OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 19 February 2004 [1]

I — Introduction

A — *Facts of the case*

1. In this particular case the Tribunal du travail de Bruxelles (Labour Court, Brussels) has posed two questions concerning the free movement of persons within the European Union. This case once again provides an opportunity to take a closer look at the right of citizens of the European Union to reside in a Member State other than that of which they are nationals.

2. The order for reference describes the situation of the applicant in the main proceedings, Michel Trojani. Mr Trojani is of French nationality. He is unmarried and has no children. He has no means of subsistence and has been living temporarily at a Salvation Army hostel in Brussels since 8 January 2002.

3. He registered with the Commune of Brussels and has a temporary registration certificate covering his period of residence from 8 April to 7 September 2002. The national court was not provided with any information concerning Mr Trojani's residential status after 7 September 2002, but he himself has told the Court of Justice that he now has a five-year temporary residence permit.

4. For some 30 hours a week, Mr Trojani does various jobs for the Salvation Army hostel as part of a personal rehabilitation scheme. In return, he receives compensation in kind to cover his living expenses. This compensation consists of board and lodging plus EUR 25 a week in pocket-money.

5. Since he had no other means of subsistence, he applied to the defendant in the main proceedings, the Centre public d'aide sociale de Bruxelles (Public Social Assistance

1 — Original language: Dutch.

Centre for Brussels), for a minimum subsistence allowance (the so-called 'minimex'). [2] In his application he stated that in principle he must pay EUR 400 a month to the hostel. In addition, he indicated that he wanted to be able to leave the hostel and live independently.

6. The national court is now asking whether in such circumstances a citizen of the Union can found a right of residence in Community law. In this connection, it has submitted two questions. The first concerns the rights of economic migrants as workers under Article 39 EC (or Article 7(1) of Regulation No 1612/68), [3] within the context of freedom of establishment (Article 43 EC) or within the context of freedom to provide services (Article 49 EC). The second question centres on Article 18 EC. This article grants every citizen of the Union the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect.

2 — This is the same allowance as that in issue in the Court's judgment in Case C-184/99 *Grzelczyck* [2001] ECR I-6193).

3 — Article 7(1) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, 1968 (II), p. 475) reads as follows: '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'.

7. During the proceedings before the Court, written observations were submitted by the applicant and the defendant in the main proceedings and by the Governments of Belgium, Denmark, Germany, France, the Netherlands and the United Kingdom, as well as by the Commission. At the hearing on 6 January 2004, the abovementioned governments (apart from the German Government) and the Commission gave oral explanations of their respective positions.

8. Finally, the Commission has proposed in these proceedings that the questions referred by the national court for preliminary ruling be reformulated, inasmuch as the main point at issue is whether Mr Trojani is entitled to the minimum subsistence allowance (minimex) in Belgium. The main proceedings are not about obtaining a residence permit. I propose that the Court should reject the Commission's proposal. The questions posed by the national court are of direct importance for the settlement of the central issue, inasmuch as the answer to the question whether Mr Trojani has a right of residence under Community law — and if so which — will determine whether he is entitled to the minimex.

B — *Basis for the analysis*

9. This case concerns a national of a Member State who moves to another Member State without having the resources to provide for himself. In the host Member

State he finds himself in a hostel where he performs certain tasks. The question now is whether this citizen of the European Union has the right under Community law to reside in that Member State and, if necessary, even claim benefits.

10. I view this problem in the light of the development of the right of residence for citizens of the European Union. As Community law now stands, this right of residence has the following principal characteristics:

(a) The right of residence is a fundamental right of every European citizen. That right may be restricted as little as possible.

(b) Community law recognises as a ground for limiting that right the interest of a Member State in preventing any unreasonable burden being placed on the public finances.

(c) In the EC Treaty a distinction is made between economic migrants and non-economic migrants. Both groups have a right of residence, the only difference being the scope of their respective claims. Economic migrants have the stronger claim. Thus, they do not need to prove that they can provide for themselves.

(d) The Court interprets the concept of worker broadly. This tends to strengthen the right of residence to the greatest possible extent.

11. Re (a): in its judgment in *Baumbast and R*,[4] the Court recognised the direct effect of the right, under Article 18(1) EC, to reside within the territory of the Member States, thereby making it autonomous and enforceable, regardless of the reasons on which residence is based. In my Opinion in that case,[5] I characterised the right of residence of citizens of the Union as a right that must be recognisable, that has meaning for the citizen.

12. Thus, the right of residence is a fundamental right of every European citizen,[6] and it should be possible actually to exercise this fundamental right. This has led, on the one

4 — Case C-413/99 [2002] ECR I-7091, paragraph 84.

5 — Paragraph 110 of the Opinion.

6 — This is also apparent from the inclusion of the right of residence in the Charter of Fundamental Rights (as well as in Chapter II of the draft Constitution).

hand, to the adoption of a number of Community regulations containing provisions designed to facilitate the exercise of the right of residence. The regulations of greatest relevance to the present case are Regulation No 1612/68 concerning migrant workers and Council Directive 90/364/EEC [7] establishing a right of residence for migrants who are not economically active. At the same time, the right of residence may be limited or subjected to conditions only on the grounds of compelling national interest.

13. Re (b): Community law recognises two categories of legitimate Member State interests that would justify the imposition of limitations and conditions on the right of residence:

— limitations on grounds of public order, public safety and public health, in accordance with Council Directive 64/221/EEC; [8]

— limitations intended to prevent — as indicated in the fourth recital of the preamble to Directive 90/364 — beneficiaries of the right of residence becoming an unreasonable burden on the public finances of the host country. Thus, it is possible to prevent the right of residence being used for social tourism, i.e. moving to a Member State with a more congenial social security environment.

This second category of legitimate interests plays a leading role in the Trojani case. Essentially, it is a question of establishing the conditions under which Member States may limit the right of residence in order to prevent an unreasonable burden being placed on their public finances.

14. Re (c): The limitations on the right of residence permitted by Community law — where an unreasonable burden would be placed on the public finances — differ depending on whether economic or non-economic migrants are involved:

— Persons who qualify as economic migrants are considered able to provide for themselves as a result of their employment or self-employment.

7 — Directive of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

8 — Directive of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ English Special Edition 1963-64, p. 117). This directive, which in principle applies only to economic migrants and their families, is also applicable, inter alia under Article 2.2 of Directive 90/364, to those who migrate for non-economic reasons.

— Others must have sufficient resources at their disposal and, moreover, be demonstrably covered by sickness insurance. In this connection, Article 1 of Directive 90/364 stipulates that Member States shall grant the right of residence to nationals of other Member States 'provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'.

15. Thus, a citizen's actual entitlement depends on his status under the EC Treaty with respect to the right of residence. His claims will be stronger if he can qualify as an economic migrant to whom Article 39, 43 or 49 EC applies. It is of no importance whether the work he does in the host country generates sufficient income to provide him with a reasonable living. Moreover, under Article 7 of Regulation No 1612/68 he is entitled — I refer only to the migrant worker — to the same advantages as national workers themselves.

16. Furthermore, these economic migrants derive their rights from the original EEC Treaty. The right of residence for non-economic migrants was recognised only later in the EC Treaty (now the Treaty of Maastricht) and (still) does not offer fully equivalent advantages.

17. In my opinion, the differential treatment of economic and non-economic migrants, viewed historically, is based on a fundamental difference in approach. In order to establish the common market, it was first necessary to remove, as far as possible, the obstacles to inter-state trade, including those relating to the labour factor. Only later was the free movement of persons to develop into a fundamental right of every citizen of the European Union.

18. The difference in treatment now has a mainly pragmatic basis. So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, i.e. moving to a Member State with a more congenial social security environment. And that is certainly not the intention of the EC Treaty, which to a considerable extent leaves responsibility for social policy in the hands of the Member States. The Community legislature has acted on the assumption that an economic migrant will not claim any subsistence allowance in the host Member State. Article 7 of Regulation No 1612/68 grants the migrant worker rights primarily in respect of conditions of employment and,

moreover, social advantages that facilitate his stay such as, for example, financial assistance with his children's education on the same conditions as for the children of national workers. [9]

19. Meanwhile, however, this assumption by the Community legislature that the economic migrant will be able to provide entirely for himself has been called somewhat into question. I refer, by way of example, to the systems that exist in Member States at the bottom end of the labour market whereby governments supplement the pay of those whose productivity is so low that they cannot work for the minimum wage applicable and still produce a profit for the employer (see also paragraph 29 et seq. below).

20. Re (d): The Court has given the concept of worker — as well as that of service provider — a broad interpretation. This can be attributed to the historical development of the right of residence which was originally accorded only to economic migrants and took account of the role of economic migration in the European integration process.

9 — Case C-3/90 *Bernini* [1992] ECR I-1071 and Case C-337/97 *Meeusen* [1999] ECR I-3289.

21. Even now, as I explained above, the right of residence still has a broader scope for the economic than for the non-economic migrant. Therefore a broad interpretation of the concept of worker favours the fullest possible materialisation of the fundamental right of every citizen of the European Union to reside within the territory of any Member State of the Union.

22. These principal characteristics form the basis for the analysis of this case.

23. It is necessary to establish whether jobs such as those done, in the present case, for the Salvation Army fall within the scope of the concept of worker as broadly interpreted by the Court. Thus, we need to determine whether the interpretation is so broad that it also encompasses the special, atypical jobs that Mr Trojani does for the Salvation Army (first question).

24. If it does not, then the Belgian authorities may, in principle, refuse the right of residence to a person who, it is true, cannot fully provide for himself but who has been offered hospitality by a private institution such as the Salvation Army. Whether this Member State can actually exercise this authority in the case of Mr Trojani depends

on the interpretation given to Article 18 EC (second question).

II — The first question

A — *The heterogeneous reality*

25. The EC Treaty has traditionally distinguished between different forms of economic migration, while under the Maastricht Treaty citizens who migrate for other than economic reasons are also accorded a right of residence. As I have already pointed out, the claims which the different categories of migrants are entitled to make on the host Member State are not the same. It is therefore still important to establish the category to which a migrant belongs.

26. The notion of worker under Article 39 EC and the related secondary Community legislation is in itself a clear concept based essentially on a simple reality. Someone moves to another Member State to take up employment. In this case as few obstacles as possible should be placed in his way. Therefore he must be able to take his family with him and his family members should also acquire certain rights in the host Member State.

27. In practice, however, the concept appears to be raising ever more questions. The activities, including non-occupational activities, in which people, and hence migrants, may engage come in a wide variety of forms and sometimes it is not immediately clear which is the main activity and which are only secondary. People work part-time and may also pursue other economic activities (in a self-employed capacity) and the work itself may be provided under all sorts of arrangements. Thus, people are not always either workers (whose rights stem from Article 39 EC and the secondary legislation based on Article 40 EC) or self-employed (to whom Article 43 EC et seq. applies), but may be both workers and self-employed at the same time. There is also the case of students who, in addition to studying, also perform small jobs to supplement their income. People such as Mr Trojani, who during their stay in another Member State perform jobs which, in any event, are clearly not full-time occupations and do not provide them with a proper livelihood, find themselves in a comparable situation.

28. Thus, a person's status is not always unambiguous but frequently hybrid in nature. What applies to people also applies to work. Within society, work comes in all shapes and sizes and it is not always clear whether it constitutes an economic activity with the fundamental characteristics of employment. This certainly applies to the bottom end of the labour market. In the case

of the private non-profit sector, as represented by the Salvation Army, a clear distinction cannot always be made between voluntary work and paid employment. Even where certain work is subsidised from public funds, however, it is often not immediately obvious whether the subsidised activity is primarily economic. This has to do with the objectives which the subsidy is intended to achieve and with its effect on the market.

29. A good example is the Netherlands Wet sociale werkvoorziening (Social Employment Law) (WSW) which was discussed in the *Bettray* case.[10] This law is intended to encourage the employment of persons who — for example, due to a physical or mental disability — are insufficiently productive to enter the labour market under the same conditions as others and find a job. Another example — also from the Netherlands — is the Besluit in- en doorstroombanen (Entry-level and Step-up Jobs Scheme),[11] which subsidises jobs for the long-term unemployed with a view to their (re)integration.

10 — Case 344/87 [1989] ECR 1621.

11 — Stbl. 1999, 591.

30. The main aim of both these pieces of legislation is integration. In both cases it is a question of the participation of persons who would otherwise be excluded from the labour market. The legislation serves as a social safety net. However, it also has an economic function. Subsidising these jobs makes it possible for the labour market to utilise these persons' capacity for work, however limited it may be. Moreover, the legislation has an effect that is comparable to work done under normal conditions. The results of the work are, of course, placed on the market as products or services. At the same time, the legislation may have the — unwanted — economic effect of creating unfair competition between the subsidised work and work done under normal market conditions.

31. The Court has addressed the problem of heterogeneity as follows. It has broadly developed the personal scope of the concept of worker within the meaning of Article 39 EC. In principle, a short-term employment relationship of limited scope and with limited remuneration will suffice.

32. However, even with this approach, new questions are constantly being raised, because in a heterogeneous situation any demarcation line is to some extent arbitrary. Moreover, the situation is becoming even more heterogeneous. Our analysis of the present case should be viewed in this context. At the same time, the existing

case-law of the Court, especially the judgments in *Bettray* and *Steymann*, [12] discussed under B below, should be taken into account.

B — *The case-law relating to the concept of worker*

33. As already mentioned, the Court has broadly developed the personal scope of the concept of worker within the meaning of Article 39 EC. I refer in this connection to the summing-up passages in the recent *Ninni-Orasche* judgment. [13]

34. First, the Court recalled the settled case-law to the effect that the concept of worker under Article 39 EC has a Community meaning and may not be interpreted narrowly. It referred to the *Lawrie-Blum*, *Brown*, *Bernini* and *Meeusen* judgments. [14] The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned.

35. 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 (see the *Lawrie-Blum*, *Bettray* and *Meeusen* judgments). [15] As correctly pointed out by the Commission in its written observations, the Court has identified three cumulative conditions: the duration of the activity, a relationship of subordination, and a remuneration.

36. Against the background of this case-law, it should be noted that the fact that paid employment is of short duration cannot in itself rule out the application of Article 39 EC. To enjoy the status of worker the person concerned must pursue effective and genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary. The Court made this point in the *Levin* and *Meeusen* judgments. [16]

37. In investigating whether a specific case involves effective and genuine employment, the national court must base itself on objective criteria and make a comprehensive

12 — For the *Bettray* judgment, see footnote 10; Case 196/87 *Steymann* [1988] ECR 6159.

13 — Case C-413/01 [2003] ECR I-13187, paragraph 23 et seq.

14 — Case C-66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16, Case C-197/86 *Brown* [1988] ECR 3205, paragraph 21, *Bernini*, cited in footnote 9, paragraph 14, and *Meeusen*, also cited in footnote 9, paragraph 13.

15 — *Lawrie-Blum*, cited in footnote 14, paragraph 17, *Bettray*, cited in footnote 10, paragraph 12, and *Meeusen*, cited in footnote 9, paragraph 13.

16 — Case C-53/81 *Levin* [1982] ECR 1035, paragraph 17, and *Meeusen*, case cited in footnote 9, paragraph 13.

assessment of all the circumstances of the case that have to do with the activities and the employment relationship concerned.

38. This brings me more particularly to the third of the three cumulative conditions mentioned above, namely, the remuneration. This condition is of particular interest in connection with the analysis of the present dispute. From the *Lawrie-Blum* and *Bernini* judgments, [17] which concerned persons gaining work experience as part of their professional training, it may be deduced that even those who receive little in the way of remuneration may be regarded as workers. The Court does not expressly require the remuneration to be so high that it enables the person concerned to provide for himself completely. I refer to the *Levin* judgment [18] in which the Court held that the remuneration may be lower 'than the guaranteed minimum remuneration in the sector under consideration. In this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from the employment of a member of their family who accompanies them.' I note that the Court did not mention the situation encountered in the present case, namely, that in which the person concerned proposes to supplement his income with social assistance.

39. The Court has expressed itself similarly in connection with the productivity of the person concerned. Even someone with low productivity — such as a trainee — may be regarded as a worker, always provided that the activities are not of a purely marginal and ancillary nature. The Court leaves it to the national court to determine whether this is so.

40. As is also apparent from the observations submitted to the Court, the circumstances of the present case resemble those that formed the basis of the *Bettray* judgment. [19] From this judgment the intervening Member States conclude that Mr Trojani — as in the *Bettray* case — cannot be regarded as a worker, whereas the Commission takes the opposite view.

41. The *Bettray* case concerned employment under the Netherlands Social Employment Law. As follows from the judgment of the Court, this law constitutes a body of rules intended to provide employment opportunities for the purpose of maintaining, restoring or improving the capacity for work of persons who, for an indefinite period, are unable, by reason of circumstances related to their situation, to work under normal conditions. To that end, undertakings or work

17 — *Lawrie-Blum*, cited in footnote 14, paragraphs 19 to 21; and *Bernini*, cited in footnote 9, paragraph 15.

18 — Cited in footnote 16, paragraph 16.

19 — Cited in footnote 10.

associations are set up with the sole purpose of providing the persons involved with an opportunity to engage in paid work under conditions which correspond as far as possible to the legal rules and practices applicable to paid employment under normal conditions. [20]

42. According to the Court, the fact that the productivity of the persons employed is low and their remuneration is largely provided by subsidies from public funds is of no consequence. The decisive point is that 'work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned ... The jobs in question are reserved for persons who, by reason of circumstances relating to their situation, are unable to take up employment under normal conditions.' Moreover, the Court attached importance to the fact that the person concerned was not selected on the basis of his capacity to perform a certain activity. He did jobs adapted to his physical and mental possibilities in undertakings or work associations set up specially to achieve a social purpose. [21]

43. It seems to me useful to compare the circumstances in the *Bettray* case with those which formed the factual basis for the *Steymann* case. [22] Mr Steymann was a member of the Bhagwan community and did work within and on behalf of that community in connection with its commercial activities. Members are expected to do such work on behalf of the community, or at least it is very rare for members to avoid taking part. The Bhagwan community provides for the material needs of its members, including pocket-money, regardless of the nature and the extent of the work they do.

44. The Court began by noting that participation in a community based on religion or another form of philosophy falls within the scope of Community law, in so far as it involves an economic activity within the meaning of Article 2 EC. The Court took the view that a member of the Bhagwan community — such as Mr Steymann — *did* fall within the concept of worker, even though the services with which that person was provided were only an indirect quid pro quo for the work effectively done. I find it even more important that the Court did not consider whether it was in fact a question of a relationship of subordination, in other words, whether Steymann was under an obligation to do *specific jobs to be specified by the community.*

20 — See paragraph 5 of the *Bettray* judgment cited in footnote 10. In the meantime this law has been radically amended.

21 — In this connection, see the more detailed description of the *Bettray* case in Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 30.

22 — Cited in footnote 12, specifically paragraph 11.

45. What then is the decisive difference between the *Bettray* and *Steymann* cases? In addition to the three conditions mentioned in paragraph 35 above, the Court also looked at the economic nature of the activity. In this respect the *Steymann* judgment is clear. However, I ask myself, have the activities performed by beneficiaries of the WSW no economic value? It appears that the Court saw the WSW only as a means of integrating people with a personal disability and not as a form of work — admittedly subsidised but still genuine — leading to the production of marketable goods.

46. Considering the thrust of the case-law summarised above, i.e. that the concept of worker should be interpreted very broadly, the *Bettray* judgment should be viewed in its specific context, within which the integration objective of the WSW was decisive. The Court stressed the limited scope of its conclusion in the *Bettray* case as follows: 'the fact that that conclusion does not reflect the general trend of the case-law concerning that concept [of worker] in Community law can be explained only by the particular characteristics of that case'.[23]

23 — *Birden*, cited in footnote 21, paragraph 31.

C — *The answer proper*

47. This case is an example of what I described above as the heterogeneous reality. Mr Trojani does certain work for the Salvation Army and it is, in any event, an established fact that this work is directly connected with his being provided with free board and lodging at a Salvation Army hostel and that what he receives is insufficient to meet all his needs. He is therefore requesting a supplementary allowance which would guarantee him a minimum level of subsistence.

48. As is evident from the foregoing, the Court has given the concept of worker a broad interpretation, so that even someone who performs activities of limited scope, with low pay and low productivity can qualify as a worker. An employment relationship exists if three conditions are met: the activity must last for a certain period time, there must be a relationship of subordination and there must be remuneration.

49. Assuming that the work Mr Trojani performs for the Salvation Army satisfies these three conditions, the Court is now faced essentially with the following question: does Mr Trojani, in the special social context

within which he does his work, qualify as a migrant worker? The intervening Member States say no, [24] the applicant in the main proceedings and the Commission say yes.

50. I share the view of the Member States. Indeed, what does this case actually involve?

51. Mr Trojani, a Frenchman, goes to Brussels and is taken in by the Salvation Army. He has no roof over his head and clearly meets the criteria for being given shelter. The Salvation Army is a religious community that sees its task as being to help people in need. The Salvation Army expects those it takes in, if they are able, to do certain jobs. These jobs can be regarded not only as a quid pro quo for the hostel accommodation (and as a means of enabling the Salvation Army and its hostels to operate cost-effectively) but also as a step towards the reinsertion of the person in need into society.

52. Under the national legislation, hostels subsidised by the competent Belgian authority, including those run by the Salvation Army, are charged with taking in people who are relationally, socially or materially vulnerable and consequently unable to lead an independent existence. [25] These people are taken in with a view to promoting their autonomy, well-being and social reintegration.

53. As the French Government has rightly pointed out, the provision of hostel accommodation and not the work done is the central feature of the relationship between Mr Trojani and the Salvation Army. The work comprises, among other things, cleaning the hostel and is simply a duty that goes with the accommodation, comparable, for example, with the chores customarily carried out in youth hostels. [26] Mr Trojani did not apply to the Salvation Army for work and the Salvation Army did not select him on the basis of his personal qualifications for a particular job. In this respect, the resemblance with the *Bettray* case is striking. [27] Mr Trojani did not enter the service of the Salvation Army.

54. In these circumstances, it is not at all obvious that Mr Trojani should be regarded as a worker, and hence the Salvation Army as an employer. In fact, that could actually be undesirable considering the requirements

24 — In this respect, the United Kingdom Government also considers that the question is mainly a factual one that should be answered by the national court itself.

25 — Article 2 of the Decree of the Commission communautaire française (Commission of the French Community) of 27 May 1999 (*Moniteur Belge* of 18 June 1999).

26 — I cite the example of a youth hostel because (as appears from the documents in the case) before being taken in by the Salvation Army Mr Trojani stayed at the Jacques Brel youth hostel in Brussels.

27 — See, in particular, paragraph 42 above.

(often in national law) that go with a contract of employment. I am thinking, for example, of the need to pay a minimum wage and to provide for worker participation in management decisions.

55. What is more, in the *Bettray* judgment the Court was already placing a certain limitation on the scope of the concept of worker in the case of non-economic activities. That judgment related to work done with a view to the integration of the person concerned. Nevertheless, the products of that work were placed on the market. As already mentioned, the Court indicated that the judgment could only be explained by the particular characteristics of the case. However, this does not mean that a conclusion comparable to that in the Bettray judgment cannot be drawn in a case such as the present one, in which the economic aspect of the activities is of even less importance than in the Bettray case.

56. This brings me to my primary opinion concerning the national court's first question. In the event that the jobs done by Mr Trojani for the Salvation Army satisfy the three conditions that the Court has established for the existence of an employment relationship, it is my opinion that in these particular atypical circumstances there can be no question of a fully-fledged employment relationship. The relationship between Mr Trojani and the Salvation Army is based essentially on the provision of shelter rather than work. Moreover, I consider it important that the activities are of no or, at most, only secondary economic importance, whereas the economic nature of the activities is a condition of applicability of Article 39 EC.

57. In addition, it is not obvious to me that the third condition for the existence of an employment relationship, namely, that the work is done for remuneration, is satisfied. With respect to this point I again refer to the observations of the French Government, which takes the view that instead of the shelter provided by the Salvation Army being regarded as a benefit in kind for the work done, the work itself should be regarded as a quid pro quo for the shelter provided.

58. This seems to me to be the right position to take. Mr Trojani is provided with a service. The work he does constitutes the quid pro quo. Thus, there is no question of work being done for remuneration.

59. It could be objected that Mr Trojani receives a (small) financial reward for the work he does, in the form of pocket-money

amounting to EUR 25 a week. According to the case-law of the Court, [28] the remuneration does not have to be sufficient to provide for all a worker's needs. Thus, for example, the Court has recognised that a low-paid trainee has an unconditional right of residence as a worker.

60. I do not deny that a wage of EUR 25 a week, together with benefits in kind, could be sufficient to constitute evidence of the existence of an employment relationship. However, I regard the pocket-money not as part of the remuneration for the work done but as part of the service provided by the Salvation Army. The provision of the pocket-money is part of the Salvation Army's social mission inasmuch as it enables the hostel dweller to spend part of the day actually outside the hostel.

61. Therefore, in the light of my knowledge of the actual circumstances of the case, I conclude that Mr Trojani cannot base his right of residence in the Kingdom of Belgium on the status of worker within the meaning of Article 39 EC.

III — The second question

62. In order to answer the national court's second question it will be necessary to interpret the — fundamental — right of European citizens under Article 18 EC to reside within the territory of the Member States, subject to the limitations and conditions laid down by the EC Treaty and by the measures adopted to give it effect. As a result of the judgment in *Baumbast and R*, [29] the application of those limitations and conditions by the Member States is subject to judicial review, and in particular a review of the principle of proportionality.

63. As already mentioned, Directive 90/364 authorises the Member States to refuse the right of residence to citizens of the European Union who do not have sufficient resources. Thus, the provisions of the directive constitute a limitation, laid down by the EC Treaty or by measures adopted to give it effect, on the right of residence within the meaning of Article 18 EC. All the Member States that have intervened in this case then conclude that Mr Trojani cannot derive any right to reside in Belgium from Article 18 EC. Mr Trojani — naturally, I might add — takes the opposite view and points out, in particular, that the limitations on the right of residence should be understood restrictively.

28 — See paragraph 38 above.

29 — Cited in footnote 4, paragraphs 86 et seq.

64. The Commission reasons quite differently, insisting that although the provisions of Directive 90/364 may constitute a limitation on the right of residence, they do not limit the right, also recognised by Article 18 EC, to travel to other Member States. It maintains that the Directive applies only from the moment at which someone applies for a residence permit. Citizens of the Union have six months within which to apply for a residence permit. The Commission derives this six-month period from the *Antonissen* judgment, [30] in which the Court gave persons from one Member State a reasonable period of six months to seek work in another. During this period they can rely on Article 39 EC without having to do any actual work.

65. Before proceeding to the core issue, I propose to respond to the argument put forward by the Commission. The Commission is being consistent insofar as it maintains that a citizen of the Union who travels within the territory of the Member States is not subject to limitations based on Directive 90/364. It is obvious that in a European area within which internal border controls have been abolished those who travel cannot be required to have sufficient resources. However, this does not mean that, by analogy with the *Antonissen* judgment, a reasonable period must be allowed. Within the context of the free movement of labour a person needs a certain period of time in which to seek work. The granting of such a period facilitates the free movement of workers. But what purpose would this period serve in the case of a non-economic migrant? The latter is not seeking work but something different. Finally, I note that the facts, as known to me, indicate that Mr Trojani has a residence permit. Thus, if for no other reason, the Commission's argument is irrelevant to the main proceedings.

66. This brings me to my answer proper which consists of two points. Firstly, it must be established whether in the given circumstances one of the limitations or conditions mentioned in the second clause of Article 18(1) EC applies. Secondly, the application of this limitation or condition must be consistent with the principle of proportionality.

67. As far as the first point is concerned, there can be no doubt. Mr Trojani does not have sufficient resources to provide for himself. It is for precisely this reason that he is applying to the Belgian authorities for the 'minimex'. Accordingly, he falls under the limitation mentioned in Article 1(1) of Directive 90/364. I refer also to the second subparagraph of Article 1(1) where it is stipulated that the resources will be deemed sufficient when they are higher than the level of resources below which the host Member State may grant assistance to its nationals, taking into account the personal circumstances of the applicant.

30 — Case C-292/89 [1991] ECR I-745, paragraph 21.

68. The second point concerns proportionality. In accordance with the settled case-law of the Court, compliance with the principle of proportionality means that the relevant national measures must be necessary and appropriate to attain the objective pursued.[31] In short, national measures that limit the right of residence may not result in a disproportionate interference with the exercise of that right. In the judgment in *Baumbast and R*[32] the Court considered that the limitation on the right of residence amounted to a disproportionate interference with the right of residence, essentially because — leaving aside all the details of the case — Mr Baumbast, although not fulfilling to the letter all the requirements of Article 1 of Directive 90/364, was not likely to become a burden on the public finances of the host Member State.

69. In short, in view of the fundamental nature of the right of residence conferred on every citizen of the European Union it would be disproportionate if on formal grounds a Member State were to limit that right without, in terms of substance, being able to invoke a compelling national interest.

70. What then does this imply as far as the present case is concerned? It is clear that Mr Trojani cannot provide for himself, since he is applying for social assistance in Belgium. Denial of the right of residence is not disproportionate since the limitations and conditions for which Directive 90/364 provides are intended to cover precisely persons such as Mr Trojani who — for at least a substantial part of their income — depend on social assistance in the host Member State. The basic principle of Community law is that persons who depend on social assistance will be taken care of in their own Member State.

71. A final pertinent question is whether the way in which Mr Trojani was treated by the Belgian authorities involves discrimination by reason of nationality, which is prohibited. The Commission mentions this point in connection with the refusal to grant Mr Trojani the 'minimex' since under national law a Belgian subject in a comparable situation might well qualify for this allowance.

72. My views on this suggestion of unequal treatment are as follows. First of all, I note that, rather than Mr Trojani's presence on Belgian territory, this argument concerns the refusal to grant him an allowance. The questions submitted by the national court for a preliminary ruling do not address this point. Nevertheless, I consider it reasonable to devote a few remarks to the subject in view of the attention it attracted during the procedure.

31 — In connection with Article 18 EC see *Baumbast and R*, cited in footnote 4, paragraph 91.

32 — Cited in footnote 4, paragraph 92.

73. The answer to the question whether the case involves prohibited discrimination by reason of nationality depends on the right-of-residence status of the citizen of the European Union. If a citizen of the European Union derives his right of residence from Community law, he will fall within the scope of Community law and in view of the prohibition on discrimination may not be treated differently when applying for social assistance. This was the situation dealt with in the *Grzelczyck* judgment, [33] which also concerned the minimex. However, even if a residence permit is issued purely on the basis of national law, as in the case of Mr Trojani, there remains the possibility of prohibited discrimination on grounds of nationality. This might well have been the case if Mr Trojani had been granted indefinite leave to stay. His residence status would then have been comparable to that of a Belgian subject and the refusal to grant an allowance would have been a consequence, not of a difference in residence status, but of a difference in nationality. However, in the present case no such permit was issued.

74. If, on the other hand — as, according to the file, happened in this particular case — a temporary residence permit is issued and, in the words of the *Kaba II* judgment, [34] the Union citizen concerned does not have an unconditional right of residence, that citizen cannot claim social assistance from the Member State even on the basis of the non-discrimination principle. His right of residence is not comparable in all respects to that enjoyed by a person who is present and settled in the Kingdom of Belgium in accordance with the legislation of that Member State. [35]

75. In the light of the above, I therefore find that in the circumstances of the main proceedings there can be no question of discrimination on grounds of nationality prohibited by Community law.

76. That leads me to conclude that, as Community law stands at present, a Member State is entitled to deny the right of residence to a citizen of the European Union who finds himself in the same factual circumstances as Mr Trojani. Such a citizen of the European Union cannot claim the right of residence on the basis of Article 18 EC if and insofar as he does not have his own means of subsistence.

33 — Cited in footnote 2.

34 — Case C-466/00 [2003] ECR I-2219, paragraph 46.

35 — *Kaba II*, cited in footnote 34, paragraph 49.

IV — Conclusion

77. In the light of the above, I propose that the Court should answer the questions put by the Tribunal du travail de Bruxelles as follows:

First question: A citizen of the European Union who does not have sufficient resources, who lives in a hostel in a Member State of which he is not a national and, in that connection, performs jobs for the hostel for some 30 hours a week, receiving in return benefits in kind that cover his living expenses in the hostel itself, plus a small amount of pocket-money, cannot claim a right of residence as a worker within the meaning of Article 39 EC.

Second question: In the factual circumstances described in the reply to the first question, a citizen of the European Union also cannot claim a right of residence on the basis of Article 18 EC, if and insofar as he does not have his own means of subsistence.