of employment and equality of treatment, or of those of the Directive with regard to the issue and renewal of residence permits.

18. The transitional provisions of the Act of Accession did not suspend the application of Article 7(1) of the Regulation. That article has therefore been applicable since 1 January 1981, with the consequence that Greek workers who were already lawfully employed in the other Member States before 1 January 1981 and who were still employed

8 — Article 45 of the Act of Accession.

9 — Ibid.

10 — Case C-305/87 [1989] ECR 1461. See also paragraph 11 of the judgment in Case 9/88 *Lopes da Veiga* [1989] ECR 2989.

11 — Paragraph 15, emphasis added.

12 — Paragraph 16. Article 9 concerns unequal treatment in the matter of accommodation between national workers and workers who are nationals of the other Member States.

13 — Paragraph 9 (see reference to the judgment, note 10, above). See also paragraph 11 of the judgment.

14 — Case 77/82 [1983] ECR 1085.

15 — See, in relation to the Act of Accession of Portugal, the *Lopes da Veiga* judgment, paragraph 10.

on that date or who have been lawfully employed after that date might benefit from that article.

19. Similarly, pursuant to Article 46 of the Act of Accession, the application of the provisions of the Directive is suspended only in so far as they cannot be dissociated from those of the Regulation which are subject to the same transitional provisions. That is not the case with the conditions for the issue and renewal of residence permits, which are independent of both Articles 1 to 6 of the Regulation ('Eligibility for employment') and Part II of the Regulation ('Clearance of vacancies and applications for employment').

20. At this point I should like to give a clear definition of the subject-matter of the question referred to the Court. With effect from 1 January 1981, may a Greek national rely on the status of worker within the meaning of Community law when he is aware that he could acquire that status only on 1 January 1981 at the earliest and that on that date he had already been unemployed since 1978, in view of the fact that on 1 January 1981 (i) he was unemployed and (ii) it was objectively impossible for him — despite his desire to work — to obtain employment?

21. The Court has held that

'the terms "worker" and "activity as an employed person" for the purposes of Community law may not be defined by reference to the national laws of the Member States but have a meaning specific to Community law'. [16]

22. Article 48 and the measures of secondary legislation adopted to implement it must be read in the context of Articles 2 and 3 of the Treaty: Article 3, in particular, mentions as one of the activities of the Community 'the abolition, as between Member States, of obstacles to freedom of movement for persons'.

23. The concepts of 'worker' and 'activity as an employed person' therefore define the sphere of application of one of the fundamental freedoms laid down in the Treaty and, as such, must be given a broad interpretation, whereas derogations from the principle of freedom of movement for workers must be interpreted strictly. [17]

24. Article 7 of the Regulation refers to the case of a worker who has 'become unemployed'. However, it protects only the national of a Member State who, at the time of the accession of his country of origin, worked in another Member State. That is not the position of a person who has never worked as the 'national of a Member State' but only as a national of a State which was *not yet* a member of the Community, since at the time of the accession of that State he was already unemployed. He could not therefore derive any rights from the Treaty of Rome.

25. The Act of Accession does not take account, as regards Community law, of either the status of the person concerned before the date of accession or the rights acquired at that time. In particular, it does not provide that the years spent as a worker in the host State before accession are to be taken into account, in one way or another, to derive rights from the Treaty. It is significant,

16 — Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 15.

17 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 13 and the *Kempf* judgment, paragraph 13.

in that regard, that by way of exception the Act of Accession of Spain and Portugal specifically took into account the circumstances of Spanish workers installed in a State of the Community before accession. [18]

26. It follows that the appellant in the main proceedings does not satisfy the Community definition of 'worker' in so far as he has never performed 'effective and genuine work' as a Community national in a Member State of the Community within the meaning of the *Kempf* and *Levin* judgments. [19]

27. Furthermore, on 1 January 1981 the appellant in the main proceedings was not, and could not be, the holder of a 'residence permit for a national of a Member State of the EEC' within the meaning of Article 4(2) of the Directive. Accordingly, he could not rely on Article 7 of the Directive, which provides that a residence permit may not be withdrawn while it is still valid from a worker who has lost his employment.

28. As the Commission correctly observes, [20] although Mr Tsiotras had applied on that date for a residence permit as a national of a Member State, he could not meet the conditions laid down in Article 4(3) of the Directive, in particular as regards the confirmation of engagement from the employer.

29. May a Community national who seeks employment in a Member State other than his own, without ever having worked as a Community national, rely on a right of residence based on Community law?

30. As long ago as the judgments in *Royer* [21] and *Levin*, [22] the Court accepted that Community nationals enjoy the right to reside in the Member State where they are seeking employment. [23]

31. In its judgment in *Antonissen* [24] the Court recognized that an unemployed Community national had such a right in so far as it might allow him to find employment. The Court indicated that, to ensure the effectiveness of the principle of freedom of movement for workers, the right to remain must be of sufficient duration. [25]

32. The Court therefore held that

'it is not contrary to the provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to seek employment may be required to leave the territory of that State (subject to appeal) if he has not found employment there after six months, unless the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged'. [26]

18 — See the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adaptations of the Treaties (OJ 1985 L 302, p. 23), Article 57(1)(a) of which provides in its second subparagraph for a right of access to any employment for members of the family of a worker established in another Member State at a date prior to the signature of the Act of Accession.

19 — Paragraphs 16 and 21, respectively.

20 — Observations of the Commission, p. 7 of the French translation.

21 — Case 48/75 [1976] ECR 497, paragraph 31.

22 — Cited above, paragraph 9.

23 — See paragraph 13 of my Opinion in the *Antonissen case* (cited below, note 24).

24 — Case C-292/89 *The Queen* v *The Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745.

25 — Paragraph 21.

26 — Paragraph 22.

33. Where it is objectively impossible for the person concerned to work, the underlying reason for the right to remain recognized in the *Antonissen* judgment is absent.

34. Furthermore, even supposing that Mr Tsiotras had the status of worker within the meaning of Article 48 of the Treaty, it is sufficiently apparent from the Commission's proposals for the amendment of Article 6 of the Directive that there is at present no right of residence in the event of long-term unemployment and that in future that right is to lapse when the right to unemployment benefit has expired. [27]

35. We may therefore conclude that a Greek national in the circumstances described by the national court was not a 'worker' within the meaning of Community law on 1 January 1981.

36. Could he have acquired that status after that date? It will be for the national court to determine, in accordance with the criteria laid down in the *Antonissen* judgment, whether Mr Tsiotras had any chance of being engaged. At the very most, it may be said that a Community national whose incapacity for work is attested by a medical certificate does not, in my view, present 'genuine chances of being engaged'. [28]

37. It seems clear, therefore, that a Greek national who was unemployed in another Member State on the day of the accession of Greece and for whom it has subsequently been objectively impossible to obtain employment does not enjoy the protection of the provisions of Community law on freedom of movement for workers. His residence therefore becomes severable from any work. Accordingly, the underlying principle of Article 48 — to ensure freedom of movement for workers — does not require that he be granted a right of residence.

38. That solution is extremely harsh, since it might lead, should the national authority so decide, to the deportation of a Community national who has resided in a Member State for more than thirty years; however, that harshness is undoubtedly mitigated today by Council Directive 90/364/EEC of 28 June 1990 on the right of residence [29] which 'detaches' the existence of this right from the exercise of an economic activity. [30] Although not working and not having the status of 'worker' within the meaning of Community law, a Community national resident in a Member State has a right of residence of at least five years provided that he either has sufficient resources and is covered by sickness insurance in respect of all risks in the host Member State [31] or is the dependent relative in the ascending line of a holder of the right of residence. [32]

27 — See Article 1(10) of the Proposal for a Council Directive 89/C/100/07 amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, submitted by the Commission on 11 January 1989 (OJ 1989 C 100, p. 8).

28 — See the medical certificate of 22 December 1987 and the statement of the employment office of 19 March 1987 referred to by the national court in its decision, p. 3 of the French translation.

29 — OJ 1990 L 180, p. 26.

30 — This measure entered into force on 1 July 1992.

31 — Article 1(1).

32 — Article 1(2). Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employed and self-employed workers who have ceased their occupational activity (OJ 1990 L 180, p. 28) does not appear to be applicable, since the appellant in the main proceedings is not a 'worker' within the meaning of that directive.

39. Does Community law confer a *'right to remain'* on a national of a Member State in the circumstances of the appellant in the main proceedings? That is the subject-matter of the second question.

40. The right to remain in a Member State after having been employed there arises under Article 48(3)(d) of the Treaty.

41. Article 2(1) of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [33] provides as follows:

'The following shall have the right to remain permanently in the territory of a Member State:

...

(b) a worker who, having resided continuously in the territory of that State for more than two years, ceases to work there as an employed person as a result of permanent incapacity to work.'

42. Can this provision be relied on by a Community national in circumstances such as those of the appellant in the main proceedings?

43. It should be pointed out, in the first place, that the abovementioned regulation, pursuant to Article 1 thereof, applies only to nationals of a Member State who have worked as employed persons in the territory of another Member State and to members of their families, and the like.

44. As we have seen, that is not the case of a person who

— has never worked since he came within the scope of Community law, and

— is not a person seeking work protected by Community law within the meaning of the *Antonissen* judgment.

45. He is therefore unable to rely on that regulation. He might do so if it were possible for him to establish not only the existence of permanent incapacity for work but also that the loss of his employment was attributable to that incapacity.

46. As far as Mr Tsiotras is concerned, the loss of his employment, which dates from 1978, occurred prior to the finding of his incapacity.

47. Clearly, the right to remain is intended to enable a Community national to remain in the territory of the Member State where he has worked in that capacity. I see in that right an application of the principle of the effectiveness of the provisions of Article

33 — OJ, English Special Edition 1970 (II), p. 402.

48 of the Treaty: a worker might be reluctant to accept work in another Member State unless he were certain of being able to remain there subsequently if he so desired. Such a right is merely the corollary of the right of residence attached to the occupational activity. Since the conditions for the right of residence have never existed, there cannot of necessity be any conditions governing the right to remain.

48. I therefore suggest that the Court should rule:

(1) A national of a Member State who, at the time of the accession of that State to the Community, was unemployed in another Member State and for whom it was objectively impossible to obtain work does not come within the scope of Article 48 of the EEC Treaty, of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community or of Directive 68/360/EEC of the Council on the abolition of restrictions on the movement and residence of workers of Member States and their families within the Community.

(2) Workers who have never enjoyed the right of residence within the meaning of Article 48(3)(a), (b) and (c) of the EEC Treaty cannot enjoy the right to remain referred to in Article 48(3)(d).