OPINION OF ADVOCATE GENERAL DARMON

delivered on 10 March 1994 *

Mr President,
Members of the Court,

1. It is highly unusual for a national court, after receiving from this Court a preliminary ruling on a question referred to it for that purpose, to seek further guidance on the path to be followed in the light of the Court's decision. [1]

2. That is, however, the case with the Arbeitsgericht Elmshorn, which considers that the Court's judgment in *Steen* v *Deutsche Bundespost* [2] can be interpreted in two ways and asks whether

'[that judgment is] to be interpreted as meaning that the national court is precluded from applying Community law in regard to a purely domestic situation, or does it, as the legally appointed court within the meaning of the second sentence of Article 101(1) of the Grundgesetz (Basic Law) of the Federal Republic of Germany, remain entitled, where the European Court of Justice lacks jurisdiction, to examine as a preliminary question, in connection with a claim that Article 3(1) of the Grundgesetz has been infringed, whether there is discrimination against a German national because the effect of Community law in the event is to place German nationals in a worse position as compared with nationals from other Member States'.

3. The facts of this case are known to the Court. I will not repeat them here and I refer in that respect both to my Opinion [3] and the Court's judgment [4] in the previous proceedings.

4. Let it suffice to point out that, as I had proposed, the Court held that a national of a Member State who has never exercised the right of freedom of movement within the Community could not rely on Articles 7 and 48 of the EEC Treaty with respect to a situation which was purely internal to that State. [5]

* Original language: French.

1 — For an example of such a case, see the judgment in Case C-304/90 *Payless DIY* [1992] ECR I-6493.

2 — Case C-332/90 [1992] ECR I-341.

3 — Points 2 to 5.

4 — Paragraphs 2 to 5.

5 — Paragraphs 9 et seq.

5. In other words, the Court took the view, which was also my own, that a situation of that kind was not a matter covered by Community law.

6. The Court's judgment has placed the court making the reference in something of a quandary regarding the conclusions which it is to draw from it.

7. Comparing the situation of a German national who could be described as non-mobile, such as Mr Steen, with that of a national of another Member State who, exercising his right of free movement, applies in Germany for the post refused to the former, the national court finds that the former is denied the protection of Community law which the latter can invoke.

8. The national court discerns in that difference in treatment a discrimination which has its source in Community law itself, which confers rights on a foreign worker from the Community but does not grant them to the national worker.

9. The Court is familiar with that problem; it is the problem of reverse discrimination.

10. On the other hand, the novel aspect is that the appraisal of such discrimination under Community law is being compared with such an appraisal under the Member State's constitutional law. To put it plainly, can such discrimination, which is unobjectionable under Community law — not because it is in conformity with Community law, but because it is not one of the matters covered by that law — be subject to review with regard to its constitutionality under national law? Is that precluded by Community law?

11. It should be pointed out that, despite the ambiguous nature of the phrase in the order for reference [6] 'the power of the German courts to consider Community law "indirectly"', the national court is not concerned to review the constitutionality of Community law, that law being, precisely, *inapplicable* to the proceedings in question.

12. The national court asks whether the judgment of the Court of Justice of 28 January 1992 leaves room for a review of the constitutionality of the *national rule* in so far as it treats a national worker in a situation purely internal to a Member State less favourably than nationals of other Member States who have exercised their right of free movement within the Community, Community law being applicable to the latter situation.

6 — Page 11 of the English translation.

13. Here again, this is a question of purely national law upon which neither Community law in general, nor this Court's judgment in particular, can have any effect.

14. What in fact is the point at issue?

15. A situation falling within the scope of Community law may, because of the primacy of that law, cause the national court to decline to apply a conflicting national rule.

16. That national rule will nevertheless continue to govern purely internal situations which do not fall within the scope of Community law, and that may lead to comparable situations being treated differently.

17. The question whether, having regard to a Member State's constitution (and in particular the principle of equality before the law), there is an obligation to eliminate any reverse discrimination is a matter to be appraised solely by the constitutional court of that State.

18. If that question is answered in the affirmative, compliance with that obligation, which is also a matter of domestic law, necessarily falls outside Community law, quite simply because the obligation has nothing to do with it.

19. One final observation.

20. The problem at the root of this second reference to the Court cannot be reduced to a comparison between the national 'non-mobile' worker and nationals of other Member States exercising their right to free movement.

21. Although Mr Steen cannot, as the Court has held, rely on Articles 7 and 48 of the EEC Treaty, since a purely internal situation is involved, he could have invoked them against another Member State in which he exercised his right of free movement, and, as I noted in my previous Opinion, even against his own State if he had lived, worked or been trained in another Member State. [7]

7 — See my Opinion in Case C-332/90 [1992] ECR I-341, I-350, point 9.

Conclusion

22. I therefore propose that the Court should rule as follows:

When, unlike other Community nationals who can rely on a right arising under Community law, a national of a Member State cannot take advantage of that right solely because his situation, which is a purely internal one, does not fall within the scope of Community law, that law has no effect on the conditions for the application by national courts of a constitutional principle of equality before the law, those conditions being determined exclusively by the domestic law of that Member State.