OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 22 October 1992 *

Mr President,
Members of the Court,

1. The present case concerns a reference by the Tribunal des Affaires de Sécurité Sociale (Social Security Court), Bobigny, for a preliminary ruling on the scope of equal treatment for migrant and national workers as laid down in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1] and 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. [2] The question submitted arose in the context of a dispute between Koua Poirrez (the applicant in the main proceedings) and the Caisse d'Allocations Familiales de la Région Parisienne substituted by the Caisse d'Allocations Familiales de la Seine-Saint-Denis (the defendant in the main proceedings). The main proceedings concern an application by Koua Poirrez for a French disablement allowance.

Background

2. Koua Poirrez was born on 17 December 1966 in the Ivory Coast. By judgment of 28 July 1987, declared enforceable in France by judgment of 11 December 1987, he was adopted by Bernard Poirrez, a French national resident and working in France. However, he did not thereby acquire French nationality, but on the contrary retained Ivory Coast nationality. [3]

Mr Koua Poirrez's application for adult disablement allowances with effect from 1 June 1990 was rejected by the Caisse. By decision of 6 September 1990 the Commission de Recours Amiable (Arbitration Committee) of the Caisse upheld the Caisse's decision. Against that decision Mr Koua Poirrez appealed by letter of 26 February 1991 to the Tribunal des Affaires de Sécurité Sociale, Bobigny (hereinafter 'the national court').

3. Pursuant to Article L. 821-1 of the Code Français de la Sécurité Sociale (French Social Security Code) allowances for disabled adults may be claimed only by 'any French national or national of a country which is a party to a reciprocal convention on allowances for disabled adults'. The *Guide de l'Allocataire* (Guide for Beneficiaries) edited by the Caisse d'Allocations Familiales de la Région Parisienne adds that the adult disablement allowance may be granted to nationals of Member States of the Commu-

* Original language: Dutch.

1 — OJ, English Special Edition 1968 (II), p. 475), as amended by Regulation (EEC) No 312/76 of 9 February 1976 (OJ 1976 L 39, p. 2).

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

3 — On 16 December 1987 Mr Koua Poirrez signed a declaration of French nationality. This was declared inadmissible by the Tribunal de Grande Instance (Regional Court), Bobigny. It appears from the file that an appeal against that decision is pending before the Paris Court of Appeal. Since the question whether Mr Koua Poirrez acquired French nationality by virtue of his adoption is a question of the interpretation of domestic French law and not Community law, it is not for the Court to give a ruling thereon.

nity as well as to their dependent spouses and relatives in the ascending or descending line. This addition was made by the French authorities in order to implement European social security law, and in particular Regulation No 1612/68. [4] In accordance with that law, migrant workers from one Member State of the Community and the members of their families must enjoy in the Member State where they work the same benefits as the nationals of that Member State. [5]

Mr Koua Poirrez is, it may be supposed, not a French national. Furthermore, he is not an EEC national or a dependant of a migrant EEC worker, and not a national of a country which has concluded with France a reciprocal convention on the recognition of disablement allowances. In those circumstances he is not entitled, according to the defendant, to claim such benefits.

4. The national court points out that the defendant's viewpoint leads to a situation of reverse discrimination (discrimination à rebours) whereby non-EEC nationals who are the members of families of French workers are said to be placed at a disadvantage in relation to non-EEC nationals who are members of families of migrant EEC workers. For if the father of Koua Poirrez were a migrant EEC worker, for example a national of another Member State working in France, his son from the Ivory Coast would be entitled under the French legislation to the benefit now denied him.

The Court is being asked whether such reverse discrimination is compatible with the prohibition on discrimination contained in Articles 7 and 48(2) of the EEC Treaty:

'Is it consistent with Articles 7 and 48(2) of the EEC Treaty to exclude from entitlement to an adult disablement allowance a member of the family of an EEC national (in this case an adopted descendant) residing in the country of which the head of household is a national, on the ground that Directives (read: Regulations) Nos 1612/68 and 1251/70 apply only to migrant workers and that the head of household does not have that status?'

Reverse discrimination

5. In order to ascertain whether the current French legislation may indeed give rise to reverse discrimination, the Court put the following supplementary questions to the French Government:

'1. May a member of the family of a migrant worker claim the adult disablement allowance if he is a national of a non-member country but the migrant worker to whose family he belongs is a national of a Member State?

4 — That addition is in response to the instructions contained in the French ministerial circulars No 1370 of 5 November 1987 and No 35 of 19 March 1992.

5 — See mainly Articles 7(2) of Regulation No 1612/68 and Article 3 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (as reproduced as an annex to Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6).

2. May a member of the family of a worker who is a French national claim the adult disablement allowance if he is a national of a non-member country and the worker to whose family he belongs is not a migrant worker?'

The French Government's reply to the first question is affirmative and it appears from its terms that once again the French provisions are inspired by a concern to ensure conformity with Community law. The reply to the second question is negative in the sense that the non-EEC nationals who are members of families of French nationals may claim entitlement to adult disablement allowances if France has entered into a reciprocal convention with the country of origin. It appears from the affirmative reply to the first question and the essentially negative reply to the second question that current French legislation may in fact give rise to reverse discrimination between non-EEC nationals who are family members of migrant EEC workers working in France, on the one hand, and non-EEC nationals who are members of families of French nationals working in France, on the other.

Conformity with Articles 7 and 48(2) of the Treaty

6. Article 7 of the EEC Treaty in general terms prohibits any discrimination on the ground of nationality:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and in cooperation with the European Parliament, adopt, by a qualified majority, rules designed to prohibit such discrimination.'

Article 48(2) of the EEC Treaty applies the prohibition contained in Article 7 to freedom of movement for workers in the following terms:

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

Article 48 is in its turn further elaborated by a number of Council regulations, including Regulations Nos 1612/68 and 1251/70 mentioned in the order for reference, and also Regulation No 1408/71. Disablement allowances come within the substantive scope of these regulations. [6]

6 — As regards Regulations No 1408/71 and No 1612/68 see Case 63/76 *Inzirillo* v *Caisse d'Allocations Familiales de l'Arrondissement de Lyon* [1976] ECR 2057, paragraphs 7 to 9 and 21. Members of families of migrant workers can only lay claim to derivative rights under Regulation No 1408/71, that is to say rights obtained in their capacity as the member of the family of a migrant worker. See Case 40/76 *Kermaschek* [1976] ECR 1669, paragraphs 5 to 7, most recently confirmed by Case C-243/91 *Taghavi* [1992] ECR I-4401 at paragraph 7. In regard to workers who wish to remain in the territory of a Member State after having been employed in that State Article 7 of Regulation No 1250/71 provides for equal treatment as recognized by Regulation No 1612/68.

7. The situation of (a member of the family of) a worker who has never availed himself of his right to freedom of movement within the Community is regarded by the Court as a purely domestic situation, that is a situation which occurs wholly within the internal sphere of a Member State. [7] The Court has repeatedly ruled that the Treaty provisions [8] on freedom of movement for workers, and the provisions adopted in implementation thereof cannot be applied to such a purely domestic situation. [9]

In support of his claim to the French disablement allowance Koua Poirrez places reliance on his status as the adopted son of Bernard Poirrez. From the facts found by the national court it appears, however, that the latter is a French national who has never worked or resided outside France, and thus has never availed himself of his right to freedom of movement within the Community. As the Commission, the Governments of Germany and France, and the United Kingdom rightly observe, this is therefore also a purely domestic situation to which the Treaty provisions concerning freedom of movement for workers is not applicable.

8. In actual fact the national court has not asked the Court of Justice whether the Treaty provisions on freedom of movement for workers are applicable or not to purely domestic situations. It has asked the Court whether the reverse discrimination which can flow from the non-applicability of such Treaty provisions to purely domestic situations is compatible with the prohibitions on discrimination contained in Articles 7 and 48(2) of the Treaty.

The answers to both questions are closely connected. Since the Treaty provisions on freedom of movement for workers are not applicable to purely domestic situations they cannot logically preclude a Member State from treating (members of families) of its own nationals in such purely domestic situations in a manner which places them at a disadvantage in relation to (members of families of) nationals of other Member States.

9. This also provides the answer to the request for a preliminary ruling as formulated by the national court. Articles 7 and 48(2) of the EEC Treaty do not preclude a member of the family of a non-migrant worker from being excluded from an allowance for disabled adults on the ground that Regulations Nos 1612/68 and 1251/70, just as Regulation No 1408/71, are applicable only to migrant workers. For those articles are not applicable to a member of a family in such a situation.

Conformity with fundamental principles of law

10. The fact that the EEC Treaty and its implementing regulations in the matter do not preclude reverse discrimination does not mean that Community law as such does not preclude it. In addition to the EEC Treaty

7 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 18; Case 180/83 *Moser* [1984] ECR 2539, paragraph 16; Case 298/84 *Iorio* [1986] ECR 247, paragraph 17; Case 147/87 *Zaoui* v *Cramif* [1987] ECR I-5511, paragraphs 15 to 16.

8 — The non-applicability to purely domestic situations applies also to Article 7 of the EEC Treaty which is drafted in general terms and of which Article 48 of the EEC Treaty is a specific application. See *Morson and Jhanjan*, paragraphs 14 to 15: 'those articles'.

9 — Recently affirmed in Case C-153/91 *Petit* v *Office National des Pensions* [1992] ECR I-4973, paragraph 8.

general principles of law and international conventions entered into by the Community form part of the Community legal order.

In that connection it is worthy of note that Koua Poirrez in his observations to the Court makes little reference to the EEC Treaty. He principally contends that reverse discrimination is incompatible with the Universal Declaration on Human Rights and with the ACP-EEC Conventions.

11. The question submitted for a preliminary ruling does not mention the Universal Declaration or the ACP-EEC Conventions. However, the Court has stated on a number of occasions that in replying to a question referred to it for a preliminary ruling it may take account of provisions of Community law which the national court has not mentioned in its question, in order to give the national court a useful answer. [10] The *ERT* judgment adds on that point that in preliminary reference proceedings the Court must supply the national court with all the elements necessary in order to test a national rule in a Community law context against the fundamental rights whose compliance is ensured by the Court:

'On the other hand, once legislation enters into the sphere of Community law, the Court in preliminary reference proceedings must supply the national court with all the elements of interpretation necessary in order to assess the conformity of that legislation with the fundamental rights whose observance is ensured by the Court, in particular, those laid down in the European Convention on Human Rights.' [11]

12. The Universal Declaration on Human Rights is an international declaration of principles. The Court considers such declarations to be codeterminative of the contents of the general principles of Community law. For since the judgment in *Nold* it has been established that:

'... fundamental rights form an integral part of the general principles of law, the observance of which it ensures.

... similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.' [12]

Article 22 of the Universal Declaration states:

'Everyone, as a member of society, has the right to social security and is entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State,

10 — Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207, paragraph 9. See also Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and see the following footnote.

11 — Case C-260/89 *ERT* [1991] ECR I-2951, paragraph 42.

12 — Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13. See also my Opinion in Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685 at point 30.

of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

13. Although the Universal Declaration and more specifically Article 22 thereof thus form part of the general principles of Community law whose observance is ensured by the Court, I am not of the view that the Court in this specific case is in a position to examine whether they are being complied with.

It seems to me that the French legislation in issue is not wholly situated within the framework of Community law within the meaning given thereto in the *ERT* judgment. Undoubtedly it is situated within that framework in so far as it — from a concern to implement European social security law — grants rights to family members of nationals from other Member States. But in view of the Court's abovementioned case-law according to which the Community rules on freedom of movement for workers are not applicable to purely domestic situations within a Member State, nor is the French legislation situated within the framework of Community law in withholding a specific social security benefit from family members of its own nationals and in that manner applying reverse discrimination to the detriment of such family members.

In those circumstances it is not for the Court to enquire whether that part of the contested national legislation, and the reverse discrimination flowing therefrom, are compatible with the fundamental rights which form part of Community law. It is therefore for the national court — having regard also to other social security rights which Mr Koua Poirrez may possibly claim — to verify whether that part of the French national legislation is compatible with Article 22 of the Universal Declaration and, if not, whether Mr Koua Poirrez may derive rights from that article.

Conformity with the ACP-EEC Conventions

14. Mr Koua Poirrez also argues that the Third and Fourth ACP-EEC Conventions preclude any reverse discrimination. The ACP-EEC Conventions, also known as the Lomé Conventions, were entered into on the one hand by the Community and its Member States, and by a number of African, Caribbean and Pacific states on the other. The Ivory Coast is a party to these agreements. The Third ACP-EEC Convention [13] was signed on 8 December 1984, entered into force on 1 May 1986 [14] and expired on 28 February 1990; [15] the Fourth Convention [16] was signed on 15 December 1989 and entered into force on 1 September 1990. [17] Since their entry into force these conventions, concluded under Article 238 of the EEC Treaty, form an integral part of the Community legal order, and the Court is consequently empowered to rule in preliminary reference proceedings on the interpretation thereof. [18]

13 — Third ACP-EEC Convention signed on 8 December 1984 in Lomé, OJ 1986 L 86, p. 3.

14 — See communication by the Council and the Commission concerning the date of entry into force of the Third ACP-EEC Convention signed at Lomé on 8 December 1984, OJ 1986 L 86, p. 209.

15 — Article 291 of the Third ACP-EEC Convention.

16 — Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ 1991 L 229, p. 3.

17 — See Council and Commission communication concerning the date of entry into force of the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ 1991 L 229, p. 287.

18 — Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, recently confirmed by Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 8 and in Opinion 1/91 of 14 December 1991, [1991] ECR I-6079, paragraphs 37 to 38.

15. Mr Koua Poirrez places specific reliance on two provisions of the conventions which contain a prohibition on discrimination, namely Article 5(2) of the Fourth Convention and Annex X to the Final Act of the Third Convention, since replaced by Annex VI to the Final Act of the Fourth Convention.

16. Article 5(2) of the Fourth Convention provides *inter alia*:

'The parties reiterate their deep attachment to ... human rights ...; non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights. (...)

(They) reaffirm their existing obligations and commitment in international law to strive to eliminate all forms of discrimination based on ... nationality .... The Member States (and/or, where appropriate, the Community itself) and the ACP states will continue to ensure, through the legal or administrative measures which they have or will have adopted, that migrant workers, students and other foreign nationals legally within their territory are not subjected to discrimination on the basis of racial, religious, cultural or social differences, notably in respect of housing, education, health care, other social services and employment.'

It is clear from its wording that Article 5(2) of the Fourth ACP-EEC Convention, just like the Universal Declaration on Human Rights to which express reference is made in the preamble to the convention, [19] constitutes a non-binding declaration of principles in regard to the observance of human rights. Only in the last mentioned sentence is that general formulation to a limited extent made more specific. However, in that last sentence there is no further mention made of discrimination on the ground of nationality.

17. Annex X to the Final Act of the Third Convention, replaced by Annex VI of the Final Act of the Fourth Convention is entitled 'Joint declaration on workers who are nationals of one of the Contracting Parties and are legally resident in a territory of a Member State or an ACP state' and provides *inter alia*:

'2. Workers who are nationals of an ACP State legally employed in the territory of a Member State and members of their families living with them shall, as regards social security benefits linked to employment in that Member State, enjoy treatment free from any discrimination based on nationality in relation to nationals of that Member State.'

Quite irrespective of whether that provision is directly effective [20] it appears from an initial reading thereof that it is wholly

19 — Fifth recital in the preamble, OJ 1991 L 229, p. 10.

20 — The Court has held the following criterion to be applicable in the matter: 'A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure' (Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719, paragraph 14. For an analysis of the application by the Court of that criterion, see paragraphs 7 to 13 of my Opinion in Case C-18/90 *Kziber* [1991] ECR I-199.

inapplicable to Koua Poirrez. Whilst he does possess the nationality of an ACP state, he is not a worker employed in the territory of a Member State. Since his adoptive father is not a national of an ACP state, Koua Poirrez cannot either rely on his status as the member of the family of a worker who is a national of an ACP state legally employed in the territory of a Member State.

Conclusion

18. In conclusion I propose that the Court should reply as follows to the question formulated by the national court:

Articles 7 and 48(2) of the EEC Treaty and its implementing regulations do not preclude a member of the family of an EEC national who has always worked and resided in the country of which he is a national from being excluded from adult disablement allowances. The same applies to Article 5(2) of the Fourth ACP-EEC Convention and Annex VI thereto.

In the present case it is not for the Court to enquire whether the general principles of Community law, which include Article 22 of the Universal Declaration on Human Rights, are being observed.