OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 10 July 2008 [1]

I — Introduction

1. By order of 16 March 2007, received at the Court on 22 March 2007, the Higher Social Security Court (Centrale Raad van Beroep), (Netherlands) has referred several questions for a preliminary ruling under Article 234 EC concerning the interpretation of Community legislation on the right of workers to move and reside freely and the Treaty provisions on citizenship of the Union in conjunction with Article 12 EC.

2. The reference was made in the course of proceedings brought by Ms Förster, a German national who had moved to the Netherlands to pursue a course of higher education and who initially also performed paid work there during her studies, against the Hoofddirectie van de Informatie Beheer Groep ('the IBG'), the administrative body charged with the enforcement of Netherlands legislation relating to the financing of studies. Ms Förster challenges the IBG's refusal to grant her financial assistance to cover study and maintenance costs ('study finance') in relation to a period during which she was no longer economically active, on the grounds that she neither retained the status of a Community worker nor fulfilled the requirement, as applied by the IBG, of lawful residence in the Netherlands for a continuous period of at least five years.

3. Thus the present case essentially raises two issues. The first is the question whether a (migrant) student in Ms Förster's situation can invoke the right of a Community worker to equal treatment in order to claim study finance, in spite of the fact that at the time in question she had ceased her previous occupational activities and was thus economically inactive.

4. Secondly, the referring court wishes to ascertain, in substance, whether a student like Ms Förster, as a citizen of the Union, can

1 — Original language: English.

in any event rely on the principle of equal treatment enshrined in the first paragraph of Article 12 EC in order to obtain study finance and, in particular, whether and under what conditions the eligibility for such a grant may be made dependent on the requirement that the student concerned be lawfully resident in the host Member State for a period of five years before applying for financial support.

5. The Court is thus invited to refine its *Bidar* case-law and, in particular, its finding that it is legitimate for a Member State to grant financial assistance only to students who have demonstrated a 'certain degree of integration into the society of that State'. [2]

II — Legal Framework

A — *Community law*

6. Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [3] provides:

'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 become unemployed, reinstatement or re-employment.

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

7. Article 1 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [4] states:

'In order to lay down conditions to facilitate the exercise of the right of residence

2 — Case C-209/03 [2005] ECR I-2119, paragraph 57.

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

4 — OJ 1993 L 317, p. 59.

and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.'

8. Article 3 of Directive 93/96 provides:

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

9. Article 2 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 [5] reads as follows:

'1. The following shall have the right to remain permanently in the territory of a Member State: (a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of that Member State for entitlement to an old-age pension and who has been employed in that State for at least the last twelve months and has resided there continuously for more than three years; …'

10. According to Article 7 of that regulation, '[t]he right to equality of treatment, established by Council Regulation (EEC) No 1612/68, shall apply also to persons coming under the provisions of this Regulation'.

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

11. Regulation No 1612/68 was amended, and Directive 93/96 repealed, by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States,[6] which the Member States, in accordance with Article 40, had to transpose by 30 April 2006.

12. According to Article 16(1) of Directive 2004/38:

'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. …'

13. Article 24 of Directive 2004/38, entitled 'Equal treatment', provides as follows:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

B — *Relevant national law*

14. The rules governing study finance grants are laid down in the Law on the financing of studies (Wet studiefinanciering, 'the WSF

6 — OJ 2004 L 158, p. 77, as corrected in OJ 2004 L 229, p. 35.

2000'). One of the requirements relates to the student's nationality. That aspect is covered by Article 2.2 of the WSF 2000, which in the period from 1 September 2000 to 21 November 2003 read as follows:

'Study finance may be granted to:

(a) students who possess Netherlands nationality,

(b) students who do not possess Netherlands nationality but are resident in the Netherlands and are treated as Netherlands nationals in respect of the financing of studies by virtue of a treaty or a decision of an organisation of public international law, or

(c) students who do not have Netherlands nationality but are resident in the Netherlands and belong to a group of persons who, by administrative order, are treated as Netherlands nationals in respect of the financing of studies.'

15. Paragraph 2 of Article 2.2., added with effect from 21 November 2003, reads as follows:

'In derogation from Article 2.2(1)(b), the requirement that a student be resident in the Netherlands shall not apply to a student on whom that requirement may not be imposed because of a Treaty or a decision of an organisation of public international law. By or pursuant to an administrative order, rules may be laid down in connection with the satisfactory implementation of this paragraph.'

16. On 4 March 2005 the IBG, the administrative body responsible for enforcing the WSF 2000, adopted the Policy rule on the monitoring of migrant workers (Beleidsregel controlebeleid migrerend werknemerschap).[7] It entered into force on 23 March 2005 and concerns the monitoring of periods of study finance with effect from the calendar year 2003. It requires the IBG to proceed from the assumption that any student who has worked for an average of 32 hours or more per month in the monitored period automatically enjoys the status

7 — AG/OCW/MT-05.11.

of Community worker. If, however, a student does not satisfy the 32-hour criterion, the IBG undertakes a more detailed investigation into the specific circumstances of the case.

17. Following the Court's ruling in *Bidar*, [8] the IBG on 9 May 2005 further adopted the Policy rule on the adaptation of applications for study finance for students from the EU, EEA and Switzerland (Beleidsregel aanpassing aanvraag studiefinanciering voor studenten uit EU, EER en Zwitserland, 'the Beleidsregel of 9 May 2005'), [9] which, in accordance with its Article 5, entered into force at the time of its publication with retroactive effect from 15 March 2005.

18. Article 2(1) and (2) of the Beleidsregel of 9 May 2005 reads as follows:

'1. A student who is a national of a Member State of the European Union or of another State which is party to the Agreement on the European Economic Area of 2 May 1992 or of Switzerland may, on application, be eligible for study finance pursuant to the WSF 2000… if, prior to the application, he has been lawfully resident in the Netherlands for an uninterrupted period of at least five years. The other provisions of the WSF 2000… shall apply without qualification.

2. The residence requirement laid down in the first paragraph is assumed to have been satisfied if the student has been registered on the municipal personal records database (GBA) during the period referred to.'

19. Since 11 October 2006 the matter has been governed by legislation and the Beleidsregel of 9 May 2005 has been withdrawn.

III — Factual background, procedure and questions referred

20. According to the order for reference and information provided at the hearing, the facts of the case are as follows.

8 — Cited in footnote 2.
9 — AGOCenW/MT/05.

21. Jacqueline Förster, a German national, was born on 18 June 1979 and grew up in Grevenbroich, Germany, which is 49 kilometres from the Dutch–German border.

22. On 5 March 2000 Ms Förster settled in the Netherlands, where she immediately enrolled for training as a primary teacher and, on 1 September 2000, on a course in educational theory leading to a bachelor's degree at the College of Amsterdam (Hogeschool van Amsterdam).

23. From 16 March 2000 she also carried out, via an employment agency, various jobs in call centres.

24. From October 2002 until June 2003 she underwent full-time paid practical training at a Dutch school providing secondary special education for pupils with behavioural problems and/or psychiatric disturbances.

25. After that practical training she undertook no further paid employment in 2003. Since July 2004 she has again been employed in the Netherlands.

26. According to the order for reference, Ms Förster has always been lawfully resident in the Netherlands.

27. From September 2000 the IBG granted Ms Förster study finance. That grant was periodically extended, always on the assumption that in the following period Ms Förster would be regarded as a worker within the meaning of Article 39 EC who, pursuant to Article 7(2) of Regulation No 1612/68, had to be treated as a student of Netherlands nationality in respect of study finance.

28. Her entitlement to study finance ended on 1 September 2004, once she had passed the final examination in the course in educational theory leading to a bachelor's degree.

29. Initially, Ms Förster was also granted study finance during the second half of 2003. However, following a check, the IBG eventually ruled, by its decision of 3 March 2005, that Ms Förster had not been gainfully employed since July 2003 and could no

longer be regarded as a Community worker. She was therefore ordered to repay the study finance relating to the second half of 2003, plus a sum for a public transport ticket covering that period which had been paid for by the IBG.

30. Ms Förster appealed against that decision to the Rechtbank Alkmaar (Alkmaar District Court), arguing that she had performed so many hours of paid employment in the first half of 2003 that she should be regarded as having also been a Community worker in respect of the second half of 2003. In the alternative, she submitted that, as a citizen of the Union fully integrated into Dutch society, she was eligible for study finance in that period pursuant to the *Bidar* judgment. [10]

31. The IBG denied that Ms Förster could be regarded as a Community worker in the second half of 2003 and considered that its decision was consistent with Community law as interpreted in *Bidar*. It took the view that students in her situation who do not derive any rights from a specific provision prohibiting discrimination are eligible for study finance only on condition that they have been lawfully resident in the Netherlands for at least five years, which was not yet the case with Ms Förster in 2003.

32. In its judgment of 12 September 2005, the Rechtbank Alkmaar dismissed the appeal. It considered, on the one hand, that in the second half of 2003 Ms Förster did not undertake genuine and effective employment and was therefore not to be regarded as a Community worker and, on the other hand, that she could not rely on the *Bidar* ruling since she had not been in any way integrated into Dutch society before her studies.

33. The main proceedings before the Centrale Raad van Beroep concern the appeal brought by Ms Förster against that judgment. She argues, principally, that, at the material time, she was already so integrated into Dutch society that she was entitled under Community law to study finance for the second half of 2003 and, alternatively, that she should be regarded as having been a Community worker throughout 2003. The IBG, for its part, maintains its position.

10 — Cited in footnote 2.

34. Referring, in particular, to the Court's judgments in *Ninni-Orasche* [11] and *Fahmi and Amado*, [12] the referring court agrees, for the time being, with the IBG's view that Ms Förster cannot be deemed to have retained the status of Community worker in the second half of 2003, since the beginning of her studies did not follow on from activities previously undertaken in the Netherlands and there was no question of involuntary unemployment which might have caused her to consider herself compelled to undergo training.

35. It notes, however, that Ms Förster may derive an entitlement to study finance from the legislation on former workers or the rules concerning citizenship of the Union in conjunction with the prohibition of discrimination on grounds of nationality laid down in Article 12 EC.

36. That raises several questions. First, the referring court is uncertain about the scope of Regulation No 1251/70, particularly as to whether Article 7 thereof also applies to students who came to the Netherlands principally to study and initially worked as employed persons on a limited scale while continuing to study, but who have meanwhile ceased to work.

37. Second, the referring court points out that a number of as yet unanswered questions of interpretation in respect of citizenship of the Union and Article 12 EC have arisen during the main proceedings, including whether, in the light of *Bidar*, [13] Directive 93/96 precludes a student in Ms Förster's situation, who came to the Netherlands primarily to study, from relying on Article 12 EC in order to obtain study finance.

38. Furthermore, the referring court asks what conclusions should be drawn from the *Bidar* [14] and *Trojani* [15] judgments in relation to the five years of residence required under the Beleidsregel of 9 May 2005 as applied by the IBG.

11 — Case C-413/01 [2003] ECR I-13187.
12 — Case C-33/99 [2001] ECR I-2415.
13 — Cited in footnote 2.
14 — Cited in footnote 2.
15 — Case C-456/02 [2004] ECR I-7573.

39. In particular, it would like to know, first, whether, in matters of study finance, Union citizens can rely on the first paragraph of Article 12 EC at all before they have been lawfully resident in the host Member State for a certain period or are in possession of a residence permit.

40. Second, it wonders whether a residence requirement provided for under national law is consistent with Article 12 EC if it is imposed solely on nationals of other Member States.

41. Third, if such a requirement can be justified in principle, the question arises whether the five-year residence requirement, as applied by the IBG, complies with that article. In that regard, the referring court notes that the fact that that period is derived from Directive 2004/38 suggests that it is lawful. If so, it wonders to what extent it may be imposed without qualification in individual cases if other factors indicate a substantial degree of integration into Netherlands society, such as the particular choice of study or having a Dutch partner.

42. Finally, the order for reference notes that the decision, based on the Beleidsregel of 9 May 2005, to deny Ms Förster study finance for the second half of 2003 on the ground that she had not been lawfully resident in the Netherlands for a continuous period of at least five years, is founded on an interpretation of the *Bidar* judgment and thus on a criterion which could not have been known at the relevant time, which may be at odds with the ruling in *Collins* [16] that a residence requirement must rest on clear criteria known in advance. The referring court emphasises, however, that there is no question of arbitrariness and that, as it is a period in the past which is concerned, the legal certainty of the interested party does not seem to be at issue. It points out, moreover, that the IBG published the Beleidsregel of 9 May 2005 a short time after the *Bidar* judgment.

43. It is against that background that the Centrale Raad van Beroep has stayed proceedings and referred the following questions to the Court:

‘(1) Does Article 7 of Regulation (EEC) No 1251/70 also apply to students who came to the Netherlands principally to study and initially worked as employed persons on a limited scale while continuing to study, but have meanwhile ceased to work?

16 — Case C-138/02 [2004] ECR I-2703, paragraph 72.

(2) Does Directive 93/96 preclude students as referred to in Question 1 from successfully relying on Article 12 EC to claim full study finance?

(3) (a) Does the rule that citizens of the Union who are not economically active can rely on Article 12 EC only if they have resided lawfully in the host Member State for a certain period or are in possession of a residence permit also apply to assistance to cover the maintenance costs of students?

(b) If so, is it permissible to impose during that period a residence duration requirement only on nationals of Member States other than the host Member State?

(c) If so, is the application of a five-year residence duration requirement consistent with Article 12 EC?

(d) If not, what residence duration may be required?

(4) Should a shorter period of lawful residence be required in individual cases if factors other than the duration of residence indicate a substantial degree of integration into the society of the host Member State?

(5) If, as is evident from a judgment of the Court of Justice, persons are able to derive, with retroactive effect, more rights from Article 12 EC than was previously assumed, may justified requirements connected therewith be imposed in respect of periods in the past if those requirements were published shortly after the publication of the judgment?'

IV — Legal analysis

A — *Introductory remarks*

44. As is evident from the description of the facts provided in the order for reference, the essential question in the present dispute is whether, in the circumstances of the case, Ms Förster is entitled under Community law

to equal treatment in respect of the grant of study finance for university education.

45. Ms Förster's claim relates to a period during which she was not pursuing any occupational activity and was thus not economically active. As has been observed before, [17] that circumstance is decisive in Community law, which — in particular as regards the enjoyment of social benefits — broadly draws a distinction between economically active persons (workers and self-employed persons) on the one hand, and economically inactive persons on the other. As a rule, the first category of persons has more extensive entitlements under Community law than the second.

46. Thus, for example, the Court's case-law distinguishes between, on the one hand, Member States' nationals such as job-seekers who have not yet entered into an employment relationship and who benefit from the principle of equality of treatment only as regards access to employment, and, on the other, those who have already entered the employment market of the host Member State and may, on the basis of Article 7(2) of Regulation No 1612/68, claim the same social and tax advantages as national workers. [18]

47. Accordingly, as regards the rights of migrant students to obtain social benefits, the situation is that, at least under Directive 93/96 as well as, prior to the completion of five years of continuous residence, under Directive 2004/38, a 'pure', economically inactive migrant student has in principle no entitlement to the payment of maintenance grants by the host Member State. However, a student who also qualifies as a worker within the meaning of Article 39 EC can avail himself of Article 7(2) of Regulation No 1612/68, which confers on workers of any Member State the right to receive in another Member State the same treatment as its own nationals as regards entitlement to social advantages. [19]

48. It was actually on that basis, in other words on account of her status as a Community worker, that Ms Förster was initially granted study finance in the Netherlands.

17 — See, to that effect, the Opinions of Advocate General Geelhoed in *Trojani*, cited in footnote 15, point 10, and *Bidar*, cited in footnote 2, point 12.

18 — See, to that effect, *Collins*, cited in footnote 16, paragraphs 30 and 31, and Case 316/85 *Lebon* [1987] ECR 2811, paragraph 26.

19 — See, as to that, below at points 65 and 66.

That finance was, however, subsequently revoked in relation to the second half of 2003 on the ground that during that period she was no longer in an employment relationship, a fact which is not disputed in the present proceedings.

49. In that respect, the referring court has rightly recognised that, under specific Community legislation such as Regulation No 1251/70 and in accordance with the *Lair* [20] and *Ninni-Orasche* [21] judgments, migrant workers are guaranteed certain rights in relation to social advantages linked to their status as a worker even when they are no longer in an employment relationship.

50. That court agrees, however, 'for the time being' with the view that Ms Förster cannot be deemed to have retained the status of Community worker within the meaning of Article 39 EC and Article 7(2) of Regulation No 1612/68. Question 1 consequently refers only to Regulation No 1251/70. The Commission's suggestion to the contrary nevertheless merits consideration in my view. In the first part of my assessment I shall therefore examine the question whether or under what circumstances a student in a situation such as that in question may avail himself of the right to be treated equally in respect of student finance, either by virtue of Regulation No 1251/70 or as a worker on the basis of Regulation No 1612/68.

51. It should be recalled in this context that the fact that the national court has referred a question which mentions specific provisions of Community law does not prevent the Court, irrespective of what appears in that question, from providing the national court with all those elements for the interpretation of Community law which may enable it to reach a decision in the case before it. [22]

52. In any event, for students unable to claim a specific right to equal treatment such as is accorded to a Community worker, the introduction of Union citizenship has opened

20 — Case 39/86 [1988] ECR 3161.

21 — Cited in footnote 11.

22 — See, for example, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and *Trojani*, cited in footnote 15, paragraph 38.

another possible avenue to, inter alia, the right to equal treatment in respect of maintenance grants.

53. As the Court has declared, Union citizenship is destined to be the fundamental status of nationals of the Member States and enables those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality. [23] As regards, more particularly, social assistance benefits, the Court has breathed life into that status in cases such as *Martínez Sala*, *Trojani* and *Bidar* by holding that a citizen of the Union who is not economically active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit. [24]

54. It is thus fair to say that the concept of Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm. That is in fact the objective invoked by the statement of the Court that Union citizenship is destined to become the 'fundamental status of nationals of the Member States'. Community law rights — in particular the right not to be subjected to unjustified discrimination — are no longer bestowed upon citizens solely when they make use of the economic freedoms and assume a corresponding status (worker, provider of services etc.), but directly by virtue of their status as a citizen of the Union. [25]

55. Thus, whereas rights to social benefits were originally linked to the pursuit of economic activities (in particular in the form of paid employment, which underpins the concept of a worker), they may now also be available to economically inactive citizens on the basis of the principle of non-discrimination. Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market [26] and who thus made some contribution to its economy, such financial solidarity is now in

23 — See, for example, Cases C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; and C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 22.

24 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 63; *Trojani*, cited in footnote 15, paragraph 43; and *Bidar*, cited in footnote 2, paragraph 37.

25 — See also, to similar effect, the Opinions of Advocate General Cosmas in Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, points 84 to 86, and of Advocate General Poiares Maduro in Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, points 68 and 69.

26 — See Case 235/87 *Matteucci* [1988] ECR 5589, paragraph 16.

principle to be extended to all Union citizens lawfully resident on its territory.

56. Yet it should be noted that certain limits remain. As the Court pointed out in *Grzelczyk* and *Bidar*, Member States are required to show 'a certain degree of financial solidarity' in the organisation and application of their social assistance systems, as opposed, one might add, to unlimited solidarity. [27] As regards assistance covering the maintenance costs of students, the Court accepted in *Bidar* that Member States are permitted to ensure that the grant of social assistance does not become an unreasonable burden upon them and that the grant of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. [28]

57. Against that background and in the light of the *Bidar* ruling, the referring court's Questions 2, 3 and 4, which I shall address together in the second part of my assessment, seek to ascertain whether, in the circumstances of her case, Ms Förster can avail herself of her right as a Union citizen to equal treatment under Article 12 EC in order to obtain study finance for the second half of 2003. To put it another way, is it compatible with that article to make the grant of study finance to migrant students conditional without exception upon the fulfilment of a residence requirement of five years?

58. As the Commission has rightly observed, Article 12 EC, which enshrines the general principle of non-discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination. It is therefore only necessary to express a view on that article if the case in the main proceedings does not fall under Article 39 EC and Article 7 of Regulation No 1612/68, which gives specific expression to the right of Community workers to equal treatment. [29]

59. Finally, in the third part of my analysis I will address Question 5, which concerns the alleged retroactive imposition by the Netherlands authorities of additional requirements in respect of the right of migrant students to study finance.

27 — See *Grzelczyk*, cited in footnote 23, paragraph 44, and *Bidar*, cited in footnote 2, paragraph 56.

28 — *Bidar*, cited in footnote 2, paragraphs 56 and 57; see also, to that effect, Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 43.

29 — See, to that effect, Case C-40/05 *Kai Lyyski* [2007] ECR I-99, paragraphs 33 and 34, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraphs 57 to 59.

B — *Applicability of the principle of non-discrimination under the provisions relating to free movement of workers*

1. Main arguments of the parties

60. In the present proceedings, written observations have been submitted by the Netherlands, German, Austrian, Belgian, Swedish, Finnish and United Kingdom Governments as well as by the Commission and Ms Förster. Apart from the Austrian and Finnish Governments, those parties were represented at the hearing on 23 April 2008, at which, additionally, the Danish Government was represented.

61. The Commission takes the view that, contrary to what the referring court suggests, Ms Förster can be regarded as a Community worker within the meaning of Article 39 EC and Regulation No 1612/68 as interpreted by the Court in particular in *Lair*, [30] *Brown* [31] and *Ninni-Orasche*, [32] since the circumstances of the case imply a substantial continuity between her practical training and her studies. With regard to the second half of 2003, she can therefore rely on Article 7(2) of Regulation No 1612/68 in order to obtain the study finance in question, which constitutes a 'social advantage' within the meaning of that regulation.

62. The Austrian, Danish, German, Netherlands and Swedish Governments essentially contradict that view. At the hearing, the Netherlands and German Governments stated that in their view previous practical training cannot lead to the status of a Community worker in respect of the period after its termination. In that regard, the present case must be distinguished from *Lair* [33] and *Ninni-Orasche*, [34] according to which there must be continuity between the previous activity as an employed person and the subsequent course of studies. Nor did Ms Förster become unemployed involuntarily within the meaning of that case-law, since it lies in the nature of such practical training that it is only temporary.

63. As regards Regulation No 1251/70, Ms Förster submits that she can rely on Article 7 of that regulation in order to claim the study finance for the second half of 2003.

64. By contrast, all the other parties which have submitted observations on that

30 — Cited in footnote 20.
31 — Case 197/86 [1988] ECR 3205.
32 — Cited in footnote 11.
33 — Cited in footnote 20.
34 — Cited in footnote 11.

point essentially agree that, in accordance with Article 1 of Regulation No 1251/70, that regulation is either inapplicable *rationae personae* or irrelevant to the present case.

2. Appraisal

65. Under Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State and avails himself of the freedom of movement of workers is to enjoy the same social advantages in the host Member State as national workers.

66. The Court has already held that a maintenance and training grant for the pursuit of university studies leading to a professional qualification constitutes a social advantage within the meaning of that article. [35] It is common ground that the study finance in question constitutes such an advantage. [36]

67. Persons qualifying as workers within the meaning of Article 39 EC and Article 7(2) of Regulation No 1612/68 can therefore avail themselves of their right to be treated equally with regard to the grant of the study finance in question.

68. It is settled case-law that the concept of 'worker' referred to in those provisions has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. According to that case-law, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration. [37]

69. It is important to note that in the present case both the national authorities and the referring court clearly proceed from the assumption that, in the period prior to the second half of 2003, Ms Förster was in a

35 — See, to that effect, *Matteucci*, cited in footnote 26, paragraph 23; *Lair*, cited in footnote 20, paragraphs 23, 24 and 28; *Brown*, cited in footnote 31, paragraph 25; and Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 23.

36 — See in particular, to that effect, *Fahmi and Amado*, cited in footnote 12, paragraph 45.

37 — See, in particular, Cases 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; *Martínez Sala*, cited in footnote 24, paragraph 32; and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13.

genuine employment relationship allowing her to claim the status of a migrant worker, performing various jobs from March 2000 and, from October 2002 until June 2003, paid (full-time) practical training. Accordingly, Ms Förster was also granted study finance in accordance with Regulation No 1612/68 and on the basis of the Netherlands rules requiring an average of 32 hours of paid employment per month to be undertaken. There is thus no reason to doubt that up until June 2003 Ms Förster satisfied the necessary conditions to be classified as a worker, as required by the provisions relating to the free movement of workers, namely that her occupational activities were effective and genuine and not purely marginal and ancillary.

70. It may be remembered in this context that, according to the Court's case-law, the fact that the occupational activities consist of preparatory training or part-time activity does not as such preclude the person undertaking them from having the status of a worker. [38]

71. On the other hand, it is also common ground that during the second half of 2003 Ms Förster was no longer employed.

72. Although, as a rule, the person concerned loses his status of worker once the employment relationship has ended, that status may, as I have mentioned above, nevertheless produce certain effects thereafter. [39]

73. Thus, in the first place, Article 7 of Regulation No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed, to which Question 1 expressly refers, extends the right to equality of treatment laid down in Regulation No 1612/68 to persons 'coming under the provisions of this Regulation'.

74. However, I share the view taken by the vast majority of the parties presenting observations in the current proceedings that Regulation No 1251/70 does not apply *ratione personae* to a person in Ms Förster's situation. Article 1 of that regulation cannot reasonably be read in isolation from Article 2, which specifies which workers have the right to remain permanently in the territory of a Member State. Those are workers whose

38 — See *Lawrie-Blum*, cited in footnote 37, paragraphs 19 to 21, and Case 53/81 *Levin* [1982] ECR 1035, paragraph 17.

39 — See point 49 above; see also *Martínez Sala*, cited in footnote 24, paragraph 33.

working relationship has ended because of their age, their incapacity to work or their employment in another Member State. Since, obviously, a person in the situation described in this case falls within none of those categories, Article 7 of Regulation No 1251/70 is not applicable.

75. Question 1 must therefore be answered in the negative.

76. In the second place, however, it must be examined whether a student in circumstances such as those at issue in the main proceedings may benefit from the *Lair*, *Brown*, *Raulin* and *Ninni-Orasche* case-law. In those judgments the Court held that a national of another Member State who has undertaken university studies in the host State leading to a professional qualification, after having engaged in occupational activity in that State, must be regarded as having retained his status as a worker provided that there is a link or, as the Court also referred to it, 'continuity' between the previous occupational activity and the studies undertaken. [40]

77. The Court has specified that such continuity may not, however, be required where a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field of activity. In that regard, the Court took account of the fact that continuous careers are nowadays less common than was formerly the case and occupational activities are therefore occasionally interrupted by periods of training or retraining. [41]

78. Finally, the Court has refused to extend the enjoyment of the rights flowing from the status of a worker to circumstances where there is a question of abuse. That would for example be the case if it were established that a national of a Member State entered another Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State [42] or where it is established that a person acquired the status as a worker exclusively as a result of his being accepted for admission to university to undertake the studies in question. In such circumstances, the employment relationship, which is the only basis for the rights deriving from Regulation No 1612/68, is merely ancillary to the studies to be financed by the grant. [43]

40 — See *Lair*, cited in footnote 20, paragraph 39; *Brown*, cited in footnote 31, paragraph 26; Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 21; and *Ninni-Orasche*, cited in footnote 11, paragraph 35. This does not, however, apply to workers who, after ceasing to exercise their occupational activity in the host Member State, have decided to return to their Member State of origin (which is not the case here). See to that effect *Fahmi and Amado*, cited in footnote 12, paragraphs 46 and 47.

41 — See in particular *Lair*, cited in footnote 20, paragraphs 37 and 38, and *Ninni-Orasche*, cited in footnote 11, paragraph 35.

42 — See, to that effect, *Lair*, cited in footnote 20, paragraph 43.

43 — See, to that effect, *Brown*, cited in footnote 31, paragraphs 27 and 28.

79. It is ultimately for the national court to conduct the factual examination necessary to determine whether, in accordance with the various criteria arising from the case-law referred to above, the applicant in the main proceedings may be regarded as having retained the status of a worker after the termination of her occupational activity. [44] However, the information provided to the Court in the present case allows the following remarks to be made.

80. First, contrary to what the German Government in particular has suggested, the fact that a person came to the host Member State 'principally to study', as the referring court mentioned in Question 1, and from the outset was pursuing studies while working as an employed person, does not as such preclude that person, in my view, from relying on the abovementioned case-law.

81. What is decisive in that respect is whether that person has actually pursued substantial work, i.e. occupational activities which are effective and genuine and not purely marginal and ancillary within the meaning of the concept of 'worker'. [45] If it is established that a person objectively meets those conditions, the fact that he is, at the same time, also to be regarded as a student cannot deprive him of the status of worker and the ensuing rights. Nor, by the same token, should the possibility that the principal motive is the pursuit of studies in itself affect his classification as a worker.

82. That view is borne out by the recent judgment in *Payir, Akyuz and Ozturk* concerning Article 6(1) of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, in which the Court addressed the question whether in cases where Turkish nationals — whose activities otherwise satisfy the three conditions laid down in that Article — have au pair or student status, they are thereby precluded from the status of workers and from being duly registered as belonging to the labour force of a Member State, within the meaning of that provision. The Court answered in the negative, holding that the persons concerned can fully rely on the rights which that provision confers upon them, provided that the objective conditions laid down in that provision are met, without it being necessary to take into account the reasons for which the person concerned was first granted the right

44 — See, to that effect, *Ninni-Orasche*, cited in footnote 11, paragraph 41.

45 — See point 68 above.

to enter or any temporal limitations attached to his right to work. [46]

83. Second, as regards the condition that either there is continuity between the activity as an employed person and the subsequent studies or the person concerned has involuntarily become unemployed, it appears from Ms Förster's submissions that she ceased to work in the second half of 2003 on the grounds that she had to focus on finishing her studies. Under such circumstances, her situation cannot in my view be described as constituting involuntary unemployment. I nevertheless agree with the Commission that the criterion of continuity may be fulfilled in the present case, both from a temporal and a material point of view.

84. In that respect, it should be noted, first of all, that the paid practical training preceding the second half of 2003 consisted in secondary special education for pupils with behavioural problems and/or psychiatric disturbances, an activity which is certainly related, in terms of content, to her studies in educational theory. [47]

85. In applying the criterion of continuity, it should also be borne in mind that, as the Court has already alluded in *Lair*, [48] continuous careers are less common in today's working environment than was formerly the case. In particular, younger people at the beginning of their professional lives are, for a number of reasons, often expected or even forced by the conditions in the job markets to show flexibility with their education and training as well as their first steps in employment. The requirement of continuity should therefore not be interpreted too strictly, in order to avoid excluding a substantial part of working students from the benefits of their rights as Community workers despite the fact that they have already been economically active and have entered the employment market of the host Member State.

86. Third, there appears to be no evidence of abuse in the present case. In particular, in

46 — Case C-294/06 [2008] ECR I-203, paragraphs 34, 43 and 46.

47 — In my view, it is not necessary to establish that continuity also existed in relation to the work pursued prior to the practical training, since that training on its own constitutes in any event effective and genuine, as opposed to purely marginal and ancillary, activities, thus allowing Ms Förster to be classified as a worker.

48 — See point 77 above.

view of the fact that Ms Förster had been in substantial paid employment relationships for more than three years before ceasing to work, it cannot be argued that she entered another Member State for the sole purpose of enjoying the benefit of the student assistance system in that State. [49]

87. Additionally, it emerged at the hearing that Ms Förster also came to the Netherlands and commenced work and studies there because of her personal relationship with a Netherlands resident. That fact may serve to indicate that she did not enter that State for the sole purpose of benefiting from its student assistance system. [50]

88. Furthermore, there appears to be no reason to assume that she was employed purely because she was accepted for admission to university, which would have resulted in her employment having to be regarded as merely ancillary to her studies.

89. It follows from all the above considerations that Article 7 of Regulation No 1251/70 does not apply to a student in a situation such as that at issue in the present case in so far as that student falls within none of the categories of workers referred to in Article 2 of that regulation.

90. However, a student in a situation such as that in the present proceedings can in principle avail himself in the host Member State of his right as a Community worker under Article 7(2) of Regulation No 1612/68 to the same social advantages as a national worker in order to obtain study finance such as that in issue. It is, however, for the national court to establish whether the various conditions set out above as regards the retention of the status of a worker after termination of employment are actually fulfilled in the present case.

C — *Applicability of the principle of non-discrimination under Article 12 EC and the residence requirement in the light of the Bidar judgment*

91. As is apparent from the answer suggested above, a student in a situation such as that at issue may in my view derive a right to be

49 — See point 78 above.

50 — Cf. *Ninni-Orasche*, cited in footnote 11, paragraph 47.

treated equally in respect of study finance from his status as a Community worker. I will nevertheless address, wholly in the alternative, Questions 2 to 4, which seek to ascertain whether a student in the circumstances underlying the present case can successfully rely on Article 12 EC to claim the right to study finance.

1. Main arguments of the parties

92. Ms Förster submits that Directive 93/96 cannot preclude students in her situation from relying on Article 12 EC to claim study finance, as a Treaty provision ranks higher than a directive. As regards *Bidar*, [51] she maintains that, in addition to the requirement of lawful residence at the time when the study assistance is applied for, the decisive criterion is whether the person concerned is substantially integrated into the society of the host Member State, which cannot simply be equated with a certain length of lawful residence. She notes in that respect that a duration of residence of five years is substantially longer than the three years accepted in *Bidar* and prevents most students from being eligible for study finance at all.

93. In her view, Member States should assess in each individual case whether the person concerned demonstrates a sufficient degree of integration into the society of the host Member State, account being taken of personal factors.

94. The Commission addresses Questions 2 to 5 only in consideration of the possibility that the Court does not follow its view that Ms Förster can rely as a Community worker on Article 39 EC and Article 7 of Regulation No 1612/68. It submits, first of all, that the present case has to be assessed in the light of the Community law applicable at the material time, i.e. Articles 12 EC and 18 EC, Directive 93/96 and Directive 90/364/EEC of 28 June 1990 on the right of residence. [52] Directive 2004/38 is, by contrast, not applicable.

51 — Cited in footnote 2.

52 — OJ 1990 L 180, p. 26.

95. Although the Commission in principle concurs with Ms Förster, it explained at the hearing that Directive 93/96 precludes a person who derives his right of residence only from that directive and no other provision of Community law from relying successfully on Article 12 EC to claim study finance, as is also apparent from *Bidar*. By contrast, an economically inactive citizen of the Union who has been lawfully resident in the host Member State for a certain period of time, within the meaning of Directive 90/364, or who possesses a residence permit, can successfully invoke Article 12 EC.

96. The five-year residence requirement, as applied by the Netherlands Government, cannot as a consequence be regarded as being discriminatory as such, since it can be assumed that the nationals of the host Member State, who have as a rule lived in that country all their lives, satisfy the criterion of a certain degree of integration.

97. In the view of the Commission, the residence requirement must, however, be applied in a less absolute manner in respect of Ms Förster than the Member States have suggested. Depending on the circumstances, other criteria must be taken into account in order to establish the degree of integration, such as whether the person concerned is born close to the border or has already worked in the host Member State. It emphasises that under Article 37 of Directive 2004/38 the Member States are free to use criteria more favourable than the five years of residence provided for under Article 24(2) of that directive, although it admits that they are not obliged to do so.

98. All the governments which have submitted observations in the present proceedings essentially agree, albeit on the basis of slightly differing arguments, that the questions referred should be answered to the effect that a student in factual circumstances such as those in the present case cannot successfully rely on Article 12 EC in order to claim a study allowance.

99. In respect of Directive 93/96, the Netherlands, Belgian and Danish Governments state that, according to *Bidar*, a distinction must be drawn between persons who move to another Member State with the primary objective of pursuing studies there and persons who settle in another Member State

for other reasons and subsequently decide to take up studies. The former category of students falls within the scope of Directive 93/96, which prevents them from relying on Article 12 EC to obtain study allowance, whereas the latter category has the right under that article to be treated on the same basis as nationals in that respect. According to the Netherlands, Danish and Swedish Governments, among others, Article 3 of Directive 93/96, which excludes the entitlement to an award of a maintenance grant, constitutes an example of a restrictive provision or limitation within the meaning of Article 18(1) EC. According to the Austrian Government, by contrast, that directive does not in principle prevent students from relying on Article 12 EC in relation to the right to be paid maintenance grants.

100. The governments agree, in essence, that Member States are not precluded from making such a grant dependent on a five-year residence requirement such as the one at issue in the present case, which is a clear and sufficient criterion, or on the possession of a permanent residence permit. There is, moreover, a consensus that there is no obligation to engage in a specific assessment in individual cases of integration into the society concerned or to use criteria other than the duration of residence, although Member States remain free to do so, and they may grant study assistance on more generous terms if they so wish.

101. In that respect, most governments have relied on Directive 2004/38, in particular Article 24(2) in conjunction with Article 16(1) as well as Article 37 thereof, whilst acknowledging that that directive is not applicable *ratione temporis* to the present case. Various Member States have also emphasised the broad margin of discretion they enjoy as regards the allocation of social assistance.

102. In particular, the Netherlands and United Kingdom Governments also point out that, as the Court indicated in *Bidar*,[53] a more generous grant of student allowances could impose an unreasonable financial burden on the Member States in view of the number of foreign students. That could have consequences for the overall level of assistance granted. Several governments also note that an individual assessment of the degree of integration would be either impossible from an administrative point of view or, as the German Government maintains, at odds with the principles of legal certainty and legality.

53 — Cited in footnote 2.

2. Appraisal

103. The questions to be addressed here can essentially be broken down into two main issues. The referring court wishes to know, firstly, whether a student in a situation such as that in the main proceedings can in principle rely, in the light of *Bidar*, on Article 12 EC in respect of assistance to cover the maintenance costs of students, such as the study finance at issue. If so, that court refers, secondly, to the rule in the Netherlands according to which the grant of study finance depends solely on the fulfilment of a five-year residence requirement and asks under what conditions such a student may in fact have the right to study finance on the basis of that article. Although those questions can to a large extent be answered by reference to *Bidar* and the case-law cited in that judgment, that case-law has to be qualified in certain respects in the light of the circumstances of the present case.

104. According to the Court's settled case-law, which is summarized in *Bidar*, a citizen of the Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law. [54]

105. It is also settled case-law that such situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 18 EC. [55]

106. Moreover, the Court has emphasised that there is nothing in the text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. [56]

107. Furthermore, as the Court has already held in *D'Hoop*, a national of a Member State who goes to another Member State and pursues secondary education there exercises the freedom to move guaranteed by Article 18 EC. [57]

108. Finally, as regards social assistance benefits, the Court recalled in *Bidar* that a citizen of the Union who is not economi-

54 — See *Bidar*, cited in footnote 2, paragraph 32; *Martínez Sala*, cited in footnote 24, paragraph 63; and *Grzelczyk*, cited in footnote 23, paragraph 32.

55 — *Bidar*, cited in footnote 2, paragraph 33; Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16; *Grzelczyk*, cited in footnote 23, paragraph 33; *Garcia Avello*, cited in footnote 23, paragraphs 22 and 23; and *Morgan and Bucher*, cited in footnote 28, paragraph 23.

56 — *Bidar*, cited in footnote 2, paragraph 34, and *Grzelczyk*, cited in footnote 23, paragraph 35.

57 — Case C-224/98 [2002] ECR I-6191, paragraphs 29 to 34.

cally active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit. [58]

109. In respect of the present case, a citizen of the Union, such as Ms Förster, who goes to another Member State and pursues occupational activities and studies there undeniably avails herself thereby of the right to move and reside freely in another Member State pursuant to Article 18 EC. In addition, it is not disputed that Ms Förster has always been lawfully resident in the Netherlands since the commencement of her studies, including during the second half of 2003.

110. It follows that a citizen of the Union in Ms Förster's situation can in principle rely on Article 12 EC in all situations falling within the scope of Community law.

111. In that regard, the Court ruled in *Bidar* that, contrary to the earlier case-law in *Brown* and *Lair* [59] and in view of the development of Community law since then, assistance, whether in the form of subsidised loans or of grants, provided to students lawfully resident in the host Member State to cover their maintenance costs falls within the scope of application of the Treaty for the purposes of the prohibition of discrimination laid down in the first paragraph of Article 12 EC. [60]

112. In the light of the above it can therefore be concluded, at least provisionally, that a student such as the one in the present case who resided lawfully for a certain period in the host Member State can in principle, subject to further conditions to be addressed below, rely on Article 12 EC to claim study finance such as that at issue.

113. However, both the order for reference and the submissions of the parties reveal uncertainty as to the impact of Directive 93/96 on that finding and the relevance of the fact that a person comes to another Member State 'principally' to study. In particular, it has been argued that the present case must be distinguished from *Bidar* on the ground that the applicant in that case

58 — See, to that effect, *Bidar*, cited in footnote 2, paragraph 37; *Martínez Sala*, cited in footnote 24, paragraph 24; and *Trojani*, cited in footnote 15, paragraph 43.

59 — See *Lair*, cited in footnote 20, paragraph 15, and *Brown*, cited in footnote 31, paragraph 18.

60 — See in particular paragraphs 42 and 48 of that judgment (cited in footnote 2).

did not enter the United Kingdom with the primary objective of pursuing studies there and derived his right of residence from Article 18 EC and Directive 90/364 rather than from Directive 93/96.

114. It is true that the Court stated in *Bidar* that Article 3 of Directive 93/96 does not preclude a national of a Member State who, by virtue of Article 18 EC and Directive 90/364, is lawfully resident in the territory of another Member State from relying during that residence on the fundamental principle of equal treatment enshrined in Article 12(1) EC. [61]

115. However, I do not think it follows that that principle would not apply to a person who derives his or her right to reside, instead, from Directive 93/96. The Court has consistently held since *Baumbast and R* that Union citizens can in any event derive their right to reside in the territory of another Member State directly from Article 18(1) EC. [62]

116. That article admittedly subjects the right of residence to the limitations and conditions imposed by the Treaty and the measures adopted to give it effect. Among such limitations and conditions are those laid down, as regards employed persons, by Council Directive 68/360/EEC, [63] as regards students, by Directive 93/96 and as regards nationals of Member States who do not enjoy a right of residence under other provisions of Community law, by Directive 90/364. [64]

117. However, it appears from *Grzelczyk* and, to an even greater extent, from *Trojani*, that the Court makes a distinction between, on one hand, the right of residence and the conditions to which it is subject and, on the other, the possibility for a citizen of the Union to rely on the principle of equal treatment enshrined in Article 12 EC, for example when claiming social benefits. The implication is that Member States may make the right to reside subject to the conditions and limitations provided for under the various residence directives, but when and as long as a Union citizen is lawfully resident in the host Member State concerned, be it by virtue of Community law or even just national law, as in the case of Mr Trojani, [65] that Union citizen is entitled to equal treatment. Consequently, the only way open to a Member State

61 — At paragraph 46 of the judgment (cited in footnote 2).

62 — Cited in footnote 23, paragraph 84.

63 — Directive 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).

64 — See also, to that effect, Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647, paragraph 65.

65 — See, to that effect, *Trojani*, cited in footnote 15, paragraph 37.

to avoid granting the benefit is to terminate the Union citizen's residence. [66]

118. That case-law thus suggests, arguably, that secondary Community law laying down conditions and limitations to the right of residence is to be regarded, by virtue of the reference contained in Article 18(1) EC, as a type of *lex specialis* in relation to that article, but not in respect of Article 12 EC.

119. Furthermore, the Court has already stated in *Grzelczyk* that, whilst Article 3 of Directive 93/96 makes it clear that that directive does not establish any right to maintenance grants by the host Member State for students benefiting from the right of residence, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefit. [67]

120. In other words, even if Directive 93/96 provides no right to maintenance assistance, such a right may still apply to students falling within that directive, by virtue of another provision of Community law such as Article 12 EC.

121. As to the issue of the student in the main proceedings coming 'principally to study', the referring court has itself observed that the intention with which persons come to the host Member State is difficult to determine. Moreover, such an intention is not decisive in respect of the applicability of Directive 93/96. It is therefore not relevant in the present context.

122. It follows from the above that Article 3 of Directive 93/96 does not preclude a national of a Member State who is lawfully resident in the territory of another Member State from relying during that residence on the fundamental principle of equal treatment enshrined in Article 12(1) EC to claim study finance such as that at issue in the main proceedings in the host Member State, even if his right of residence is based on that directive.

123. It remains to be examined, in respect of Questions 3(b), (c) and (d) and 4, whether that article permits a Member State to make the entitlement of nationals of other Member

66 — See, to that effect, *Grzelczyk*, cited in footnote 23, paragraphs 37 to 42, and *Trojani*, cited in footnote 15, in particular paragraphs 36, 37 and 43 to 46; cf. also, to that effect, *Bidar*, cited in footnote 2, paragraphs 36 and 47.

67 — See *Grzelczyk*, cited in footnote 23, paragraph 39.

States to such study finance conditional upon having completed five years of residence.

124. It appears from *Bidar* that although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State. [68]

125. As the Court stated in that judgment, it is therefore legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State. [69]

126. However, the Court made it clear that a Member State cannot require students to establish a link with its employment market, [70] a requirement which the Court has held on several occasions to be legitimate in relation to social allowances. [71]

127. The Court held in *Bidar* that the condition of a sufficient degree of integration into society may be established by a finding that the student in question has resided in the host Member State for a certain length of time. It accepted that the requirement of three years' residence provided for by the national legislation at issue in that case was an appropriate length of time. [72]

128. The present case raises the question whether, in the light of that judgment, a requirement of five years' residence corresponds to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into society. As several governments have emphasised

68 — Paragraph 56 of that judgment (cited in footnote 2) with reference to *Grzelczyk*, cited in footnote 23, paragraph 44.

69 — Paragraph 57 of that judgment. See also, to that effect, *Morgan and Bucher*, cited in footnote 28, paragraph 43; see also, as to that criterion in the context of a pension granted to civilian victims of war or repression, Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 34, and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 37.

70 — *Bidar*, cited in footnote 2, paragraph 58.

71 — See, for instance, *D'Hoop*, cited in footnote 57, paragraph 38, and *Collins*, cited in footnote 16, paragraph 67.

72 — See to that effect paragraphs 59 to 61 (case cited in footnote 2).

in their submissions, Member States enjoy wide discretion in terms of the criteria used to assess the degree of connection to society in respect of a social benefit as the student finance at issue in the main proceedings. However, they must still abide by the limits imposed by Community law, in particular the principle of proportionality. [73]

129. Member States are obviously allowed to some extent to apply general conditions which require no further individual assessment, such as the three years' residence requirement at issue in *Bidar*. However, the case-law of the Court also suggests that the condition imposed may not be so general in scope that it systematically excludes students, regardless of their actual degree of integration into society, from being able to pursue their studies under the same conditions as nationals of the host Member State. In other words, the criterion used must still be indicative of the degree of integration into society. [74]

130. In my view, that is not the case with a five-year residence requirement, since it can reasonably be assumed that a number of students may have established a substantial degree of integration into society well before the expiry of that period. That is especially the case with students who, like Ms Förster, have also pursued occupational activities in the host Member State in addition to their studies. In fact, as has been submitted by Ms Förster, a residence requirement of five years may prevent students who make use of their right to move to another Member State and study there from benefiting from their right to equal treatment as citizens of the Union in respect of study allowances, regardless of the actual link they may have established with the society of the host Member State. That cannot in my view be considered proportionate.

131. It is true that Directive 2004/38 places Member States under no obligation to grant maintenance aid for studies prior to acquisition of the right of permanent residence and thus not before five years have expired. However, apart from the fact that that directive is not applicable to the facts of the present case, it cannot detract from the requirements flowing from Article 12 EC and the general principle of proportionality.

73 — See, to that effect, *Nerkowska*, cited in footnote 69, paragraph 38; *Tas-Hagen and Tas*, cited in footnote 69, paragraph 36; *Morgan and Bucher*, cited in footnote 28, paragraph 46; and Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 79.

74 — See to that effect the reasoning in *Bidar*, cited in footnote 2, paragraphs 61 and 62, in respect of the requirement that the student must be settled in the host Member State, and *Morgan and Bucher*, cited in footnote 28, paragraph 46.

132. Rather, a period of five years of continuous residence in the host Member State marks the outer limit within which it may still be possible to argue that a student pursuing studies in another Member State has not established a sufficient degree of integration into the society of that State to qualify for equal treatment, as provided for by Article 12 EC, in respect of social benefits such as student maintenance grants.

133. When a student has already been resident in the host Member State for three years, as in the present case, it would seem disproportionate, even though five years may not have yet elapsed, to refuse study finance if the student can adduce reasonable evidence that he or she is already substantially integrated into the society of the host Member State.

134. Finally, I do not think that the above reasoning should be affected by the fact that a residence requirement is imposed only on nationals of other Member States. As the Commission has noted, it is legitimate to assume that the nationals of a Member State have a genuine link with the society of that State.

135. The answer to Questions 3(b), (c) and (d) and 4 should therefore be that a Member State is precluded by Article 12 EC, read in conjunction with the principle of proportionality, from denying study finance such as that at issue to an economically inactive student from another Member State who has already been lawfully resident for three years in the host Member State solely on the ground that that student was not resident for five years in the host Member State prior to the study period concerned, if other factors, to be demonstrated by the student by appropriate means, indicate a substantial degree of integration into the society of the host Member State.

D — *Question 5 concerning legal certainty*

1. Main arguments of the parties

136. Ms Förster submits that both the disputed repayment order and her appeal

against it predate the Beleidsregel of 9 May 2005. It is contrary to the principle of legal certainty and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to adopt rules restricting her rights after she has invoked Article 12 EC. [75]

137. In the same vein, the Commission proposes to answer Question 5 in the negative, arguing that the national court has to take account, when interpreting rules of its national law, of the general principles of law, particularly those of legal certainty and non-retroactivity.

138. The German, Austrian and Netherlands Governments maintain, on the other hand, that if the Court's judgment allows persons retroactively to derive more rights from Article 12 EC than was previously assumed, requirements in respect of periods in the past may also be imposed when implementing that judgment. That, according to the Netherlands Government, is in accordance with *Collins*. [76]

2. Appraisal

139. I shall address Question 5 for the sake of completeness notwithstanding the answers suggested to the previous questions. It appears from the order for reference that the referring Court essentially seeks to ascertain whether the principle of legal certainty, as applied in *Collins*, precludes the Dutch authorities from refusing study finance for the second half of 2003 on the basis of the residence duration requirement contained in the Beleidsregel of 9 May 2005, adopted following the *Bidar* judgment, if that Policy rule provides for more rights — in this case more generous access to study grants — than before. Study finance was previously granted only to students from other Member States entitled to it under Article 39 EC or Article 43 EC.

75 — She refers to Eur. Court H. R., *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A No 301-B.

76 — Cited in footnote 16.

140. The principle of legal certainty is a fundamental principle of Community law which requires, in areas covered by Community law, that the Member States' rules should be clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are. It aims to ensure that situations and legal relationships governed by Community law remain foreseeable. [77] Accordingly, in *Collins*, the Court stated that the application by the national authorities of a residence requirement must rest on clear criteria known in advance. [78]

141. However, the case-law of the Court also indicates that it is of relevance whether the rule in question involves positive or negative consequences for individuals. In the case of rules imposing obligations on individuals, strict observance of the requirements flowing from the principle of legal certainty and the protection of the individual is naturally of particular importance. [79]

142. Accordingly, the principle of legal certainty and the protection of the individual do not in my view preclude a rule from being applied retroactively in so far as such application puts the individual concerned in a more favourable legal position. [80]

143. The reply to Question 5 should therefore be that the principle of legal certainty does not preclude a Member State from applying a rule such as the Beleidsregel of 9 May 2005 in respect of periods in the past if such application puts the individual concerned in a more favourable legal position.

77 — See, to that effect, Case 257/86 *Commission* v *Italy* [1988] ECR 3249, paragraph 12, and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30.

78 — Cited in footnote 16, paragraph 72.

79 — See, to that effect, Case 239/86 *Ireland* v *Commission* [1987] ECR 5271, paragraph 17; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others* [2005] ECR I-4983, paragraph 80.

80 — The judgment of the European Court of Human Rights relied on by Ms Förster, cited in footnote 75, in which that court held that there had been a breach of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, is in my view not relevant, as it concerns a form of interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute (see §§ 49 and 50 of that judgment).

V — Conclusion

144. I therefore propose that the Court answer the questions referred as follows:

'(1) Article 7 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 does not apply to a student in a situation such as that at issue in the present case in so far as that student does not fall within any of the categories of workers referred to in Article 2 of that regulation.

(2) A student in a situation such as that at issue in the present proceedings can in principle invoke in the host Member State his right as a Community worker under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community to the same social advantages as a national worker in order to obtain study finance such as that in issue. It is, however, ultimately for the national court to establish whether the various conditions as regards the retention of the status of a worker after termination of employment are actually fulfilled in the case at hand.

(3) Article 3 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students does not preclude a national of a Member State who has been lawfully resident for a certain time in the territory of another Member State from relying on the fundamental principle of equal treatment enshrined in Article 12(1) EC to claim study finance such as that at issue in the main proceedings in the host Member State, even if his right of residence is based on that directive.

(4) A Member State is precluded by Article 12 EC, read in conjunction with the principle of proportionality, from denying study finance such as that at issue to an economically inactive student from another Member State who has already been lawfully resident for three years in the host Member State solely on the ground that that student was not resident for five years in the host Member State prior to the study period concerned, if other factors, to be demonstrated by the student by appropriate means, indicate a substantial degree of integration into the society of the host Member State.

(5) The principle of legal certainty does not preclude a Member State from applying a rule such as the Beleidsregel of 9 May 2005 in respect of periods in the past if such application puts the individual concerned in a more favourable legal position.'