REPORT FOR THE HEARING
in Case C-171/91 *

I — Facts and procedure

1. *Legal framework*

Under Article 48(3) of the EEC Treaty:

'It [freedom of movement for workers] shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(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;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.'

Article 1 of Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968, p. 475) provides that

'1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of the State.'

According to Article 7(1) and (2) of that regulation:

'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

* Language of the case: German.

and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

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

Article 1 of Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) provides that

'Member States shall, acting as provided in this directive, abolish restrictions on the movement and residence on nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.'

According to Article 4(1) and the first indent of Article 4(3) of Directive 68/360:

'1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. ...

3. For the issue of a residence permit for a national of a Member State of the EEC, Member States may require only the production of the following documents:

— by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;'

Article 6(1)(b) of that directive provides that

'The residence permit:

(a) ...

(b) must be valid for at least five years from the date of issue and be automatically renewable.'

According to Article 7 of that directive:

'1. A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.

2. When the residence permit is renewed for the first time, the period of residence may be restricted, but not being less than twelve months, where the worker has been involuntarily unemployed in the Member State for more than twelve consecutive months.'

Under Article 2 (1) of Commission Regulation (EEC) No 1251/70 of 29 June 1970 (OJ, English Special Edition 1970 (II), p. 402) on the right of workers to remain in the territory of a Member State after having been employed in that State:

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

(a) ...

(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.

If such incapacity is the result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, no condition shall be imposed as to length of residence.'

Article 44 of the Act concerning the Conditions of Accession of the Hellenic Republic and the Adjustments to the Treaties (OJ 1979 L 291, p. 17, hereinafter the 'Act of Accession') states that

'The provisions of Article 48 of the EEC Treaty shall only apply in relation to the freedom of movement of workers between the present Member States and Greece subject to the transitional provisions laid down in Articles 45, 46 and 47 of this Act.'

According to Article 45(1) of the Act of Accession:

'1. Articles 1 to 6 and 13 to 23 of Regulation (EEC) No 1612/68 on the freedom of movement of workers within the Community shall only apply in the present Member States with regard to Hellenic nationals and in Greece with regard to nationals of the present Member States as from 1 January 1988.

The present Member States and the Hellenic Republic may maintain in force until 1 January 1988, with regard to Hellenic nationals and to nationals of the present Member States respectively, national provisions submitting to prior authorization immigration undertaken with a view to pursuing an activity as an employed person and/or the taking up and pursuit of paid employment.'

Article 46 of the Act of Accession provides that

'In so far as certain provisions of Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States

and their families may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to Article 45, the present Member States and the Hellenic Republic may derogate from these provisions, in so far as is necessary for the application of the provisions for derogation which are laid down in Article 45 in connection with the said regulation.'

2. *The dispute in the main proceedings*

Mr Dimitrios Tsiotras, the appellant, is a Greek national who since 1960 has lived in Germany, where he held various positions as an employed person until October 1978. Since then he has been unemployed. After at first receiving unemployment benefit, he has received unemployment assistance since 1979. Between 7 June 1979 and 16 August 1981 he was incapable of work due to illness. Since September 1981 his sole resources have been those made available by social assistance.

The residence permit issued to Mr Tsiotras, the validity of which was on each occasion limited to one year, was last renewed on 4 December 1980.

The Landeshauptstadt Stuttgart, the respondent, first of all deferred its decision on Mr Tsiotras's application for the extension of his residence permit pending the determination of proceedings which Mr Tsiotras had previously brought with a view to obtaining an invalidity pension and further developments as regards his need for social assistance.

The appellant's application for an invalidity pension was definitively rejected in 1983 on the ground that he was not incapable of work.

By a decision of 1 August 1986 the respondent, taking account of Mr Tsiotras's financial circumstances, finally rejected his application for the extension of his residence permit.

When the objection lodged by Mr Tsiotras against that decision was dismissed, he instituted legal proceedings with a view in particular to obtaining a residence permit as a national of a Member State.

In that connection he produced an attestation from the Arbeitsamt (Labour Office) Stuttgart, dated 19 March 1987, certifying that he had been registered as unemployed since 5 November 1982 and that 'on account of health limitations and the bad state of the employment market no possibilities of placement are to be expected in future'.

In the appeal proceedings, Mr Tsiotras also produced a medical certificate dated 22 December 1987, according to which the doctor treating him had considered him to be 'incapable of work owing to his current general and nutritional condition', as well as an attestation from the Arbeitsamt dated 4 October 1988, according to which he had registered on that date as seeking work through that office.

By a judgment of 15 February 1989, the Verwaltungsgerichtshof (Higher Administrative

Court) dismissed Mr Tsiotras's application on the ground that, in the first place, not having the status of worker, he did not enjoy a right of residence under Community law, and secondly, as he was not suffering from permanent invalidity, he did not have the right to remain under Community law either.

With regard to the first point, the Verwaltungsgerichtshof explains that the status of worker presupposes the pursuit of an occupation. Mr Tsiotras has been unemployed since 1978 and his prospects of obtaining a new placement are nil. A worker who is involuntarily unemployed does of course continue to enjoy the advantages associated with freedom of movement, but only for a period of one year.

With regard to the second point, the Verwaltungsgerichtshof points out that it follows from the certificates of the Arbeitsamt, attesting that Mr Tsiotras had sought work, that he does not intend to give up work permanently. Even on the assumption that he was suffering from a permanent incapacity for work, there is no causal connection between the occurrence of that incapacity and the loss of employment, since the latter preceded the former.

Before the Bundesverwaltungsgericht, Mr Tsiotras has claimed that he is entitled to be granted a residence permit of unlimited duration as a Community national. The period of residence may be restricted only when the residence permit is first granted (Article 6(1)(b) of Directive 68/360) or when it is renewed for the first time in the event of the worker's involuntary unemployment (Article 7(2) of that directive).

Mr Tsiotras takes the view, moreover, that he has a right to remain under Community law irrespective of the recognition of his right to a pension. His permanent incapacity for work is evidenced by the medical certificate of 22 December 1987 and his efforts to find work are merely the result of his perception that his right of residence is jeopardized by the fact that he is in receipt of social assistance. In addition, a Community national may have a right to remain in the host State even if his incapacity for work arose outside the context of an employment relationship.

The respondent and the Oberbundesanwalt (Senior Federal Attorney) at the Bundesverwaltungsgericht (intervener) support the view taken by the Verwaltungsgerichtshof. As regards the right to remain, the Oberbundesanwalt submits that the Commission's proposals of 21 April 1989 to amend Article 6 of Directive 68/360 and its accompanying statements (OJ 1989 C 100, p. 8) reveal that a right of residence in the event of long-term unemployment will in future be granted for the period during which a worker receives unemployment benefit, but there is no such right where the worker draws unemployment assistance.

The Bundesverwaltungsgericht emphasizes that freedom of movement is recognized for nationals of Member States who possess the status of 'worker' within the meaning of Article 48 of the Treaty. In that respect, Regulation No 1612/68 lays down as an essential criterion the pursuit by the person concerned of an 'activity as an employed

person' (Article 1(1)). Those two concepts, which are not expressly defined in any of the relevant provisions, must be given a broad interpretation, given that they define the field of application of one of the fundamental freedoms guaranteed by the Treaty (Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, at paragraphs 9 and 13, and Case 9/88 *Lopes da Veiga* v *Staatssecretaris van Justitie* [1989] ECR 2989).

However, Mr Tsiotras has not carried on an activity as an employed person since the accession of the Hellenic Republic to the European Communities. It is apparent from the findings of the appeal court that Mr Tsiotras has been unemployed since 1978 and that at the time of the accession of the Hellenic Republic he was not in receipt of unemployment benefit. It is no longer possible to establish whether, at that time, he was seeking employment despite his illness. In any event, he was at that time in possession of a residence permit in Germany as a worker, which allowed him to take up employment.

According to the Bundesverwaltungsgericht, the question therefore arises whether that factor, in conjunction with the appellant's previous employment in Germany before the date of accession, is sufficient to confer upon him the status of a worker entitled to freedom of movement.

The Bundesverwaltungsgericht takes the view that if that is the case, the appellant's status as a worker may none the less have been lost at a later date. While the certificate issued by the Arbeitsamt Stuttgart shows that Mr Tsiotras sought employment through that body between November 1982 and October 1988, his poor health and the bad state of the employment market meant that he had no prospect of finding work. Even on the assumption that when Mr Tsiotras became involuntarily unemployed he was still entitled, pursuant to Article 6(1)(b) or Article 7(2) of Directive 68/360, to apply for an extension of his residence permit, which had expired at the end of 1981, those provisions could not provide a basis for entitlement to a residence permit of unlimited duration regardless of whether he continued to have the status of worker.

According to the Bundesverwaltungsgericht, the question therefore arises whether Mr Tsiotras's status as a worker was lost, despite his continued willingness to work, owing to the objective impossibility of finding employment, and whether Directive 68/360 is therefore inapplicable *ab initio* in such a case.

The Bundesverwaltungsgericht adds that although the Court of Justice stated in *Levin* that the advantages conferred by Community law in the name of freedom of movement can be relied upon only by persons 'who actually pursue or seriously wish to pursue' activities as employed persons, it has not yet had to resolve the question whether recognition of the status of worker depends on the actual possibility for the person concerned of finding employment.

In the event of an affirmative answer to that question, Mr Tsiotras would be unable to seek the issue or renewal of a residence permit for the future since he would in the

circumstances have no right of residence under Community law.

As for the recognition of Mr Tsiotras's right to remain in the host State, which would justify the extension of his residence permit, the Bundesverwaltungesgericht considers that this also raises problems. It points out in that respect that Article 1 of Regulation No 1251/70 refers only to nationals of a Member State who have worked as employed persons in the territory of another Member State and that, pursuant to the first sentence of Article 2(1)(b) of that regulation, the right to remain presupposes that the worker 'ceases to work there as an employed person as a result of permanent incapacity to work' and has resided 'continuously in the territory of that State for more than two years'.

Since Mr Tsiotras was employed in Germany only before the accession of Greece to the European Communities, the applicability of that regulation in his case can be ruled out on that ground alone.

Furthermore, Mr Tsiotras's permanent incapacity for work was established only as from December 1987, so that from the time he ceased to be employed until December 1987 he was not incapable of working. If Mr Tsiotras lost his status as a worker because it was objectively impossible for him to find employment, Regulation No 1251/70 and Directive 68/360 might have been inapplicable *ab initio*. Although Mr Tsiotras was able to continue to reside in Germany, it was to enable him to pursue the judicial proceedings which he had initiated with a view to obtaining an extension of his residence permit.

According to the Bundesverwaltungsgericht, the question whether permanent incapacity for work supervening during a period of residence linked to such a purpose can give rise to a right to remain within the meaning of Regulation No 1251/70 has not yet been resolved by the Court of Justice.

Finally, even if Regulation No 1251/70 were in principle to be considered applicable in this case, the right to remain presupposes, according to Article 2(1)(b) of that regulation, a causal link between permanent incapacity for work and cessation of employment. In the case in point, the loss of work is not the result of such incapacity, but is linked to the appellant's situation as an unemployed person. However, it cannot be ruled out that permanent incapacity for work arising during a period of involuntary unemployment may give rise to a right to remain in the host State.

The Bundesverwaltungsgericht emphasizes that the Court of Justice has not yet given a ruling on the matter.

Having regard to the foregoing considerations, the Bundesverwaltungsgericht decided to stay the proceedings and refer to the Court of Justice the following questions for a preliminary ruling:

'1. Does a national of a Member State of the EEC lose the status of worker and with it the right to freedom of movement under Article 48(1) and (3) (b) and (c) of the EEC Treaty, thus rendering inapplicable Directive 68/360/EEC of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 485) where, after cessation of employment in another

Member State, at the time of the accession of his State of origin to the European Communities, or subsequently, he could not or cannot be found employment in spite of his readiness to work and consequently the underlying objective of freedom of movement, namely employment, can no longer be attained?

2. Does a national of a Member State of the EEC lose the right to remain in a country under Article 48(3)(d) of the EEC Treaty in conjunction with Article 2 (1) (b) of Regulation (EEC) No 1251/70 of 29 June 1970 (OJ, English Special Edition 1970 (II), p. 402), where his permanent incapacity for work arises only after the occurrence of the factors mentioned in Question 1, in particular where such incapacity arises only during a further period of residence afforded to him in the State where he was formerly employed solely for the purpose of the conduct of judicial proceedings regarding the grant of a residence permit?'

3. *Procedure before the Court*

The order for reference was lodged at the Court Registry on 1 July 1991.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 16 October 1991 by the appellant, Mr Dimitrios Tsiotras, represented by Rolf Gutmann, Rechtsanwalt of Stuttgart, on 25 October 1991 by the Commission of the European Communities, represented by Dimitrios Gouloussis, Legal Adviser, and Jürgen Grunwald, of its Legal Service, acting as Agents, on 4 November 1991 by the German Government, represented by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Joachim Karl, Regierungsdirektor at the Federal Ministry for Economic Affairs, acting as Agents, and on 12 November 1991 by the Greek Government, represented by Vassileios Kontolaimos, State Legal Adviser, acting as Agent.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

The *appellant* states at the outset that his observations are not confined to the questions formulated by the national court. If follows from the consistent case-law of the Court (see, *inter alia*, Case 4/79 *Providence agricole de la Champagne* v *ONIC* [1980] ECR 2823) that the Court may extract from all the information provided by the national court those points of Community law which, having regard to the subject-matter of the dispute, require interpretation, or whose validity requires appraisal.

In his view, any restriction of the Court's jurisdiction which could prevent it from answering the questions mentioned by one of the parties to the case where the answer is relevant in the main proceedings exceeds the powers of the national court and is contrary to a fundamental principle of Community law, namely observance of the rights of the defence, which is also enshrined in Article

6 of the European Convention for the Protection of Human Rights. Such a restriction would oblige the person concerned, where appropriate, to bring an action in the Constitutional Court for infringement of a fundamental right with the result that the outcome of the proceedings would be delayed.

Mr Tsiotras then points out that, according to the Court's case-law (the *Lopes da Veiga* judgment and Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085), transitional periods are intended to do nothing other than prevent disturbance of the labour market as a result of a huge influx of persons seeking employment and that, as a result, the residence permits of workers and work seekers of one Member State who are already established in another Member State are immediately converted, at the time of accession, into Community residence permits, even in the absence of an express statement by the competent authorities, which is purely declaratory (Case 48/75 *Royer* [1976] ECR 497).

The appellant emphasizes that the first question on which a preliminary ruling is sought is linked to the fact that he was out of work at the time of the accession of the Hellenic Republic. That fact is irrelevant, in the light of the foregoing considerations. As a worker seeking employment who was established in the host State, he was already covered at that time by the Community provisions on freedom of movement.

That freedom did not lapse because of the fact that he was unsuccessful in his attempt to find work in Germany. Otherwise workers who have become long-term unemployed persons after several years of employment in the host State could be required to return to their country of origin.

As is apparent from Article 7 of Directive 68/360, it is only exceptionally that loss of employment by a Community national entails the loss of his freedom of movement. The exception laid down in that provision does not cover the case of Mr Tsiotras, who has lived in a Member State since 1960 and who has worked there for the greater part of that period.

The appellant adds that it follows from the Court's case-law (Case C-292/89 *Antonissen* [1991] ECR I-745) that a person seeking employment must also be regarded as a worker and that freedom of movement includes the right to seek employment.

Mr Tsiotras considers, therefore, in reply to the first question, that the status of worker cannot be lost on account of the fact that the aim of freedom of movement, namely the pursuit of an activity as an employed person, is impossible to attain.

According to the appellant, it is necessary, in order to answer the second question, to ascertain the circumstances in which a Community national obtained his temporary residence permit.

The Court has indeed already had occasion to rule that a Turkish national could not rely on employment authorized temporarily for the duration of a procedure aimed at obtaining a residence permit in order to claim a right of residence (Case C-192/89 *Sevince* v

Staatssecretaris van Justitie [1990] ECR I-3461 regarding the EEC-Turkey Association Agreement), and that a worker from a Member State in search of employment in another Member State does not acquire a right to remain in that State (Case C-292/89 *Antonissen*). In his view, however, the situation in the present case is completely different.

Unlike Mr Antonissen, Mr Tsiotras already enjoyed a right of residence before he became unemployed. To that extent, 'temporary' residence in connection with legal proceedings was also a result of his previous employment in Germany and his incapacity for work is closely linked to his former working life. That close link, in his opinion, justifies recognition of his right to remain pursuant to Article 2(1)(b) of Regulation No 1251/70.

The appellant adds that, as in the *Lopes da Veiga* case, his current residence in Germany was preceded by a period of residence in that country, during the course of which he worked as an employed person, married, divorced and even adopted a child, who is at present working in Germany.

The right to remain within the meaning of Article 2 of Regulation No 1251/70 is in fact linked to the existence of material circumstances of that kind, and to confine that right to those who went straight from working life to retirement would mean that persons who became unemployed at a time when they were approaching retirement age would be excluded from the benefit of Regulation No 1251/70, while it is precisely for that category of persons that the provisions concerning the right to remain are important.

Finally, the appellant observes that it would be surprising if Germany could deprive workers of the right to remain by altering their social security rights. If he is unable to claim an invalidity pension, it is because the conditions laid down for obtaining a pension of that type have been tightened (see Article 1 of the Haushaltsbegleitgesetz 1984 (BGBl. I, p. 1532)).

While the Member States are free to determine the conditions for the grant of social benefits such as an invalidity pension, it is not permissible that a worker should thereby lose the benefit of rights conferred on him by Community law.

According to the appellant, it is appropriate to consider a further question, namely the scope of his right of residence.

Mr Tsiotras takes the view that he is entitled to obtain both a residence permit valid for five years and a residence permit of unlimited duration. That is true whether the starting point is taken as the date on which he applied for an extension of his permit or the date on which his incapacity commenced.

However, the grant by the German authorities of a residence permit of unlimited duration in a case such as his is possible only if Paragraph 7a of the German Aufenthaltsgesetz/EWG (Law on residence by European Community nationals), in

force since 1 January 1991, is held to be incompatible with Community law. According to that provision, a Community residence permit is to be renewed indefinitely, in particular where the alien is able to make himself understood orally in basic German, and has adequate accommodation as well as guaranteed resources enabling him to support himself without being dependent on social assistance.

In Mr Tsiotras's opinion, that provision is contrary to Community law.

While Article 6(1)(b) of Directive 68/360 confers on Community nationals the right to obtain a residence permit which is valid for at least five years from the date of issue and which is 'automatically renewable', no restriction is possible thereafter except at the time of the first application for renewal, and then only if the worker has been unemployed for more than one year (Article 7(2) of that directive).

In other cases, those concerned are entitled to be granted a residence permit which is 'automatically renewable', which means that they enjoy a permanent right of residence.

In that regard, the appellant again points out that the Community rules on the right of residence distinguish between the right of residence and the documents attesting that right (which are referred to in Article 6 et seq. of Directive 68/360).

Article 4 of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), confers on self-employed workers 'the *right* of permanent residence'. As proof of that right, a document valid for not less that five years must be issued and must be automatically renewable.

Similarly, the right of retired workers and self-employed persons to remain is not limited in time and is certified by residence permits which are valid for at least five years and are automatically renewable (see, as regards self-employed persons, Articles 2(1) and 6(1) Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after haing pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10)).

On the other hand, the right to remain in the case of migrants who are not in active employment is not unrestricted (Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence, (OJ 1990 L 180, p. 26), but depends in particular on proof that they have sufficient resources (Article 3 of that directive). The same holds true for former employees and self-employed persons who emigrate to another Member State (Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ 1990 L 180, p. 28).

As for Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30), the document to be issued is valid for a comparatively shorter period, which can be explained by the fact that the residence of students in the host State is of a temporary nature.

It follows that a document certifying a right of residence for a limited period may conceal the existence of a permanent right of residence. Although the Member States are not required, under Community law, to certify a permanent right of residence, if they do so the issue of the document must not depend on requirements which are not laid down by Community law.

Mr Tsiotras takes the view that the conditions laid down in Paragraph 7a of the Aufenthaltsgesetz/EWG (knowledge of the language and suitable accommodation) are therefore contrary to Community law, except for the condition relating to proof of accommodation, which may be required when the residence permit is first issued (Case 249/86 *Commission* v *Germany* [1989] ECR 1263).

Similarly, the duration of residence cannot depend on the fact that the worker is not in receipt of social assistance.

The problems that arise for the solution of the dispute in the main proceedings are precisely of that order. Mr Tsiotras is in receipt of social assistance in Germany, which means, according to German law, that a residence permit of unlimited duration cannot be granted. As for his knowledge of the language, it cannot be established by the court making the reference owing to German procedural law, and the matter should, accordingly, be referred back to the competent court. As far as the incorrect statement in the documents before the Court is concerned, regarding the lack of personal accommodation, it has not been accepted by the courts hearing the case.

Mr Tsiotras further observes that if the invalidity which has since occurred is taken as a basis, he also enjoys a permanent right to remain pursuant to Article 2(1) of Regulation No 1251/70.

Finally, the appellant points out that he has suffered discrimination in comparison with aliens whose residence permits acquired under the law of the former German Democratic Republic (GDR) were, in certain cases, converted into permanent residence permits as from the entry into force of the new German law on aliens.

That question is governed by Article 8 of the Treaty on the Unification of Germany, the application of which allowed residence permits previously issued by the GDR to be converted into residence permits of unlimited duration.

Under the law of the former GDR, residence *permits* which were valid for five years and were renewable conferred a *right* of permanent residence as is the case under the Community legal system. In Mr Tsiotras's opinion, the German authorities may not certify a right of residence for an unlimited period following the accession of the GDR and deny it to nationals of the Member States.

In conclusion, a worker seeking employment who is a national of a Member State of the Community, and to whom the labour market of the State in which he lives, and in which he is already established, is closed, nevertheless loses his status as a worker within the meaning of Article 48 of the EEC Treaty only in the exceptional circumstances provided for in Article 7(2) of Directive 68/360.

The right to remain within the meaning of Article 2(1) of Regulation No 1251/70 is not lost because of the fact that the national of the Member State concerned, long before his invalidity occurred, unsuccessfully sought employment and the authorities of the host State did not certify his right of residence at the time.

When renewing the residence permit of both a worker within the meaning of Article 6(1)(b) of Directive 68/360 — unless he is unemployed when the permit is renewed for the first time, in accordance with Article 7(1) of Directive 68/360-and a person having the right to remain pursuant to Article 2(1) of Regulation No 1251/70, a Member State may not make the issue of a document attesting a right of residence for an unlimited period conditional upon knowledge of the language of the host State and the ability of the Community national concerned to provide for his needs from his own resources. A provision of national law which lays down such requirements is not applicable.

With regard to the first question, the *German Government* points out that, notwithstanding the accession of the Hellenic Republic to the European Communities, the appellant may not rely on Article 48 of the EEC Treaty and Article 1(1) of Regulation No 1612/68.

First of all, he is unable to claim a right of residence as a *worker* under Community law.

Such a status can be conferred only on Community nationals who have actually been employed as workers. That applies not only to nationals of a Member State who move to another Member State in order to work there, but equally to those who are already in another Member State at the date of the accession of their State of origin.

In the present case, the appellant could only become a worker within the meaning of Article 48 of the Treaty on 1 January 1981 at the earliest. However, Mr Tsiotras has been continuously unemployed since 1978.

Nor can the appellant claim the benefit of the Community provisions on freedom of movement as a *person seeking employment*.

While the right of residence of a Community national in search of employment in another Member State is guaranteed by Community law, the host Member State may expel such a person if after six months he has not found employment and is unable to prove that he is continuing his search with a real chance of success (Case C-292/89 *Antonissen*). There is no such prospect in the present case, since Mr Tsiotras has been seeking employment without success since 1978, and the difficult

state of the labour market and the appellant's limited prospects of being recruited make it unlikely that he will find work.

The fact that the one-year residence permit which was granted to Mr Tsiotras on 4 December 1980 authorized him to take up employment is irrelevant in the circumstances, since he failed to find work during the period in question, at the end of which he no longer had a right to obtain a residence permit.

Directive 68/360 is not applicable to the appellant since, as has already been pointed out, he is not a worker within the meaning of Regulation No 1612/68. Even if that directive were applicable to him, he would, pursuant to Article 7(2) thereof, have at the most only a right of residence limited to one year, since on 1 January 1981 he had already been unemployed for more than twelve months. Accordingly, Community law would have allowed his residence to be terminated in any event on 1 January 1982.

With regard to the second question, the German Government points out that, if the appellant has never been a worker enjoying freedom of movement, he cannot have a right to remain pursuant to the first sentence of Article 2(1)(b) of Regulation No 1251/70. In any event the substantive conditions laid down by that regulation are not fulfilled.

In the first place, the right to remain in the host State presupposes that cessation of employment is the result of permanent incapacity. In the case in point, the appellant's involuntary unemployment, which occurred in 1978, preceded his incapacity. In the absence of that link between cause and effect, incapacity arising during a period of involuntary unemployment cannot justify a right to remain.

The German Government adds that such a right to remain is also conditional on the person concerned having resided in Germany as a worker for at least two years. That implies that on the date when the incapacity arose, he still enjoyed the right of residence in Germany under Community law, which was not so in this case.

The appellant was authorized to reside in Germany only until the completion of legal proceedings concerning the refusal to grant him a residence permit, which, in accordance with the Court's case-law (Case C-192/89 *Sevince*), cannot confer a right to remain in that State under Community law.

Finally, the German Government points out that according to Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, to be transposed into German internal law by 30 June 1992, the right of residence is guaranteed to workers who have

ceased all occupational activity only if their sickness insurance is adequate and, unlike Mr Tsiotras, they do not become dependent on social assistance in the host State.

The *Greek Government* takes the view that Mr Tsiotras has never lost the status of worker within the meaning of Article 48 of the EEC Treaty, given that at the time of the accession of the Hellenic Republic he was in possession of a residence permit which had been renewed until 4 December 1981.

The Greek Government points out in that respect that, according to the Court's case-law, a person who is involuntarily unemployed or incapable of work, who receives unemployment benefit or assistance and who is registered as seeking work does not lose his status as a worker (Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 and Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741).

Furthermore, pursuant to Article 7 of Directive 68/360, which, like corresponding provisions of the Treaty concerning freedom of movement for persons, is directly applicable (Case 131/79 *Santillo* [1980] ECR 1585), a residence permit may not be withdrawn from a worker for the sole reason that he is no longer in employment, either because he has been affected by temporary incapacity for work resulting from sickness or an accident, or because he is involuntarily unemployed and duly certified as being so by the competent employment office.

According to the Greek Government, the competent German authorities ought therefore to have renewed Mr Tsiotras's residence permit automatically, pursuant to Article 6 (1) (b) of Directive 68/360, according to which residence permits, which must be valid for at least five years from the date of issue, are automatically renewable.

Article 7(2) of that directive, which allows the validity of the permit when it is renewed for the first time to be limited to twelve months where the worker has been involuntarily unemployed in the host State for more than twelve consecutive months, cannot be applied in the present case, given that the appellant had already had his permit renewed several times.

The Greek Government considers that Mr Tsiotras's residence permit should in any event have been considered to be automatically renewable on grounds of equal treatment between Community nationals. It points out in that respect that, at the time of the accession of the Hellenic Republic, the appellant had resided in German territory as a worker for 13 years on the basis of a valid residence permit and that he continues to reside there at present. To call those facts in question is directly contrary to the spirit of the Community rules on freedom of movement for persons.

In addition, the Greek Government challenges the view that the aforementioned provisions of Directive 68/360 have been applicable only since 1 January 1988, the date on which, pursuant to Article 45 of the Act of Accession, Articles 1 to 6 of Regulation No 1612/68 apply with regard to Greece. The provisions of Directive 68/360 which are at

issue do not form part of the matters governed by the aforementioned provisions of Regulation No 1612/68.

At all events, the Landeshauptstadt Stuttgart should, according to the Greek Government, have regarded the permit as valid or as automatically renewable since 1 January 1988.

Finally, the Greek Government considers that the appellant has not lost his status as a worker, inasmuch as he also enjoys the right to remain permanently in Germany pursuant to the first sentence of Article 2(1)(b) of Regulation No 1251/70. Mr Tsiotras, who has resided as a worker in the territory of the Federal Republic of Germany for more than two years since the date of the accession of the Hellenic Republic to the European Communities, only fell ill subsequently.

According to the *Commission*, it is necessary first of all to ascertain whether Regulation No 1612/68 is applicable in a case such as this.

The Commission points out in that regard that, in so far as the present case is concerned with the right of residence of a Greek national who worked as an employed person in the Federal Republic of Germany even before the accession of the Hellenic Republic and who was registered as unemployed on 1 January 1981, the question arises whether he comes within the scope of Article 7(1) of that regulation, a provision which Article 44 et seq. of the Act of Accession do not preclude from being applicable forthwith (see, in that respect, the *Lopes da Veiga* judgment).

While that article expressly covers the case of a worker who has 'become unemployed', in the present case the question arises whether the appellant at any time had the status of worker within the meaning of that provision.

According to the Commission, Mr Tsiotras, who was employed in the Federal Republic of Germany only at a time when the Hellenic Republic was not yet a member of the European Communities, cannot be regarded as a national worker of a Member State for the purposes of Article 48 of the Treaty and cannot therefore come within the scope of Regulation No 1612/68.

That conclusion is supported by Directive 68/360, which, in Article 4(3), makes the issue of a residence permit subject in particular to the production by the person concerned of a confirmation of engagement from the employer or a certificate of employment, a condition which was not fulfilled in this case, since at the time Mr Tsiotras was already unemployed.

Admittedly, Article 7(1) of that directive provides that 'a valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment', but the application of that provision presupposes that the person concerned meets the conditions necessary for the issue of a residence permit and that he is in possession of that permit at the time of losing his employment.

It follows that, at the time of the accession of the Hellenic Republic, the appellant did not enjoy, in the Federal Republic of Germany, a right of residence under Community law.

Nor, according to the Commission, did the appellant subsequently acquire a right of residence in Germany. Pursuant to Article 48(3)(a) and (b) of the Treaty and the aforementioned implementing provisions, such a right of residence presupposes that the person concerned accepts an offer of employment actually made in the host State or that he is in employment there.

It is apparent from the order for reference that although Mr Tsiotras began to seek new employment through the competent labour office on 4 October 1988, he claimed at the same time that he was permanently incapable of work. The appellant cannot therefore come within the category of persons who accept offers of employment actually made, the more so since, in his own words, he sought work, to the detriment of his health, only because he considered that his right of residence was in jeopardy (order for reference, p. 5).

Finally, the Commission takes the view that since the appellant has never enjoyed the right of residence under Community law, he cannot rely on Article 48(3)(d) of the Treaty on the right of workers to remain in the territory of a Member State after being employed in that State.

The Commission proposes, therefore, that the questions submitted for a preliminary ruling should be answered as follows:

'1. Article 48(1) and (3)(b) and (c) of the EEC Treaty, as well as Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community and Articles 4 and 7 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, must be interpreted as meaning that a Greek national in the Federal Republic of Germany who was employed there on a regular basis before 1 January 1981, but who had become unemployed by that date, has no right of residence under Community law.

2. Article 48(3)(a) and (b) of the EEC Treaty must be interpreted as meaning that workers who accept offers of employment, despite a permanent, medically certified incapacity for work, have no right of residence.

3. Workers who have never had a right of residence pursuant to Article 48(3)(a) to (c) of the EEC Treaty cannot claim the right to remain referred to in Article 48(3)(d).'

J. C. Moitinho de Almeida

Judge-Rapporteur